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Part VI

Department of Transportation

Office of the Secretary

Participation by Minority Business Enterprise in Department of Transportation Programs

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 23

Participation by Minority Business Enterprise in Department of Transportation Programs

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

SUMMARY: This final rule establishes a uniform program by which firms owned and controlled by minorities and women may participate in contracts let by recipients of financial assistance from the Department of Transportation (DOT). It supersedes all existing Minority Business Enterprise (MBE) regulations, orders, circulars and administrative requirements concerning financial assistance programs that the Department has issued. This rule requires recipients of DOT financial assistance to submit programs for increasing the participation of MBEs in their contracting activities. In particular, the regulation requires recipients to set goals for the participation of MBEs in both their overall programs and specific contracts.

DATES: Effective date: April 31, 1980. Comments are requested on the final rule by April 31, 1981. See "Request for Comments" heading under "Supplementary Information" for further information.

ADDRESS: Comments should be sent to the following address: Docket Clerk (Docket No. 64), 400 7th Street SW., Room 10200, Washington, D.C. 20590. Comments are available for public inspection at this address on Monday through Friday from 9:00 a.m. to 5:30 p.m. Persons wishing to have their comments acknowledged should send a stamped, self-addressed postcard with their comments. The docket clerk will return these postcards when the comments are docketed.

FOR FURTHER INFORMATION CONTACT: Carl T. Horton, Special Assistant to the Secretary, U.S. Department of Transportation, 400 7th Street SW., Room 10200, Washington, D.C. 20590, 202-426-8024.

SUPPLEMENTARY INFORMATION:

Request for comments

DOT has carefully studied ways to encourage MBE participation in its financial assistance programs. The Department also has paid careful attention to the public comments on the notice of proposed rulemaking (NPRM) that led to this final rule (44 FR 28928, May 17, 1979). Nevertheless, we expect that, as recipients, contractors and the public work with the provisions of this regulation, they may have suggestions for improving them. Consequently, the Department will keep the docket for this rule open for a year from the rule's effective date. The Department encourages recipients, contractors and the general public to send comments to the docket concerning their experiences with the implementation of the rule, problems they have had and suggestions they have for changing the rule's language to make it work better. In addition, the Department is interested in hearing suggestions for technical assistance or other help which the Department could give recipients to ease their compliance with the regulation.

When the comment period ends, the Department will use the comments and any additional information to review the MBE regulation. After the review, if the Department believes that changes are appropriate, it will publish amendments to the regulation. In any event, DOT will publish a notice concerning the review and will respond to comments received during the extended comment period.

Synopsis

This synopsis answers some basic questions about the Department's MBE regulation. Detailed information about the regulation's provisions and the Department's response to public comments are in the section-by-section portion of this preamble.

To Whom Does This Regulation Apply?

This regulation applies to all applicants for and recipients of Federal financial assistance from DOT and to their dealings with prime contractors and subcontractors, including certain lessees such as airport concessionaires. The regulation requires both recipients and their prime contractors to take affirmative action to use MBEs. It does not apply to DOT procurement, which will be addressed in a later addition to this regulation.

What Is a Minority Business Enterprise?

An MBE is a small business that is both owned and controlled by minorities or by women. This means that minorities or women must own 51% of the business, and that they must control the management and daily operations of the business. Minorities include Blacks, Hispanics, Asian Americans, American Indians and Alaskan Natives and members of other groups or other individuals who the Small Business Administration (SBA) has determined are economically and socially disadvantaged under Section 8(a) of the Small Business Act.

How Does a Recipient Decide Whether a Business Is Really an MBE?

One of the major problems with MBE programs has been their infiltration by "fronts," ineligible business that claim to be MBEs in order to participate. To mitigate this problem, the regulation requires recipients to certify that businesses seeking to participate as MBEs are actually eligible. Recipients must require prospective MBEs to complete a form describing who owns the business, who is responsible for important management decisions, the relationship of the MBE to other firms and other pertinent information. This information, and the guidance provided by the regulation's standards for eligibility as an MBE, should enable a recipient to decide whether a firm actually qualifies as a minority business.

How Do Recipients Increase Their Use of MBEs?

In their financial assistance agreement with DOT and in DOT-assisted contracts, all recipients must include clauses stating that their policy will be to ensure maximum participation of MBEs. They must also pledge to take all reasonable steps to ensure that MBEs have the maximum opportunity to compete for and perform contracts. Recipients and contractors must promise not to discriminate on the basis of race, color, national origin or sex in the award of and performance under contracts.

Applicants for medium-sized grants must submit an MBE affirmative program to DOT for approval. Medium-sized grants include, for example, $250,000 Federal Aviation Administration (FAA) grants to general aviation airports and $250,000 grants from the Urban Mass Transportation Administration (UMTA) for purposes other than buying transit vehicles. The affirmative action program must include provisions for:

- A directory of MBEs available to compete for the recipient's contracts
- Procedures for certification to determine whether businesses can be considered as eligible MBEs
- Overall percentage goals for the dollar value of work to be awarded to MBEs and percentage goals for each specific contract with subcontracting possibilities
- Procedures to ensure that prime contractors take affirmative action to seek MBE participation in subcontracts.

Applicants for larger grants (for example, those of $500,000 or more under certain UMTA and FAA programs) must also meet the

requirements described above. In addition, they must:

- Issue an MBE policy statement
- Designate a liaison officer and support staff to operate the MBE program
- Take certain steps to assist MBEs, including helping them overcome barriers such as the inability to obtain financing
- Use banks owned and operated by minorities or by women, when possible
- Establish a system to ensure that sub-recipients, contractors and subcontractors comply with applicable MBE requirements
- Use set-asides where necessary to meet MBE goals, unless this is prohibited by law.

How Do MBE Goals Work?

Each recipient that is required to have an MBE program must establish both overall goals and contract goals. Overall goals set a reasonable target for the percentage of the dollar value of the recipient's DOT-assisted contracting that will go to MBEs over a given period or for a particular project. Overall goals should be based on factors such as the kind and amount of the recipient's contracting activity and the availability of minority contractors. For example, a state highway department might decide that a reasonable goal for MBE participation in its program in a given year was 15% of the dollar value of all DOT-assisted contracts. DOT must approve the overall goals and the methods used to set them.

Contract goals establish what percentage of the dollar value of each contract with subcontracting possibilities will be performed by MBEs. Contract goals can vary considerably, depending on the kind of work to be performed and the availability of MBEs to do it. However, over the long run, the recipient's contract goals should call for enough MBE participation to meet the recipient's overall goals.

How Are Prime Contracts Awarded Under the Rule?

Solicitations for prime contracts issued by DOT recipients must state what the MBE percentage goal is for the contract. Potential prime contractors must submit an assurance with their bids or proposals that they will make sufficient reasonable efforts to meet the goal. After the recipient receives the bids or proposals, it requires the competitors to submit information about the MBE participation they have obtained. Based on this information, the recipient determines which competitor among those who have met the goal offers the lowest price. If the recipient believes the price is reasonable, it awards the contract to this competitor. But if the recipient does not believe the price is reasonable, it considers the price offered by the competitor which, though failing to meet the goal, has the highest percentage of MBE participation of the remaining competitors. If the recipient decides that this competitor's price is reasonable, then the recipient awards the contract. If the recipient determines that the price is not reasonable, the recipient continues the process with the remaining competitors in order of their MBE participation. If the recipient cannot find a competitor with MBE participation that offers a reasonable price, the recipient may offer the contract to a competitor without MBE participation, as long as the competitor demonstrates that it made sufficient reasonable efforts to meet the goal.

To determine if a competitor's price is reasonable, the recipient must decide whether it would award the contract if the competitor's offer were the only one that had been received. If the competitor's price is such that the recipient reasonably would award the contract in that situation, the price is reasonable. If the price is such that the recipient would refuse to award the contract and instead would resolicit it or cancel the solicitation, then the price is unreasonable.

What Is the Role of Set-Asides Under This Regulation?

