Official Questions and Answers (Q&A's) Disadvantaged Business Enterprise Program Regulation (49 CFR 26)

Overview

The General Counsel of the Department of Transportation has reviewed these questions and answers and approved them as consistent with the language and intent of 49 CFR Part 26. These questions and answers therefore represent the institutional position of the Department of Transportation. These questions and answers provide guidance and information for compliance with the provisions under 49 CFR part 26, pertaining to the implementation of the Department's disadvantaged business enterprise program. Like all guidance material, these questions and answers are not, in themselves, legally binding or mandatory, and do not constitute regulations. They are issued to provide an acceptable means, but not the only means, of compliance with Part 26. While these questions and answers are not mandatory, they are derived from extensive DOT, recipient, and contractor experience and input concerning the determination of compliance with Part 26.

Q&A's have been added to address the following elements of the DBE program:

Personal Net Worth
Program Administrator
Prompt payment and Retainage
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Fostering Small Business Programs
Commercially Useful Function
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Personal Net Worth

If the owner of a DBE or ACDBE certified firm or applicant firm has a personal net worth of less than $1,320,000, does that necessarily mean that the recipient must regard the owner as being economically disadvantaged? Section 26.67(b) (2) (Posted - 11/14/12)

• No. A person cannot be regarded as economically disadvantaged if he or she exceeds the $1,320,000 personal net worth (PNW) cap. However, there may be some cases in which an individual whose PNW is less than $1,320,000 may properly be regarded as not being economically disadvantaged.

• The legal and policy rationale behind the PNW provision of the rule is that a program designed to assist socially and economically disadvantaged individuals should not include people who can reasonably be regarded as having accumulated wealth too substantial to need the program's assistance.

• Consequently, in determining whether an individual is economically disadvantaged, a recipient is entitled to look not only at the individual's PNW but also at his or her overall economic situation to make a reasonable determination of whether the individual is fairly regarded as being economically disadvantaged.

• Consistent with Small Business Administration practice in the 8(a) program, it is appropriate for recipients to review the total fair market value of the individual's assets and determine if that level appears to be substantial and indicates an ability to accumulate substantial wealth.

• For example, an individual with very high assets and significant liabilities may, in accounting terms, have a PNW of less than $1,320,000. However, the person's assets (e.g., a very expensive house, a yacht, extensive real or personal property holdings) may lead to a conclusion that he or she is not economically disadvantaged. The recipient can rebut the individual's presumption of economic disadvantage under these circumstances, as provided in sec. 26.67(b) (2).

This guidance applies to determinations of economic disadvantage under both 49 CFR Part 23 and 49CFR Part 26.

Does a recipient simply accept an owner's PNW statement? Should the recipient investigate? Section 26.67 (a) (Posted - 4/12/99)

• A PNW statement is a signed representation to a DOT recipient that the information presented is true. Falsification can lead to criminal prosecution. Recipients should first review a PNW statement to determine whether the individual's PNW is more than $1,320,000.

• In addition, recipients should review each PNW statement to determine if there are any obvious mistakes, omissions, or suspicious information. Where the recipient has a reasonable basis to believe that the PNW statement is incomplete or inaccurate, the recipient may "look behind" it, by seeking further information or conducting an investigation to clear up the issues. Recipients have discretion to devise procedures to obtain needed information in these cases.

• The Department emphasizes that recipients are prohibited from using requests for additional information concerning PNW issues as a way of targeting, punishing, harassing, or discriminating against specific firms or classes of firms. We regard such misconduct as noncompliance with part 26 (see 26.7(b), 26.109(d)).

• If there is a credible allegation that an owner has falsified a PNW statement, the recipient should investigate and/or refer the matter to the Department of Transportation's Office of Inspector General.

In calculating personal net worth, how should retirement savings be counted? (Section 26.67(a) (2) (iii) (d)) (Posted - 2/17/00 - Edited 12/7/01)

• The basic principle in counting assets in the personal net worth calculation is to count the present value of assets attributable to the individual.

• Retirement savings or investment devices (e.g., a pension plan, IRA, 401(k)) do count toward calculations of an individual's personal net worth. This is because these assets, even though generally not readily available as sources of financing for business operations, are part of an individual's overall wealth.

• Recipients should count only the present value of a retirement savings or investment device toward the personal net worth calculation. That is, the recipient needs to determine how much the asset is actually worth today, not what its face value is or what the individual's return on it may be at some point in the future.

• In making this present value determination, the recipient would subtract the interest or tax losses the individual would incur if he or she liquidated the asset today.

In calculating personal net worth, how should assets held by spouses in joint or community property be counted? (Posted - 2/17/00 - Edited 12/7/01)

• The Department is aware that there have been many questions about how to calculate personal net worth (PNW), of which this is one. The Department has asked for comment on potential changes to the rule on this subject. Meanwhile, we offer the following suggestions concerning marital assets.
• The basic principle in counting assets in the personal net worth calculation is to count the present value of assets attributable to the individual.

• If an asset is held as community property, or jointly (including a tenancy by the entireties) between two people, 50 percent of the value of the asset is normally attributed to each person. For example, suppose a woman owner of a firm applying for DBE certification has, with her husband, a $100,000 joint savings account. Half of this asset -- $50,000 -- would be counted toward her personal net worth. The recipient to which her firm applied would not count the full $100,000 toward her personal net worth.

• A legal instrument valid under state law can alter this normal attribution of assets between owner.
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Prompt Payment and Retainage

What must recipients do to ensure compliance with the requirement that subcontractors (which includes subconsultants) must be promptly paid for work performed on a U.S. Department of Transportation funded (DOT-assisted) contract? (Posted - 4/15/2016)

- The recipient's approved DBE program plan should outline the steps it will take to address the barriers created by delays in payment to subcontractors. First and foremost, the DBE program plan must contain the prompt payment and release of retainage (where applicable) contract clause that must be included in every DOT-assisted contract. As required by the DBE program regulation, 49 C.F.R. § 26.29 (2016), the contract clause must obligate the contractor to pay the subcontractor for satisfactory completion of the subcontract no later than 30 days after the contractor receives payment from the recipient for the work performed by the subcontractor.

