DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 23

[OST Docket 48478; Notice 92-26]

RIN 2105-AB92

Participation by Disadvantaged Business Enterprise in Department of Transportation Programs

AGENCY: Department of Transportation, Office of the Secretary.

ACTION: Notice of proposed rulemaking.

SUMMARY: The proposed rule would revise the Department's implementing regulations for its disadvantaged business enterprise (DBE) program. This statutory program is intended to provide contracting opportunities for small businesses owned and controlled by socially and economically disadvantaged individuals in the Department's highway, mass transit, and airport financial assistance programs. The proposed rule would clarify regulatory provisions and revise program elements in light of the Department's experience in administering the program since 1980.

DATES: Comments should be received no later than March 9, 1993. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Interested persons should send comments to Docket Clerk, Docket No. 48478, Department of Transportation, 400 7th Street, SW., room 4107, Washington, DC 20590. We request that, in order to minimize burdens on the docket clerk's staff, commenters send three copies of their comments to the docket. Commenters wishing to have their submissions acknowledged should include a stamped, self-addressed postcard with their comments. The docket clerk will date stamp the postcard and return it to the commenter. Comments will be available for inspection at the above address from 9 a.m to 5:30 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Deputy Assistant General Counsel for Regulation, and Enforcement, Department of Transportation, 400 7th Street, SW., room 10424, Washington, DC 20590. (202) 366-9306 (voice); 202-755-7687 (TDD).

SUPPLEMENTARY INFORMATION:

Background

The Department of Transportation has had for twelve years a policy of assisting businesses owned and controlled by minorities and women in participating DOT financial assistance programs. Some of the Department's operating administrations had minority business programs beginning in the late 1970s.

The Department published the original 49 CFR part 23 in 1980. The regulation required goals to be set for businesses owned or controlled by members of minority groups and women (MBE/WBE). This original regulation has been amended several times. In 1981, we dropped a "conclusive presumption" provision (which said that if one bidder met an MBE goal, then it was conclusively presumed that bidders who failed to meet the goal had failed to make adequate good faith efforts, and consequently could not receive the contract) and substituted the present "good faith efforts" approach, in which a contractor may either meet the goal or demonstrate good faith efforts. In the same year, the Department expanded the definition of "Hispanic" to include persons with origins in Spain and Portugal.

In 1983, Congress enacted the first statutory disadvantaged business enterprise (DBE) provision. This provision required the Department to ensure, except as the Secretary determined otherwise, that not less than 10% of the funds authorized for the highway and transit financial assistance programs be expended with DBEs. Under the 1983 statute, members of several minority groups were presumed to be socially and economically disadvantaged; women were not. The Department amended its rule to create a DBE program for Federal Highway Administration (FHWA) and Federal Transit Administration (FTA; formerly the Urban Mass Transportation Administration) programs, Federal Aviation Administration (FAA) and Federal Railroad Administration (FRA) programs.

In 1987, Congress reauthorized and amended the statutory DBE program. In this legislation, Congress, added women to the groups presumed to be disadvantaged. In separate legislation, Congress added an identical provision applying to the FAA's airport grant program. The Department's 1987 amendments to part 23 added FAA programs to the DBE portion of the rule and established a single DBE goal, for firms owned by women and minority group members.

As a result of these changes, part 23 has become something of a patchwork. The regulation should be clarified to reflect program changes since 1980. Also, the Department has over twelve years of experience in implementing part 23, which has showed us where clarification of the Department's intent would be helpful, and where recipients and other participants in the program may have misunderstood or misinterpreted portions of the regulation.

For these reasons, the Department is proposing to revise part 23. This revision is not intended to change radically the basic structure of the program. However, this revision is intended to create a clearer regulation that deals explicitly with implementation problems in the program.

Section by Section Analysis

This portion of the preamble describes each section of the proposed revision to part 23, highlighting changes between the existing rule and the proposed revision and stating the rationale for changes the Department proposes to make.

Section 23.1 Purpose

The purpose of the part is to carry out the applicable statutes that provide the basis for the DBE program. The section refers to a separate statute concerning DBE participation in airport concessions. The section notes that the DBE program is intended to provide appropriate flexibility with respect to establishing and meeting DBE goals. This section would delete references to MBE and WBE participation and references to the statutory for the original MBE/WBE program. Given specific Congressional authorization for the DBE program, references to other statutes, (e.g., Title VI of the Civil Rights Act of 1964 and parallel provisions in DOT grant program statutes) are no longer necessary.

The Department's policy encourages the formation and growth of new and existing DBEs by providing the maximum practical opportunity to compete for and participate in DOT's financial assisted programs. The Department seeks to create an environment where eligible entrepreneurs are afforded the opportunity to realize the full economic benefits of DOT funded and assisted procurement opportunities. It will do so by providing goals not less than 10 percent of the funds authorized for DOT assisted programs and by assisting their development of DBE firms. The Department is working so that former DBE's will function as full-fledged participants in the free enterprise system, capable of gaining their fair and reasonable share of transportation business activity without the help of a DBE program.

Section 23.3 Applicability

There would be two principal changes from the current regulation. First, the section would refer to the statutory FAA program for airport concessionaires. Second, it would delete reference to programs of the Federal Railroad Administration. The FRA is the only major DOT grant agency not now covered by a DBE statute. The FRA has separate statutory authority for an MBE/WBE program and has its own implementing regulations (49 CFR part 265). FRA would continue to operate under those rules.

Section 23.5 Definitions

The NPRM proposes a number of changes to the definitions section. The definitions of affirmative action and applicant would be dropped; a definition of affiliate would be added. The definition of joint venture would be expanded for greater clarity. The definition of minority is no longer needed in the rule and would be deleted. A definition of disadvantaged business enterprise, similar to that in the existing subpart D, would be substituted for the obsolete definition of minority business enterprise. A new definition of "good faith efforts" would also be added.

A definition of "small business concern," similar to that in the existing Subpart D, is in the new definitions section. It notes that a business is not eligible, even though it meets SBA size criteria, if it exceeds the DOT statutory cap on average annual gross receipts.

This section also includes a definition of socially and economically disadvantaged individuals, taken, with minor modifications, from the existing subpart D. The modifications include references to certain countries (e.g., Thailand, Burma, Malaysia, Indonesia and Sri Lanka) not specifically included in the current definition. SBA has made persons from these countries eligible in recent years. In future, any new groups added by SBA would automatically become eligible. A definition of SBA would be also added.

We also propose including a definition of "business opportunity," which would replace the definition of "lessee" in the current rule. The definition is specific to the FTA program, and includes contracts with concessionaires and similar business opportunities arising out of an FTA-assisted program.

Some concepts used in the regulation (e.g., social and economic disadvantage, commercially useful function) are explained in some detail in the regulatory text and the appendices. For this reason, the Department does not believe it is necessary to define them in this section. However, the Department seeks comment on whether definitions of these or other terms should be added.

Section 23.7 Discrimination prohibited

This section, the wording of which is somewhat revised, would state a basic prohibition against discrimination in contracting. The statutory authorities for the DBE program do not address age, disability, religion, or other grounds on which other statutes may prohibit discrimination. Consequently, part 23 does not address these matters. However, recipients are subject to nondiscrimination requirements under other statutes (e.g., the Americans with Disabilities Act) in administering their DBE programs as they are in implementing other programs.

Section 23.9 Exemptions and interpretations

The Department's administration of the DBE program has been criticized on the ground that inconsistent regulatory interpretations and program guidance have confused recipients and contractors. A draft General Accounting Office (GAO) report makes this point with particular reference to certification issues. The Department intends to form an internal DBE Program Council as a coordination mechanism.

In any regulatory program involving several different Department of Transportation agencies, coordination and consistency in the application and interpretation of regulatory provisions are essential. The same regulatory language cannot mean one thing in the highway program, something different in the transit program, and a third thing in the airport program.

Consequently, the rule would make clear, that before any written interpretation would be viewed as valid and binding, it must be concurred in by the DBE Program Council. Each interpretation letter (or other written guidance that interprets part 23) would state that the DBE Program Council has concurred in the interpretation and that the interpretation is effective throughout the DOT DBE program. This language would ensure for example, that if the FAA interprets a part 23 provision in the context of the airport program, interested parties in the highway or transit program will know, with certainty, that the interpretation applies to them as well.

Typically, requests for exemptions to Office of the Secretary rules are processed under the provisions of 49 CFR part 5. However, it is likely that most requests for exemption from part 23 will arise from parties who typically deal directly with an operating administration. Each of the three operating administrations may consider such exemption requests and grant or deny them, again with the DBE Program Council's concurrence.

The criteria for considering exemption requests are the same as those used to make decisions on exemption requests under 49 CFR part 5. First, the request must be based on special or exceptional circumstances. It is not appropriate to grant an exemption on the basis of circumstances that are likely to be repeated or result in carving out a generally applicable exception to a rule. Relief in very particularized circumstances is the aim; for more generally applicable relief, an amendment to the rule is the proper course. Second, the exemption must be based on circumstances not contemplated as part of the rulemaking. Sometimes, a particular party will wish that a rulemaking decision had been different. However, if the Department has decided not to take a certain course in general, it is not appropriate for the Department to allow a particular party to take that course through an exemption.

Section 23.11 Reporting Requirement

This provision would require that recipients report to the concerned departmental element concerning DBE participation in their DOT assisted contracts. The reports would be quarterly, unless the administrator of a particular element determined otherwise. The Department's Office of Small and Disadvantaged Business Utilization (OSDBU) has developed a model reporting form for use in the DBE program. The Department is seeking comment at this time on whether modifications to the form should be made and whether a single DOT-wide form or different forms for the operating administrations' respective programs would work better. For the convenience of commenters the draft OSDBU form is reprinted at the end of this preamble. Recipients should contact their operating administration offices of civil rights for more information on operating administration versions of a reporting form.

Section 23.21 Assurances

Like its counterpart in the existing regulation, this provision requires that financial assistance agreements between DOT and recipients, and contracts between recipients and contractors, contain assurances of compliance with the regulation. The text of the assurances has been condensed.

Section 23.23 DBE Program Requirement

Instead of the present two-tier DBE program requirement, all recipients above a certain threshold level would have to have the same DBE program. This program would include a DBE directory, certification process and application of Part 23 certification standards, efforts overall goals, contract goals, a good faith award mechanism, a system for counting DBE participation, and procedures for denial and removal of certifications. Other DBE program elements include a policy statement, a DBE liaison officer, techniques to facilitate DBE participation, use of DBE financial institutions, a DBE development program, and a mechanism to ensure prompt payment of DBE subcontractors by prime contractors. The latter two provisions are new.

DOT agencies must review and approve recipients' DBE programs, as under the existing rule. The NPRM would add a provision codifying the existing interpretation that a recipient remains subject to a requirement to implement its program until DOT funds have been expended. An annual program update would also be required.

One DBE program issue that concerns the Department is that of the tenure of participating firms. Under the current rule, a firm can participate indefinitely, as long as it continues to meet eligibility criteria. While a few firms may cease to be eligible if they grow to exceed SBA business size criteria, there is no "graduation" provision, similar to that which SBA has established for its 8(a) program. A GAO report has also mentioned this issue as an area of concern.

Helping DBE firms develop to the point where they can compete in the open market is an important aim of the program. The absence of a graduation provision may make it more difficult for the Department to achieve that objective. A few firms may succeed within the DBE program to the point where they limit opportunities for other DBE firms to grow. According to FHWA figures, as few as 10 firms in some states get over 50 percent of the DBE work, while only 25 percent of all certified firms, nationwide, get any work at all. A graduation program could encourage successful firms to move into the open market while opening space in the DBE program for smaller, start-up businesses.

The Department is aware that a graduation program would preclude the participation of some firms that otherwise meet DBE eligibility criteria, which may raise legal and policy issues. Nevertheless, the Department seeks comment on whether it should adopt a graduation requirement of some kind. For instance, should there be a maximum number of years a DBE firm can participate in the program, or a limit on the number or dollar value of DBE contracts a firm may receive? Should there be a business development program, operated by the recipient, in which DBEs would be required to participate, at the conclusion of which the DBEs would have to compete in the open market? The Department seeks comment on both the concept and the details of a graduation provision.

Section 23.25 DBE Directory

This provision would retain the existing DBE directory requirement. The Department has heard of some instances in which a recipient has chosen to certify, or to list in its directory, a DBE firm as being eligible to participate in the DBE program only in certain specified fields of operation. For example, a firm might be an eligible DBE as a guardrail contractor but not an eligible DBE as a traffic control contractor. This approach is contrary to the intent of the rule. The directory listing of the type of work the firm prefers to do is a voluntary listing on the firm's part, for the convenience of readers of the directory. Nothing in this section however is intended to preclude a recipient from having a prequalification requirement for DBE firms where it has such a requirement for all contractors or subcontractors.

Section 23.27 Certification Process

Recipients must ensure that only the eligible firms participate as DBEs. The proposal would make several changes to the current rule's certification process provisions. One modification would provide that where a firm is located outside the geographic area in which the recipient operates, the recipient, rather than conducting its own site visit, could rely on reports of site visits performed by other DOT recipients.

Paragraph (c)(6) concerns the requirement that the recipient obtain or compile a list of the equipment owned by or available to the firm. This is not intended to require that firms own any particular set of equipment; it is only to require that whatever equipment is present be listed.

Paragraph (c)(7) proposes a new requirement. Owners of applicant firms would have to submit statements of personal net worth, consistent with SBA rules on this subject. This requirement is consistent with the Department's DBE statutes, which reference SBA regulations in the context of DBE eligibility. The Department proposes that recipients would use the same form (SBA Form 413, Personal Financial Statement) used by applicants to SBA's 8(a) program.

The purpose of the proposed requirement is to give recipients quantitative information on which to base decisions about economic disadvantage. As explained further in § 23.29, if an owner's net worth was over $750,000, the recipient would regard the presumption of economic disadvantage as having been rebutted. The owner would still have the opportunity to make an individual showing of economic disadvantage. This requirement would apply to all owners of applicant firms, and the recipient could not target individuals or members of certain groups for requests for this information.

Paragraph (c)(8) requires potential DBEs to complete and submit an appropriate certification form. A copy of the form (somewhat revised from that found in Schedule A of the present rule) is found in appendix A. It will include a signed affidavit. The Department seeks comment on whether it should retain this existing model form, modify it in various ways, or drop the model form. Should the use of the form be mandated, or should recipients be able to modify it at their discretion? (Recipient flexibility and ease of use for applicants may be countervailing considerations on this point.) Any suggestions for modification would be welcomed. In particular, we request suggestions based on successful forms that recipients have developed.

Between certification and a subsequent recertification review, that changes to a firm may occur that could affect the firm's eligibility. For example, the firm could be sold, one owner could buy out the interest of another, a business could grow beyond the bounds of SBA size limits, or the firm could enter into a meaningful relationship with a non-DBE firm. Paragraph (d) proposes a new requirement that firms would have a duty to report a significant change that could affect eligibility.

One of the most pervasive causes of concern in the certification process is the necessity for firms seeking work in more than one jurisdiction to make multiple applications for certification. This can result in additional time and expense for those firms. In response to this problem, paragraph (e) proposes that, beginning 3 years after the effective date of the revised rule, all recipients would have to join unified statewide certification programs. The Department make this proposal as a way of more closely approaching the ideal of "one-

stop shopping." Some states have already a statewide uniform certification program. (It would also be possible for a group of states, as an option, to combine their resources into a regional certification consortium as well. Regional programs would not be mandatory under the proposal, however.)

Once such a unified system is established, a firm wishing to work for any DOT recipient in the state would apply to the consolidated certification program, rather than to the individual recipient. The certification from the consolidated program would be accepted by all DOT recipients in the state. The Department seeks comment about the practicability, advantages, or potential disadvantages of such a system. The Department also seeks comment on the lead time needed to establish such a system. Is three years a reasonable time, or should a longer period (e.g., five years) be permitted?

Currently, the Department permits, but does not require, one recipient to accept certification decisions made by another. This provision would continue for the present. However, once unified certification systems are in place, the provision will no longer be necessary within a state. However, the Department proposes that unified certification systems could, but would not have to, accept one another's certifications.

The Department recognizes that there may be some situations in which a large city may have an unusually high proportion of the certification activity within its state or region (e.g., New York City). The Department seeks comment on whether the regulation should handle such situations in any different way under this requirement for uniform certification system. If so, how should a special provision work and where should it be applied?

This section also proposes a new requirement that all certifications by the statewide certification program would be precertifications. That is, the system would take certification actions before the involvement of the potential DBE in a particular contract was at issue. The Department also proposes that, once all the information was gathered by the recipient, it would have 60 days to make a certification, lest inaction by the recipient over a long period of time prejudice the opportunities of firms to participate. The Department seeks comment on whether this is an appropriate time limit.

Other suggestions have been made to deal with problems of multiple certifications. One is a uniform nationwide certification process run by DOT. This approach, in the Department's view, would probably result in slower, less effective service even if the Department had the resources to operate it. Another idea is "mandatory reciprocity"—requiring a recipient to accept any certification made by another recipient. This approach raises a serious concern about the quality of the certification process. That is, since the quality of recipient certification programs is likely to vary, mandatory reciprocity could create a "least common denominator" effect in which bad certifications drive out good. The Department seeks comment on whether limiting the scope of mandatory reciprocity (e.g., to a state or region) could mitigate this problem.

During the period before unified certification systems are established, the primary responsibility for certifying DBEs remains with each recipient. Even if another recipient or separate entity is authorized by a reciprocity agreement to do certifications, the recipient must keep the ultimate authority and responsibility to ensure that only eligible DBEs participate. The Department also seeks comment on whether a more centralized review of reciprocity agreements in DOT should take place.