A set-aside is the designation of a given contract for competition solely among MBEs. The theory behind set-asides is that many MBEs are relatively young, small and struggling. Therefore, they are less likely than the more established non-MBEs to win some kinds of contracts in the open market. Setting aside an appropriate contract ensures that an MBE will perform it. This technique has obvious advantages for the MBE involved. It also has advantages for the recipient because it ensures that the dollar value of a particular contract will count toward its overall MBE goal. DOT believes that set-asides are an extremely useful tool for improving MBE participation, and it encourages recipients to use them. Nevertheless, the Department recognizes that set-asides may not be appropriate in every situation. State or local law may prohibit their use. In these cases, recipients are not required to use set-asides to comply with the regulation. Generally, using set-asides under this rule is up to the recipient's discretion. However, recipients that could use set-asides but do not and consequently fail to meet their MBE goals may be found in noncompliance with the regulation.

What Happens When a Recipient Fails to Comply with the Regulation?

The Department may find that a recipient is not in compliance with the regulation as a result of a compliance review or the investigation of a complaint. If DOT thinks that a recipient has failed to comply with the regulation, it writes the recipient, describing the problem and giving the recipient a chance to settle the matter informally with the Department. DOT may seek formal sanctions if these negotiations are unsuccessful. A hearing similar to those in cases of violations of Title VI of the Civil Rights Act of 1964 is held if the recipient requests it. If the Secretary finds the recipient in noncompliance, it may lose DOT's financial assistance.

Background

It is the Department of Transportation's policy to encourage and increase MBE participation in the contracts and programs that it funds. Minorities and women have traditionally been underrepresented as owners and managers of businesses in this country and as DOT-assisted contractors. To overcome this situation, the Secretary of Transportation issued DOT Order 4000.7A, Minority Business Enterprise Program (March 6, 1978), which set forth the administrative framework for a DOT MBE program and required the Departmental elements to issue implementing plans. This regulation supersedes the Order with requirements applicable to financial assistance programs of all Departmental elements.

Authority

The legal authority for this regulation includes Executive Order 11625 (October 13, 1971), which requires that Federal executive agencies develop comprehensive plans and programs to encourage minority business enterprise. More recently, President Carter, in his Urban Policy Statement of March 27, 1978, directed all Federal agencies to triple Federal contracting to MBEs by the end of fiscal year (FY) 1979 and to include MBE goals in Federal assistance programs.

The Department's concern with increasing opportunities for MBEs was evident long before the issuance of DOT Order 4000.7A. The numerous statutes and regulations that create and define the programs of DOT's operating elements include provisions for nondiscrimination, racially based affirmative action and, in some instances, specific MBE requirements. Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) forbids

discrimination in the provision of benefits, services and participation in Federally assisted programs. As interpreted by both the Department of Justice and this Department, Title VI provides a basis for the creation of regulatory provisions to increase MBE participation in these programs.

Section 905 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), and the regulations implementing it (49 CFR Part 265), probibit discrimination on the basis of race, color, national origin or sex in the participation in, or benefits of, any program funded by the 4R Act. The Act explicitly requires the Federal Railroad Administation (FRA) and its recipients to take affirmative action, including the development and implementation of affirmative action programs to assist minority-owned businesses in the programs set up by that Act. Section 906 of the Act creates a Minority Business Resource Center to, among other things:

> Design and conduct programs to encourage, promote and assist minority entrepreneurs and businesses to secure contracts, subcontracts, and projects related to the maintenance, rehabilitation, restructuring, and improvement, and revitalization of the Nation's railroads (49 U.S.C. sec. 11(c)(4)).

Section 30 of the Airport and Airway Development Act of 1970, as amended (49 U.S.C. sec. 1730), requires the Federal Aviation Administraiton (FAA) to take affirmative action to ensure that no person is discriminated against on the grounds of race, creed, color, national origin or sex in any program or activity funded by the Act. The legislative history of the provision reveals a particular concern for increasing MBE participation. Recently published Section 30 rules (45 FR 10184, February 14, 1980) specifically provide for MBE requirements under Section 30 to be implemented in this regulation.

A recent amendment to the Urban Mass Transportation Act of 1964, Section 19 (Pub. L. 95–599), requires UMTA to take affirmative action to ensure that no person is descriminated against on the grounds of race, color, national origin, age or sex in any program or activity funded by the Act. Before this amendment was passed, UMTA had issued an interim circular (UMTA C 1165.1) that contains requirements for affirmative action for MBEs by grant applicants which are similar to those in this regulation.

The Federal Highway Administration (FHWA) has regulations creating specific affirmative action requirements for its aid recipients to encourage MBEs to bid on Federally assisted highway projects (23 CFR Part 230, Subpart B).

Congress has recently shown its support for the concept of using Federal financial assistance programs to promote MBEs through its enactment of the 10 percent MBE participation provision in Section 106(f)(2) of the Local Public Works Capital Development and Investment Act of 1976, as amended (42 U.S.C. sec. 6705(f)(2)). OMB Circular A–102 requires Federal financial assistance recipients to carry out affirmative action to ensure MBE use. The provisions of this circular, according to a September 20, 1979, letter from OMB to the Deputy Assistant Secretary for Community Planning and Development of the Department of Housing and Urban development (HUD), are consistent with implementation by Federal agencies of MBE programs such as this regulation.

Executive Order 12138 directs Federal financial assistance agencies to issue affirmative action regulations to support women's business enterprise.

There is significant general authority for the use of Federal contracts and grants to promote national goals. At least 39 Federal programs use Federal contracts and grants to further goals other than to the primary object of the program, including provisions to promote hiring veterans, purchasing American products and requiring affirmative action in employment by contractors and grantees.

In an area analogous to that covered by Executive Order 11625, for instance, the Federal government has required its contractors to take affirmative steps to promote hiring minority employees in federally funded projects under Executive Order 11246, as amended. Under this Order, courts have approved a variety of affirmative actions including the imposition of specific numerical minority hiring goals. The same principles that courts have held to sanction affirmative action requirements for contractors and grantees under Executive Order 11246 support the affirmative action requirements which this regulation imposes on grantees and their contractors in the area of minority business enterprise.

Current MBE Use

The President, in his Urban Policy Statement, and the Secretary, in DOT Order 4000.7A, have both emphasized the vital role that MBEs are to play in direct Federal and Federally assisted contracting. To date, MBEs have not participated meaningfully in this contracting. While members of minority groups represent approximately 15.7% of the U.S. population according to the 1970 census, they own only 3% of the businesses in the United States. Statistics for women are even more disparate; while they comprise 51% of the population, they own only 4.6% of the businesses.

The statistics in terms of gross receipts also show disparity. For example, women-owned business receipts totaled only 0.3% of all U.S. business receipts in 1972, the most recently available figures. Despite Federal programs of the SBA, the Department of Commerce and others to assist firms owned by minorities, participation in Federally-assisted contracting is negligible. Moreover, these programs place little emphasis on women-owned firms.

In terms of dollars levels, the DOT financial assistance program is far more significant than direct DOT contracting. Unfortunately, MBE participation is at a low level in this program. Over the past three fiscal years, MBE participation has increased only from approximately 1% to 2% of all DOT financial assistance.

In FY 1979, DOT awarded grants of $13.3 billion. Of this amount, $360,456,000 went to minority contractors. In addition, awards of $90,365,000 were made to women-owned firms. This performance must be improved if the Department's goal of encouraging full participation by women- and minority-owned firms is to be realized.

A Civil Rights Commission Report, entitled "Minorities and Women as Government Contractors" (May, 1975), found that little had been done to implement the requirements of OMB Circular A–102 that grantees take affirmative action to ensure MBE use. Implementation had generally been limited to including the circular's language in grant agreements without monitoring and enforcement. The report recommends that Federal agencies "enforce Federal policies and procedures designed to stimulate the development of special contracting programs by state and local governments, including affirmative action programs." The report also recommends the development of a data collection and reporting system to help monitor activities.

Usefulness of Goals

The experience of both the Department and the Economic Development Administration (EDA) of the Department of Commerce indicates that affirmative action and specific MBE requirements significantly increase use of MBEs. The 15% MBE goal of FRA's Northeast Corridor Improvement Program is currently being exceeded by more than 3%. Nearly each time a goal has been placed in a contract let by a

DOT recipient, the goal has been met or exceeded. The 10% goal on the Local Public Works Act administered by EDA is also being exceeded.