- Second, the recipient must implement appropriate mechanisms to ensure compliance with prompt payment and retainage requirements by all program participants. This means recipients must use legal and contract remedies available under Federal, state, and local law. See 49 C.F.R. § 26.37 (2016). The contract remedies to be used or available penalties or sanctions that may be imposed by the recipient in the event of a breach of the prompt payment or release of retainage contract clause should be set forth in the appropriate contract document. See 49 C.F.R. § 26.13(b) (2016). Other compliance mechanisms must be described in the recipient's DBE program plan, which is subject to approval by the appropriate DOT Operating Administration (OA).

- Some, but not all, of the mechanisms a recipient may use to enforce compliance with the prompt payment requirement are contained in 49 C.F.R. § 26.29 (2016). For example, recipients may require the contractor to obtain its prior written consent for good cause delays in or postponement of payment. The available remedies should be set forth in the DBE program plan, which is subject to approval by the appropriate DOT OA.

- The rule authorizes, but does not require, recipients to use the particular methods described in section 26.29. This does not mean, however, that enforcement of the prompt payment or release of retainage requirement itself is optional. Recipients are expected to enforce the terms of the contract that specifies what happens if this provision of the contract is breached. If the recipient does not choose to use the methods mentioned in the rule, then it must use other methods that are equally effective in achieving compliance. This information must be set forth in the contract and in recipient's DBE program plan document.

- Third, the DBE program plan also must describe the process used by the recipient, if any, to resolve disputes concerning the subcontractor's performance or indicate what happens in the event of a dispute (e.g., governed by the terms of the relevant prime or sub contract document). The appropriate OA is expected to review the DBE program plan to ensure the process is adequately described.

When are prime contractors required to return retainage to subcontractors? (Posted - 4/15/2016)

- Withholding a certain percentage of the payment that is owed the prime contractor or the subcontractor until all the work of the prime contractor has been satisfactorily completed is known as "retainage." The prompt payment provision of the DBE rule is intended to change when retainage is released. Prime contractors' traditional practice of holding retainage until the recipient has made final payment to the prime contractor, even though the subcontractor's work may have been satisfactorily completed months or years earlier, is not permitted.

- For example, suppose there is a prime contract that will take three years to complete. Subcontractor A satisfactorily completes its work at the end of year one. The prime contractor must pay the retainage it has held to Subcontractor A at the end of year one. The prime contractor cannot wait until the end of year three, when the entire prime contract has been completed and the recipient has paid its retainage (if any) to the prime contractor, to make this payment to Subcontractor A.

- Recipients that hold retainage must make incremental acceptances of portions of the prime contract as the work is completed so that retainage that covers that work is released before final payment for completion of the entire contract.

- If retainage is held by the recipient against the prime contractor or held by the prime contractor against the subcontractor, there must be a contract clause obligating the payment of retainage within 30 days of the recipient's incremental acceptance of the work performed by the subcontractor (option three under 49 C.F.R. § 26.29(b) (2016)) or payment of retainage by the prime contractor (option two or three under 49 C.F.R. § 26.29(b) (2016)) within 30 days of satisfactory completion of the work performed by the subcontractor.

Does the prompt payment and release of retainage requirements apply only to DBE subcontractors? (Posted - 4/15/2016)

- No. The prompt payment and release of retainage (where applicable) obligation is a race- and gender-neutral requirement that applies to DBE and non-DBE subcontractors alike. It is intended to apply to all subcontractors at all tiers.

When does the time period for payment or release of retainage begin to run? (Posted - 4/15/2016)

- The 30-day time period for payment of subcontractors begins when the contractor receives payment from the recipient for satisfactory completion of the work. Satisfactory completion is defined by the regulations as "when all the tasks called for in the subcontract have been accomplished and documented as required by the recipient." In the case of a second or third tier subcontractor, the 30-day time period begins to run when the 1st tier subcontractor receives payment from the prime contractor or when the 2nd tier subcontractor receives payment from the 1st tier subcontractor.

- As stated above, the incremental acceptance of a portion of a contract also will trigger release of retainage. The work of a subcontractor that is covered by the recipient's acceptance of that portion of the prime contract is deemed satisfactorily completed. For purposes of 49 C.F.R. § 26.29(b)(3) (2016), incremental or monthly progress payments for completed work may constitute incremental acceptance by the recipient.

- Contractors must submit the required documentation to recipients to begin the payment process. Similarly, subcontractors may be required to submit documentation to the prime contractor. In the interest of transparency, recipients are encouraged to share information regarding required documentation with subcontractors, to take steps to promote the timely submission by contractors of invoices for payment, especially when notified by a subcontractor that the work has been completed but payment has not been received, and to have adequate internal controls in place to facilitate timely payment at all tiers of contracting. Many state transportation agencies require at least monthly invoicing by the prime contractor. Delays by contractors of more than 30 days in submitting invoices for payment on completed work creates undue hardship on subcontractors and should be discouraged by recipients.

How does a delay in payment by the recipient affect the prompt payment obligation imposed on contractors? (Posted - 4/15/2016)

- Because the regulatory requirement to promptly pay subcontractors is activated once the contractor receives payment from the recipient, a delay in payment by the recipient will have a direct impact on how quickly a subcontractor is paid for completed work.

- Like the Federal Prompt Pay Act that applies to contracts that are let by Federal government agencies, many state laws require state government agencies to promptly pay their contractors within a certain number of days (typically 7 – 30 days) of receipt of relevant documents (e.g., a proper invoice for the amount due and confirmation that the goods and services have been received and accepted by the recipient). Based on a search of state laws, all states have some kind of prompt payment law for public projects with one exception -- New Hampshire. This information is subject to change. Recipients that are covered by such state law requirements are encouraged to reference applicable prompt payment laws in their contract documents and their DBE program plan. This will assist program participants (e.g., prime contractors and subcontractors) in managing expectations.