The Department seeks comment on whether recipients should process a certification application from an out-of-state firm only if a recipient or unified certification system the state in which the firm resided had certified it first. The advantage of such an approach would be that it would give the recipient with superior knowledge of the recipient and its circumstances a lead role in making certification decisions. It could also help to reduce burdens on other recipients. However, out-of-state firms may be concerned that they would be unduly burdened by this approach.

Section 23.29 Standards for Certification as a DBE

In recent years, the application of the certification standards in § 23.53 of the existing regulation has become an increasingly contentious issue. Some parties have argued that standards are unequally applied. In some cases, some recipients appear to have misunderstood the language and intent of the Department's certification standards. In other cases, interpretations of the standards have been made that differ with the Department's intent. A GAO report fairly criticized the consistency of the Department's guidance in this area. One of the most important objectives of this revised regulation is to state clear and unmistakable certification standards that will be applied as uniformly as possible by recipients.

Paragraph (a) makes explicit two important general points. First, except with respect to situations in which social and economic disadvantage is presumed, the applicant has the burden of proving, by a preponderance of the evidence, that it meets certification criteria. The Department seeks comment on whether this is the appropriate burden of proof. Second, recipients should ordinarily not make decisions based on single factors. It is essential to the success of the program that certification decisions be based on considering all the facts, as a whole. Making single factor decisions is probably the most important source of error in certification decisions.

The first point that must be established is designated group status, without which a business owner does not benefit from the statutory presumption of social and economic disadvantage. Sometimes, this decision is obvious, and no further inquiry need be made. Other times, however, designated group status is not clear, and the recipient must make a decision based on a variety of factors, set forth in the rule.

The second area of consideration is business size. The proposed language explicitly references the necessity of meeting SBA size standards, which apply to affiliates of a company as well as the company itself. The rule also specifies that a firm may not exceed the statutory cap on average gross receipts, a concept which in turn is also defined by SBA regulations. The current statutory cap is $15.37 million. The Department will adjust this cap from time to time to reflect inflation.

Members of the designated groups are presumed to be socially and economically disadvantaged. A presumption is a very specific legal concept. It means that from fact X, one draws conclusion Y, without making any of the intervening factual or legal inquiries that would be necessary if one were making a case-by-case determination. When the DBE statute says that members of a members of certain designated groups shall be presumed to be socially and economically disadvantaged, the statute commands (except in a situation where the presumption is rebutted) that any individual who fits into one of these categories must be viewed as socially and economically disadvantaged, without further inquiry into the individual facts of his or her situation.

However, the presumption of social and economic disadvantage is rebuttable. How is the presumption

rebutted? The proposal refers to the statement of net worth. If an individual's net worth is over $750,000 (a figure drawn from SBA regulations for eligibility in the 8(d) program), the rule regards the presumption as having been rebutted. The burden of proof then shifts to the individual to prove disadvantage on an individual basis. The Department seeks comment on this approach.

The NPRM would clarify the place of 8(a) firms in the DBE program. A firm certified by SBA under its section 8(a) program has been found by another Federal agency, after a long and detailed individualized inquiry, to be owned and controlled by socially and economically disadvantaged persons. However, that an 8(a) firm which exceeds the statutory cap on average annual gross receipts (or which exceeds SBA size criteria for the type of work it would perform as a DBE) is not eligible. The recipient could inquire, as part of the initial certification process, into the average annual gross receipts and business size of a firm to determine whether the firm exceeds this cap. Information relevant to this issue (e.g., concerning affiliates) could also be collected as part of the initial certification process.

If the recipient doubts the ownership, control, or disadvantage of an 8(a) firm, it could bring these concerns to the attention of SBA and request a response from SBA. The recipient could also initiate a decertification proceeding against the firm, taking into account, any response received from SBA. The Department plans to work with SBA to establish a procedure to facilitate communication between the agencies in such cases.

In making individual determinations of social and economic disadvantage for firms not entitled to the statutory presumption, the NPRM tells the recipient to use relevant SBA regulations. For the information of commenters, the SBA regulations are attached at the end of this preamble. The Department seeks comment on whether it is appropriate to use these rules for this purpose, and whether any modifications are appropriate.

The basic requirements for ownership would remain unchanged. The firm's ownership by socially and economically disadvantaged individual must be real, substantial and continuing, going beyond *pro forma* ownership of the firm as reflected in an ownership document. The proposal would make a number of clarifications in specific provisions related to ownership. Codifying a long-established interpretation, securities held in trust could be counted in some circumstances (e.g., where the disadvantaged owner exercises effective control over the business). The Department seeks comment on how so-called "living trusts" should be addressed under this provision.

As under the current rule, there must be sufficient contributions of capital or expertise on the part of the disadvantaged owner. However, the NPRM would clarify that debt instruments from financial institutions and similar organizations do not necessarily render a firm ineligible, even if the debtor's ownership interest is security for the loan. In addition, it would not necessarily render a firm ineligible if the owner received his or her interest as the result of a transfer from another disadvantaged individual or through inheritance, a property settlement in a divorce, or a gift.

The NPRM would establish new special provisions for transactions between spouses. Assets (other than the business itself) held jointly or as community property by spouses could be counted toward ownership, the other spouse irrevocably renounces all rights in the ownership interest as provided by state law. Spousal cosignature of certain documents would also not constitute a ground to find a potential DBE firm ineligible, assuming other requirements are met.

However, the recipient would have to give heightened scrutiny to transactions in which assets held in sole ownership by one spouse are used to acquire the other spouse's ownership interest in a firm, or in which there is an interspousal transfer of the business or its assets. In keeping with the principle of avoiding single factor decisions, such a situation does not automatically render a firm ineligible. However, it should be a "red flag" to recipients to look very closely at the ownership and control of the firm to ensure that it meets eligibility requirements. In particular, situations in which evidence shows that a non-disadvantaged man has transferred an interest in a business to his wife or other female relative specifically for the purpose of obtaining DBE certification should be reviewed closely by recipients to ensure that ineligible firms do not participate in the program.

The current regulation, and the text of the proposed regulation as well, say that an individual may make a contribution of expertise as well as of capital in return for its interest in the business. The NPRM would clarify that the expertise must be in an area critical to the firm's operations and specific to that type of business, as well as documented in the firm's records. By specific to the type of business, we mean the expertise must relate to the substance of the type of work performed by the firm (e.g., in computer engineering, systems analysis or software design for a computer firm, in use of explosives for a demolition firm) rather than to generic business administration expertise (e.g., bookkeeping, office management). The Department seeks comment on this approach, as well as on whether contributions of expertise should be accepted at all.

With respect to control, the proposal retains the basic requirement that a DBE firm must be an independent business. An independent business whose viability does not depend on its relationship with other firms. In determining independence, the proposal directs recipients to look at the relationships between the potential DBE firm and other firms, their resources and personnel. The recipient may consider normal industry practices when making determinations about independence, but industry practices do not override requirements of this rule. The Department also seeks comment on whether there should be additional restrictions on the activities of non-disadvantaged participants in the firm (e.g., the non-disadvantaged owner must not be more than a 10% owner in a firm in the same or related field; the non-disadvantaged owner, within two years of the application, must not be a 10% or greater owner, or an officer, director or manager, of a firm that employed a disadvantaged owner) of the applicant firm; the spouse of a disadvantaged owner could not own more than 10% of a DBE firm). The purpose of such restrictions would be to limit the circumstances in which there was a dependent relationship between the DBE and former non-DBE employers or present non-DBE firms. On the other hand, such provisions could create additional burdens for DBEs applying for certification (e.g., having to research and present to the recipient information on the investments of non-DBE participants).

As under the present rule, the socially and economically disadvantaged owners of a DBE firm must possess the power to make day-to-day as well as longer-term decisions on matters of management, policy and operations. The proposal codifies the Department's interpretation of this requirement that an individual is not required to have hands-on, direct control of or expertise in every aspect of a firm's affairs. The disadvantaged owners may delegate various areas of management or daily operations to employees, regardless whether these persons are disadvantaged individuals themselves.

The disadvantaged owners must be able to use intelligently and evaluate critically information presented by employees of the firm concerning daily operations and management. Especially as organizations grow and become more complex, many important functions will be delegated. Also, in the absence of state or local law compelling a particular license or credential for a person controlling a firm, possessing such a license or credential in itself, is a requirement for certification.

In small private businesses, it is not uncommon for the owner or chief operating officer of the business to take a low salary so that more of the firm's revenues can be used to develop the business further. The business, however, may have to hire skilled employees at higher salary rates. For this reason, the proposal clarifies that differences in remuneration between employees and disadvantaged owners, while they may be relevant to determinations about control, are to be considered in the context of industry practices and company policies when the firm is being evaluated for certification. The proposal would also add that there should be no *per se* rule prohibiting participation of family members in a DBE firm. The ability of an individual to control a business is evaluated in the same way, regardless of the presence or absence of family relationships among other people involved. Other provisions are intended to clarify areas of confusion or misunderstanding. The proposal distinguishes "commercially useful function" concept (to be used only with respect to counting DBE participation of firms already certified) and ownership and control, a distinction which has sometimes eluded recipients. Recipients may not consider "commercially useful function" in determining whether a firm should be certified. This is consistent with long-established DOT interpretation of part 23.

In some cases, a firm has been certified for a number of years, has lost its certification because of a perceived defect in its ownership or control in the past. Present-day ownership and control matter; long-term circumstances that have no present relevance do not. There is no place for a doctrine of "original sin" in the DBE program. The proposal would make this point clear.

The proposal would codify the existing policy that only for-profit firms are eligible to be DBEs. Not for-profit organizations, even though controlled by socially and economically disadvantaged individuals, are not eligible to be certified. The reason is that the purpose of the DBE program is to aid socially and economically disadvantaged entrepreneurs in the for-profit private sector. The Department seeks comment on whether there is any basis for changing this policy. Also, the Department asks whether, if there are state laws that allow a small for-profit firm to organize under state not-for-profit corporate law (e.g., in order to receive tax advantages), recipients should be allowed to certify such firms.

Under the proposal, a small business concern owned and controlled by one or more certified DBE firms may be an eligible DBE. The Department seeks comment on whether a more restrictive provision, like that of the SBA 8(a) program (which limits an 8(a) firm to a 10 percent equity ownership role in another 8(a) firm) is appropriate. Also, firms owned by Indian tribes or Alaskan native corporations may be regarded as being owned by socially and economically disadvantaged individuals, even if ownership may formally reside in the tribe as an entity, rather than in individual members of the tribe. Such a business must meet other criteria of the regulation (e.g., size, control). This also codifies an existing interpretation.

Section 23.21 Overall Goals

The proposed provisions follow those of current subpart D. The Department seeks comment on whether the public notice provision of this section continues to be useful.

Section 23.33 Contract Goals

The contract goal provisions of the proposal follow those of the existing rule. As now, recipients are not required to set each contract goal at the same percentage level as the overall goal. However, over the period covered by its overall goal, the recipient must ensure that its contract goals are set so that, if met, they will cumulatively result in the recipient meeting or exceeding its approved overall goal.

To further the recipient's efforts in maximizing opportunity while encouraging equitable distribution of contract opportunities, a recipient is encouraged to develop innovative contracting techniques to increase DBE participation in DOT funded programs. For example, in addition to the new DBE Development Program proposed in § 23.39, a recipient could provide for incentive programs to encourage the general contracting industry to subcontract with responsible DBEs.

There may be additional costs associated with locating, selecting, utilizing, training and assisting DBEs, for maintaining support records; and for supplying all facilities and services to complete this DBE provisions when the non-DBE contractor goes beyond the minimum contract requirements. The Department seeks comment on whether, in the event that a non-DBE contractor seeks the contract goal requirement, the contractor should be eligible to receive compensation for some or all of this cost, based on documented evidence of the DBE completion of the assigned subcontract work and final payment to the DBE subcontractor for the work performed. Such compensation could be calculated based on such factors as number of DBEs participating, level of participation exceeding the contract requirement, expanded area of DBE participation, etc. The Department seeks comment on whether such an approach would be practicable and beneficial.

Over several years, contractors have brought to the Department's attention what is referred to as the "equitable distribution" problem. That is, DBEs are said to cluster in certain low-capital intensive subcontracting areas, reducing opportunities for non-DBE firms in these fields. The Department seeks comment on a number of ideas that have been suggested to address this problem:

(1) The recipient could set a ceiling on DBE participation eligible to count toward goals in a particular field or fields on a contract or set of contracts to ensure that non-DBE subcontractors were not excluded (e.g., no more than 50 or 60 or 75 percent of work in a field could be credited to DBE goals on a contract).

(2) The recipient could set a ceiling of this sort only if DBE participation in that field typically exceed a certain level (e.g., 90%).

(3) The recipient could set such a ceiling, but only if it ensured that any limitation on DBE participation in field X was made up by participation in field Y in which DBEs had not participated in large numbers in the past.

(4) Prime contractors could get "extra credit" for using DBEs in non-traditional fields. For example, a firm could get $1.25 credit toward its goal for every $1.00 spent on a DBE in a field in which DBEs typically had low participation.

All of these ideas appear to have disadvantages. They could reduce DBE participation and in some cases, or make the achievement of statutorily mandated goals more difficult or raise legal authority issues. The Department seeks comment on how these or other mechanisms might be established in a way that would minimize potential disadvantages. We also point out that the DBE development program discussed below is targeted at providing assistance to DBEs seeking to move out

of the traditional areas in which DBEs have worked.

A new provision would be added making explicit current policy concerning the role of operating administrations in oversight of recipient's contract goals. The operating administrations would not necessarily to review every contract goal a recipient sets. However, an operating administration could choose to review any contract goal and require that it be approved by the operating administration.

This section also includes a proposed provision, applicable only to the FTA program, concerning business opportunities like concessions in transit stations. (The provision would not apply to FAA programs, since there is a separate program for airport concessions in subpart D. Also, it would not apply to FHWA programs, because FHWA grantees appear seldom to have business opportunities of this kind. However, the Department seeks comment on whether a similar provision could usefully apply to the FHWA program.) FTA's experience under § 23.43(d)(2) of the current rule, which requires recipients to submit separate overall goals for lessees, has not worked as well as hoped. Therefore, we propose that FTA recipients include goals for DBE participation when soliciting competitive bids or proposals from prospective commercial levees, concessionaires, etc. These business opportunities typically result from, or take place in facilities constructed with, Federal financial assistance. However, because business opportunities for contracts of this kind are, as such, contracts in which FTA funds participate, DBE goals and participation in this area would be counted separately from the other goals and DBE participation under part 23.

Section 23.35 Good Faith Efforts

This section states the Department's continuing policy that recipients shall award contracts only to a contractor who meets the DBE contract goal or demonstrates that it has made good faith efforts to do so. Appendix B sets forth the kind of good faith efforts this section contemplates. The proposed section would have three new elements. First, all bidders would reflect DBE participation in their bid documents. Compliance with DBE requirements would always be a matter of responsiveness. The existing rule permits recipients to determine whether to treat DBE compliance as a matter of responsiveness or responsibility. The change is intended to reduce the likelihood of "bid shopping," which can adversely affect DBEs, but it could increase burdens on unsuccessful bidders for prime contracts.

Second, a recipient would not be permitted to use more stringent mechanisms for contract award for DOT assisted contracts (e.g., a conclusive presumption). The proposal takes a neutral position with respect to DBE set-asides, neither authorizing nor prohibiting them. However, the rule would prohibit recipients from using group-specific set-asides (e.g., a set-aside solely for firms owned by Black individuals, as opposed to a set-aside for all DBE firms).

Third, the section would prohibit a prime contractor from replacing a DBE subcontractor except where the DBE breaches its contract. The prime contractor would have to provide written notice to the recipient. Good faith efforts to find a substitute DBE would be required.

Appendix B lists matters recipients should consider in receiving contractors' good faith efforts. One of the considerations is that extra costs involved with finding and using DBEs are not an adequate reason for failing to meet a goal, so long as these costs are "reasonable." The Department seeks comment on whether this provision should be made more specific (e.g., by requiring recipients to quantify, in their bid documents, what a "reasonable" cost would be for DBE participation in that contract).

Section 23.37 Counting DBE Participation

This provision follows the counting provisions of the existing part 23. There would be some clarification of the concept of "commercially useful function" and an explicit recognition of FHWA's practice that a DBE must perform at least 30 percent of the work of a contract with its own forces to be viewed as performing a commercially useful function. In addition, we would add to prohibit prime contractors from counting DBE participation toward meeting its goal until the DBE had been paid.

The Department seeks comment on several counting issues. First, should materials obtained by DBEs from non-DBE sources count toward DBE goals? For example, a DBE steel erection firm may have a contract to obtain and install a quantity of steel, which it buys from a large non-DBE steel company. Should the total amount of the contract, including the cost of the steel, be counted toward DBE goals, or only the work performed by the DBE itself, exclusive of the steel? A broader question is whether any portion of a contract subcontracted by a DBE to a non-DBE should be counted toward DBE goals. That is, if a DBE firm gets a $100,000 subcontract, and then subcontracts $65,000 of the work to a non-DBE, should $100,000 or $35,000 be counted toward DBE goals? (The NPRM proposes that the DBE could not subcontract any portion of a subcontract back to the prime contractor or its affiliate.) Finally, where a DBE is a prime contractor, should the firm have to meet a DBE goal (under the present rule it is not required to do so)?

Section 23.39 Additional Program Elements

The program elements discussed in this section include a policy statement, a DBE liaison officer, the use of outreach or supportive services techniques, and investigating the use of DBE financial institutions. These elements are part of the current rule.