Interagency Cooperation

As part of its efforts to avoid duplicative or conflicting regulatory requirements, during 1979 DOT participated in an informal Interagency Committee on financial assistance program MBE requirements. The committee, directed by HUD's Deputy Assistant Secretary for Community Planning and Development, included representatives from HUD as well as the Department of the Interior, Environmental Protection Agency, EDA and DOT. The committee drafted standard provisions for important parts of all the participating agencies' MBE rules. To the extent possible, this final rule incorporates the committee's recommendations.

Section-by-Section Analysis

The following portion of the supplemental information discusses each section of the final rule. The analysis describes differences between the final rule and the NPRM and provides the Department's response to comments relevant to each section. It does not discuss each provision of the regulation in detail.

General Structure of the Regulation

The NPRM covered both MBE participation in contracting under DOT financial assistance programs and in contracts awarded directly by DOT. This final rule covers only financial assistance programs. The Department contemplates adding a direct contracts subpart (subpart B) to the rule at a later date. This subpart will implement the Small Business Act, as amended (Pub. L. 95–507). The NPRM proposed essentially parallel provisions for direct contracting and financial assistance programs. However, after consulting with the Office of Federal Procurement Policy, the SBA, the Department of Justice and others, the Department decided that this approach was not appropriate. Instead, DOT will issue a separate rule concerning its direct contracting program. In addition, UMTA expects to publish an NPRM concerning MBE requirements for manufacturers of transit vehicles in the near future. This regulation will become subpart D of Part 23.

Because this final rule no longer addresses direct DOT procurement activities, the language has been changed and references to direct contracts have been deleted. The final rule substitutes "minorities or women" for "socially and economically disadvantaged individuals" and refers simply to "MBEs" instead of "businesses owned and controlled by such individuals." We also have tried to make the language as clear and simple as possible, in keeping with the President's instructions to write rules in "plain English." Editorial changes are not discussed unless they affect the substance of a section.

Subpart A—General

Section 23.1 Purpose

This section states the general purpose and policy behind the regulation and specifies the statutes that it implements in part. The NPRM cites Section 8(d) of the Small Business Act of 1953, as amended by Pub. L. 95–507. This statute has been deleted because it pertains only to direct procurement. However, a reference to Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d–1) has been added. This addition responds to the Department of Justice's comment that minority business activities fall within the purview of Title VI.

Section 23.3 Applicability

Except for editorial changes, this section is the same as the NPRM.

Section 23.5 Definitions

The definition of "compliance" is the same as in the NPRM. However, the definition of "probable compliance" has been deleted. The concept of "probable compliance" is not used in any other DOT civil rights regulation, such as the Title VI regulation and the rules implementing Section 504 of the Rehabilitation Act of 1973. To be consistent with these other regulations, we decided to eliminate the term.

The definition of "contract" has been clarified by adding a sentence pointing out that, for purposes of this rule, a lease is a contract. The definition of "direct contract" has been deleted. The definition of "minority" has been changed in certain respects. First, in response to various comments and to the agreement of the Interagency Committee, the term "minority" has been limited to persons who are citizens or lawful permanent residents of the United States. Second, a "Hispanic" is now defined as a person of Spanish or Portuguese culture with origins in Mexico, South or Central America or the Caribbean Islands. This definition is now consistent with that used by the Interagency Committee and reflects the suggestions of commenters. The major substantive difference between this definition and the one in the NPRM is that it includes persons of Portuguese culture. This change was made to avoid excluding Brazilians, and rests on a policy decision that the program should cover all persons of Latin American origin. The definition deliberately excludes persons of European origin, including persons from Portugal and Spain. Finally, to be consistent with an Interagency Committee definition, the definition of minority has been expanded to include groups or individuals who the SBA considers economically and socially disadvantaged under Section 8(a) of the Small Business Act. This change allows an individual who does not otherwise qualify as a minority (e.g., a white male from an impoverished area of Appalachia) to participate in the MBE program if the SBA finds that he is economically and socially disadvantaged.

The definition of "DOT financial assistance" has been amended to clarify that licenses to construct and operate deep water ports are considered to be a form of DOT financial assistance.

The definition of "minority business enterprise" has been changed in one important respect. The NPRM defines an MBE as a small business concern owned and controlled by socially and economically disadvantaged individuals. The final rule refers to small business concerns owned and controlled by one or more minority persons or by women. The Department is aware that women are not by definition a minority. But to simplify drafting, we will include businesses owned and controlled by women under the general heading of MBE. This will avoid the necessity of repeating "minority-owned enterprises and women-owned enterprises." The Department, however, has retained the substantive provision of the NPRM that requires recipients to set separate goals for businesses owned and controlled by minorities and women. As several commenters noted, separate goals are necessary to permit minority-owned and women-owned firms to participate equitably in the program.

The Department has retained two other requirements set forth in the definition of MBE. First, the MBE must be small as defined by section 3 of the Small Business Act and implementing regulations. Some commenters favored including large as well as small minority- and women-owned businesses in the definition. The Department, however, believes that it should focus its efforts on helping the many small, struggling new enterprises that minorities and women are starting. The resources of the Department and its

financial aid recipients should not be diverted to large businesses that are already successful. We would point out, however, that small businesses, as defined by the Small Business Act (see SBA regulations at 13 CFR part 121), include the majority of businesses with which DOT recipients have contracts and subcontracts.

Second, the final rule retains the requirements that one or more minority persons or women own at least 51% of the businesses or, in the case of a publicly held business, own at least 51% of the stock. Many commenters argued that this percentage is too large. They pointed out that in order to start businesses, minorities and women often need assistance from non-minorities who will accept at least equal ownership. Thus, these commenters suggested that the ownership requirement be reduced to 50% or less.

The Department believes, however, that the 51% requirement is appropriate because it demonstrates that minorities or women actually own the business and are not fronts for non-minority owners.

In defining the "MBE coordinator," we have eliminated NPRM language referring to the need for the coordinator to cooperate with the director of civil rights of the Departmental element if the director and the MBE coordinator are not the same people. We regard this solely as a matter of internal organization.

The definition of "program" has been expanded and clarified to make it consistent with the scope of the "program" concept in other Federal civil rights regulations. "Program" means "any" undertaking by a recipient to use DOT financial assistance, and specifically includes the entire activity, any part of which DOT funds assist. For example, DOT may provide funds to an airport for the construction or extension of a runway. The requirements of this part apply to the entire activity—the whole airport—a part of which has directly received DOT financial assistance. Consequently, both construction contracts for the runway, and lease agreements with concessionaires in the airport terminal fall under the requirements of this regulation.

In the definition of "recipient," the phrase "including a primary recipient" has been deleted because it is superfluous. Primary recipients are recipients by definition. In the definition of "set-asides," the parallel term "MBE set-aside" is deleted as duplicative. The reference to set-asides as a "procurement technique" has been simplified by deleting the word "procurement." The definition of "socially and economically disadvantaged individual" has been deleted because the rule no longer concerns direct procurement.

Section 23.7 has been added. It prohibits discrimination against any person in contracting opportunities on the basis of race, color, national origin, or sex. This prohibition is inherent in the application of Title VI of the Civil Rights Act of 1964 and other antidiscrimination statutes to the MBE area. However, the Department's Title VI regulation does not contain an explicit prohibition of discrimination specifically concerned with minority business. This prohibition was added to fill this gap and to ensure that this MBE regulation is sufficiently inclusive. This section's prohibitions are similar to those that the Department previously has applied under Title VI. Since complaints of discrimination against MBEs will be handled administratively under this rule rather than under the Title VI regulation, it is useful to include the prohibition here.

It should be pointed out that this revision applies to all persons and businesses. Unlike the definition of MBEs, which includes any small business, this antidiscrimination language applies to large and small businesses alike.

Subpart C—Recipients' Minority Business Enterprise Programs

This subpart derives from subpart C of the NPRM. Subpart B has been reserved for the future addition of material affecting direct DOT procurements.