What happens when there is a dispute over the satisfactory completion of the work performed by the subcontractor? (Posted - 4/15/2016)

- The obligation to promptly pay subcontractors or to release retainage does not arise if there is a legitimate dispute over the subcontractor's performance. Recipients are encouraged to develop a dispute resolution process as a mechanism to ensure compliance with the purpose and intent of the prompt payment and release of retainage requirements. As stated above, the process used should be described in the DBE program plan and in the relevant contract document.

- A prime contractor may not withhold payment to a subcontractor that has satisfactorily completed work on the contract (contract A) as a means to address a dispute between the

prime contractor on an unrelated contract (contract B). That would not constitute a legitimate dispute over the subcontractor's performance on contract A.

What effect does the absence of a direct relationship between the recipient and the subcontractor have on the obligation imposed on the recipient under the DBE program regulations? (Posted - 4/15/2016)

- None. The prompt payment and release of retainage obligation is both a regulatory requirement that recipients are expected to comply with in administering their DBE program and a contractual obligation recipients are expected to enforce. Under the financial assistance agreement signed by the recipient, it is contractually obligated to implement a DBE program that complies with 49 C.F.R. Part 26 (2016), which includes the prompt payment requirement. The lack of a direct contractual relationship between the recipient and a subcontractor does not relieve the recipient of its obligation to ensure compliance with DBE program requirements by program participants as a condition of the recipient's receipt of DOT financial assistance.

Is the obligation to promptly pay subcontractors a material term of a DOT-assisted contract? (Posted - 4/15/2016)

- Yes. Every DOT-assisted contract must include a commitment by the parties to carry out all applicable requirements of 49 C.F.R. Part 26 (2016) in the administration of the contract. See 49 C.F.R. § 26.13 (2016). This commitment covers the prompt payment and release of retainage requirements in 49 C.F.R. § 26.29 (2016). Failure by the contractor to honor this commitment is considered a material breach of the contract, subject to the penalties, sanctions, and remedies listed in section 26.13 and any other equally effective remedies the recipient deems appropriate. An effective remedy recognizes the importance of this obligation and seeks to correct the problem.

- The contractual commitment is a material term of the contract between the recipient and the prime contractor, and it is a material term of the contract between the prime contractor and the subcontractor under 49 C.F.R. § 26.13(b) (2016). The term "contractor" is defined to mean "one who participates, through a contract or subcontract (at any tier) in a DOT-assisted highway, transit, or airport program." 49 C.F.R. § 26.5 (2016). Consultants and sub-consultants (e.g., architecture and engineering firms) are contractors. All forms of contractual agreements (e.g., truck leasing agreements, task orders, etc.) are covered by the prompt payment requirement, which cannot be waived.

What are some of the contractual penalties that may be imposed by a recipient when a subcontractor is not promptly paid? (Posted - 4/15/2016)

- Under 49 C.F.R. § 26.13(b) (2016), the penalties imposed by the recipient may include, but are not limited to, the following:
    1. terminating the contract,
    2. withholding progress payments,
    3. assessing sanctions,
    4. imposing liquidated damages,

5. disqualifying the contractor from bidding on future contracts, or
6. other remedies the recipient deems appropriate.

- DOT OAs are expected to ensure recipients enforce compliance with DBE program contractual commitments in DOT-assisted contracts.

How are prompt payment complaints processed? (Posted - 4/15/2016)

- Complaints of non-payment should be submitted first to the recipient (i.e., the state or local transportation agency, transit authority, or airport that awarded the DOT-assisted contract).

- The recipient has an obligation to investigate the complaint and provide a timely response to the complainant. A timely response should be no more than the time required to promptly pay the subcontractor for completed work.

- If the recipient fails to respond to the complaint or otherwise fails to comply with DBE program regulations, the subcontractor may contact the appropriate OA providing financial assistance on the contract. The OA will investigate the complaint of noncompliance by program participants.

- The OA contact information is posted on the DOT DBE program websites hosted by the Departmental Office of Civil Rights, the Federal Highway Administration, the Federal Transit Administration, and the Federal Aviation Administration.

Is relying on complaints an appropriate means of enforcing the prompt payment and retainage requirements of the rule? (Posted - 4/15/2016)

- No. Relying only on complaints or notifications from subcontractors about a contractor's failure to comply with prompt payment and retainage requirements is not a sufficient mechanism to enforce the requirements of section 26.29.

- Subcontractors are often reluctant to complain about contractors for fear that doing so will make it more difficult to get work in the future, despite the prohibition in the regulations against retaliation against individuals who file a complaint (49 C.F.R. § 26.109(d) (2016)). This may result in recipients not receiving complaints that would timely alert them to noncompliance by contractors.

- While this section does not mandate that a recipient employ a specific type of mechanism for monitoring prompt payment, recipients are expected to take affirmative steps to monitor and enforce prompt payment and retainage requirements. For example, posting prime contractor payment information on a recipient's website, database, or other place accessible to subcontractors may be effective in alerting small business subcontractors to the start of the 30 day clock. Using automated systems that require real time entry of payments to, and receipts by, prime contractors and subcontractors and that is regularly monitored is another example of a proactive compliance mechanism that flags late entries/acceptances for follow-up. Notarized certification from the prime contractor that payment was made to subcontractors and verification of that information also is a form of active monitoring.

What records should recipients and contractors retain to document compliance with the prompt payment requirement? (Posted - 4/15/2016)

- To ensure compliance with the prompt payment provision, recipients may require prime contractors to provide information concerning payments to subcontractors and release of retainage where held. Data collected from contractors may include copies of cancelled checks. All participants in the Department's DBE program, including contractors, are required to cooperate fully and promptly with requests for information pursuant to 49 C.F.R. § 26.109(c) (2016).

The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 C.F.R. part 26 (2016).