The NPRM proposes a new program element to deal with the apparently pervasive problem of slow or irregular payments by prime contractors to DBE subcontractors. The recipient would use one or more of five provisions. The recipient could choose which options to use; no one of the proposed options would be mandatory. The recipient would include appropriate clauses in its contract documents to make the mechanism contractually binding on all parties. In requiring a prompt payment mechanism, the Department is not proposing a novel or unique requirement. For example, Federal agency procurement is subject to the requirements of the Prompt Payment Act.

The first option would be to establish an alternative dispute resolution procedure to resolve disputes between primes and DBE subcontractors. A second approach would be a prompt payment clause in all contracts, including appropriate sanctions for failure to comply. A third approach would be a requirement that a prime contractor obtain prior approval from the recipient based on good cause, for any delay or postponement of the payment of funds to a DBE subcontractor. A fourth option would be a procedure through which payments owed to DBE subcontractors be paid directly to the subcontractor by the recipient, rather than through the prime contractor. A final approach would be a limitation on the ability of prime contractors to draw down contract funds without paying DBE subcontractors. The Department seeks comment on the merits of these proposals. In particular, the Department seeks information on any non-regulatory, or less prescriptive,

approaches to the prompt payment problem that commenters may wish to suggest.

Another new proposed element would be a business development program. This program would be aimed at helping firms move beyond the traditional areas of DBE participation. Appendices C and D set out proposed guidelines for this program element. Each operating administration would decide whether its recipients would be required to include this element (e.g., on the basis of supportive services or other resources available in the respective modal programs).

The recipient's DBE program would also describe the means by which the recipient enforces requirements on subrecipients, contractors and subcontractors. The operating administrations will oversee the recipients' enforcement of their requirements. As the operating administration notifies a recipient of a problem, the recipient would have to take remedial steps. If the recipient fails to do so, the operating administration could invoke available administrative sanctions.

Section 23.41 Transit Vehicle Manufacturers

This provision is the same as its counterpart in the existing DBE regulation.

Section 23.51 Recipients' Denials of Initial Requests for Certification

This provision and § 23.53 are designed to ensure that recipients afford adequate procedural due process to DBE firms and develop an adequate record of certification actions. The provisions would reform and standardize existing certification practice.

When a firm's initial request for certification is denied, the recipient must provide a written explanation of the reasons, specifically referencing evidence in the record that supports each reason for the denial. There must not be generic denials; each denial must be supported by specific evidence.

The Department also proposes that, within 30 days of receiving a written explanation, a firm may show to the recipient that it has resolved the specific problems cited as reasons for the denial. There would be an informal opportunity to be heard. Mere paper changes, without substantive changes, would not "cure" a defect.

When it denies certification to a firm, the recipient would be required to establish a 6–12 month waiting period before the firm may reapply for certification. Many recipients already follow this practice. The Department seeks comment on whether the rule should specify a different time period, or whether, as under the existing regulation, this determination should be left to the recipients' discretion.

Section 23.53 Recipients' Proceedings to Remove Eligibility

This section applies only to firms who already have a certification that a recipient seeks to eliminate. This section would apply to any removal of an existing certification, whether originating with an outside complaint, information provided by a DOT agency, a recertification review, etc. Like § 23.51, it is intended to reform and standardize recipients' procedures.

When a recipient receives a complaint alleging that a currently certified firm is ineligible, the recipient would first notify the firm that the complaint had been filed. This written notice would summarize grounds on which the firm's eligibility is being questioned. The recipient is not required to accept a general allegation that a firm is ineligible and could not propose decertification based on an anonymous complaint. This provision is not intended to interfere with the Department of Transportation Inspector General's "Hotline," which could continue to receive anonymous complaints. A recipient could institute its own investigation based on information from the Hotline or other sources, even if anonymous.

The recipient would then review all available information and conduct an additional investigation, if needed. If the recipient determined, based on this review, that there is reasonable cause to believe that the firm is ineligible, the recipient would provide written notice to the firm that the recipient proposes to find it ineligible, setting forth the reasons for the proposed determination. If the recipient determines that there is not reasonable cause, it notifies the interested parties of this determination. All statements of reasons for findings on this issue of reasonable cause would have to specifically reference evidence in the record on which the finding is based.

A recipient may also come to question the eligibility of the firm based on its own recertification review or other investigation. The recipient would follow the same reasonable cause notice procedure. The NPRM would also modify an exiting Part 23 provision that allows the Department to suspend a certification pending a certification review. In the proposal the Department could, after notifying the recipient and the firm, direct a recipient to suspend a certification of a firm and to open a removal of eligibility proceeding. The Department seeks comment on whether such a provision is advisable or whether a milder remedy (e.g., a request by the Department for the recipient to conduct a recertification review) would be better.

Once a recipient notifies a firm that it has found reasonable cause, the recipient must give the firm an opportunity for a hearing. The recipient has the burden of proving by a preponderance of evidence, that the firm does not meet certification standards. The Department seeks comment on whether this is the appropriate burden of proof. A complete record of the hearing must be maintained. A firm may also elect to present information and arguments in writing, without going to a hearing.

One of the most important components of due process in any administrative proceeding is the separation of functions. If a proceeding is to be fair, the "prosecutor" and "judge" cannot be the same person or office. The recipient can provide for separation of functions in a number of ways. For example, a decision can be made by an Administrative Law Judge. An official of the state or local agency involved, who is outside the DBE program office, can be designated as the decisionmaker, while the DBE program office takes advocate role. However, the separation of functions is accomplished, it is crucial that the decisionmaker cannot be the same as, subject to influence by or under the direction of the office proposing to remove the firm's eligibility.

As the proponent of the removal of a certification, the recipient (i.e., the office acting as the "prosecutor") always bears the ultimate burden of persuasion that the firm is ineligible. When the recipient makes a "reasonable cause" determination, however, a burden of going forward with evidence concerning its eligibility shifts to the firm.

In fairness to firms whose eligibility is in question, the NPRM proposes that a decision to remove eligibility could be based only on changes in circumstances since the time of the recipient's most recent certification of the firm, on information that has been fraudulently concealed or misrepresented in previous certification reviews, or in order to be consistent with changes in part 23 itself. The intent of this provision is to prevent the situation in which a firm is deceitful based on a changed view by the recipient of the same facts that earlier lead to the firm's certification. The recipient could, however, decertify a firm if the recipient made a documented finding that its previous decision had been clearly erroneous (e.g., because a

key piece of information in the file had been overlooked by the previous decisionmaker).

Under the proposal, recipients must provide firms a letter setting forth the decision in an eligibility proceeding, including specific references to the evidence in the record that support each reason for the decision. The notice would also inform the firm of the consequences of the recipient's decision and of the availability of an administrative appeal to DOT.

Section 23.55 Administrative Appeals to the Department of Transportation

Under § 23.55 of the existing DBE regulation, persons dissatisfied with recipients' certification decisions may take an administrative appeal to the Department of Transportation. The existing provision does not set forth procedures for these appeals, however. The proposed section would remedy this problem.

The proposal provides that any firm which is denied certification, or whose eligibility is removed by a recipient, or before owner is determined not to be a member of a designated disadvantaged group or concerning which the presumption of disadvantage has been rebutted, may make such an appeal. (The complainant in an ineligibility complaint, where the recipient does not remove the firm's eligibility, may also appeal. A DOT operating administration may initiate such a proceeding in certain circumstances, as well.) Actions by a recipient that deny an individual the benefit of the presumption of social and economic disadvantage may also be appealed under this section.

As under the present regulation, a recipient's decision would remain in effect pending the Department's decision on appeal. The Department seeks comment on whether there should be a provision allowing the Department to stay the effect of a recipient's determination while an appeal is pending. An appeal would have to be made in writing within 90 days of the recipient's decision.

The Department would have to make a decision based solely on the administrative record, which, under §§ 23.51 or 23.53, the recipient will have developed before making its own decision. The Department does not make a *de novo* review of the matter, and DOT would not hold a hearing. DOT could, however, supplement the record with relevant information made available by the DOT Office of Inspector General, other law enforcement authorities the firm, the recipient, and other sources.

After reviewing the record, DOT would uphold the recipient's decision if it is supported by substantial evidence and consistent with part 23. The Department seeks comment on whether the "substantial evidence" standard of review is appropriate here, or whether an alternative standard, such as "arbitrary and capricious," would be better. If the recipient's decision did not meet the standard of review, the decision of the recipient would be reversed. The Department would have the option of sending the record back to the recipient for additional information if it appeared to be incomplete. The Department could not uphold recipients' decisions based on grounds not specifically articulated in those decisions. That is, the Department's job is not to search for reasons to uphold decisions; rather, it is to evaluate the reasons for decisions given by recipients. Again, written notice of the decision would have to be provided to interested persons.

The Department seeks comment on whether there should be a time limit on its handling of appeals. If so what should it be? (The NPRM proposes 60 days.) What should be the effect of a failure to meet the deadline?

Section 23.57 Effect of Decisions

The present rule leaves unclear the effect of DOT certification appeal decisions. The proposal would clarify this matter. Since a determination under section 23.55 is on review of an administrative record, and not a *de novo* determination on the merits, it would be binding only on the recipient (or unified certification program) involved. The recipient would take the action directed by the appeal decision. Other recipients could take note of the action, and, if appropriate, open an inquiry into the firm's status. There would be no automatic action taken as the result of the Department's affirmance or reversal of another recipient's decision.

The Department seeks comment on whether, following a recipient or DOT decision in a certification case, a second recipient could take action without going through its own proceeding. For example, if State A decertifies a firm, should State B be able to adopt this finding (and/or a DOT decision upholding the finding) and decertify the firm, or should State B have to go through its own proceeding to remove eligibility? The proposed regulation takes the latter course.

The Department is concerned that information about its decisions has not been readily enough available to recipients, contractors, and other interested persons. The Department is considering a number of steps to improve the availability of decisions. These include publishing or making available substantive summaries of decisions, creating an index to facilitate retrieval of decisions on various substantive issues, or creating a computer access system (analogous to, or perhaps added to, the Department's new Alcohol and Drug Information Center (ADIC)). The Department seeks comment on the information needs of users and how we might best meet these needs.

Section 23.59 Compliance With Overall Goal Requirements

This section emphasizes that any noncompliance with a part 23 requirement may subject a recipient or contractor to program sanctions available under the authority of the three operating administrations. It is basically the same as the present provision on the subject.

Sections 23.61–21.65 Enforcement Actions

Sections 21.61 and 21.63 have to do with noncompliance complaints; that is, complaints that a recipient has failed to meet its obligations under part 23. These provisions are essentially similar to those in the existing part 23 for FHWA and FTA programs. Because, as a matter of statute, FAA enforcement proceedings must comply with section 519 of the Airport and Airway Improvement Act, there would be a new, separate section for FAA enforcement actions. The current procedural rules implementing section 519 are found at 14 CFR part 13.

In § 21.65, the proposal discusses the application to the DBE program of the Department's suspension and debarment rules and the Program Fraud and Civil Remedies Act. The Department seeks comment on whether the reference to suspension or debarment procedures are needed, or whether those procedures can stand on their own. Is there any due process problem with the application of suspension and debarment in the DBE context? In addition, the Department could suspend or revoke a certification of a firm which is indicted on the basis of conduct related to the DBE program. A certification would be revoked upon conviction of a criminal offense related to the DBE program.

The Department also seeks comment on what additional compliance and enforcement measures, if any, should be added to the regulation.

Section 23.67 Miscellaneous Provisions

This section includes a requirement to cooperate with DOT and recipient investigations and a prohibition on intimidation and retaliation, both drawn from the existing regulation. It also clarifies that, in response to requests for program information, the Department would follow Freedom of Information Act requirements.

Standards for Determination of Social and Economic Disadvantage

For information purposes, the Department presents the following standards for determination of social and economic disadvantage, drawn from Small business Administration rules (See 13 CFR 124.105–124.106). The standards provide for the following:

Social Disadvantage

(a) *General.* Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control. For social disadvantage relating to Indian tribes and Alaska Native Corporations, see § 124.112(a).

(b) *Members of designated groups.* (1) In the absence of evidence to the contrary, the following individuals are presumed to be socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China, Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea. The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Hong Kong, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal); and members of other groups designated from time to time by SBA according to procedures set forth at paragraph (d) of this section.

(2) An individual seeking socially disadvantaged status as a member of a designated group may be required to demonstrate that he/she holds himself/herself out and is identified as a member of a designated group if SBA has reason to question such individual's status as a group member.

(c) *Individuals not members of designated groups.* (1) An individual who is not a member of one of the above-named groups must establish his/her individual social disadvantage on the basis of clear and convincing evidence. A clear and convincing case of social disadvantage must include the following elements:

(i) The individual's social disadvantage must stem from his or her color, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar cause not common to small business persons who are not socially disadvantaged.

(ii) The individual must demonstrate that he or she has personally suffered social disadvantage, not merely claim membership in a non-designated group which could be considered socially disadvantaged.

(iii) The individual's social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries.

(iv) The individual's social disadvantage must be chronic and substantial, not fleeting or insignificant.

(v) The individual's social disadvantage must have negatively impacted on his or her entry into and/or advancement in the business world. SBA will entertain any relevant evidence in assessing this element of an applicant's case. SBA will particularly consider and place emphasis on the following experiences of the individual, where relevant:

(A) *Education.* SBA shall consider, as evidence of an individual's social disadvantage, denial of equal access to institutions of higher education; exclusion from social and professional association with students and teachers; denial of educational honors; social patterns or pressures which have discouraged the individual from pursuing a professional or business education; and other similar factors.

(B) *Employment.* SBA shall consider, as evidence of an individual's social disadvantage, discrimination in hiring; discrimination in promotions and other aspects of professional advancement; discrimination in pay and fringe benefits; discrimination in other terms and conditions of employment; retaliatory behavior by an employer; social patterns or pressures which have channelled the individual into nonprofessional or non-business fields; and other similar factors.

(C) *Business history.* SBA shall consider, as evidence of an individual's social disadvantage, unequal access to credit or capital; acquisition of credit or capital under unfavorable circumstances; discrimination in receipt (award and/or bid) of government contracts; discrimination by potential clients; exclusion from business or professional organizations; and other similar factors which have impeded the individual's business development.

(d) *Socially disadvantaged group inclusion*—(1) *General.* Upon an adequate preliminary showing to SBA by representatives of an identifiable group that the group has suffered chronic racial or ethnic prejudice or cultural bias, and upon the request of the representatives of the group that SBA do so. SBA shall publish in the **Federal Register** a notice of its receipt of a request that it consider a group not specifically named in paragraph (b)(1) of this section to have members which are socially disadvantaged because of their identification as members of the group for the purpose of eligibility for the 8(a) program. The notice shall adequately identify the group making the request, and if a hearing is requested on the matter and such request is granted, the time, date and location at which such hearing is to be held. All information submitted to support a request should be addressed to the AA/MSB&COD.

(2) *Standards to be applied.* In determining whether a group has made an adequate preliminary showing that it has suffered chronic racial or ethnic prejudice or cultural bias for the purposes of this regulation, SBA shall determine:

(i) Whether the group has suffered the effects of prejudice, bias, or discriminatory practices;

(ii) Whether such conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in the Small Business Act; and

(iii) Whether such conditions have produced impediments in the business world for members of the group over which they have no control and which are not common to all small business owners. If it is demonstrated to SBA by a particular group that it satisfies the above criteria, SBA will publish the notice described in paragraph (d)(1) of this section.

(3) *Procedure.* Once a notice is published under paragraph (d)(1) of this section, SBA shall adduce further information on the record of the proceeding which tends to support or refute the group's request. Such information may be submitted by any member of the public, including Government representatives and any member of the private sector. Information may be submitted in

written form, or orally at such hearings as SBA may hold on the matter.

(4) *Decision.* Once SBA has published a notice under paragraph (d)(1) of this section, it shall afford a period of not more than thirty (30) days for public comment concerning the petition for socially disadvantaged group status. If appropriate, SBA may hold hearings within such comment period. Thereafter, SBA shall consider all information received and shall render its final decision within 60 days of the close of the comment period. Such decisions shall be published as a notice in the **Federal Register**. Concurrent with the notice, SBA shall advise the petitioners of its final decision in writing. If appropriate, SBA shall amend this regulation accordingly.

Economic Disadvantage

(a) *Economic disadvantage for the 8(a) program.* (1)(i) For purposes of the 8(a) program, economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged, and such diminished opportunities have precluded or are likely to preclude such individuals from successfully competing in the open market. In determining economic disadvantage for purposes of 8(a) program eligibility, SBA shall compare the applicant concern's business and financial profile with profiles of businesses in the same or similar line of business which are not owned and controlled by socially and economically disadvantaged individuals.

(ii) This program is not intended to assist concerns owned and controlled by socially disadvantaged individuals who have accumulated substantial wealth, who have unlimited growth potential or who have not experienced or have overcome impediments to obtaining access to financing, markets and resources.

(iii) For economic disadvantage as it relates to tribally-owned concerns, *see* § 124.112(b)(2).

(2) *Factors to be considered.* In determining the degree of diminished credit and capital opportunities of a socially disadvantaged individual, SBA will consider factors relating both to the applicant concern and to the individual(s) claiming disadvantaged status. Factors fall into three general categories: The personal financial condition of the individual(s) claiming disadvantaged status, including that individual's access to credit and capital; the financial condition of the applicant concern; and the applicant concern's access to credit, capital and markets.