Section 23.41—General

This section is essentially identical to section 23.41 of the NPRM. Paragraph (a) has been restructured to clarify the categories of applicants that are subject to various affirmative action requirements. DOT licensees under the Deepwater Port Act of 1974 have been added to the list of recipients that must comply with the regulation. The DOT Offices of Civil Rights and General Counsel have determined that deepwater ports licensed by the Department are recipients of Federal financial assistance as defined by section 23.5. In paragraph (g), a reference to the MBE agreement subjecting the recipient to fund cutoff sanctions has been changed. This reference was somewhat confusing, and now states that failure to keep the commitments of the MBE program is deemed noncompliance with the regulation.

This section provides that applications for project approvals or grants are approved only after DOT has approved the applicant's MBE program. Current recipients do not need to submit MBE programs in order to continue to receive funding under their existing approvals. However, MBE programs are required to be approved before any future DOT grant or project or grant approval may be given. In order to give recipients the time they need to prepare MBE plans, and because of the frequency of project approvals in some programs, these approvals may continue for 90 days from the effective date of the rule before the MBE Programs must be approved by DOT. However, contracts let after the MBE Program is approved for projects or grants approved during the 90-day "grace period" are intended to be covered by the MBE program.

Commenters expressed confusion about the meaning of Paragraphs (i) and (j). Paragraph (i) means that contracts solicited or let after the approval date of a recipient's MBE program are covered by the terms of that program. This is true even if a recipient solicits a contract relating to a grant approved before the date the MBE program is approved.

Paragraph (j) states that any manufacturer bidding on a contract to supply transit vehicles to an entity receiving UMTA assistance for their purchase must have a UMTA-approved MBE program. This requirement will be further delineated in a separate UMTA rulemaking, which will culminate in a new subpart D to be added to this Part. Meanwhile, manufacturers should continue to work with UMTA with respect to MBE requirements.

Section 23.43—General Requirements for Recipients

Paragraphs (a) to (c) of this section are substantially identical to section 23.43 of the NPRM. Paragraph (d), concerning lessees, has been added. Section 23.5 defines lessees as firms leasing space on grantees' facilities for operating transportation-related activities or activities providing of goods and services to the facility or the public on the facility. Lessees not meeting these criteria, such as persons who rent space on airport grounds for industrial plants, are not covered by the regulation at all.

The airport concessionaire is probably the most typical lessee covered by the regulation. Other lessees covered by the regulation include providers of food and ground transportation to passengers or store owners renting space on airport concourses and providers of services to airport concourses. The regulation also covers providers of services to the airport itself as well as air

transportation activities such as contractors with on-airport facilities for providing food and fuel to airlines. These kinds of leases may occur at facilities other than airports (e.g., some Amtrak stations), but the provision is most applicable to airports.

Paragraph (d) expressly prohibits recipients from excluding MBEs from becoming lessees by entering into long-term, exclusive agreements with non-MBEs for operating major transportation-related activities that provide goods and services to the facility or to the public on the facility. This provision addresses a specific problem that the Department has encountered at airports in the course of enforcing Title VI. Airports sometimes give a long-term lease to a single business concern to conduct all food service activity or all ground transportation activity at the airport. The exclusive nature of these contracts prohibits any other business, including, by definition, any minority business from participating in any way in that major activity. For example, one airport was about to give a long-term, exclusive contract for taxi service to a large, white-owned taxi company. A small minority-owned taxi company in the area objected to this award in a Title VI complaint to the Department. Finding that the complaint was justified, the Department contacted the airport and negotiated a settlement with the airport and the taxi companies that permitted the minority company to share in the concession.

Paragraph (d)(1) aims at preventing this kind of situation from occurring in the future. It requires recipients to structure their leasing activities so that MBEs have an opportunity to share some portion of major concession and other opportunities. This provision does not require recipients to abrogate or modify existing contracts during their term. However, when the agreements are modified, renewed, renegotiated or resolicited, MBEs must be given the opportunity to participate. This provision prohibits long-term exclusive contracts.

The second part of this paragraph requires recipients that must submit affirmative action plans under section 23.41 (a)(2) or (a)(3) to also submit separate, overall goals for the participation as lessees of firms owned and controlled by minorities and by women. These separate overall goals are required only for recipients that have business opportunities for lessees. The goals are to be based on the same factors as goals for other contractors, and must cover a specified period. Goals for lessees are reviewed at least annually, and whenever they expire. After each review, recipients must submit new goals for Departmental approval. Recipients failing to meet their goals for MBE lessees must demonstrate to the Department in writing that they made reasonable efforts to meet the goals. This requirement is designed to ensure that recipients avoid excluding MBEs from leasing opportunities. It forces them to examine their leasing opportunities, access the availability of MBEs to participate in them and take affirmative action to increase MBE participation. Leasing opportunities, such as those for concessions at airports, are among the benefits created by DOT assistance to transportation facilities. In making these opportunities available to the business community, DOT recipients are obliged to ensure that minority businesses have a fair share.

Except for this requirement, however, recipients are not required to include lessees in other portions of their affirmative action programs. Most of the other provisions of the affirmative action programs are not apt for lessees. It is also important to note that lessees themselves are not subject to the requirement of this part, except for the obligation to avoid discrimination against MBEs.

Section 23.45—Required MBE Program Components

This section describes in detail the requirements placed upon DOT recipients and their contractors. In response to comments and in order to clarify provisions of the regulation, a number of substantive changes have been made from the NPRM.

In paragraph (b)(1), the language of the NPRM referring to the appointment of a "senior-level" liaison officer has been changed. The provision now requires the recipient's chief executive officer to designate an MBE liaison officer and adequate staff to administer the MBE program. This MBE liaison officer reports directly to the chief executive officer. Some commenters thought that the NPRM required hiring new personnel. This is not the case. Depending upon the needs of the organization's needs, the chief executive officer could designate existing officials to perform the liaison functions. Rather than saying that the MBE liaison officer must have "senior-level authority," the final rule simply provides that the liaison officer shall report directly to the chief executive officer. The intent of this requirement is that the person in charge of the MBE program must have direct access to the top decisionmaker of the organization. The liaison officer, in order to carry out the MBE functions properly, should not have to go through a chain of command to reach the top decisionmaker.

Paragraph (d) encourages recipients and contractors to use banks owned and controlled by minorities and women. While commenters wanted this to count toward meeting MBE goals, we disagree. The Department recognizes that successful minority and women-owned banks are necessary for the growth of a viable minority business community. However, the services that banks provide are very different from the types of contracting services (e.g., construction) which MBE goals are designed to foster. Thus, we have decided merely to encourage the use of MBE banks but not to count this toward meeting any goals. Using MBE banks, as such, is not required by the regulation. However, failure to investigate the opportunities to use MBE banks in good faith may cause a recipient to be in noncompliance with the regulation.

Many commenters objected to paragraph (e), which requires recipients to have an MBE directory. They pointed out that compiling a directory would require substantial staff effort and resources. The Department is aware that a good, comprehensive, current MBE directory will take real effort on the part of recipients. We also believe, however, that this effort can be very fruitful. With an accurate, up-to-date directory of MBEs in a given area, recipients and their contractors will know which firms they can use to meet MBE goals. Having that information will make both the contractor's and the recipient's job of complying with the substance of this regulation much easier, and will help increase the real opportunities of minority businesses in the area.

It should be emphasized that this provision does not require each recipient to compile its own MBE directory. In areas where there are several recipients (e.g., an airport, a transit authority and a highway department serving the same metropolitan area), the Department encourages the recipients to pool their efforts and make available one comprehensive area-wide MBE directory. In less densely populated areas, various groupings of state and local government agencies could cooperate on a similar effort. Where national directories of MBEs in certain fields exist, recipients may use them as a starting point.

The language in paragraph (f)(1) has been changed slightly. As in other parts of the regulation, we have deleted language referring to joint ventures in

addition to MBEs. This deletion makes no substantive change in the rule since eligible MBEs include, by definition, joint ventures.