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Good Faith Efforts Requirements

Should recipients treat as evidence of good faith efforts to meet contract goals the proposed use of potential DBE firms that are not certified in the recipient's state? Section 26.53(b) (2) (vi); Appendix A (Posted - 12/09/11)

• No. As background, bidders or offerors on prime contracts may, on some occasions, propose the use on a contract of minority- or women-owned firms that are not currently certified in the recipient's state. In some cases, such firms might be certified as DBEs in other states.

• Good faith efforts are efforts to obtain participation by certified DBEs on the contract. Efforts to include firms not certified as DBEs in the state where the contract is being let are consequently not good faith efforts to meet a DBE contract goal. This is true even if a non-certified firm is owned by minorities or women or is certified in another state.

• We would point out, however, that it is appropriate for recipients to take potential DBEs into account when calculating overall goals.

May a recipient consider a bidder's "track record" in using DBEs as it evaluates the firm's good faith efforts? Section 26.53 Appendix A (Posted - 2/17/00)

• The factors cited in Appendix A, section IV, concerning good faith efforts are not an exclusive list of the things a recipient may consider in determining whether a bidder has made good faith efforts on a contract.

• It is permissible for a recipient, in evaluating the good faith of a bidder's efforts to meet a contract goal, to look at the "track record" of the firm in using DBEs in other situations.

• For example, suppose that Contractor X has a long, documented history of making good, and frequent, use of DBEs not only on DOT-assisted contracts but on non-Federally- assisted contracts as well. Contractor Y does not have such a positive track record.

• In evaluating the efforts Contractor X has made to meet a particular contract goal, a recipient might conclude that the credibility of its efforts is improved by its history of DBE utilization.

• In a similar situation, the recipient might decide that the less positive history of DBE utilization by Contractor Y did not provide the same degree of credibility of its efforts to meet the goal.

Do recipients apply post-award good faith efforts requirements to contracts on which there is no contract goal? Section 26.53(f) (Posted - 2/12/02)

• No. The post-award good faith efforts requirements of 26.53(f) apply only to contracts in which there is a contract goal.

• These requirements (1) prohibit prime contractors from terminating a DBE for convenience and then substituting the prime contractor's own forces, and (2) require the prime contractor to make good faith efforts to replace a DBE firm that could not complete its contract with another DBE firm, to the extent needed to meet the contract goal.

• These provisions are premised on their having been a contract goal that the prime contractor has committed itself to make good faith efforts to meet. When there is a contract goal, the provisions of Section 26.53(f) are necessary to prevent a prime contractor from circumventing its good faith efforts obligation after the contract has been awarded.

• Where there is no contract goal (i.e., a race-neutral procurement), these provisions are not relevant.

May a prime contractor use the union or non-union status of a DBE firm as a good-faith reason for not selecting the firm to work on a contact or as good cause to terminate the firm from a contract? Section 26.53 (f); Appendix A (IV) (E) (Posted - 5/24/12)

• When a bidder or offer or on a prime contract is unable to meet a DBE contract goal, the bidder must, in order to be responsive or responsible, document the good faith efforts it made to meet the goal. The nature and scope of these efforts are explained in Appendix A to 49 CFR Part 26.

• The DBE rule provides that “The contractor’s standing within the industry, membership in specific groups, organizations, or associations and political and social affiliations (for example, union vs. non- union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor’s efforts to meet the project goal.”

• This means that the bidder or offer or cannot successfully document good faith efforts if it has declined to use a DBE firm because that firm is a union or non-union firm.

• The terms of an applicable project labor agreement or collective bargaining agreement applying to a prime contract may mandate that all firms working on the contract observe stated wage or working conditions requirements, regardless of whether the firms are union or non-union firms. In a situation of this kind, a bidder or offer or on the prime contract is not obligated, as a condition of meeting good faith efforts requirements, to use a DBE firm that will not observe the stated requirements.

• A prime contractor is prohibited from terminating a DBE subcontractor it has listed to meet a contract goal without the written consent of the recipient agency. The DBE Liaison Officer (DBELO) is the most appropriate official to determine whether consent for a termination should be provided.

Such a termination can only be for good cause.

• The DBE regulation lists eight specific circumstances that constitute good cause, none of which provide that union or non-union status is good cause to terminate a DBE firm. The ninth basis for a good cause termination is "other documented good cause that you [the recipient] determine compels the termination of the DBE subcontractor."

• The Department interprets this ninth ground for a good cause termination as not including the union or non-union status of the DBE firm. For example, if a prime contractor lists a non-union DBE subcontractor to work on a contract, and a union objects to or takes action against the prime contractor's use of the DBE firm, the recipient does not have a basis for consenting to the termination of the DBE firm by the prime contractor.

What, and how much, assistance is it appropriate for a prime contractor to provide to a DBE? (Posted 6/18/08)

• A DBE must be independent to be eligible for certification. In thinking about the assistance that prime contractors may properly provide to DBEs, recipients should determine whether there is a pattern of close, pervasive ties between a DBE and the prime contractor. If it appears that, absent its ties to a prime contractor, a DBE firm is not viable; it should not be regarded as independent. A firm must be independent to be eligible for DBE certification.

• In Appendix A, the Department mentions that it is appropriate for prime contractors to provide assistance to DBEs in a variety of areas, such as bonding, credit, insurance, equipment, materials and supplies.

• In providing such assistance, a prime contractor should be careful not to provide so much assistance to a particular DBE in so many areas that a reasonable recipient or UCP would conclude that the DBE is not viable without the relationship to the prime contractor. It makes sense for a prime contractor to pick and choose ways of assisting a DBE that do not become so pervasive as to create independence issues. This assistance should be transparent and arms-length.

• As part of their contract performance oversight functions, recipients should continue to scrutinize the independence of DBEs as they work on projects. Recipients may require prime and subcontractors to report any contract performance issues that could call a DBE's independence into question.