(i) *Personal financial condition of the individuals claiming disadvantaged status.* This criterion is designed to assess the relative degree of economic disadvantage of the individual, as well as the individual's potential to capitalize or otherwise provide financial support for the business. The specific factors to be considered include, but are not limited to: the individual's personal income for at least the past two years; total fair market value of all assets; and the individual's personal net worth. Subject to the exclusions set forth in paragraph (a)(2)(i)(B) of this section, an individual whose personal net worth exceeds $250,000 will not be considered economically disadvantaged for purposes of 8(a) program entry. For personal net worth thresholds relating to continued 8(a) program eligibility, *see* § 124.111(a).

(A)(*1*) Except as provided in paragraph (a)(2)(i)(A)(*2*) of this section, when married, an individual upon whom eligibility is based shall submit a financial statement relating to his/her personal finances and a separate financial statement relating to his/her spouse's personal finances. A married applicant individual residing in any of the community property states or territories of the United States (e.g., Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico Texas, Washington and Wisconsin) must clearly identify on his or her financial statement those assets which are his or her separate property and those which are community property. The spouse of such married applicant must similarly identify on his or her financial statement those assets which are his or her separate property and those which are community property. A one-half interest in the assets identified as community property (and income derived from such assets) will be attributed to the applicant individual for purposes of determining economic disadvantage. Assets or a community property interest in assets, which applicant spouse has transferred to a non-applicant spouse within 2 years of the date of application to the 8(a) program will be presumed to be the property of the applicant spouse for purposes of determining his/her personal net worth. However, such presumption shall not apply to any applicant spouse who is subject to a legal separation recognized by a court of competent jurisdiction. A financial statement of a spouse of an applicant is not required if the individual and his/her spouse are subject to a legal separation recognized by a court of competent jurisdiction. However, an applicant individual must include on his or her statement all community property in which he or she has an interest.

(*2*) Except for concerns where both spouses are individuals upon whom eligibility is based, the requirement of paragraph (a)(2)(i)(A)(*1*) of this section, relating to the separate financial statements, applies only to determinations of economic disadvantage for purposes of 8(a) program entry. For a concern where both spouses are individuals upon whom program eligibility is based, the personal net worth of each spouse individually will be considered for program certification and for continued program eligibility.

(B) Whenever SBA calculates the personal net worth of an individual claiming disadvantaged status for purposes of the 8(a) program, SBA shall exclude the individual's ownership interest in the applicant or participating 8(a) concern and the equity in his/her primary personal residence, but shall not exclude any portion of such equity in his/her primary residence which is attributable to excessive withdrawals from the applicant or participating 8(a) concern.

(C) Whenever SBA calculates the personal net worth of an individual claiming to be an Alaskan Native, as defined in § 124.100, for purposes of qualifying an individually owned 8(a) applicant concern, SBA shall include assets and income from sources other than an Alaska Native Corporation, as defined in § 124.100, and shall exclude from such calculation any of the following which the individual receives from any Alaska Native Corporation:

(*1*) Cash (including cash dividends on stock received from a Native Corporation) to the extent that it does not, in the aggregate, exceed $2,000 per individual per annum;

(*2*) Stock (including stock issued or distributed by a Native Corporation as a dividend or distribution on stock);

(*3*) A partnership interest;

(*4*) Land or an interest in land (including land or an interest in land received from a Native Corporation as a dividend or distribution on stock); and

(*5*) An interest in a settlement trust.

(ii) *Business financial condition.* This criterion will be used to provide a financial picture of a firm at a specific point in time in comparison to other concerns in the same or similar line of business which are not owned and controlled by socially and economically disadvantaged individuals. In

evaluating a concern's financial condition, SBA's consideration will include, but not be limited to, the following factors: business assets, revenues, pre-tax profit, working capital and net worth of the concern, including the value of the investments in the concern held by the individual claiming disadvantaged status.

(iii) *Access to credit and capital.* This criterion will be used to evaluate the ability of the applicant concern to obtain the external support necessary to operate a competitive business enterprise. In making the evaluation, SBA shall consider the concern's access to credit and capital, including, but not limited to, the following factors: Access to long-term financing; access to working capital financing; equipment trade credit; access to raw materials and/or supplier trade credit; and bonding capability.

(b) *Economic disadvantage for the 8(d) Subcontracting Program, Small Disadvantaged Business Set-Asides, Small Disadvantaged Business Evaluation Preferences and for any other Federal procurement programs requiring SBA's determination of disadvantaged status.* (1) For purposes of the section 8(d) Subcontracting Program and other programs requiring SBA's determination of disadvantaged status, economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities, as compared to others in the same or similar line of business and whose diminished opportunities have precluded or are likely to preclude such individuals from successfully competing in the open market. In determining economic disadvantage for the section 8(d) Subcontracting program, Small Disadvantaged Business set-asides and Small Disadvantaged Business Evaluation preferences, SBA will consider the factors set forth in paragraph (a) of this section but will apply standards to each factor that are less restrictive than those applied when determining economic disadvantage for purposes of the 8(a) program. This approach corresponds to the Congressional intent that partial or complete achievement of a concern's 8(a) program business development goals should not necessarily preclude its participation in other Federal procurement programs for concerns owned and controlled by socially and economically disadvantaged individuals.

(2) An individual whose personal net worth exceeds $750,000 as calculated pursuant to paragraph (a)(2)(i) of this section, will not be considered economically disadvantaged for purposes of section 8(d) of the Small Business Act (15 U.S.C. 637(d)) or any Federal procurement program which uses section 8(d) for its definition of economic disadvantage.

Proposed Reporting Form for DBE Data

BILLING CODE 4910-62-M

U.S. Department of Transportation

Report of DBE Awards and Commitments

1. Administration: _____ 2. Fiscal Year: _____ 3. Report Period: _____

4. Name of Recipient: _____

5. Address: _____

6. City / State / Zip: _____

7. Annual DBE Goal: _____%

8. Total prime contracts / procurements awarded this report period to all contractors: (a) Number _____ (b) $ Value _____

	Number		$ Value	
	(a) Women	(b) Total	(c) Women	(d) Total
9. DBE prime contracts / procurements awarded this report period				
10. DBE subcontracts / procurements awarded this report period				
11. Subcontracting / procurement commitments to DBEs this report period				

12. Total prime contracts / procurements awarded to date to all contractors: (a) Number _____ (b) $ Value _____

13. Total awards to date to DBEs: (a) Number _____ (b) $ Value _____ (c) _____%

14. DBE prime and subcontracts / procurements awards by ethnic group:	Number		$ Value	
	(a) Women	(b) Total	(c) Women	(d) Total
Black American				
Hispanic American				
Native American				
Asian-Indian American				
Asian-Pacific American				
Other				
TOTAL				
15. Number and $ Value of DBE prime and subcontract awards by type of work:				
(a) Professional / Consultant Services				
(1)				
(2)				
(3)				
(b) Construction				
(1)				
(2)				
(3)				
(c) Supplies				
(1)				
(2)				
(3)				
(d) Equipment				
(1)				
(2)				
(3)				
(e) Other				
(1)				
(2)				
(3)				
TOTAL				

16. Name of Preparer: _____ 17. Telephone No. ( ) _____

The Public reporting burden for this collection of information is estimated to average one hour per response. If you wish to comment on the accuracy of the estimate or make suggestions for reducing this burden, please direct your comments to OMB and the DOT at the following addresses:

Office of Management and Budget
Paperwork Reduction Project (2105-0510)
Washington, DC 20503

and

U.S. DOT/OST/OSDBU, S-42
400 Seventh Street, S.W.
Washington, DC 20590

DOT F 4600.6 (8/88) OMB Approval No. 2105-0510 Expires 7-31-95

DOT 4630—REPORT OF DBE AWARDS AND COMMITMENTS (Instructions)

1. The DOT Operating Administration providing Federal financial assistance. (Example: FHWA, FTA, FRA, FAA).

2. Federal fiscal year, beginning October 1 and ending September 30. (For FAA recipients indicate the time period covered by the goals, if applicable).

3. The period of the Federal fiscal year for which the report is being submitted. If report is submitted on a quarterly basis enter the number 1, 2, 3, or 4—October 1 through December 31 (10/1—12/31) would be the first quarter. If other than a quarterly report specify the time period using the beginning and ending month and day. (Recipients of an FAA grant of $1 million or more which will result in DOT-assisted contracts should submit the report each report period until all contracts and subcontracts under that portion of the grant are executed. All other FAA recipients should submit the report annually following the end of the fiscal year. Sponsors of more than one airport should submit a separate report for each facility).

4. Name of the recipient or subrecipient. (In the case of the Federal-aid highway program, this would be the State highway agency).

5. Street address or post office box number of recipient or subrecipient. (May be omitted by State highway agencies).

6. City, State and ZIP Code for recipient or subrecipient. (May be omitted by State highway agencies).

7. The recipient's annual DBE goal for the fiscal year indicated in Item 2 as approved by the DOT Operating Administration indicated in Item 1

8(a). The total number of DOT-assisted prime contracts/procurements awarded during the reporting period. These totals shall include all types of contracts/procurements for which DOT funds are used, including professional/consultant services, construction, purchase of material or supplies, lease or purchase of equipment, and any other types of services. (For FHWA recipients this includes advance construction projects).

8(b). For FHWA and FAA recipients, the dollar value of the total Federal share of all prime contracts and procurements reported in Item 8(a). For FTA recipients the total dollar of FTA-assisted funds. Recipients of other DOT Operating Administrations may include recipient matching funds. This and all other dollar entries are to be rounded to the nearest dollar. (For FHWA recipients the Federal share of advance construction projects should be the amount of Federal-aid funds which would eventually be obligated when the project is converted).

9. For FHWA, FTA and FAA recipients, the number and dollar value of the Federal share of the prime contracts/procurements reported in Item 8 which were awarded to DBEs. Recipients of other DOT Operating Administrations may include recipient matching funds in the reported DBE awards. The total awards to DBEs should be included in Columns b and d. The portion of total DBE awards that were made with women-owned firms should be included in Columns a and c.

10. For FHWA, FTA and FAA recipients, the number and dollar value of the Federal share of the *DBE subcontracts/procurements* actually executed by (non DBE) prime contractors on all active DOT-assisted prime contracts/procurements during the reporting period. Recipients of other DOT Operating Administrations may include recipient matching funds in the reported DBE subcontract awards. Include all qualifying subcontracts executed during the period regardless of when the prime contract was executed. This includes transactions for professional/consultant services, construction, purchase of materials, lease of equipment, etc., which were made with a DBE during the reporting period. The total awards to DBEs should be included in Columns b and d. The portion of total DBE awards that were made with women-owned firms should be included in Columns a and c.

11. For FHWA recipients, the number and dollar value of the Federal share of subcontracting commitments to DBEs made by successful (non DBE) bidders at the time of prime contract/procurement award for all prime contracts/procurements reported in Item 8. The total commitments to DBEs should be included in Columns b and d. The portion of total DBE commitments that were made with women-owned firms should be included in Columns a and c. Commitments are written indications to the recipients that the (non DBE) successful bidder intends to use specific DBEs as subcontractors, material suppliers, etc. (NOTE: THIS ITEM DOES NOT APPLY TO FTA, FAA and FRA RECIPIENTS).

12(a). The total number of DOT-assisted prime contracts/procurements awarded to date. This is the sum of all prior and current awards as reported in Item 8(a).

12(b). For FHWA, FTA and FAA recipients, the dollar value of the total Federal share of all prior and current prime contracts and procurements reported in Item 8(b). Recipients of other DOT Operating Administrations may include recipient matching funds. This and all other dollar entries are to be rounded to the nearest dollar. (For FHWA recipients, the Federal share of advance construction projects should be the amount of Federal-aid funds which would eventually be obligated when the project is converted).

13(a). For FTA and FAA recipients, the number of executed DBE prime contracts/procurements reported to date in Item 9(b) and the executed DBE subcontracts/procurements reported to date in Item 10(b). For FHWA recipients, use the sum of Item 9(b) and Item 11(b) subcontracting/procurement commitments to DBEs as reported to date.

13(b). For FTA and FAA recipients, the dollar value of the total Federal share of the DBE prime contracts/procurements and DBE subcontracts/procurements reported to date in Item 9(d) and Item 10(d). FHWA recipients should include the dollar value of the total Federal share reported to date in Item 9(d) and Item 11(d). Recipients of other DOT Operating Administrations may include recipient matching funds. This and all other dollar entries are to be rounded to the nearest dollar. (For FHWA recipients the Federal share of advance construction projects should be the amount of Federal-aid funds which would eventually be obligated when the project is converted).

13(c). The percent of DBE awards to date, i.e. Item 13(b) divided by Item 12(b) and the results multiplied by 100.

14. This is a breakdown by ethnic group of the number and dollar value of all DBE prime contracts/procurements reported in Item 9 plus all executed DBE subcontracts/procurements reported in Item 10. The total awards to DBEs should be included in Columns b and d. The portion of total DBE awards that were made with women-owned firms should be included in Columns a and c. For FHWA, FTA and FAA recipients, the dollar value of the Federal share is reported. For recipients of other DOT Operating Administrations, recipient matching funds may be included.

The ethnic group definitions for the MBE program are contained in 49 CFR 23.5, dated March 31, 1980, and for the DBE program, in 49 CFR 23.62, dated July 21, 1983 and revisions dated October 21, 1987 and May 23, 1988. The ethnic group labeled "Other" includes DBEs owned and operated by individuals who have been determined by recipients on a case-by-case basis to be socially and economically disadvantaged. In the case of split ownership by two or more minorities/disadvantaged individuals, the DBE participation should be reported for the ethnic group which owns the largest share. If the ownership is equal, the DBE participation should be reported for the ethnic group involved which is listed first.

15. The number and dollar value of awards by type of work performed by DBEs for the prime contracts/procurements reported in Item 9 and the executed subcontracts/procurements reported in Item 10. Prime and subcontracts/procurements which involve more than one type of work should be reported only for the predominant work type based on cost.

NOTE: Examples of the types of work are listed below:

a. Professional/Consultant Services:
- —*Engineering*—professional services such as design or construction inspections performed by an engineering firm.
- —*Architectural*—professional services performed by an architectural firm.
- —*Accounting.*
- —*Right-of-Way*—Right-of-way services such as fee appraisals and negotiations.
- —*Supervision and management of transit system operations.*
- —*Other*—Other professional services such as supportive services and research contracts.

b. Construction:
- —*Grading and Drainage*—grading, drainage, clearing and related construction items.
- —*Paving*—construction of base course, pavement and related items.
- —*Structures/Buildings*—bridge construction operations, including piling, substructure, superstructure, etc., and building construction including plumbing, heating, electrical work, etc.
- —*Materials*—manufacture and/or supply of materials which are incorporated in a construction project.
- —*Equipment*—rental of equipment for use on a specific construction project.
- —*Trucking*—agreements for the hauling of earthwork or other materials for a construction project.
- —*Traffic Control*—permanent traffic control items such as signs, signals or markings, and temporary traffic control items such as barricades and flagging.
- —*Landscaping*—landscaping, seeding, sodding, erosion control and related items.
- —*Other*—other construction activities such as lighting contracts and guard rail.

c. Supplies:
- —*Fuel.*
- —*Tires.*
- —*Other.*

d. Equipment:
- —*Leasing.*
- —*Purchase.*
- —*Other.*

e. Other:
- —*Building leases.*
- —*Printing.*
- —*Etc.*

16. Typed name of person who prepared the report.

17. Telephone number of person who prepared the report

BILLING CODE 4910-62-C

Regulatory Analyses and Notices

Executive Order 12291

This NPRM does not propose a major rule under Executive Order 12291. The NPRM is significant under the Department's Regulatory Policies and Procedures. However, cost impacts of the proposal, if adopted, would be minimal. That is, the proposal changes would realize greater efficiencies in program administration and would not impose significant new costs on recipients or prime contractors. There would probably be some savings realized: DBE applicants would benefit from the "one-stop shopping" certification process, and state and local governments would benefit from the clarification of certification standards. Otherwise, program costs and benefits would remain at about existing levels. For this reason, we have not prepared a full regulatory evaluation.

Regulatory Flexibility Act

The Department certifies that the proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. Obviously, the DBE program is aimed at improving contracting opportunities for small businesses owned and controlled by socially and economically disadvantaged individuals. However, the proposed revision, while improving program administration and facilitating DBE participation (e.g., by making the certification process clearer), would not impose new costs on small entities. For this reason, it has not been necessary to prepare a regulatory flexibility analysis.

Paperwork Reduction Act

The NPRM contains one new item (concerning personal financial statements to be submitted by applicants for DBE certification) and modifications of two existing items (concerning DBE application forms and recipients' data reporting forms) that are subject to OMB review under the Paperwork Reduction Act. These items would not go into effect until OMB clearance is obtained.

Federalism

The proposed regulation would not have sufficient Federalism impacts to warrant the preparation of a Federalism assessment. While the rule concerns the activities of state and local governments in DOT financial assistance programs, the proposal would not significantly alter the role of state and local governments vis-a-vis DOT from the present part 23.

Issued this 16th day of November, 1992, at Washington, DC.

Andrew H. Card, Jr.

Secretary of Transportation.

For the reasons set forth in the preamble, the Department proposes to amend Subtitle A of Title 49 as follows:

Title 49 of the Code of Federal Regulations Part 23 is revised to read as follows:

PART 23—PARTICIPATION BY DISADVANTAGED ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS

Subpart A—General

Sec.

Subpart B—DBE Programs

Subpart C—Certification, Compliance and Enforcement Procedures

Authority: Section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991; Section 511 of the Airport and Airway Improvement Act of 1982, as amended.

Subpart A—General

§23.1 Purpose.