A sentence has been added to paragraph (f)(2) stating that a prime contractor must make a good faith effort to replace a defaulting MBE with another MBE. This makes the rule consistent with the Interagency Committee position. The Interagency Committee has also provided guidance about the nature of good faith efforts by contractors in this area. They include notifying the recipient immediately of the MBE's inability to perform and the contractor's intent to obtain a substitute MBE. The contractor should also contact available MBE referral services and individual MBEs in an effort to recontract the work of the defaulting firm with another MBE as well as to increase the participation of satisfactory MBEs in the project. If the contractor obtains a substitute MBE, the contractor should notify the recipient immediately and provide it with copies or descriptions of new or amended contracts and a completed certification form for each new MBE.

In the same paragraph, a phrase has been added to the end of the second sentence specifying that the recipient's approval of substitutions is to ensure that the substitute firms are eligible MBEs. The rule does not require recipients to approve the substitute firm in respects other than its MBE eligibility, however.

In order to obtain an MBE replacement, it is possible that a prime contractor will incur extra costs or take extra time. Nothing in this rule is intended to preclude a recipient from modifying or renegotiating a contract in order to compensate the contractor or allow additional time for the completion of the contract. Reasonable extra expenses incurred by the recipient in such a situation are intended to be allowable project expenses reimbursable by DOT in the appropriate funding ratio.

Paragraph (g) of this section, which deals with percentage goals for work awarded to MBEs, is one of the key provisions of the regulation. It has been changed in a number of respects. Subparagraphs (1) and (2) have been clarified. In particular, the subparagraph on contract goals now clearly specifies that the recipient set goals on a specific contract. The bidder or proposer must meet or exceed the goals or demonstrate why it could not despite its best efforts.

Paragraph (g) retains the two-goal structure of the NPRM. Recipients must set overall goals for their programs and contract goals for each contract under the program. Many commenters objected to this two-goal system, favoring one overall goal. The Department, believes, however, that the two-goal approach is necessary to increase MBE participation in programs receiving DOT financial assistance. Contract-specific goals have a short-range focus requiring contractors to seek sufficient MBE participation in each contract. Overall goals require recipients to make long-term plans, requiring recipients to become familiar with existing MBEs and their capabilities. To establish these goals, the recipient must consider not only existing MBEs but also the potential availability of new MBEs and the services they could provide. By requiring recipients to set both short-term and long-term goals, the rule should increase familiarity with and use of MBEs.

Some commenters argued that setting binding goals is illegal because it is equivalent to a quota system. The goal system set forth in this rule differs significantly from an impermissible quota system. Unlike quotas, these goals are flexible. They are not rigid numerical requirements. The recipients set them based on the availability of MBEs and the type of services they perform. More importantly, a recipient or contractor not meeting the numerical goals is not necessarily precluded from winning a contract. If the recipient or the contractor can show that it made reasonable efforts to try to meet the goals, it will be in compliance or can be awarded a contract despite its failure to meet the numerical goals. Goals of this kind are not unlawful.

Subparagraph (3)(ii) is new. This provision requires the recipient to publish a public notice announcing its overall goals when it sends them to the Department for approval. The goals and the methods used to select them must be open for public inspection at the recipient's office for 30 days. The recipients and the Department will accept public comments on the goals for 45 days after the date of the recipient's notice. This provision gives the public generally and the contracting community in particular an opportunity to comment on the recipients proposed overall goals. The comments are strictly informational and will enable both DOT and the recipient to determine how realistic the proposed goals are. This provision is not intended to turn the goal-setting process into notice-and-comment rulemaking. Neither the recipient nor the Department need respond to any of these comments.

The NPRM's subparagraph (5) has been deleted consistent with our previously stated policy to include only small business MBEs in the program.

The language of subparagraph (5) [subparagraph (6) in the NPRM] has been changed. The NPRM stated that, in setting overall goals, recipients must take into account both existing minority firms and "those firms which are likely to be formed." Many commenters objected to this provision, stating that it was futile to speculate on the business plans of individuals unknown to the recipients as a basis for creating a reasonable goal that they would be expected to meet. These commenters also thought that the guideline offered by the NPRM provision—the population of minority groups within the area—appeared inadequate. We have altered the provision in response to these comments. It now says that overall goals shall be based on two considerations: a projection of the number and types of contracts to be awarded by the recipient, and a projection of the number and types of minority businesses likely to be available to compete for contracts from the recipient over the period during which the goals will be in effect. This language, while calling on recipients to make reasonable projections concerning the minority business community in its area, does not invite the degree of speculation called for by the NPRM.

We have rephrased the language in the second part of subparagraph (9) [subparagraph (8) in the NPRM] in response to comments asking for a definition of the geographic area in which recipients are to seek MBEs. The rule now states that recipients must search for MBEs in at least the same area in which they look for non-MBE contractors. If there are too few MBEs in this area, the contractor must expand its search in order to make reasonable efforts to meet overall or contract goals.

The search for MBEs must be expanded only within a reasonable area. A contractor in South Carolina, for example, need not look for plumbing contractors in California. On the other hand, if the contractor needs a specialized kind of subcontractor that is not found as easily as a plumber, it may be reasonable for the contractor to look outside of the region or state where it usually operates. This language does not, however, set precise boundaries for the geographic area; we do not believe this is possible in a general rule of nationwide applicability. The altered language in this section, however, should give recipients more guidance in their search for MBEs while preserving a flexible approach.

One of the most controversial portions of the NPRM was the provision in paragraph (h) of this section that

solicitations under the recipient's MBE programs must require each competitor to submit, with its bid or proposal, the names of MBE subcontractors and the projected dollar value of their work for the competitor on the prime contract. Commenters thought this provision added administrative burdens to all competitors for contracts, including those competitors that were not awarded the contract. It would be costly for competitors, in terms of efforts and salaries, to gather all this information before bidding. Commenters also asserted that this requirement would prove costly and wasteful to recipients who would have to review all of the information supplied by the competitors. This review might slow the procurement process. Commenters also pointed out that this effort would not increase MBE participation since only the successful competitor's MBE efforts would actually result in awarding subcontracts going to MBEs. For long-term contracts, prebid negotiation and commitment to MBEs was viewed as particularly unreasonable and burdensome. Commenters suggested that only the apparent successful competitor should have to locate MBE participants.

The Department is convinced that contractors should be encouraged to deal with MBEs at the earliest possible time. However, commenters have persuaded the Department that it is too costly and administratively burdensome to require all competitors for a contract to submit MBE names with their bids. Consequently the provision has been changed. It now requires all bidders or proposers to submit a written assurance of meeting the contract goals in their bids or proposals. Within a reasonable time after the bids have opened but before the contract is awarded (e.g., 5 to 15 days) the recipient must require all bidders or proposers that wish to stay in competition for the contract to submit the names of MBE subcontractors, a description of the work they are to perform and the dollar value of each proposed MBE subcontract. This approach preserves the value of identifying MBEs before a contract is awarded. However, it reduces the administrative burdens on contractors by imposing the MBE identification requirement only on those bidders or proposers who, after they know their relative competitive position, wish to stay in the running. The recipient sets the time at which bidders or proposers are required to submit the information.

Subparagraph (2) of paragraph (h) listed those activities that demonstrate a competitor's reasonable efforts to meet MBE goals. One way is to advertise a solicitation for specific quotations in trade newsletters for at least 20 days before the bids are due. Commenters objected to this provision, indicating that there are rarely 20 days between the time they learn of a contract and the date bids are due. The final rule states that this requirement applies only when time permits. A shorter reasonable time may be used when the full 20 days are not available. Thus, if a contractor learned of a contract only two weeks before the bid was due, this 20-day requirement would not apply. Nevertheless, the contractor still must advertise its need for solicitations in order to document reasonable efforts. This subparagraph has been redesignated as subparagraph (i)(4) in the final rule.

Another controversial portion of this section in the NPRM stated that, if the bidder or proposer did not meet the MBE goals, price alone was not an acceptable basis on which an MBE sub-bid could be rejected, unless the bidder or proposer could demonstrate to the recipient that it could not get a reasonable price from an MBE. That is, if an MBE does not offer the lowest subcontract price for a job, but its price is reasonable, and the prime contractor cannot otherwise meet its goals, the prime contractor cannot reject the MBE bid and still show "reasonable efforts." The preamble to the NPRM, though not the text of the proposed rule itself, proposed the standard that an MBE price is reasonable if it is within 5 percent of the low bid.