• One situation that has been brought to the Department's attention concerns the use of cranes. Often, according to stakeholders, a crane provided by a prime contractor may be used jointly on a project by the prime contractor and subcontractors, including DBEs, as it is not practical or economically feasible for each contractor to have its own crane.

o In this situation, the Department believes that, as long as such arrangements are consistent with normal industry practice in a given jurisdiction, the joint use of a prime contractor's crane by a DBE should not cause the DBE to be regarded as failing to meet independence requirements for certification.

o We note, however, that as provided in 26.55(a) (1), the cost of equipment purchased or leased by a DBE from a prime contractor does not count for DBE credit. Consequently, if a charge for the use of a prime contractor's crane (as distinct from the DBE's labor in operating the crane) is part of the cost OF THE DBE's contract, it would be subtracted from the DBE credit allowed for the contract.

• There may be occasional short-term or emergency circumstances in which a DBE uses a prime contractor's equipment, supplies, etc. to a limited degree (e.g., the DBE's backhoe breaks down, and the DBE uses the prime contractor's backhoe for the rest of the day). Such short-term, limited use, as distinct from a pattern or practice of such use, would not usually result in a DBE being regarded as having lost the independence needed for certification and would not result in a subtraction from the DBE credit allowed for the DBE's work on the contract.

• It is possible that a group of prime contractors, or a state or local prime contractor's association, could join efforts to provide various kinds of assistance to a considerable number of DBEs in the jurisdiction in a way that would not create a dependent relationship between any given DBE and a particular prime contractor.

• Prime contractors with questions about the appropriateness of their assistance relationships with DBEs should consult in advance with recipients or the state's UCP, who should be prepared to provide advice about whether the relationship or some aspects of it may be problematic. If a recipient provides an opinion about the appropriateness of a relationship, the recipient should make clear that, even if the relationship appears appropriate on its face, dealings between prime contractor and the DBE during the implementation of the contract could still run contrary to the independence requirements of the DBE rule.

• Mentor-protégé programs meeting the requirements of 26.35, which contain safeguards for the independence of DBE protégés, are another method through which prime contractors can assist DBEs without creating independence issues. Note that only a firm that the recipient has already certified as a DBE (necessarily including a determination that the firm is independent) can participate as a protégé.
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Certification Procedures

Can recipients and UCPS charge application fees to firms seeking DBE certification? Section 26.83(f) (Posted - 12/09/11)

• No, unless the relevant DOT operating administration approves the fee. An application fee may be charged only "subject to the approval of the concerned operating administration as part of your DBE program." This means that a certifying entity is prohibited from charging such a fee unless the concerned operating administration has approved it.

• This approval concerns not only the concept of charging a fee, but the specific dollar amount of a fee.

• If a certifying entity is currently charging an application fee in the absence of the concerned operating administration's approval, the certifying entity should immediately stop charging it.

• To be approved, a fee must be "reasonable." In keeping with the objective of encouraging firms to apply for DBE certification, rather than deterring them from doing so, any application fee should be modest.

• Recipients are reminded that fee waivers should be made in appropriate cases.

What procedures should a Unified Certification Program (UCP) use to remove or replace the certification functions of one or more of its members? Section 26.81(a) (4) (Posted 12/9/11)

• If a UCP member wants to stop performing certification functions, or if a UCP wants to remove or replace the certification functions of a member, the UCP must, submit to USDOT an amendment to its UCP plan for prior approval.

• The proposed amendment should do the following things: (1) describe how the certification functions of the UCP member will be delegated to other UCP partners; (2) provide details of how the UCP will ensure that DBE firms certified by the withdrawing UCP member will remain certified; (3) describe how one or more UCP members will divide the certification workload, for both currently certified firms and pending applications; (4) designate which UCP member or members will review annual affidavits of no change for firms certified by the withdrawing member; and (5) provide assurances that the UCP will inform all firms that their certification, annual affidavits, and applications will now be processed by another UCP member.
• The Department may disapprove the proposed UCP amendment if proper protections for certified DBE firms and applicants are not adequately described.

• If the proposed amendment is not approved, disapproved, or remanded to the UCP for revisions within 180 days of its submission, it is deemed to be accepted.

How do recipients respond to applicants for certification who are certified by another UCP? (Section 26.83) (Posted - 2/23/99)

• You have the discretion to handle this situation in any of the following ways.

• You can certify the firm in reliance on the certification decision of the other UCP.

• You can make your own certification decision based on documentation provided by the other UCP.

• You can require the applicant to go through your own certification process, without regard to the actions of the other UCP.

Can UCPS treat certified DBE firms as new applicants if the UCP member that originally certified the firm no longer certifies firms on behalf of the UCP? (Sections 26.81 – 26.83) (Updated December 9, 2011)

• No. Once a DBE firm is certified, it remains certified unless and until decertified by the

UCP under section 26.87.

• A firm does not lose its certification because the UCP member that originally certified it ceases to perform certification functions for the UCP.

• In the event that a UCP member that formerly had certification duties no longer performs certifications for the UCP, all DBE certifications issued by that member remain in effect until and unless the decertification procedures set forth in 26.87 have been completed.

• Certified firms are not considered new applicants just because a new certifying entity now has their file.

Is it appropriate for UCP's to require out-of-state applicants to appear in person for an interview? (Section 26.83(c) (1)) (Posted - 9/1/05)

• UCPs may appropriately rely on reports of on-site reviews conducted by the home state of an out-of-state applicant to meet the on-site review requirements of Part 26.

• UCPs should not routinely require all out-of-state applicants for certification to appear in person for an interview. Such a requirement may impose unnecessary financial hardships on the applicant and his or her small business.

• The information necessary for the UCP to make a certification decision should normally appear in the on-site review report of the applicant's home state. This information typically includes the results of the home state's interview with the applicant.

• However, there may be individual cases in which the UCP has reason to believe that the home state's on-site review report does not sufficiently address important substantive questions necessary for the UCP's consideration of the firm's application.

• In such cases, the UCP has discretion to require the applicant to appear in person for an interview. Before imposing such a requirement, the UCP should determine if other, less onerous, means can be used to obtain the needed information (e.g., sending documents, participating in a teleconference or videoconference).