(a) The purpose of this Part is to carry out the statutes establishing the Disadvantaged Business Enterprise (DBE) program in the Department's Federal-aid highway program, Federal transit assistance program, and airport grant program.

(b) This part is also intended to carry out the statutory requirement that, to the maximum extent practicable, at least ten percent of certain concession businesses are DBEs at airports receiving Federal grant funds.

(c) The Department's DBE program is intended to provide appropriate flexibility to recipients of Federal assistance in establishing and meeting DBE goals, using a variety of means toward that end.

§23.3 Applicability.

(a) This Part applies to all DOT financial assistance in the following categories that recipients expend in DOT-assisted contracts:

(1) Federal-aid highway funds authorized by title I and section 202 of Public Law 100-17.

(2) Federal transit funds authorized by title I or title III of Public Law 100–17 or by the Federal Transit Act of 1964, as amended:

(3) Airport funds authorized by the Airport and Airway Improvement Act of 1982 (AAIA), as amended.

(b) Subpart D of this part applies to any sponsor that has received a grant for airport development authorized by the Airport and Airway Improvement Act of 1982, as amended.

(c) This part does not apply to federally-assisted contracts to be performed entirely outside a state of the United States, the District of Columbia, or Puerto Rico.

§23.5 Definitions.

Affiliate has the meaning given the term in regulations of the Small Business Administration (SBA; 13 CFR 121.401).

Business opportunity means an opportunity to obtain property rights by lease or otherwise in an FTA recipient's facilities or equipment for the purpose of operating a transit-related activity, for the provision of goods or services, or for the purpose of conducting any other authorized commercial activity.

Compliance means the condition existing when a recipient has properly implemented and met the requirements of this Part and its approved DBE program.

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 any program to which this Part applies.

Department or *DOT* means any U.S. Department of Transportation, including the Office of the Secretary and the operating administrations.

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

(1) Which is at least 51 percent owned by one or more socially and economically disadvantaged individuals or, in the case of a corporation, at least 51 percent of the stock of which 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 which if funded in whole or in part with DOT financial assistance, 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.

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 shares in the control, management, risks, and profits of the joint venture to a degree commensurate with its ownership interest.

Noncompliance means the condition existing when a recipient has not properly implemented and met the requirements of this part.

Operating Administration means any of the following parts of DOT: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The Administrators of the operating administrations include their designees.

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

Program means any undertaking by a recipient to use DOT financial assistance.

Recipient means any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, for any program, or which 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). However, notwithstanding meeting SBA small business standards, a firm that exceeds the currently applicable cap on average annual gross receipts established by DOT notice in the **Federal Register** is not a small business concern for purposes of this part.

Socially and economically disadvantaged individuals means individuals who are citizens (or lawfully admitted permanent residents) and who are:

(1) Individuals in the following groups, who 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, 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, Kirbati; 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.

(2) Any individual, not a member of one of these groups, who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis.

§ 23.7 Discrimination prohibited.

No persons shall be excluded from participation in, denied the benefits of, or otherwise discriminated against in connection with the award and performance of any contract covered by this part on the basis of race, color, sex, or national origin.

§ 23.9 Exemptions and interpretations.

(a) The administrators of FHWA, FTA, and FAA, or their designees, may issue written interpretations of or written guidance concerning this Part. Such interpretations are issued only with the concurrence of the Department's DBE Program Council or its designated representative. Such interpretations shall be deemed valid and binding only if they contain the following statement:

> This interpretation of 49 CFR Part 23 has been reviewed by the Department of Transportation's DBE Program Council for consistency with the language and intent of Part 23. The DBE Program Council concurs in its issuance and its application to parties subject to all Department of Transportation disadvantaged business enterprise regulations.

(b) FHWA, FTA, and FAA may grant exemptions from specific requirements of this Part, upon written request from any regulated party. No waivers, exemptions, or exceptions to the provisions of this Part shall be granted except as provided in this paragraph.

(1) The basis for any grant of an exemption shall be special or exceptional circumstances, not likely to be generally applicable, and not contemplated in connection with the rulemaking that established this Part, that make compliance with a specific provision of this Part impracticable. Any grant of an exemption shall be conditioned on the regulated party taking specified practicable steps to comply with the intent of the provision from which an exemption is granted.

(2) All grants or denials of requests for exemption shall be in writing, and shall be issued only with the concurrence of the Department's DBE Program Council or its designated representative. Such grants or denials shall be deemed valid and binding only if they contain the following statement:

> This response to a request for an exemption from 49 CFR Part 23 has been reviewed by the Department of Transportation's DBE Program Council for

consistency with the language and intent of Part 23. The DBE Program Council concurs in its issuance.

(c) The DBE Program Council or its designated representative may issue interpretations of and guidance concerning this Part.

§ 23.11 Reporting requirement.

Recipients shall report to the concerned operating administration data concerning DBE participation in their DOT-assisted contracts. These reports shall be made quarterly, unless another frequency is established by the Administrator of the concerned operating administration.

Subpart B—DBE Programs

§ 23.21 Assurances.

(a) Each financial assistance agreement between a DOT operating administration and a recipient, or between a primary recipient and another recipient, shall include the assurance set forth in this paragraph. This requirement applies regardless of whether the recipient or subrecipient involved is required to have a DBE program under § 23.23 of this part.

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. The recipient shall take all necessary and reasonable steps under 49 CFR part 23 to ensure that eligible disadvantaged business enterprises (DBEs) have the maximum feasible opportunity to participate in DOT-assisted contracts. The recipient's DBE program, if required by 49 CFR part 23 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 23.

(b) Each contract between a recipient, subrecipient, or contractor and a contractor or subcontractor shall include the assurance set forth in this paragraph. This requirement applies regardless of whether the recipient or subrecipient involved is required to have a DBE program under § 23.23 of this Part.

The contractor, subrecipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The requirements of 49 CFR part 23 and the recipient's DOT-approved DBE program (where required) are incorporated in this contract by reference. 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.

§ 23.23 DBE program requirement.

(a) Recipients in the following categories who let DOT-assisted contracts shall implement a DBE program containing the elements set forth in §§ 23.25–39, 23.51, 21.53, and 23.57(b) of this Part.

(1) All FHWA recipients;

(2) FTA recipients that receive $250,000 or more per year in FTA financial assistance.

(3) FAA recipients that receive $200,000 or more per year in FAA financial assistance.

(b) A recipient subject to the requirement to have a DBE program shall submit its program for approval to the DOT operating administration providing the greatest amount of its DOT financial assistance. Recipients shall also submit for approval significant changes in their programs. Recipients shall submit an update/progress report annually or whenever approval is sought for a significant program change. A DBE program approved by one DOT element is deemed to be approved by all DOT elements providing financial assistance to the recipient.

(c) A recipient required to have a DBE program is not eligible to receive DOT financial assistance unless its DBE program has been approved by DOT and it is in compliance with its program and this part.

(d)(1) A recipient that becomes subject to the requirement to have a DBE program shall continue to apply the program to contracts under all subsequent grants, regardless of the amount of those grants.

(2) A recipient subject to the requirement to have a DBE program shall continue to implement its program until all funds from DOT financial assistance have been expended.

§ 23.25 DBE directory.

Each recipient shall maintain and make available to interested persons a directory identifying eligible DBEs. The listing for each firm shall include its address, phone number, the types of work the firm prefers to perform and its preferred locations (if any) for performing the work. It may include additional relevant information at the recipient's discretion. Recipients shall update the directory at least annually.

§ 23.27 Certification process.

(a) Recipients shall ensure that only firms certified as eligible DBEs under this section participate as DBEs in their programs.

(b) Recipients shall determine the eligibility of firms as DBEs consistent with the standards of § 23.29 of this part.

(c) Recipients shall take at least the following steps in determining whether a DBE firm meets the standards of § 23.29:

(1) Perform an on-site visit to the offices of the firm. The principal officers of the firm shall be personally interviewed and their résumés and/or work histories reviewed. The recipient shall also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in the recipient's jurisdiction or local area. Where the firm is located outside the geographic area in which the recipient normally operates, the recipient may rely on the facts in reports of on-site visits performed by other DOT recipients.

(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 each disadvantaged owner of the firm to submit a statement of personal net worth, consistent with SBA regulations (see 13 CFR 124.106(a));

(8) Require potential DBEs to complete and submit an appropriate application form. The application form shall be similar to or a reproduction of the model provided in appendix A. The statement shall either be in the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States. The recipient shall review this form prior to making a decision about the eligibility of the firm.

(d) After a firm is certified, the firm shall notify the recipient in writing of any change in its circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part. The firm shall provide the notification within 30 days of its occurrence. Failure by the firm to make timely notification of a significant change affecting its

ownership and control shall be deemed a failure to cooperate under § 23.67(c) of this part.

(e) The recipient shall conduct a recertification review of each DBE firm it has certified at least once every two years.

(1) At the time of the recertification review, the firm shall submit a sworn statement setting forth any changes in the firm that may affect its eligibility. Supporting documentation describing in detail the nature of such changes shall be attached to the statement. If no changes have taken place since the previous certification or recertification, the sworn statement shall so recite.

(2) The recipient may request, and the firm shall provide, any additional information relevant to the recertification review.

(3) The firm subject to the recertification review shall remain certified unless and until the recipient removes its eligibility, following the procedures of § 23.53 of this part.

(f)(1) No later than three years from the effective date of this section, each recipient shall participate in a unified statewide certification program that DOT has approved. States may join a multistate regional unified certification program, at their discretion. Such a program shall make all certification decisions on behalf of and binding on all DOT recipients in the state or multistate region, with respect to participation in the DOT DBE Program.

(2) Beginning three years from the effective date of this section, each unified certification program shall process an application for certification from a firm from outside its jurisdiction only if the firm has previously been certified in the unified certification program for the jurisdiction in which it has its home office.

(3) A unified certification program may accept the certification of a firm from the unified certification program for the jurisdiction in which the firm has its home office. A unified certification program accepting the certification of another unified certification program shall assume responsibility for taking all appropriate actions with regard to that firm.

(4) All certifications by unified certification programs shall be pre-certifications; i.e., certifications which take place before the issuance of a solicitation for a contract on which a firm seeks to participate as a DBE.

(5) Unified certification programs shall make decisions on applications for certification within 60 days of receiving from the applicant firm all information required under this section.

(g) A recipient or unified certification program may, but is not required to, accept certifications made by other DOT recipients or unified certification programs. A recipient or unified certification program accepting the certification of another recipient or unified certification program shall assume responsibility for taking all appropriate actions with regard to that firm. Recipients or unified certification programs may enter into written reciprocity agreements with other DOT recipients or unified certification programs. Such an agreement shall outline the specific responsibilities of each participant.

§ 23.29 Certification standards.

(a) *General.* (1) In determining whether to certify a firm as eligible to participate as a DBE in DOT-assisted programs under this Part, recipients shall apply the standards of this section.

(2) The firm seeking certification has the burden of demonstrating, by a preponderance of the evidence, group membership (see paragraph (b)), business size (see paragraph (c)) ownership (see paragraph (g)) and control (see paragraph (h)).

(3) Members of the designated groups are rebuttably presumed to be socially and economically disadvantaged.

(4) Individuals who are not presumed to be socially and economically disadvantaged, and individuals concerning whom the presumption of disadvantage has been rebutted (see paragraph (d).), have the burden of demonstrating, by a preponderance of the evidence, that they are socially and economically disadvantaged (see paragraph (f)).

(5) Recipients shall 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. It is inappropriate, in most instances, for recipients to make certification decisions based on any single factor.

(b) *Group membership.* Where the recipient has a reasonable doubt whether an individual is a member of a group that is presumed to be socially and economically disadvantaged, the recipient may require the individual to demonstrate that he or she is a member of the group. In making such determinations, recipients shall take into account such factors as whether the person has held himself or herself out to be a member of the group, whether the person is regarded as a member of the group by the relevant minority community, whether the person's appearance, ancestry, language, and pattern of activity, as applicable, are consistent with group membership. In making these determinations, the recipient shall use the provisions of SBA regulations at 13 CFR 124.105.

(1) If the recipient determines that an individual claiming to be a member of a group presumed to be disadvantaged is not a member of the group, the individual must demonstrate social and economic disadvantage on an individual basis (see paragraph (f)).

(2) A decision by the recipient concerning membership in a designated group is subject to the certification appeals procedure of § 23.55.

(c) *Business size.*

(1) A firm (including its affiliates) must be an existing, operational small business, as defined by Small Business Administration (SBA) standards. Recipients shall apply the 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; and

(2) A firm (including its affiliates) must not have average annual gross receipts, as defined by SBA regulations (see 13 CFR 121.402), over the past three fiscal years, in excess of the current maximum level established by the Secretary.

(d) *Social and economic disadvantage.*

(1) 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, rebuttably presumed to be socially and economically disadvantaged individuals. If the statement of personal net worth of an owner of the firm who is presumed to be economically disadvantaged shows that the individual's personal net worth (as defined in SBA regulations, 13 CFR 124.206) exceeds $750,000, the recipient shall regard the presumption of social and economic disadvantage as having been rebutted. In this case, the owner must demonstrate to the recipient that he or she is socially and economically disadvantaged on an individual basis (see paragraph (f)).

(e) *Section 8(a) Firms.* (1) If a firm applying for certification has a current, valid certification from the SBA under the section 8(a) program, it shall be presumed to be eligible for the DBE program, subject to demonstrating that it meets the average annual gross receipts

limit referenced in paragraph (a)(2) of this section and that it meets SBA business size criteria for the type(s) of work it seeks to perform in the recipient's DBE program. If the firm does not meet these requirements, it is not an eligible DBE, even though it has a valid 8(a) certification from SBA.

(2) Consistent with this presumption, recipients shall not require 8(a) firms to provide information, as part of the initial certification process, beyond what is necessary for purposes of the DBE directory (see § 23.25), related to ownership, control, or social and economic disadvantage. The recipient may require the firm to provide information to demonstrate that it meets the average annual gross receipts limit and that it meets SBA small business size criteria for the types of contracting it expects to perform in the recipient's DBE program.

(3) If a recipient has doubts about the ownership, control, or disadvantaged status of an 8(a) firm, the recipient shall bring its concerns to the attention of the SBA and request a response from the SBA. The recipient may initiate a proceeding to remove eligibility under § 23.53 of this part, including in the record and taking into account any response received from SBA.

(f) *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. The recipient shall make a case-by-case determination of whether such an individual is socially and economically disadvantaged. In making these individual determinations, recipients shall implement the provisions of relevant SBA regulations relating to social and economic disadvantage (13 CFR 124.105(c) and 124.106(b)).

(g) *Ownership.* To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals. In the case of a corporation, such individuals must own at least 51% of the combined total of all classes of stock. In determining whether the socially and economically disadvantaged participants in a firm own the firm, the recipient shall look at all relevant facts as a whole. It is inappropriate, in most instances, for recipients to make ownership decisions based on any single factor.

(1) 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.

(2) All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Except as provided in this paragraph, no securities held in trust, or by any guardian for a minor, shall be considered as held by disadvantaged persons in determining the ownership of a firm. However, securities held in trust shall be regarded as held by a disadvantaged individual for purposes of determining ownership of the firm, if—

(i) The beneficial owner of securities held in trust (including in a "living trust") is a disadvantaged individual, and the trustee is the same or another such individual; or

(ii) The beneficial owner, rather than the trustee, exercises effective control over the management, policy-making, and daily operational activities of the firm.

(3) The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests shall 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 a paid employee. Debt instruments from financial institutions or other organizations which 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.

(4) The recipient may consider the following factors in determining the ownership of a firm. However, a contribution of capital is not regarded as failing to be real and substantial, and a firm is not ineligible solely because a socially and economically disadvantaged individual acquired his or her ownership interest—

(i) Through a transfer from another socially and economically disadvantaged individual;

(ii) Through a division of property or settlement agreement in a divorce action, provided that no term or condition of the agreement or divorce decree is inconsistent with this section;

(iii) Through inheritance, or otherwise due to the death of the former owner; or

(iv) Through a gift (including a gift of funds used to acquire the interest in the firm).

(5) The recipient shall apply the following rules in situations in which marital assets, or assets transferred from one spouse to another, form a basis for ownership of a firm:

(i) 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, the recipient shall 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.

(ii) 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 shall be included as part of the firm's application for DBE certification.

(iii) In the following cases, the recipient shall give heightened 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:

(A) When assets of one spouse held in that spouse's sole ownership are used to acquire an ownership interest in a firm asserted by the other spouse;

(B) When the firm in question, or its assets, are transferred from one spouse to the other.

(6) The co-signature of one spouse on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents shall not constitute a ground to find a potential DBE firm ineligible, if the firm is otherwise owned and controlled by the other spouse consistent with the standards of this section.

(7) In situations in which expertise is relied upon as the contribution to acquire ownership, the expertise must be in areas critical to the firm's operations, specific to the type of work the firm performs, and documented in the records of the firm. The records must clearly show the contribution of expertise and its value to the firm.

(h) *Control.* In determining whether the socially and economically disadvantaged participants in a firm control the firm, the recipient shall look at all relevant facts as a whole. It is inappropriate, in most instances, for

recipients to make control decisions based on any single factor.

(1) A DBE must be an independent business. An independent business is one the viability of which does not depend on its relationship with another firm or firms.

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

(ii) The recipient shall 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 substantially compromise the independence of the potential DBE firm.

(iii) The recipient shall examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor substantially compromises the independence of the potential DBE firm.

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

(2) 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 shall 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) which 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 as provided for in paragraph (c)(6) of this section.

(3) The socially and economically disadvantaged owners shall 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. Non-disadvantaged owners of the firm shall not be disproportionately responsible for the operation of the firm.