Public comments were mixed on this issue. Some supported the concept of a tolerance in bid prices. Others suggested different percentages for the presumption of "reasonable price" or sliding scales adjusted to the amount of the contract. Many other commenters, particularly in the contractor community, strongly objected to the provision. They argued that any bid tolerance would be inflationary. It would encourage MBEs to increase their bids by the percentage tolerance and thus increase costs unnecessarily. Other commenters stated that bid tolerance violates the concept of competitive bidding since contractors would be forced to accept something other than the lowest bid. Many contractors thought that the provision put them between a rock and hard place. On the one hand, a contractor could accept a relatively high MBE bid and consequently fail to be the low bidder. But on the other hand, that contractor could take a low bid from a non-minority subcontractor and fail to qualify under the "best efforts" requirement for award of the prime contract. Finally, opponents of this provision argued that MBEs must learn sometime to be low bidders in order to succeed in the contracting field.

The rationale for the NPRM provision was that a bid tolerance recognizes that because of difficulty in obtaining financing, start-up costs, less experience, inability to purchase large quantities of supplies and other factors, MBEs' prices may be higher than those of non-MBEs, at least initially. This provision protects MBEs from being rejected when their prices were only slightly higher than a non-minority subcontractor's. The provision also responds to a concern in the minority contracting community that prime contractors and non-MBE subcontractors sometimes agree to beat the price of an MBE by a small amount in order to justify not contracting with it. The percentage presumption was designed to provide an objective standard for the recipient to determine the reasonableness of an MBE price. Otherwise, individual contractors and recipients would be forced to make time-consuming, subjective decisions for each subcontract.

After evaluating the comments and the reasons for the "reasonable price" provision, the Department decided to make a major change in its approach. A new paragraph (i) of the rule, based on UMTA's experience, establishes a conclusive presumption that if one competitor offering a reasonable price meets the MBE contract goal, competitors failing to meet the goal have failed to make sufficient reasonable efforts to do so, and consequently are ineligible to be awarded the contract. Meeting the goal is treated similarly to complying with any other specification of the solicitation which a contractor must meet in order to be responsive.

The way this provision works is best illustrated by a hypothetical example. The XYZ Transit Authority has received the following bids on a contract, for which the MBE goal was 12 percent.

Competitor	Price	MBE Participation
A	$150,000	15%
B	130,000	13%
C	110,000	12%
D	95,000	10%
E	110,000	6%
F	95,000	5%
G	85,000	2%
H	100,000	0%
I	90,000	0%
J	20,000	0%
K	65,000	0%

Competitors A, B and C have met the MBE goal, but competitor C offers the lowest price of the three. The recepient must determine whether C's bid of

$110,000 is reasonable. To do this, the recipient determines whether it would award the contract to competitor C if the firm had been the only bidder, or whether it would cancel and readvertise because the price was too high. In making this determination, XYZ Transit Authority should be guided by its estimate of the cost of the work. It should also evaluate whether the contract should be awarded at all on the basis of the original solicitation. Resolicitation may be appropriate if the work can be performed less expensively under other specifications or if it appears that bidders misunderstood the specifications.

In the first case, XYZ Transit Authority decides that a reasonable price would lie within $10,000 of its engineer's estimate of $103,000 for the work of the contract. Therefore, since competitor C falls within this reasonable range, it is awarded the contract. Presumably, even though the prices of competitors who did not meet the MBE goal were the same or less than those offered by competitor C, these firms did not make sufficient reasonable efforts to meet the goal. Therefore, competitors D through K are ineligible to be awarded the contract.

In the second case, XYZ Transit Authority has determined that a reasonable price lies within $10,000 of its $90,000 cost estimate for performing work of the contract. Competitor C does not fall within this reasonable range, and consequently is ineligible to be awarded the contract even though it met the MBE goal. The Transit Authority then looks at the competitor having the Highest Percentage of MBE participation among those competitors failing to meet the goal. This is competitor D, whose price of $95,000 falls within the reasonable range. In this case, competitor D is awarded the contract.

In the third case, XYZ Transit Authority has determined that a reasonable price is one within $5,000 of its $80,000 cost estimate for the project. For this reason, competitors A through F are eliminated because their prices exceed the reasonable range. Competitor G, though only having 2 percent MBE participation, falls within the reasonable range, and is awarded the contract. The recipient, as the examples illustrate, begins with the lowest-priced competitor meeting the MBE goals and works downward in order of MBE participation percentage until a competitor with a reasonable price is found.

In the fourth case, XYZ Transit Authority has determined that a reasonable price for the contract is around $65,000. Consequently, all competitors with any MBE participation are eliminated from consideration. So too are competitors H and I, who have no MBE participation. Competitor J is eliminated because its bid of $20,000 clearly rests on a misunderstanding on the specifications. This leaves only competitor K. Since competitor K has failed to obtain any MBE participation, it must demonstrate to XYZ Transit that its failure came despite sufficient reasonable efforts to meet the MBE contract goal. It makes this demonstration by documenting its efforts, including its attendance at a prebid meeting to inform MBEs of subcontracting opportunities, its advertisements aimed at minority business, its written notifications to minority businesses about the contract, its efforts to select portions of the work to be performed by MBEs, its efforts to negotiate with MBEs for specific subcontracts, its reasons why these negotiations did not succeed, its efforts to assist MBEs in obtaining bonding and insurance, and its reasons for viewing MBEs that it had contacted as unqualified to perform the contract, if this was the case. If XYZ Transit concludes that competitor K made sufficient reasonable efforts, K gets the contract. If not, XYZ Transit Authority is left with the choice of revising its idea of a reasonable price or readvertising the contract.

As the hypothetical example shows, this approach has two important advantages. First, it reduces the paperwork and compliance burdens placed upon recipients and contractors. Recipients do not need to monitor contractors' activities to determine precisely how they are going about obtaining MBE subcontractors in terms of their prices and the percentage of MBE participation. This approach focuses on how successful competitors are in obtaining MBE participation; thus, it largely eliminates the necessity for recipients to oversee the methods that competitors use to identify MBE subcontractors. In addition, this approach uses the competitive incentives of the marketplace to achieve the goals of the regulation. Competitors for prime contracts will know that their success in obtaining MBE participation is, like their price, a key factor in determining whether they will be awarded the contract. By tying eligibility for contract award to relative performance in obtaining MBE participation, this approach is likely to provide powerful motivation to contractors to find MBE subcontractors. At the same time, this provision never requires recipients to spend more for a contract than they believe is reasonable. In the experience of UMTA, this approach has proven highly successful, resulting in increased MBE participation within reasonable cost limits. Nevertheless, the Department recognizes that this system will be new to recipients of DOT financial assistance from other operating administrations. Consequently, we are particularly interested in receiving comments concerning the implementation of this provision during the extended comment period. Based on their experience implementing this provision, recipients and contractors who believe that another mechanism would work better are invited to suggest improvements.

Subparagraph (7) of paragraph (h) in the NPRM required contractors to keep records for three years after performance to show their compliance with the MBE program. Commenters objected to this provision, arguing that it is excessive and would drive up contractor's cost since additional personnel would be required to maintain the records. The Department agrees that such records are unnecessary and has deleted this subparagraph.

The remainder of this section is unchanged. In particular, paragraph (k) [paragraph (j) in the NPRM], which allows for the use of set-asides, remains part of the regulation. A set-aside is a procurement technique that limits consideration of bids on a given contract to those submitted by MBEs. The theory behind set-aside is that many MBEs are relatively young, small and struggling. Consequently, they are less likely than the more established non-MBEs to win some kinds of contracts in the open market. Therefore, in order to improve opportunities for MBEs, the NPRM proposed that recipients could restrict the scope of the market so that MBEs compete only among themselves for a given contract. The intent is that through this device, MBEs may be nurtured and grow to take their place eventually as full-fledged competitors in the marketplace.

Many commenters, particularly contractors and a few transit agencies, generally opposed set-asides. Most opponents did not offer any specific objections, although some argued that there were not enough MBEs to make set-asides work or that set-asides were inflationary and could exacerbate the problem of sham MBEs. Other contractors, including some state departments of transportation, some contractors and some minority organizations, supported set-asides.