• When the UCP determines that the applicant must appear in person for an interview, the UCP should send a letter to the applicant explaining the reason for the requirement, including the information the UCP is seeking and the reasons why other means of obtaining it are impracticable.

Would it be acceptable for a unified certification program (UCP) to be formed by all recipients in a state or region agreeing to one form, process, and procedure that all recipients would use, and DBE firms would only need to apply to one of the recipients involved? (Section 26.81) (Posted - 4/12/99)

• The DOT DBE rule does not prescribe the particular form a UCP must take.

• If all recipients in a state or region agreed to use the same form, process, and procedure, and a firm certified by one recipient was accepted by all, that would satisfy the "one-stop shopping" requirement

of part 26. There could also be other ways of meeting this requirement.

• The Department will work with recipients in each state to facilitate their consideration of the best form of UCP for them.

Must recipients "recertify" firms every three years? (Section 26.83(h)) (Posted - 4/12/99)

• No. The rule does not say that recipients must recertify firms every three years. It says that recipients cannot require a firm to go through a recertification review process more frequently than once every three years.

• Once recipients have determined that a firm is an eligible DBE, it remains certified unless and until its eligibility has been removed through 26.87 procedures.

• Certifications do not "expire" after three years. Once certified, a firm remains an eligible DBE unless and until its eligibility has been removed under section 26.87.

• DBEs' "no change" affidavits and notices of change are intended to keep recipients current on the status of certified firms. If the facts on which the firm's certification was based change, the recipient can take action under 26.87 to remove eligibility.

• Of course, a recipient can investigate a firm if there is reason to believe that its current information is incorrect or outdated, or that there are problems with the firm's status as an eligible DBE.

What points should UCP members emphasize in working together to make certifications decisions? (Posted - 6/18/08)

• Recipients of DOT financial assistance are required to establish a unified certification program (UCP) to provide a one-stop shopping service to DBE program applicants and participants. Most recipients have formed or joined a UCP as required. All UCP participants operate under a "UCP agreement" and must comply with all provisions of the regulation concerning certification and non-discrimination.

• Each UCP member is to follow the procedures listed in the UCP agreement, including the division of tasks assigned to particular members. According to §26.81(b) (1), all certification decisions by the UCP shall be binding on all DOT recipients within the state.

• In the event of a disagreement— (e.g., one or more UCP members believe a firm should not be certified and others believe the firm is eligible) UCP members should work through their differences. UCP agreements should always include a dispute-resolution mechanism.

• One possible way of resolving a disagreement is to use another certification officer from a neighboring UCP to serve as an arbitrator, and all parties agree to the decision made by the arbitrator.

• Another solution may be to request that another certification officer from a nearby state's UCP offer an opinion after conducting a site visit to the firm or after reviewing the administrative record used by the UCP in making its decision.

• UCP members should be treated as co-equals in the decision-making process. That is, a larger recipient (e.g., a State DOT) should not be presumed to have a stronger voice in making decisions than a smaller recipient (e.g., a city transit authority or airport).

• To achieve the goal of one-stop shopping, UCP members should coordinate their actions closely. For example, it is inconsistent with the purpose and structure of a UCP for one member to take action (e.g., certifying a firm) contrary to the action of another member or on its own, without following the UCP process.

• UCPs should evaluate a firm once it is notified of changes in the ownership of a DBE or ACDBE firm and advise the firm of its decision within ninety (90) days of the notification.

• UCPs are encouraged to update on-site reviews. Any on-site review over 3 years old should be updated to reflect current status.

• UCPs should promptly respond to requests from other UCPs for information needed for the certification process (e.g., a request from another state for an on-site review report).

• The decision of the UCP about a firm's eligibility is binding on all UCP members and staff. It is not appropriate for one UCP member, or the staff of a UCP member, to file a certification appeal with DOT because of disagreement with the UCP's decision. The Department's Office of Civil Rights will not consider such a complaint.

• UCPs should ensure that any state-level appeal process from certification decisions available to firms calls for appeals to be heard and decided by experienced, professional employees very familiar with DOT DBE program certification standards and procedures. The individuals making decisions on appeal should, to the maximum extent possible, be insulated from political pressure (e.g., by firewalls prohibiting contact with them by state or local elected or appointed officials concerning the merits or outcome of a case). In DOT's experience, a flawed state appeal process can be worse than none at all.

Do all recipients have to participate in Unified Certification Programs (UCPs)? Section 26.81 (Posted - 2/12/02)

• Section 26.81(a) of the DBE regulation says to recipients that "you and all other recipients in your state must enter into in a Unified Certification Program (UCP)" (emphasis added).

• The purpose of this provision is to ensure that DBEs and applicants (including airport concessionaires) will have "one stop shopping" on certification matters with respect to every recipient in the state. This is not possible unless all recipients with certification responsibilities are part of the UCP.

• Recipients who are not required to have DBE programs do not have certification responsibilities. Therefore, they do not need to participate in a UCP.

• All state DOTs must participate in the UCP. However, subrecipients of state DOTs do not have to be involved in the UCP formation process or sign the UCP agreement on their own. The state DOT is responsible for ensuring (e.g., through subgrant agreements) that its subrecipients comply with all provisions of the UCP (e.g., that they accept as DBEs firms that the UCP has certified).

• Airports and transit properties that receive funds directly from FAA or FTA must also participate in the UCP. Since these recipients must participate in the UCP, it is vital that they have the opportunity to be involved in the discussions leading up to its formation (e.g., that they get notice of meetings and working drafts of documents). No direct recipient who wishes to be involved in the work of developing the UCP may be excluded.

• All parties who must participate in a UCP (i.e., state DOTs and airports and transit properties that receive funds directly from FAA or FTA) must commit in writing to participate.

• We recognize that UCP negotiations involving a large number of recipients may be complex and difficult. That is why the Department allowed three years from the effective date of the rule for recipients to agree on a UCP.