(i) The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to management and non-management employees, regardless of whether these employees 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 employee 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.

(ii) The socially and economically disadvantaged owners must have an overall understanding of 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 use and critically evaluate information presented by employees of the firm concerning its daily operations, management, and policymaking.

(iii) If state or local law requires the persons owning and controlling a certain type of firm to have a license or other formal credential, 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 do not require such a person to have such a license or credential to own and control a firm, the recipient shall not deny certification solely on the ground that the person lacks the license or credential. However, the recipient may take into account the absence of a license or credential as one factor in determining whether the socially and economically disadvantaged owners actually exercise control over the firm.

(iv) Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as managers, stockholders, officers, and/or directors. Such individuals may not, however, possess or exercise the power to control the firm.

(v) If a recipient considers differences in remuneration between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a potential DBE, it shall do so 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.

(vi) The fact that a member of the family of a socially and economically disadvantaged owner of a firm participates in the firm as a manager, employee, owner board member, does not, in itself, indicate that the owner fails to control the firm. In considering the firm's eligibility, the recipient shall make a judgment about the control the socially and economically disadvantaged owner exercises vis-a-vis other persons involved in the business as it does in other situations, without regard to whether or not the other persons are family members.

(i) *Other certification considerations.* (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 which have already been certified as DBEs. Except as provided in paragraph (2) of this paragraph, recipients shall not consider commercially useful function issues in any way in making decisions about whether to certify a firm as a DBE.

(2) A recipient 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 or other DOT federally assisted programs.

(3) Recipients shall evaluate the eligibility of a firm in light of present circumstances. Recipients shall not decline 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.

(4) Firms seeking DBE certification shall cooperate fully with requests by recipients for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial of certification.

(5) A small business concern which is 51 percent owned and controlled by one or more certified DBE firms is itself an eligible DBE, if it meets the business size and other eligibility criteria of this part.

(6) 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.

(7) A firm owned by an Indian tribe recognized by the Department of the Interior or an Alaskan Native Corporation may be regarded as owned by socially and economically disadvantaged individuals, notwithstanding the fact that ownership may formally reside in the tribe or corporation as an entity, rather than in individual members of the tribe. Such a firm must meet the control and business size criteria of this section in order to be an eligible DBE.

§ 23.31 Overall goals.

(a) Recipients are required to establish overall goals and shall calculate them as follows:

(1) For FHWA recipients, as a percentage of all Federal-aid highway funds the recipient will expend in FHWA-assisted contracts in the forthcoming fiscal year;

(2) For FTA and FAA recipients, as a percentage of all FTA or FAA funds (exclusive of FTA funds to be used for the purchase of transit vehicles) that the recipient will expend in FTA or FAA-assisted contracts in the forthcoming fiscal year. In appropriate cases, the FTA or FAA Administrator may permit a recipient to express its overall goal as a percentage of funds for a particular grant or project or group of grants and/or projects.

(b) In setting overall goals, recipients shall consider the following factors:

(1) Overall goals shall be based on the number and types of contracts to be awarded by the recipient and the number and types of DBEs likely to be available to work on the contracts during the period covered by the goal.

(2) The recipient shall use its past performance in setting and meeting DBE overall goals as a guide for establishing reasonable expectations for future overall goals.

(c)(1) Recipients setting overall goals on a fiscal year basis shall submit them to the applicable DOT operating administration for approval 60 days before the beginning of the Federal fiscal year to which the goal applies, or at another time determined by the Administrator of the concerned operating administration.

(2) An FTA or FAA recipient setting overall goals on a project or grant basis shall submit the goals at a time determined by the FTA or FAA Administrator.

(3) Submissions of overall goals shall include a description of the methodology used to establish the goals and the reasons for selecting the particular goal submitted.

(d) The recipient shall submit its overall goal to the Administrator of the applicable operating administration for approval. The Administrator considers whether the goal represents a reasonable expectation for DBE participation in the recipient's DOT-assisted contracts, based on such factors as stated in paragraph (b) of this section, existing DBE capacity and the recipient's efforts to develop the capacity of available DBEs.

(e) If a recipient submits an overall goal of less than ten percent, it shall take the following additional steps:

(1) Ensure that the submission is signed or concurred in by the Governor (with respect to a state transportation agency), Mayor or other responsible elected official (with respect to a local mass transit agency), or the responsible elected official or head of the board (with respect to an airport operator).

(2) Consult with minority and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged businesses and the recipient's efforts to increase the participation of such businesses. If it appears to the Administrator of the concerned operating administration that the recipient has failed to consult adequately with relevant persons or organizations, the Administrator may direct the recipient to do so, prior to approving the goal.

(3) Submit with its request for approval for a goal of less than ten percent a justification including the following elements:

(i) The recipient's efforts to locate DBEs;

(ii) The recipient's efforts to make DBEs aware of contracting activities;

(iii) The recipient's initiatives to encourage and develop DBEs;

(iv) Legal or other barriers impeding the participation of DBEs at a level of at least ten percent in the recipient's DOT-assisted contracts and the recipient's efforts to overcome or mitigate the effects of these barriers;

(v) The availability of DBEs to work on the recipient's DOT-assisted contracts;

(vi) A summary of the views and information concerning the availability of DBEs and the adequacy of the recipient's efforts to increase DBE participation provided during the consultation required by paragraph (d)(2) of this section.

(f)(1) The Administrator of the concerned operating administration accepts a recipient's request for approval of a goal of less than ten percent if he/she determines that—

(i) The recipient is making all appropriate efforts to increase DBE participation in its DOT-assisted contracts to a level of at least ten percent;

(ii) Despite these efforts, the recipient's requested goal represents a reasonable expectation for the participation of DBEs in its DOT-assisted contracts, given the availability of DBEs to work on these contracts.

(iii) The steps required by paragraph (d) of this section have been taken.

(2) Before acting on a request to approve a goal of less than ten percent, the Administrator of the concerned operating administration shall provide the Director of the DOT Office of Small and Disadvantaged Business Utilization the opportunity to review and comment on the request.

(g)(1) If the Administrator of the concerned operating administration does not approve the recipient's requested goal under paragraph (d) or (e) of this section, the Administrator shall provide to the recipient a written explanation of his/her decision.

(2) When the Administrator does not approve the recipient's requested goal, the Administrator, after consulting with the recipient, shall establish an adjusted overall goal. The adjusted overall goal represents the Administrator's determination of a reasonable expectation for the participation of DBEs in the recipient's DOT-assisted contracts, and is based on the information provided by the recipient in its submission and other information available to the Administrator. The adjusted overall goal shall be binding on the recipient.

(h) The Administrator may condition the approval of an overall goal on any reasonable future action by the recipient.

(i) At the time the recipient submits its overall goals to the Department for approval, the recipient shall publish a notice announcing these goals, informing the public that the goals and a description of how they were selected are available for inspection during normal business hours at the principal office of the recipient for 30 days following the date of the notice, and informing the public that the Department and the recipient will accept comments on the goals for 45 days from the date of the notice. The notice shall include addresses to which comments may be sent, and shall be published in general circulation media and available minority-focus media and trade association publications, and shall state that the comments are for informational purposes only.

(j) Failure to have an approved overall goal is noncompliance by a recipient with the requirements of this Part. A

recipient that does not have an approved overall goal is not eligible to receive Federal financial assistance from FHWA, FTA, or FAA.

(k) If a recipient fails to meet an approved overall goal, it shall have an opportunity to make an explanation to the Administrator of the concerned Operating administration why the goal could not be achieved and why meeting the goal was beyond the recipient's control.

(l)(1) If the recipient does not make such an explanation, or the explanation does not justify the failure to meet the goal, the Administrator may direct the recipient to take remedial action. Failure to take such remedial action is noncompliance with this Part.

(2) Before the Administrator determines whether an explanation justifies a recipient's failure to meet its goal, the Director of the Office of Small and Disadvantaged Business Utilization shall have an opportunity to review and comment on the recipient's explanation.

§ 23.33 Contract goals.

(a) The recipient shall establish a DBE contract goal on each prime contract with DBE subcontracting possibilities, regardless of whether the recipient has met its overall goal for the year or for a grant or project. The goal shall be calculated on the basis of the entire amount of the contract (i.e., both the state/local and Federal share of the contract).

(b) Recipients 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 its overall goal, the recipient shall ensure that its contract goals are set so that, if met, they will cumulatively result in the recipient meeting its overall goal.

(c) Each FTA recipient shall establish a DBE participation goal for each business activity afforded through leases or concessions involving the use of the recipient's facilities or equipment, notwithstanding the fact that such opportunities do not involve the expenditure of Federal funds and therefore are not included in the recipient's overall goal.

(d) Operating administration approval of each contract goal is not necessarily required. However, operating administrations may review and approve or disapprove any contract goal established by a recipient, at the operating administration's discretion.

§ 23.35 Good faith efforts.

(a) The recipient shall award a contract only to a contractor which meets the DBE contract goal or demonstrates that it has made good faith efforts to do so.

(b) All solicitations for DOT-assisted contracts for which a contract goal has been established shall inform competitors for the contract that—

(1) Award of the contract will be conditioned on meeting the requirements of this section;

(2) All bidders shall be required to submit the following information with bids/proposals for contracts, as a matter of responsiveness:

(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) If the contract goal is not met, evidence of good faith efforts.

(c) If the DBE participation submitted by the bidder/offeror does not meet the contract goal, the recipient shall determine whether the bidder/offeror's good faith efforts are adequate. In making this determination, the recipient uses appendix B to this part.

(d) The recipient shall ensure all information is complete and accurate and adequately documents the competitor's good faith efforts before the recipient commits itself to the performance of the contract bidder/offeror.

(e) Recipients are required to use the good faith efforts mechanism of this section as the means of ensuring that contract goals are met and may not, except as provided in paragraph (f) of this section, use more stringent contract award mechanisms for DOT-assisted contracts.

(f) Nothing in this part prohibits a recipient with its own legal authority to employ set-asides from using a DBE set-aside on a DOT-assisted contract. This part does not provide independent legal authority to employ set-asides. Recipients shall not use group-specific set-asides on DOT-assisted contracts.

(g)(1) Recipients shall require that each prime contractor have a written subcontract, letter of intent, or other writing memorializing its commitment to use a DBE subcontractor whose participation it submits to meet a contract goal.

(2) Recipients shall require that a prime contractor not terminate a DBE subcontractor listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm) unless the DBE is in breach of its contract with the prime contractor. Such a termination shall not take place without prior written notice to the recipient.

(3) When a DBE subcontractor is terminated, the recipient shall 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 the same amount of work under the contract as the DBE that was terminated, regardless of whether the prime contractor's DBE participation percentage is above or below the contract figure committed to at contract award.

(4) The recipient shall include in each prime contract a liquidated damages clause or penalty provision that the recipient shall invoke if the prime contractor fails to comply with the requirements of this paragraph.

§ 23.37 Counting DBE participation.

(a) Except as otherwise provided in this section, the full dollar value of a contract with a DBE is counted toward DBE goals.

(b)(1) The entire fees or commissions charged by a DBE firm for providing a *bona fide* service, such as professional, technical, consultant or managerial services, are counted toward DBE goals, provided that they are determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(2) The entire fees or commissions charged by a DBE firm for providing bonds or insurance specifically required for the performance of a DOT-assisted contract are counted toward DBE goals, provided that they are determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(c) When a DBE performs as a partner in a joint venture, 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 is counted toward DBE goals.

(d) Expenditures to a DBE contractor may be counted 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 a distinct element 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 be responsible for the purchase and quality of, and payment for, materials used to perform its work under the contract. To determine whether a DBE is performing a commercially useful function, the recipient shall evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under to 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) If, consistent with state and local law and industry practices, a DBE enters into lower tier subcontracts, the following rules apply:

(i) If a 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, the DBE shall be presumed not to be performing a commercially useful function.

(ii) Any portion of the value of the contract that a DBE subcontractor subcontracts back to the prime contractor or an affiliate of the prime contractor shall not be counted toward DBE goals.

(iii) In the FHWA program, if a DBE does not perform at least 30 percent of the total cost of its contract with its own work force, it shall be presumed not to be performing a commercially useful function.

(iv) When a DBE in the FHWA program is presumed not to be performing a commercially useful function as provided in paragraph (d)(2)(iii) of this section, the DBE may present evidence to rebut this presumption to the recipient. The recipient may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices. This determination is subject to review by the FHWA Administrator.

(3) The performance of such specified work and the appropriate compensation for that work, whether it is performed by a prime contractor, subcontractor (at whatever tier) or lessor, shall be part of a formally executed written agreement between the contracting parties. The recipient's DBE program shall set forth a monitoring and enforcement mechanism to verify that the work committed to the DBE at contract award is actually performed by the DBE and that the DBE is duly compensated for the performance of the work, before counting that work toward DBE goals.

(e) Expenditures with DBEs for materials or supplies are counted toward DBE goals as provided in this paragraph:

(1) (i) If the materials or supplies are counted from a DBE manufacturer, 100 percent of the cost of the materials or supplies are to be counted toward DBE goals.

(ii) For purposes of this paragraph, a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials or supplies in question.

(2) (i) If the materials or supplies are purchased from a DBE regular dealer, 60 percent of the cost of the materials or supplies may be counted toward DBE goals.

(ii) For purposes of this paragraph, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials or supplies required for the performance of the contract are bought, kept in stock, and regularly sold to the public in the usual course of business. To be a regular dealer, the firm must engage in, as its principal business, and under its own name, the purchase and sale of the products in question. A regular dealer in such bulk items as steel, cement, gravel, stone, or asphalt need not keep such products in stock, if it owns or operates distribution equipment. The supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not an on *ad hoc* or contract-by-contract basis. Packagers, brokers, manufacturers' representatives, or persons who arrange or expedite transactions shall not be regarded as regular dealers within the meaning of this paragraph, unless they also meet the standards of this paragraph.

(3) If the materials or supplies are purchased from a DBE which is neither a manufacturer nor a regular dealer, credit toward DBE goals may be counted as follows:

(i) The entire fees or commissions charged for assistance in the procurement of the materials and supplies are counted toward DBE goals, provided that they are determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar services. No portion of the cost of the materials and supplies themselves may be counted toward DBE goals, however.

(ii) The entire fees charged for the delivery of materials or supplies required on a job site are counted toward DBE goals, provided that they are determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar services. No portion of the cost of the materials and supplies themselves may be counted toward DBE goals, however.

(4) The dollar value of a contract with a firm whose eligibility has been removed may not be counted toward the recipient's overall goal.

(f) If a firm has not been certified by the recipient as a DBE, or if the recipient's certification procedures, as applied to the firm, do not comply with the requirements of this Part, the firm's participation may not be counted toward DBE goals.

(g) The participation of a DBE subcontractor shall not be counted toward the prime contractor's goal until the amount being counted toward the goal has been paid to the DBE.

§ 23.39 Additional program elements.

Recipients required by § 23.23 of this part to have a DBE program shall incorporate into their DBE programs and implement the following additional elements:

(a) The recipient shall issue a policy statement which expresses the organization's commitment to the program, states its objectives, and outlines responsibilities for its implementation. The recipient shall circulate the statement throughout its organization and to the DBE and non-DBE business communities.

(b) The recipient shall have a DBE liaison officer, who shall have direct, independent access to the Chief Executive Officer of the organization with respect to DBE program matters. The liaison officer shall be responsible for implementing all aspects of the recipients' DBE program. The recipient shall have adequate staff to administer the program.

(c) The recipient shall develop and use techniques to facilitate DBE participation, including but not limited to the following:

(1) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways to facilitate DBE participation;

(2) Providing assistance to DBEs in overcoming limitations such as inability to obtain bonding or financing;

(3) Providing technical assistance and other services;

(4) Carrying out information and communications programs on contracting procedures and specific contract opportunities in a timely manner, with such information being made available in languages other than English where appropriate; and

(5) Taking appropriate steps to encourage diversity in the types of work performed by DBEs and the performance of prime contracts as well as subcontracts by DBEs (e.g., incentives for the participation of DBEs in fields other than speciality subcontracting

fields in which DBEs have traditionally participated).

(d) The recipient shall thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in its community and make reasonable efforts to use these institutions. Recipients shall also encourage prime contractors to use such institutions.

(e) The recipient's DBE program shall include a monitoring and enforcement mechanism to verify that the work committed to DBEs at contract award is actually performed by the DBE and that the DBE is duly compensated for the performance of the work.

(f) The recipient shall establish, as part of its DBE program, a mechanism to ensure that DBE subcontractors are promptly and fully paid, and otherwise treated fairly and equitably, by prime contractors. The recipient shall include appropriate clauses in its contract documents to ensure that the mechanism is contractually binding on all parties involved. The mechanism shall include one or more of the following provisions:

(1) A procedure for alternative dispute resolution to resolve disputes between prime contractors and DBE subcontractors, including but not limited to issues concerning payment of DBE subcontractors;

(2) The inclusion in every prime contract of a prompt payment clause which obligates the contractor to pay the subcontractor for satisfactory performance of its contract no later than 10 days from receipt of payment out of such amounts as are paid to the contractor by the recipient in accordance with the contract's provisions. Any delay or postponement of the payment of funds among the contracting parties may take place only for good cause, with prior approval by the recipient. The prompt payment clause shall also provide for appropriate penalties for failure to comply, which shall be set and imposed at the recipient's discretion.