The Department believes that set-asides are an important tool to enable recipients to meet MBE goals and

encourage recipients to use them. Where not prohibited by state or local law, recipients may determine that set-asides are necessary to meet their goals and establish procedures for set-asides. If a recipient concludes that state or local law prevents using set-asides, the Department may examine the validity of the legal rationale upon which this conclusion is based.

The Department takes the position that set-asides are a tool that recipients should use to meet their overall goals, particularly when other means of meeting those goals are unsuccessful. If a recipient fails to meet its overall goals, is not prohibited by state or local law from using set-asides, and chooses not to use set-asides, the recipient may be subject to being found in noncompliance with this regulation on the grounds of having failed to make all reasonable and necessary efforts to meet its goals.

The Department has decided to retain the requirement that MBE set-asides may only be used if there are at least three capable MBEs to bid on the contract. Although several commenters argued that often there are not three such MBEs, the Department believes that without this requirement, the components of a successful competitive bidding process would not exist.

Section 23.47—Counting MBE Participation Toward Meeting MBE Goals

This section derives from Section 23.9 of the NPRM. Under paragraph (a) of this section, as in the NPRM, the total dollar value of a contract awarded to an MBE is counted toward applicable MBE goals.

The material in paragraph (b) was contained in paragraph (c) of the NPRM. It provides that a recipient will count the dollar amount of a contract awarded to an MBE owned and controlled by minority males and white females toward both minority and female goals in proportion to the ownership percentage of each group in the business. For example, if a $1 million contract were awarded to a firm owned in equal shares by two black males, one Hispanic male and one white female, $750,000 would be credited toward the minority goal and $250,000 toward the female goal.

A new provision in this paragraph provides that a recipient may assign the dollar amount of a contract awarded to a firm owned by minority women either entirely to the minority goal or entirely to the female goal, but not to both. Commenters suggested several ways to count the dollar value of contracts awarded to those firms. Some favored a hard and fast rule which would always assign the dollar values to minority goals, while others favored always assigning the dollar values to women's goals. Some commenters favored the approach adopted in the final rule. The Department believes that this provision avoids double counting, but gives recipients some flexibility in meeting their goals.

The material contained in paragraph (b) of the NPRM has been split into paragraphs (c) and (d) in the final rule. Paragraph (c) describes the method for counting contracts awarded to joint ventures. A recipient should count toward its goals only that percentage of the dollar amount of the contract equal to the percentage of the ownership of the joint venture vested in the MBE.

Paragraph (d) of the final rule addresses the problem of using MBEs as mere "brokers." One problem that has arisen in MBE programs is that, in an attempt to meet MBE goals without providing substantive work to MBEs, contracting agencies have sometimes hired an MBE as a mere broker. For example, the contracting agency may award a $1 million contract to a legitimate MBE. The MBE, in turn, subcontracts virtually all of the work to non-minority firms. In this transaction, the MBE performs no commercially useful functions. The practice may help the recipient to meet its goals, but the MBE does little if anything in terms of normal industry practices to justify its existence as part of the operation. This paragraph attempts to discourage such practices. Only expenditures to MBE contractors performing a commercially useful function in the work of a contract may be credited to the recipient's goals. An MBE is considered to perform a commercially useful function when it is responsible for the execution of a distinct element of the work of the contract and carries out its responsibilities by actively performing, managing, and supervising the work involved. The recipient's determination about whether an MBE contractor performs a useful function includes an evaluation of the amount of work subcontracted, industry practices and other relevant factors.

Consistent with industry practice, an MBE contractor may enter into some subcontracts. However, when an MBE contractor subcontracts a significantly greater portion of the work of a contract than would be expected on the basis of normal industry practice, the firm is presumed to be a mere passive conduit or broker, rather than to be performing a commercially useful function. The firm may present evidence to rebut this presumption (e.g., the magnitude of subcontracting was reasonable in light of unusual circumstances). The recipient's decision on the rebuttal of this presumption is subject to Departmental review.

A new paragraph (e), added to accommodate material developed by the Interagency Committee, addresses credit for supplies and materials furnished by MBEs. Recipients may credit such expenditures toward their goals provided that the MBEs assume the actual contractural responsibilities for furnishing the supplies and materials and also manufacture them. For these purposes, a manufacturer is a supplier that either produces goods from raw materials or substantially alters them before resale. When the supplier is not the manufacturer, the recipient may credit toward its goal 20 percent of the expenditure to the supplier, as long as the supplier performs a commercially useful function in the transaction.

Section 23.49—Maintenance of Records and Reports

This section is basically unchanged from section 23.47 of the NPRM. It will not become effective until it is cleared by the Office of Management and Budget (OMB). The Department will inform the public through the Federal Register when OMB clearance is received. One subparagraph has been added to the end of the section. It specifies that data pertaining to minority-owned businesses, women-owned businesses, and firms not owned by minorities will be separated in records and reports. This "breakout" requirement will simplify the Department's monitoring of the program.

Section 23.51—Certification of Eligibility of Minority Business Enterprises

This section and section 23.53 have been moved from Subpart A in the NPRM to Subpart C in the final rule because they apply to financial assistance programs. They will not apply to direct contracting programs when these are added to Part 23.

Paragraph (a) was clarified but is unchanged substantively from the NPRM. In addition, there are no substantive changes in the provisions of paragraph (b), which establish a basic requirement for completing and submitting Schedules A and B by firms seeking to be considered as MBEs. The rule requires that every business wishing to participate as an MBE submit a completed Schedule A. Businesses wishing to participate as joint ventures must submit a completed Schedule B. The MBE joint venture partner also completes a Schedule A. This

requirement goes into effect only when the Office of Management and Budget approves Schedule A and B.

Paragraph (c), which is new, describes the circumstances under which a business seeking to participate as an MBE need not submit Schedules A and B. One such circumstance would be where the recipient has established an MBE certification system different from that established in this rule. DOT recipients are free to establish such systems. The recipient, however, must demonstrate to DOT that its system is at least as effective as that established in the rule and must receive the Department's concurrence. In such a case, the potential MBE contractor would have to submit information required by the recipient's system rather than that called for by Schedules A and B. This paragraph was added in response to comments that requested greater flexibility in the certification requirements.

Paragraph (c) also provides safeguards against duplicated effort. These safeguards are parallel to, but clearer than, the now-deleted portions of paragraph (b). A potential MBE contractor does not need to submit additional information to the DOT recipient if it has already submitted the same information to or has been certified by that recipient, any element of DOT or another Federal agency that uses essentially the same MBE definitions and ownership and control criteria as DOT (e.g., other Federal agencies participating in the Interagency Committee). It is the recipient's responsibility to obtain information and evidence of certification from the other agency.

Several commenters suggested that the recipient should be able to rely on another agency's certification. As long as the other agency is part of DOT or another Federal agency that uses essentially the same criteria as DOT's, we agree. However, we have decided not to extend this "full faith and credit" to certifications by other recipients. One agency's certification of an MBE would serve as evidence of an MBE's eligibility, but not as conclusive proof. Finally, paragraph (c) provides that a potential MBE contractor need not obtain certification under DOT procedures if the Small Business Administration has determined that the contractor is owned and controlled by socially and economically disadvantaged persons.

Section 23.53—Eligibility Standards

A new section entitled "Eligibility Standards" has been developed. It describes the standards that recipients must use to determine whether a firm is actually owned or controlled by minorities or women. This section, which includes information that was in paragraph (c) through (j) of Section 23.7 of the NPRM, contains certain substantive changes.

For consistency with the Interagency Committee guidelines, material has been added to the standards requiring that an eligible MBE be an independent business. The new material points out that even though a business may be regarded as independent for some purposes (e.g., taxation), it may not qualify as independent for MBE certification.

Some commenters suggested that we not use independence as a criterion for eligibility since this would prevent affiliates of non-MBE firms from being certified as MBEs. We do not agree. An affiliate could qualify for MBE certification on its own if it were recognized as a separate business entity for tax or corporate purposes and met other MBE criteria. Such recognition is not sufficient for MBE certification, but it is one factor to be considered. In determining eligibility, DOT recipients must consider all relevant factors, including the potential MBE's resources and relationships with other businesses.