• The Department supports efforts by recipients to make this process as simple as possible.
Here are a few ideas that we have heard:

o A steering committee of recipients in the state, representing all three modes, could take the lead on accomplishing the substantive work of drafting a UCP agreement. Other recipients would then receive and comment on drafts. The steering committee would respond to comments before obtaining written commitments from the other recipients.

o An organization (e.g., a state transit association) could negotiate on behalf of small grantees with individual larger grantees from its own and other modes.

o Where a single state agency or steering committee is taking the lead on developing the UCP, it could create a web site that permits recipients from around the state to view and participate in the ongoing work of drafting the UCP agreement.

o Creating a UCP is a "One DOT" project at the state level. We urge staffs from all highway, transit, and airport agencies to work cooperatively to make this effort succeed. The Department stands ready to assist the parties to UCP negotiations in achieving their objective.

How do recipients respond to applicants for certification who are certified for SBA programs? (Section 26.67(c)) (Posted - 4/12/99 - edited 12/7/01)

• Recipients may sometimes receive applications from firms who have already been certified by the U.S. Small Business Administration (SBA) under the 8(a) or small and disadvantaged business (SBD) program.

• The certification criteria for these programs, which concern only procurement by Federal agencies, are similar - though not identical - to the certification standards for the DOT DBE program.

• Recipients have discretion concerning how they treat SBA-certified firms. This discretion is similar to the discretion recipients can exercise with respect to firms certified by another DOT recipient (see 26.83(e)).

• Recipients can accept an SBA certification for a firm, just as they can accept a certification by another DOT recipient.

• The recipient must ensure that an SBA-certified firm meets the DOT $17.4 million annual average gross receipts cap.

• If the SBA firm has not been the subject of an on-site review, the DOT recipient must perform and evaluate the results of such a review before completing the certification. The recipient may also obtain additional information from the firm for administrative purposes.

• On the other hand, the recipient can require the firm to follow the recipient's normal application process, even though SBA (or another DOT recipient) has already certified it.

Can recipients and UCPS charge application fees to firms seeking DBE certification? (Section 26.83(f)) (Posted - 12/09/11)

• No, unless the relevant DOT operating administration approves the fee.

• An application fee may be charged only "subject to the approval of the concerned operating administration as part of your DBE program." This means that a certifying entity is prohibited from charging such a fee unless the concerned operating administration has approved it.

• This approval concerns not only the concept of charging a fee, but the specific dollar amount of a fee.

• If a certifying entity is currently charging an application fee in the absence of the concerned operating administration's approval, the certifying entity should immediately stop charging it.

• To be approved, a fee must be "reasonable." In keeping with the objective of encouraging firms to apply for DBE certification, rather than deterring them from doing so, any application fee should be modest.

• Recipients are reminded that fee waivers should be made in appropriate cases.

What is a "notice of change" and when should recipients require DBE firms to submit one? (Section 26.83(i)) (Posted - 4/12/99)

• A "notice of change" is a written affidavit that DBE firms must provide to the recipient within 30 days of any change in their circumstances affecting their ability to meet part 26 eligibility standards regarding size, disadvantage, ownership and control.

• A notice of change must include documentation describing the change in detail.

• The notice of change requirement became effective March 4, 1999.

• Recipients should ensure that all currently certified DBEs are aware of their obligation to submit notices of change.

• For purposes of this notice requirement, a "change" in the firm's circumstances includes a change in the regulation (e.g., from former part 23 to part 26) that affects the firm's eligibility. For example, part 26 includes a $1,320,000 personal net worth cap that was not included in former part 23. A disadvantaged owner whose net worth exceeds this amount is obligated to file a notice of change.

What is a "no change" affidavit and when should recipients require DBE firms to submit one? (Section 26.83(j)) (Posted - 4/12/99 - Edited 12/7/01)

• A "no change" affidavit is an affidavit each DBE firm must provide to the recipient annually on the anniversary date of the firm's certification. The affidavit affirms that there have been no changes in the firm's circumstances affecting its ability to meet part 26 size, disadvantage, ownership, and control standards (except for changes about which the firm has submitted a "notice of change" to the recipient).

• With a "no change" affidavit, the rule requires a firm to submit supporting documentation concerning its size and gross receipts.

• The "no change" affidavit requirement became effective March 4, 1999, for all DBE firms.

• All firms certified under former part 23 will have a certification anniversary date no later than March 3, 2000. Therefore, recipients should ensure that all such firms have submitted their initial "no change" affidavits in that time, each by its own certification anniversary date, and each year thereafter.

• For purposes of this notice requirement, "no change" in the firm's circumstances means, among other things, that changes in the regulation (e.g., from former part 23 to part 26) have not affected the firm's eligibility. For example, part 26 includes a $1,320,000 personal net worth cap that was not included in former part 23. By submitting a "no change" affidavit, the owner of a DBE firm is affirming that his or her personal net worth does not exceed $1,320,000. Recipients should ensure that currently certified DBEs are aware of this obligation.

Are DBE and ACDBE firms required to transmit notices of change and affidavits of no change to all recipients/UCPS with which they are certified? (Section 26.83(i)-(j)) (Posted - 12/09/11)

• Yes. A DBE or ACDBE, including one that is certified in more than one state, must always send an annual affidavit of no change or, as needed, a notice of change, to every recipient/UCP with which it is certified. For firms certified in more than one state, sending such documents only to the firm’s home state is not sufficient.

• This requirement applies to ACDBEs under 49 CFR Part 23 as well as DBEs under 49 CFR Part 26.

• The fact that ACDBEs and DBEs remain certified until or unless decertified does not affect the requirement to provide annual affidavits of no change and notices of change.

• Failure to provide these documents subjects a firm to decertification proceedings for failure to cooperate (see 49 CFR 26.109(c)).

• When providing an affidavit of no change, the firm must attach documentation showing that it continues to meet applicable small business size standards. Recipients/UCPs may request additional information (e.g., concerning personal net worth or the firm's independence) where there is reason to believe that additional verification is necessary.