(3) A requirement that any delay or postponement of the payment of funds to DBE subcontractors by a prime contractor, as called for by the contract between them, may take place only for good cause, with prior approval by the recipient;

(4) A procedure through which payments owed to DBE subcontractors under their contracts with prime contractors shall be made directly by the recipient to the DBE subcontractors, rather than through the prime contractor; or

(5) A requirement that contractors not draw down funds due on work performed by DBE subcontractors except as needed to meet immediate cash disbursement needs, and that any such funds drawn down and not disbursed within seven calendar days be returned. All funds retained in excess of seven calendar days shall be required to be returned with interest due, calculated as of the date of the original withdrawal.

(g) The Administrator of an operating administration may direct recipients of its funds to establish a DBE development program to assist selected DBE firs in becoming able to compete in types of business outside narrow areas of specialization in which DBE firms have traditionally operated.

(1) To participate in this program, a DBE firm shall have been certified by the recipient for at least two years and shall have participated in at least one contract let by the recipient during that time.

(2) To participate in this program, a DBE firm shall be determined by the recipient to have as its primary area of operation one of the specialized areas of business traditionally performed by DBEs and to be capable, with business development assistance, of competing successfully in one or more areas of business not traditionally performed by DBEs.

(3) In providing business development assistance to DBE firms, recipients shall be guided by the provisions of Appendix C.

(4) As part of its business development program, a recipient may establish a "mentor-protege" program, in which another DBE or non-DBE firm is a principal source of business development assistance.

(i) Only DBE firms meeting the criteria of paragraphs (g) (1) and (2) of this section may participate in such a program.

(ii) To participate in a mentor-protege program, a DBE firm shall have participated during the preceding two years in at least one contract let by the recipient in which the mentor firm did not participate.

(iii) During the course of the mentor-protege relationship, the mentor firms shall not claim credit for using the protege firm for more than one half of its goal on any contract let by the recipient.

(iv) The mentor-protege program of a recipient shall be consistent with the guidelines in Appendix D.

(h) The recipient shall implement appropriate mechanisms to ensure compliance with the requirements of this Part by all participants in the program. The recipient shall include in its DBE program the contract provisions, enforcement mechanisms, or other means it uses to ensure compliance.

§ 23.41 Transit vehicle manufacturers.

(a) Each FTA recipient shall require, as part of its DBE program, that each transit vehicle manufacturer, as a condition of being authorized to bid on transit vehicle procurements in which FTA funds participate, certify that it has complied with the requirements of this section.

(b) Each manufacturer shall establish and submit for the FTA Administrator's approval an annual overall percentage goal. The base from which the goal shall be calculated is the amount of FTA financial assistance participating in transit vehicle contracts to be performed by the manufacturer during the fiscal year in question. Funds attributable to work performed outside the United States and its territories, possessions, and commonwealths shall be excluded from this case. The requirements and procedures of Subpart B with respect to submission and approval of overall goals apply to transit vehicle manufacturers as they do to recipients.

(c) A manufacturer may make the certification required by this section if it has submitted the goal this section requires and the FTA Administrator has approved it or not disapproved it.

Subpart C—Certification, Compliance and Enforcement Procedures

§ 23.51 Recipients' denials of initial requests for certification.

(a) When a recipient denies a request by a firm, which does not have a current certification from the recipient, to be certified as a DBE, the recipient shall provide to 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. Except as provided in paragraph (b) of this section, the time period for reapplication (see paragraph (c) of this section) shall begin on the date the explanation is received by the firm.

(b) A firm may, within 30 days of receiving this written explanation, submit evidence to the recipient that it has resolved the problems cited in the explanation for the denial of certification. The recipient shall provide to the firm, on request, an informal opportunity to be heard on the matter. If the recipient determines that the firm meets eligibility requirements, it shall certify the firm. If the recipient determines that the problems have not been resolved, the recipient shall provide a written explanation of its

determination to the firm. The time period for reapplication shall begin to run on the date the firm receives the explanation.

(c) When a firm is denied certification, the recipient shall establish a time period of no less than six and no more than twelve months that must elapse before the firm may reapply to the recipient for certification.

(d) A firm that is denied certification may appeal the denial to the Department under § 23.55 of this part.

§ 23.53 Recipients' proceedings to remove eligibility.

This section provides the procedures by which recipients resolve issues concerning the eligibility of DBE firms which are currently certified by the recipient, whether these issues are raised as the result of an ineligibility complaint, a DOT directive to suspend certification, a recertification review by the recipient, or other information coming to the attention of the recipient. Such issues include, but are not necessarily limited to, the ownership, control, socially and economically disadvantaged status, and size of the firm.

(a) *Ineligibility complaints.* (1) Any person may file with the recipient a written complaint alleging that a currently-certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. A recipient is not required to accept a general allegation that a firm is ineligible and shall not accept an annonymous 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 may be protected as provided in § 23.67(b) of this part.

(2) Promptly upon receipt of such a complaint, the recipient shall notify the firm, in writing, that a complaint challenging its eligibility has been filed and that the firm may provide written information and arguments concerning its eligibility. The notice shall specify the grounds on which the firm's eligibility is being questioned.

(3) The recipient shall review the administrative record, the material provided by the firm and the complainant, and other available information, and may conduct any additional investigation that it deems necessary.

(4) If the recipient determines, based on this review, the there is reasonable cause to believe that the firm is ineligible, the recipient shall provide written notice to the firm that the recipient proposes to find the firm ineligible, setting forth the reasons for the proposed determination. If the recipient determines that such reasonable cause does not exist, it will 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 shall specifically reference the evidence in the record on which each reason is based.

(b) *Recipient-initiated proceedings.* If, based on a recertification review or other information that comes to its attention, the recipient determines that there is reasonable cause to believe that a currently-certified firm is ineligible, or when there is a DOT directive to suspend certification under paragraph (c) of this section, the recipient shall provide written notice to the firm that the recipient proposes to find the firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause shall specifically reference the evidence in the record on which each reason is based.

(c) *DOT directive to suspend certification.* (1) If FHWA, FTA, or FAA determines that information in the recipient's certification records, or other information available to the DOT agency, creates a substantial probability that a firm certified by a recipient does not meet the eligibility criteria of this part, the DOT agency may direct the recipient to suspend the firm's certification. During the period of suspension, the firm is not eligible to participate in the recipient's Federally-assisted contracts as a DBE.

(2) The DOT agency concerned shall provide to the recipient and the firm a notice setting forth the reasons for the suspension.

(3) The recipient shall immediately commence a proceeding to remove eligibility under paragraph (b) of this section. If the recipient finds, in this proceeding, that the firm is eligible, the suspension shall be lifted.

(d) *Hearing.* When a recipient notifies a firm that it has found reasonable cause to remove its eligibility, under paragraph, (a), (b) or (c) of this section, the recipient shall give the firm an opportunity for a hearing, at which it may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why the firm should remain certified.

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

(2) If the social and economic disadvantage of the firm's owners is at issue in the proceeding, the recipient, in making its decision, shall use relevant SBA rules relating to social and economic disadvantage (13 CFR 124.105(c) and 124.106(b)).

(3) The recipient shall maintain a complete record of the hearing, either by transcript or an audio recording. If an audio recording is made, the recipient shall make a written transcription of the recording if there is an appeal to DOT under § 23.55 of this part.

(4) The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, a decision by the recipient to remove the firm's eligibility must be based on a preponderance of the evidence that the firm no longer meets the eligibility standards of this part.

(e) *Separation of functions.* The decision in a proceeding to remove a firm's eligibility shall be made by an office or personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility, and which is not subject to direction from the office or personnel who did take part in these actions.

(f) *Grounds for decision.* A decision to remove eligibility shall not be based on a reinterpretation or changed opinion of information available to the recipient at the time of the most recent certification of the firm. Such a decision shall be based only on one or more of the following:

(1) Changes in the firm's ownership and control since the most recent certification of the firm by the recipient;

(2) Information or evidence not available to the recipient at the time of the most recent certification of the firm;

(3) Information that has been fraudulently concealed or misrepresented in previous certification reviews;

(4) A change in the certification standards or requirements of this part since the most recent certification of the firm by the recipient; or

(5) A documented finding that the recipient's previous determination that the firm was eligible was clearly erroneous.

(g) *Notice of decision.* Following the recipient's decision, the recipient shall provide the firm a letter setting forth 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 shall inform the firm of the consequences of the recipient's decision and of the availability of an appeal to the Department of Transportation.

(h) *Status of firm during proceeding.* Except as provided in paragraph (c) of this section, a firm remains an eligible DBE during the pendancy of a recipient's proceeding to remove eligibility. 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 a recipient removes a firm's eligibility, the recipient shall take the following action:

(1) When a prime contractor has made a commitment to using the ineligible firm, but a subcontract has not been executed, the recipient shall inform the prime contractor that the ineligible firm does not count toward the contract goal. The recipient shall direct the prime contractor to meet the contract goal or demonstrate good faith efforts to the recipient.

(2) If a prime contractor has executed a subcontract with the ineligible firm, the remaining portion of the ineligible firm's performance of the contract shall not count toward the contract goal. The recipient shall direct the prime contractor to make good faith efforts to use an eligible DBE to make up that portion of the goal.

(3) The recipient shall include appropriate provisions in all DOT-assisted prime contracts and subcontracts, and solicitations for them, to ensure that the requirements of paragraphs (i) (1) and (2) of this section may be carried out in accordance with the laws and regulations governing the recipient's procurement activities.

(4) Only participation by an eligible DBE firm may be counted toward a recipient's DBE overall goal. Participation by a firm as a subcontractor, as a direct contractor to the recipient, or in any way after its eligibility has been removed may not be counted toward a recipient's overall DBE goal.

§ 23.55 Administrative appeals to the Department of Transportation.

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

(2) Any complainant in an ineligibility complaint to a recipient (including a DOT agency in the circumstances provided in § 23.53(c)) 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.

(b) Pending the Department's decision in the matter, the recipient's decision remains in effect.

(c) The appeal shall be made by letter within 90 days of the date of the recipient's decision and shall include information and arguments concerning why the recipient's decision should be reversed.

(1) Letters of appeal from a firm which has been denied certification or whose certification has been removed, or before owner is determined not to be a member of a designated disadvantaged group or concerning which the presumption of disadvantage has been rebutted, shall state the names 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.

(2) In the case of an ineligibility complaint filed with a recipient, the Department shall request, and the firm whose certification has been questioned shall promptly provide, the information called for in paragraph (c)(1) of this section.

(d) When it receives an appeal, the Department shall request a copy of the recipient's complete administrative record in the matter. The recipient shall provide the administrative record, including a hearing transcript, within 30 days of the Department's request.

(e) The Department shall make its decision based solely on the 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; a recipient; or a firm or other private party. When the recipient provides supplementary information to the Department, the recipient shall also make this information available to the firm and any third-party complainant involved. The Department shall make available to the firm, on request, to the firm and any third-party complainant involved, any supplementary information it receives from any source.

(f)(1) The Department shall affirm the recipient's decision if it determines, based on the administrative record, that the recipient's decision is supported by substantial evidence and that its decision is consistent with the substantive and procedural requirements of this part.

(2) If the Department determines, after reviewing the record, that the recipient's decision is not supported by substantial evidence or is inconsistent with the substantive or procedural requirements of this Part, the Department shall reverse the recipient's decision.

(3) In considering actions by recipients that are allegedly inconsistent with procedural requirements of this part, the Department is not required to reverse the recipient's 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 the recipient with instructions seeking clarification or augmentation of the record before making a finding. The Department may also remand a case to the recipient for further proceedings consistent with Department instructions concerning the proper application of the provisions of this part.

(5) The Department may not uphold recipients' decisions based on grounds not specifically articulated in the recipients' decisions.

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

(7) The Department shall make its decision within 60 working days of having received the complete record of recipient's proceeding.

(8) The Department shall inform the recipient, the firm, and the complainant in an ineligibility complaint, in writing of its decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision.

(9) The General Counsel concurs with each decision under this section prior to its issuance.

(g) All determinations under paragraph (d) of this section are administratively final, and shall not be subject to petitions for reconsideration.

§ 23.57 Effect of decisions.

(a) A determination under § 23.55 of this part shall be binding only on the recipient from whose action the appeal is taken. *Provided,* That in the case of a decision made by a unified state or regional certification program, the determination will be applicable throughout the state or region.

(b) The recipient to which a determination under § 23.55 of this part is applicable shall take the following action:

(1) If the Department determines that the recipient erroneously certified a firm, the recipient shall remove the firm's eligibility on receipt of the determination, without further proceedings at the recipient level. Effective on the date of the recipient's receipt of the Department's determination, the consequences of a removal of eligibility set forth in § 23.53(g) shall attach to the firm.

(2) If the Department determines that the recipient erroneously failed to find reasonable cause to propose removing the firm's eligibility, the recipient shall expeditiously schedule a proceeding to determine whether the firm's eligibility should be removed, as provided in § 23.53(d) of this part.

(3) If the Department determines that the recipient erroneously declined to certify or removed the eligibility of the firm, the recipient shall certify the firm, effective on the date of the recipient's receipt of the Department's determination.

(4) If the Department affirms the recipient's determination, no further action by the recipient is necessary.

§ 23.59 Compliance with overall goal requirements.

Noncompliance with any requirement of this part may subject a recipient to formal enforcement action under §§ 23.61 or 21.63 of this Subpart or appropriate program sanctions by the concerned operating administration, such as the suspension or termination of Federal funds, 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 section 519 of the AAIA, as amended; and in the case of the FTA program, any actions permitted under the Federal Transit Act of 1964, as amended, or applicable FTA program requirements.

§ 23.61 Enforcement actions—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 Department. The complaint shall be filed no later than 180 days after the date of the alleged violation or the date on which a continuing course of conduct in violation of this part became known to the complainant. The Secretary may extend the time for filing in the interest of justice, specifying in writing the reason for so doing. Confidentiality of complainants' identities may be protected as provided in § 23.63(a)(1) of this Part.

(b) *Compliance reviews.* The Department may review the recipient's compliance with this Part at any time, including reviews of paperwork and on-site reviews, as appropriate.

(c) *Reasonable cause notice.* If it appears, from the investigation of a complaint or the results of a compliance review, that a recipient is in noncompliance with this part, the Department shall promptly send to the recipient, return receipt requested, a written notice advising the recipient that there is reasonable cause to find the recipient in noncompliance. The notice shall state the reasons for this finding and direct the recipient to reply within 30 days concerning whether it wishes to begin conciliation.

(d) *Conciliation.* (1) If the recipient requests conciliation, the Department shall pursue conciliation for at least 30, but not more than 120, days from the date of the recipient's request. The Department may extend the conciliation period for up to 30 days for good cause, consistent with applicable statutes.

(2) If the recipient and the Department sign a conciliation agreement, then the matter is regarded as closed and the recipient is regarded as being in compliance. The conciliation agreement shall set forth the measures taken or to be taken by the recipient to ensure its compliance with this part. While a conciliation agreement is in effect, the recipient remains eligible for FHWA or FTA financial assistance.

(3) The Department shall monitor the recipient's implementation of the conciliation agreement and ensure that its terms are complied with. Failure by the recipient to carry out the terms of a conciliation agreement is noncompliance with this part.

(4) If the recipient does 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 proceedings.* (1) Enforcement proceedings are conducted in accordance with the Department's procedures for enforcing Title VI of the Civil Rights Act of 1964 (see 49 CFR 21.13–17).

(2) Findings and sanctions imposed in enforcement proceedings are binding on all operating administrations.

§ 23.63 Enforcement actions—FAA programs.

(a) Compliance with all requirements of this Part by airport sponsors and other recipients of FAA financial assistance is enforced through procedures of section 519 of the Airport and Airway Improvement Act of 1982, as amended, and regulations implementing section 519.

(b) The provisions of § 23.61(b) and § 23.65 apply to enforcement actions in FAA programs.

§ 23.65 Enforcement actions—Firms participating in the DBE program.

(a) *Suspension and debarment; Referral to Department of Justice.* (1) The Department may initiate suspension or debarment proceedings under 49 CFR part 29 with respect to any firm which does not meet the eligibility criteria of § 23.55 and which 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.

(2) The Department may initiate suspension or debarment proceedings under 49 CFR part 29 with respect to any firm which, in order to meet DBE contract goals, 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 which does not meet the eligibility criteria of § 23.55.

(3) In a suspension or debarment proceeding brought under paragraph (a)(1) or (2) of this section, the Department, or an 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.

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

(5) The Department may refer to the Department of Justice, for prosecution under the U.S. Criminal Code, 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 criminal statutes.

(6) Each recipient shall, and any other person may, bring to the attention of the Department's Office of Inspector

General, or other appropriate Department officials, any information that could lead a reasonable person to believe that misconduct covered by this section is occurring or has occurred.

(b) *Suspension or revocation of certification for criminal conduct.* (1) In order to protect the integrity of the DBE program, the Department is authorized to suspend the DBE certification of a firm upon the issuance of a federal or state criminal indictment or information against a certified firm, or any owner, officer, director or management official thereof, in connection with conduct in the Department's DBE Program. The General Counsel shall concur in any such action. A DBE firm whose certification has been suspended pursuant to this section shall be ineligible to participate in the Department's DBE Program during the period of such suspension. *Provided,* That such a firm may be permitted to continue work as a DBE on a contract which has been executed prior to the date of the indictment or information. The suspension shall be lifted if and when the indictment or information is dismissed or the firm is acquitted of criminal charges.

(2) The Department shall immediately direct affected recipients to revoke the DBE certification of a firm upon conviction of an offense in connection with the Department's DBE Program by a federal or state court of a certified firm, or any owner, officer, director or management official thereof. The General Counsel shall concur with any such action. Said revocation shall result in a period of DBE ineligibility of 3 years.