Commenters disagreed on the degree to which recipients must scrutinize a potential MBE before certifying it. Some thought that recipients should use only information provided in Schedules A and B. These commenters stated that further probing would make any decision too subjective and also would be time-consuming. Other commenters believed that it is necessary to investigate both the form and the substance of the MBE in depth before determining eligibility. While the regulation does not specify the depth of investigation, the recipient is obliged to ensure that the MBEs in its program are eligible. The recipient is best situated to determine how much scrutiny is necessary, but this determination is ultimately subject to DOT review.

The final paragraph of this section has been expanded and clarified. It now provides that recipients shall safeguard information obtained for determining eligibility that may reasonably be regarded as confidential. This information may not be disclosed to unauthorized persons, consistent with Federal, state and local law (e.g., the Freedom of Information Act and state equivalents).

Section 23.55—Appeals of Denials of Certification as an MBE

Section 23.55 has been added to this subpart. It concerns appeals of denial of certification as an MBE and is substantively the same as section 23.61 of the NPRM.

Subpart E—Enforcement and Compliance

This subpart, formerly subpart D in the NPRM, sets forth the means by which the Department will ensure that recipients and their contractors comply with the regulations. It has been redesignated subpart E so that subpart D could be reserved for the UMTA Transit Vehicle Manufacturer Requirements, to be added later by a separate rulemaking. Sections 23.71, 23.77 and 23.79 have been reserved for sections to be added by a later issuance concerning DOT's direct contracting program.

Section 23.73—Complaints

This section is little changed from section 23.63 of the NPRM. Commenters questioned whether certain provisions in this section accorded recipients their full due process rights. Subparagraph (a) permits the Secretary to extend or waive the time limit for filing complaints. Commenters argued that this provision would subject recipients to liability indefinitely, which would be inconsistent with due process. First, the Department expects this provision to be used infrequently and only to prevent clear injustices. Second, this language is typical of Federal civil rights enforcement provisions and is consistent with the Department's Title VI and 504 regulations. Third, the rule requires that the Secretary must state, in writing, the reasons for the extension. This requirement should prevent frivolous and unwarranted time limit extensions.

Commenters suggested that third parties be permitted to file complaints. Paragraph (a) in the NPRM allowed these parties only to inform the Secretary of possible violations, but this information was not treated as a complaint. The rationale for this provision was the view that only persons adversely affected should be able to file complaints. Also, once a third party had informed the Secretary of a possible violation, there could be a DOT compliance review that would explore any violation by the recipient. While because of these factors, calling a communication to the Department "complaint" or not probably will not be crucial, we decided to permit third parties to file "complaints," lest the public believe that DOT listens less intently to information provided by third parties. In the Department's Title VI experience, moreover, third parties have provided some of the most important

complaints the Department has received.

We have deleted the phrase in paragraph (b) stating that the Secretary will promptly investigate any complaint that the Comptroller General is not reviewing. This phrase referred only to direct DOT contracting. We have also deleted the phrase "investigative merit" from this subparagraph. The Department will be able to determine which complaints deserve further investigation, and which should be dismissed as frivolous.

Commenters suggested that DOT add subpoena power to paragraph (c) to ensure a full investigation of complaints. The subparagraph allows the Department only to request information from respondents. Although the power to subpoena respondent's records or other information may be helpful in an investigation, this power can be granted to agencies only by statute. Congress has not acted to grant the Department this authority. However, since the refusal to provide needed information is itself noncompliance, the Department's efforts to obtain information should have considerable "clout."

The last due process problem commenters cited in this section arises in paragraph (e). This paragraph states that the complainant's identity shall be kept confidential. Commenters argued that this violates due process, which requires the accused to face his or her accuser. Providing for the confidentiality of complainants is typical of Federal civil rights enforcement practice and is consistent with our own title VI regulations. Furthermore, the Department believes that concealing the accuser's identity may help to prevent any retaliatory acts the respondent might take against the complainant. Although subparagraph (e) prohibits such actions, keeping the complainant's identity confidential provides an additional protection.

It should be pointed out that subparagraph (e) provides for waiving the privilege if it would be likely to hinder the investigation. In practice, however, the Department's experience is that a complainant's identity rarely remains concealed. In the majority of cases, complainants and respondents know each other. Nevertheless, we have retained this provision to ensure confidentiality in those infrequent cases where the respondent does not know the complainant (e.g., a "whistle-blower" in the respondent's organization who wants to remain anonymous) and investigation can proceed without involving the complainant personally.

Section 23.75—Compliance Reviews

With one exception, this section is substantively identical to section 23.65 of the NPRM. The term "reasonable cause to believe that the recipient is not in compliance" has been substituted for the term "probable noncompliance." The "reasonable cause" language seeks to reflect accurately the state of the compliance proceeding at this stage—that is, based on the investigation, enough evidence has been gathered to lead a reasonable person to believe that a recipient is not in compliance. While the evidence is sufficient to initiate conciliation proceedings, it is not necessarily sufficient to permit a finding of noncompliance that would support a cutoff of funds to the recipient. The term "probable noncompliance" may imply a prejudgment of "guilt," and so is less appropriate to this stage of the proceedings.

Section 23.81—Conciliation Procedures for Financial Assistance Programs

This section derives from section 23.71 of the NPRM. We substituted the "reasonable cause" language (as in section 23.75) for the phrase "probable noncompliance." Two substantive changes were made. The last sentence of paragraph (a) has been changed to set a minimum length of 30 days for the conciliation process.

Subparagraph (a)(2), replacing the open-ended time span for conciliation of the NPRM, sets a 120-day time limit for conciliation. After this period has elapsed, the Department begins sanctions, when the head of the responsible office of civil rights makes a written determination that an extension of the conciliation period is necessary. The extension shall be no longer than 30 days, and may be renewed by another written determination. The determination must include reasons for the extension, and must be provided to the complainant and respondent.

The reason for this provision is to place some time pressure on the Department and the respondent so that the conciliation period is not unduly prolonged. At the same time, if additional time is necessary, the responsible Office of Civil Rights may obtain it by making a written, reasoned statement of the necessity for the extension.

Section 23.83—Enforcement Proceedings for Financial Assistance Programs

The material in this section was formerly in section 23.73 of the NPRM. The NPRM's reference to 49 CFR 21.15 and 21.17 has been changed to refer to DOT's procedures for enforcing Title VI of the Civil Rights Act of 1964, 49 CFR Part 21. The Department is currently under revising Part 21. Referring to it generally, rather than to particular sections, will eliminate the necessity for later amendments to the MBE rule.

Section 23.85—Emergency Enforcement Procedure

This section is considerably different from the NPRM. The NPRM provision established an expedited emergency enforcement procedure to decide cases of alleged noncompliance on their merits. Commenters questioned whether this procedure was necessary and whether the section was fully consistent with the Department's administrative due process obligations. In considering these comments, the Department concluded that the most significant purpose of the procedure was to maintain the status quo in a fast-breaking situation so that irrevocable commitments of resources under DOT-assisted programs would not be made while serious allegations of noncompliance were pending. Consequently, the section has been revised to provide for what is, in effect, an administrative restraining order procedure. The procedure is triggered when the Secretary determines that conciliation and enforcement proceedings set forth in sections 23.81 and 23.83 will not result in the timely and adequate enforcement of the provisions of this part. In such a case an emergency reasonable cause notice is sent to the recipient. It describes the areas of alleged noncompliance and explains why the normal course of conciliation and enforcement pursuant to sections 23.81 and 23.83 will be ineffectual. It also requires the recipient to show cause within 15 days (in most cases) why appropriate action to ensure compliance, which is described in the notice should not be taken. Appropriate action entails halting all or any part of the recipient's contracting activities affected by the recipient's alleged noncompliance until the matter is resolved under sections 23.81 or 23.83. This action does not affect existing contracts. When the Secretary makes an order under this paragraph, resolution of the alleged noncompliance must be expedited. The recipient may respond in writing or orally on the record before an official appointed by the Secretary before the Secretary makes a decision. The Secretary must review the recipient's submission before making such decision.