(3) Each recipient shall immediately notify the Department in writing of any indictment, charging by information, or conviction of a DBE firm or any owner, officer, director or management official thereof.

§ 23.67 Miscellaneous provisions.

(a) *Availability of records.* In responding to requests for information concerning any aspect of the DBE program, the Department shall comply with provisions of the Freedom of Information Act and Privacy Act. Recipients shall comply with state or local legal requirements concerning the release of information.

(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 shall 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.

(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) shall 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; 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 or suspension and debarment).

(d) *Intimidation and retaliation.* Recipients, contractors, and other persons shall 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.

Appendix A To Part 23—DBE Certification Form

BILLING CODE 4910-62-M

Disadvantaged Business Enterprise (DBE) CERTIFICATION APPLICATION

Application is hereby made by the Individual (organization) identified bellow for certification as a disadvantaged business (DBE) enterprise under the U.S. Department of Transportation DBE program pursuant to 49 CFR 23. Socially and Economically Disadvantaged (SED) Individuals are presumed to be members of the following groups: Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Subcontinent Americans, Women and any groups so designated by the Small Business Administration (SBA). Applicants who are not one of the presumed groups must prove socially and economically disadvantage in accordance with 13 CFR 124.105.

Any person claiming SED status shall attach copies of a current Financial Statement prepared by an independent CPA or accountant. In adition a copy of one of the following documents must be submitted to prove membership in the ethnic group claimed:

Membership letter or certificate of ethnic organization - Tribal Certificate or Bureau of Indian Affairs Card - Birth Certificate/Record (including those of natural parents) - U.S. Passport - Armed Service Discharge Papers - Alien Registration Number - Any other document that provides evidence of ethnicity.

NOTE: For purposes of this application the following SED codes are to be used (B) Black Americans, (H) Hispanic Americans, (NA) Native Americans, (AP) Asian-Pacific Americans, (AS) Subcontinent - Asian Americans, (F) Female, (SBA) Other Groups Approved By SBA (O) Other.

Answer all questions. Indicate "N/A" if question does not pertain to your firm.

1. Name and Address of Company	2. Mailing Address (if Different)
3. Contact Person and Title	4. Telephone No.
5. Federal Identification Number	6. Other Identification Number Used

7. Has this firm been certified under Section 8(a) by the Small Business Administration? Yes __ No __
If certified attach a copy of the certification.

8. NATURE OF THE FIRM'S BUSINESS: -

_____

Identify only those areas for which you can provide a commercially useful function and still be competitive with firms in those areas. You are responsible for providing evidence of your firm's experience or ability to perform in these areas.

___Construction ___Professional Service ___ Supplier ___Manufacturer

9. Standard Industrial Classification (SIC) Code and applicable size standard for which the firm qualifies to do business (Refer to the small business size standard at 13 CFR 121)

SIC_____ Size_____ SIC_____ Size_____

SIC_____ Size_____ SIC_____ Size_____

10. List States in which the firm is authorized to do business.

11. LICENSES REQUIRED TO CONDUCT BUSINESS. Attach copies of any required local, county and state active business license(s) and permit(s), i.e., contractors, PUC, A&E registration etc.

A. For each license/permit attached, indicate:

Name of licensee	Name of Qualifying Individual	Type of licenses	DBE Code	Exp. Date

(If the qualifying individual is not one of the minority or women owners listed in the application, please explain in Item 28.)

12. OWNERSHIP INFORMATION

___Sole Proprietor ___ Partnership ___Corporation ___Joint Venture (Complete Schedule A)

Date established/incorported _____ State_____

13. LIST OWNERS/INVESTORS WHO HAVE A 5% OR MORE INTEREST:

NAME	DBE Code	Gender M/F	Date of Owner-ship	No. of Shares	Voting %	U.S. Citizen?

Check here ____, if more space is needed and continue listing in Item 28.

14. BOARD OF DIRECTORS (in the last three years)

Name	Title	DBE Code	M/F	Expiration of

Check here ____, if more space is needed and continue listing in Item 28.

15. Firms with less than 100% minority/woman ownership, list the contributions of money, equipment, real estate, or expertise of each of the owners/investor. **Attach proof of the initial investment in the firm (dollars, real estate, equipment, etc.) on behalf of each of the owners. If more space is required continue in Item 28**

_____

_____

_____

_____

_____

16. MANAGEMENT: List individuals by name and title responsible for the management areas indicated. Detailed resume showing work/experience history and current responsibilities must be included for each individual listed.

DUTIES	INDIVIDUAL RESPONSIBLE	Reports to:	DBE Code
Preparation and presentation of estimates and bids:			
Hiring and firing management personnel:			
Final Determination of what jobs the company will undertake:			
Day to Day Operations			
Negotiations and approval of contracts:			
Administration of company contracts:			
Marketing and sales activities:			
Negotiating and signing for surety bonds?			
Supervision of field operations:			

17. Identify any owner or management official of the firm who is, or has been, an employee of another firm that has an ownership interest in or a present business relationship with the named firm. Provide details of the arragement and relationship. Present business relationships include shared space, equipment, financing or employees, as well as both firms having the same owners.

Be sure to list those persons who are currently working for any other business which has a relationship with this firm, whether on a full-time or part-time basis as an owner, partner, shareholder, advisor, consultant, or employee.

18. COMPANY'S EXPERIENCE: List the three largest projects performed by the company in the last 3 years. If performed as a subcontractor, indicate the name of the prime contractor and a contact person for these projects.

Project	Dollar amount	Date Completed	Prime Contractor/ Contact Person

19. Indicate the firm's gross receipts for the last three tax years:

YEAR ENDING			
GROSS RECEIPTS	$	$	$

20. Name of Surety Company _____ Bonding limit _____

Agent _____ Telephone Number _____

21. Who signs for insurance and payroll? _____

Provide copy of the signed Corporate Bank Resolution(s) and bank account(s) signature card(s)

22. List all sources and amounts of money loaned to the company, when and by whom:

Source	Amount	Date	Terms

23. NAME, COMPANY AND ADDRESS OF FIRM'S CPA OR ACCOUNTANT

24. NAME, COMPANY AND ADDRESS OF FIRM'S ATTORNEY

25 WORKFORCE INFORMATION

Past calendar year: Highest Total _____ Lowest Total _____ Average _____

A. Permanent Personel Currently on Payroll

	Administrative	Clerical	Supervisory	Skilled	Unskilled
Part-Time					
Full-Time					
TOTAL					

B. Are any of the employees on another firm's payroll? Yes _____ No _____

If yes, please identify firm(s) and number of employees _____

26 Provide a listing of owned equipment. Do not include leases. Copies of the state registration cards and titles must be provided for all vehicles that require state registration/licensing. Copies of documentation of ownership for all other equipment owned must be attached.

27 Indicate if the firm or other firms with any of the same officers has previously received or has been denied certification of participation as a DBE, MBE or WBE and describe the circumstances. Indicate the name of the certifying authority and the date of such certification or denial.

28 Please use the space provided below to explain any of the above items. You may attach additional sheets if necessary.

AFFIDAVIT

"The Undersigned swears that the foregoing statements are true and correct and include all material information necessary to identify and explain the operations of the firm bellow as well as the ownership thereof. Further, the undersigned agrees to permit an onsite review of the company's operation as well as the audit and examination of books, records and files of the named firm. Any material misrepresentation will be grounds terminating eligibility as well as any contract which may be awarded and for initiating action under Federal and/or State laws concerning false statements."

NOTE: If additional information is required to determine certification, the conditions outlined herewith in the affidavit are applicable. If there are any significant changes in the information provided above that would alter your status as a DBE inform the certifying agency.

_____
Name of Firm

_____
Name Title

_____
Signature Date

On this _____ day of _____, 19__, before me appeared _____who, being duly sworn, did execute the foregoing affidavit, and did state that he or she was properly authorized by (Name of Firm) _____ to execute the affidavit and did so as his or her free act and deed.

Notary Public _____ Commission expires _____

[Seal]

- Submit the following Documents (and any amendments thereto):

S			1. Current Federal Tax Form 1040 (plus previous two (2) years
S	P	C	2. Equipment rental and purchase agreement
S	P	C	3. Management service agreements
	P		4. Current Federal Tax Form 1065 (plus previous two (2) years)
	P		5. Partnership agreement
	P		6. Buy-out rights agreement
	P		7. Profit-sharing agreement
S	P	C	8. Proof of capital invested
S	P	C	9. Current financial statement prepared by an independent CPA or accountant
		C	10. Current Federal Tax Form 1120S and 4562 (plus previous two (2) years)
S	P	C	11. Resumes of principals of your company showing education, training and employment, with dates
		C	12. Article of incorporation, including date approved by State
		C	13. Minutes of first corporate organizational meeting
		C	14. Minutes of board meetings for the past two years
		C	15. Corporate bylaws
		C	16. Copy of stock certificates issued (not a specimen copy)
		C	17. Stock transfer ledger
		C	18. Proof of stock purchase
S	P	C	19. Copies of third-party agreements, such as rental or management service agreements,
S	P	C	20. Applicable license(s) and/or permit(s)
S	P	C	21. Business card
S	P	C	22. Birth certificate or American passport of qualifying applicant
S	P	C	23. Names of two client references
S	P	C	24. Lease/rental agreement for business site
S	P	C	25. One canceled check used for lease/rental of business site
S	P	C	26. Bank signature card
S	P	C	27. Recent contractual agreement between firm and client
S	P	C	28. Brochure (or descriptive information on firm)

S- Sole Proprietorship P - Partnership C - Corporation

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Appendix B to Part 23—Good Faith Efforts

The following is an array of efforts which can be made in any combination, which should be considered a part of bidders' good faith efforts to meet the contract goal. The degree to which these efforts were pursued should be considered in recipient's decision on approving the award to the successful bidder/offer.

A. Coordinating any pre-bid meetings at which DBEs could be informed of contracting and subcontracting opportunities.

B. Advertising in general circulation, trade association, and minority focus media concerning the subcontracting opportunities.

C. Providing written notice to all certified DBEs who have capabilities pertinent to the work of the contract that their interest in the contract is being solicited. (This notice should be in sufficient time to allow the DBEs to respond to the written solicitation.)

D. Following up initial solicitations of interest by contracting DBEs to determine with certainty if the DBEs are interested.

E. Selecting portions of the work to be performed by DBEs in order to increase the likelihood of the DBE goals being achieved; (This may include, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation.)

F. Providing interested DBEs with adequate information about the plans specifications, and requirements of the contract:

G. Negotiating in good faith with interested DBEs; (The evidence of such negotiations should include the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting, and a statement as to why additional agreements could not be reached for DBEs to perform the work. Extra cost involved in finding and utilizing DBEs should not be accepted as an adequate reason for the bidder's failure to meet the contract goal as long as such costs are reasonable.)

H. Not rejecting DBEs as unqualified without sound reasons based on a thorough investigation of their capabilities. (The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example, union vs. non-union employee status) are not to be causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.)

I. Making effort to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor:

J. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services; and:

K. Effectively using the services of available minority/women's community organizations; minority/women contractors' groups; local, State, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

Appendix C to Part 23—DBE Developmental Program

(A) Each firm that participates in the developmental program is subject to a program term not to exceed 5 years from the date of program entry. The term will consist of two stages; a developmental stage and a transitional stage.

(B) In order for a firm to remain eligible for program participation, it must continue to meet all eligibility criteria contained in § 23.29.

(C) By no later than 6 months of program entry, the participant should develop and submit to the recipient a comprehensive business plan setting forth the participant's business targets, objectives and goals. The participant will not be eligible for program benefits until such business plan is submitted and approved by the recipient. The approved business plan will constitute the participant's short and long term goals and the strategy for developmental growth to the point of economic viability beyond traditional areas of DBE program participation.

(D) The business plan should contain at least the following:

1. An analysis of market potential, competitive environment and other business analyses estimating the program participants prospects for profitable operation during the term of program participation and after graduation from the program.

2. An analysis of the firm's strengths and weaknesses, with particular attention paid to the means of correcting any financial, managerial, technical, or labor conditions which could impede the participant from receiving contracts other than those in traditional areas of DBE participation.

3. Specific targets, objectives, and goals for the business development of the participant during the next two years, utilizing the results of the analysis conducted pursuant to paragraphs (D)1. and 2. of this appendix;

4. Estimates of contract awards from the DBE program and from other sources which are needed to meet the objectives and goals for the years covered by the business plan; and

5. Such other information as the recipient may require.

(E) Each participant shall annually review its currently approved business plan with the recipient and shall modify such plan as may be appropriate to account for any changes in the firm's structure and redefined needs. The currently approved plan shall be considered the applicable plan for all program purposes until the recipient approves in writing a modified plan. The recipient shall establish an anniversary date for review of the participant's business plan and contract forecasts.

(F) Each participant shall annually forecast in writing its need for contract awards for the next program year and the succeeding program year during the review of its business plan conducted under paragraph (E) of this appendix. Such forecast shall be included in the participant's business plan. The forecast shall include:

(1) The aggregate dollar value of contracts to be sought under the DBE program, reflecting compliance with the business plan;

(2) The aggregate dollar value of contracts to be sought in areas other than traditional areas of DBE participation.

(3) The types of contract opportunities being sought, based on the firm's primary line of business; and

(4) Such other information as may be requested by the recipient to aid in providing effective business development assistance to the participant.

(G) Program participation is divided into two stages:

(1) a developmental stage and

(2) a transitional stage. The developmental stage is designed to assist participants to overcome their social and economic disadvantage by providing such assistance as may be necessary and appropriate to enable them to access relevant markets and strengthen their financial and managerial skills. The transitional stage of program participation follows the developmental stage and is designed to assist participants to overcome, insofar as practical, their social and economic disadvantage and to prepare the participant for leaving the program.

(H) The length of service in the program term should not be a pre-set time frame for either the developmental or transitional stages but should be figured on the number of years considered necessary in normal progression of achieving the firm's established goals and objectives. The setting of such time could be factored on such items as, but not limited to; the number of contracts, aggregate amount of the contract received, years in business, growth potential and prospectus, etc.

(I) Beginning in the first year of the transitional stage of program participation, each participant shall annually submit for inclusion in its business plan a transition management plan outlining specific steps to promote profitable business operations in areas other than traditional areas of DBE participation after graduation from the program. The transition management plan should be submitted to the recipient at the same time other modifications are submitted pursuant to the annual review under paragraph (E) of this appendix. Such plan shall set forth the same information as required under paragraph (F) of this appendix of steps the participant will take to continue its business development after the expiration of its program term.

(J) When a participant is recognized as successfully completing the program by substantially achieving the targets, objectives and goals set forth in its program term, and has demonstrated the ability to compete in the marketplace in non-traditional areas, its further participation within the program may be determined by the recipient.

(K) In determining whether a concern has substantially achieved the goals and objectives if its business plan, the following factors, among others, shall be considered by the recipient:

(1) Profitability;

(2) Sales, including improved ratio of non-traditional contracts to traditional-type contracts;

(3) Net worth, financial ratios, working capital, capitalization, access to credit and capital;

(4) Ability to obtain bonding;

(5) A positive comparison of the DBE's business and financial profile with profiles of non-DBE businesses in the same area or similar business category; and

(6) Good management capacity and capability.

(L) Upon determination by the recipient that the participant should be graduated from the developmental program, the recipient shall notify the participant in writing of its intent to graduate the firm in a letter of notification. The letter of notification shall set forth findings, based on the facts, for every material issue relating to the basis of the program graduation with specific reasons for each finding. The letter of notification shall also provide the participant 45 days from the date of service of the letter to submit in writing information which would explain why the proposed basis of graduation is not warranted.

(M) Participation of a DBE firm in the program may be discontinued by the recipient prior to expiration of the firm's program term for good cause due to the failure of the firm to engage in business practices that will promote its competitiveness within a reasonable period of time as evidenced by, among other indicators, a pattern of inadequate performance or unjustified delinquent performance. Also, the recipient can discontinue the participation of a firm that does not actively pursue and bid on contracts, and a firm that, without justification, regularly fails to respond to solicitations in the type of work it is qualified for and in the geographical areas where it has indicated availability under its approved business plan. The recipient shall take such action if over a 2 year period a DBE firm exhibits such a pattern.

Appendix D to Part 23—Guidelines for Mentor-Protege Programs

The purpose of this program element is to assist DBEs to move into nontraditional areas of work, via the provision of training and assistance from other firms. Any mentor-protege program shall be evidenced by a written development plan, approved by the recipient, which clearly sets forth the objectives of the parties and their respective roles, the duration of the arrangement and the resources covered. The formal mentor/protege agreement may set a fee schedule to cover the direct and indirect cost for such services rendered by the mentor for specific training and assistance to the protege through the life of the agreement. It is recognized that this type of service provided by the mentor is considered fundable under the applicable DOT federally assisted program.

To be eligible, the mentor's services provided and associated costs must be directly attributable and properly allowable to specific individual contracts, the recipient may establish a line item for the mentor to quote the portion of the fee schedule expected to be provided during the life of the contract. The amount claimed shall be verified by the recipient and paid on an incremental basis representing the time the protege is working on the contract. The total individual contract figures accumulated over the life of the agreement shall not exceed the amount stipulated in the original mentor/protege agreement.

DBEs involved in a mentor-protege agreement must be independent business entities which meet the requirements for certification as defined in Part 23. If the recipient chooses to recognize mentor/protege agreements, formal general program guidelines shall be developed and submitted to the operating administration for approval prior to the recipient executing an individual contractor/subcontractor-mentor/protege plan.

[FR Doc. 92-29454 Filed 12-8-92; 8:45 am]
BILLING CODE 4910-62-M