Is an on-site review of a firm necessary to certify a firm? To deny certification to the firm? Section (26.83(c)1)) (posted 2/12/02)

• As a recipient, you are not permitted to certify a firm as an eligible DBE unless there has been an on-site review of its eligibility that you take into account in making your decision. There are no exceptions to this requirement, which is crucial to preventing DBE fraud and ensuring the integrity of the DBE program.

• However, there are some situations in which you may deny certification to a firm without an on-site review.

• Generally, these situations are ones in which the information contained in the firm's application, viewed in the light most favorable to the firm, precludes it from being certified.

- Here are examples of these situations:

    - The personal net worth statement of the sole owner of a firm exceeds the $1.32 million limit
    - The firm exceeds the $23.98 million cap on gross annual receipts, averaged over three years, or exceeds the applicable SBA business size standard
    - The applicant fails to cooperate with the recipient's information requests (e.g., an owner refuses to supply necessary personal net worth information)
    - It is clear from the application that disadvantaged individuals do not own or control the firm (e.g., that non-disadvantaged individuals own 60 percent of the stock, or that white males make all day-to-day business decisions of the company)

• In other situations, there must be an on-site review before you deny a firm's application for certification.

Would it be acceptable for a multi-state unified certification program (UCP) to be formed by states in a region, so that DBE firms would only need to apply to one of the UCP's involved? (Section 26.81) (Posted - 4/12/99)

• If all UCPs in a region agreed to use the same form, process, and procedure, and a firm certified by one recipient was accepted by all, that would satisfy the "one-stop shopping" requirement of part 26.

• The Department encourages recipients and UCPs to work together to form regional UCPs or to have other reciprocity agreements. Doing so will further reduce burdens on small businesses.

WHAT HAPPENS IF A STATE FAILS TO RESPOND TO DOT COMMENTS ON ITS DRAFT UCP? (Section 26.81) (Posted - 9/1/05)

• The DBE rule requires all recipients in a state to participate in a UCP. DOT must approve the UCP before the recipients in the state are regarded as complying with this requirement.

• If a state has submitted a draft UCP, on which the Department has commented, the state has an obligation to respond promptly with a revised UCP draft that accommodates the comments.

• If the state has not responded in a timely manner, DOT will send a letter directing the state to furnish the response within 60 days. If the state does not respond as directed, then the recipients responsible for participating in the UCP will be regarded as being in noncompliance with the DBE regulation.

What actions does a recipient take after it requests a currently certified firm to undergo a certification review? (Posted - 9/22/00)

• When a recipient requires a currently certified firm to undergo a certification review, the recipient should not treat the firm as though it were a new applicant.

• While the firm must provide all requested information, the firm does not bear the burden of proving its eligibility, as it would upon initial application.

• If the recipient determines, based on the information in the reapplication for certification, that there is reasonable cause to believe that the firm is no longer an eligible DBE, the recipient would begin a 26.87 proceeding to remove the firm's eligibility.

• If the firm does not provide the requested information in a timely manner, the recipient could begin a 26.87 proceeding to remove the firm's eligibility on the ground of failure to cooperate (see 26.109(c)).

Are there any circumstances in which a recipient may remove the eligibility of certified DBE firms without going through the procedures of §26.87? (Section 26.87) (Posted - 9/1/05)

• There is only one situation in which a recipient may remove the eligibility of a certified DBE firm without a §26.87 decertification proceeding. That is when the DBE firm does not dispute that the personal net worth of an owner necessary to its certification exceeds $1.32 million.

• In ALL other cases, without exception, a recipient is not permitted to remove the eligibility of a certified firm without a §26.87 decertification proceeding.

• In particular, a recipient is not permitted to automatically remove the eligibility of a firm without a §26.87 decertification proceeding because the firm has not responded to the recipient's request for recertification information or has failed to submit an affidavit of no change in a timely manner.

• In such cases, the recipient would begin a §26.87 decertification proceeding on the ground that the firm has failed to cooperate (see §26.109(c)). This could be an administrative "default judgment" process in which, if the firm also did not respond to the notice initiating the §26.87 action, the

recipient could issue a notice decertifying the firm without further proceedings.

• If a recipient has mistakenly removed the eligibility of a firm without a §26.87 decertification proceeding, the recipient must immediately restore the firm to the list of certified DBEs and then, if appropriate, pursue a §26.87 proceeding. A recipient who fails to do so is in noncompliance with Part 26.

• While there are numerous reasons for which a firm's certification can be lost or its DBE eligibility terminated, it is important to note that there is no such thing in the DBE program as the "expiration" of a certification (i.e., a "term limit" of a certain number of years on the firm's eligibility). Once certified, a firm remains certified until and unless it is decertified.

When a state makes a significant change to its UCP plan, is it required to resubmit the plan to DOT for approval? (Section 26.81) (Posted - 9/1/05)

• Yes. It is similar to the requirement for a significant change to a DBE program.

• Under § 26.21(b) (2), the recipient is not required to submit updates to its program, but any significant change must be submitted and approved by DOT.

• Similarly, recipients must submit significant changes to their UCP plans to DOT for approval.

• The following are examples of a significant change to a UCP plan:
o In a state's original plan, one agency was responsible for performing certifications. In a time of state budget constraint, the legislature eliminates funding for the agency. This would force the state to develop a new system for certification.
o Different agencies within a state have different functions regarding certification. For some reason, they believe it necessary to restructure and realign those agencies and their functions with regards to certification.
o An important player in a UCP plan (e.g., an airport authority) wants to cease participating in the UCP.

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Certification Standards

Section 26.81(b); Appendix F; 26.35 What, and how much, assistance is it appropriate for a prime contractor to provide a DBE? (Posted - 6/18/08)

• A DBE must be independent to be eligible for certification. In thinking about the assistance that prime contractors may properly provide to DBEs, recipients should determine whether there is a pattern of close, pervasive ties between a DBE and the prime contractor. If it appears that, absent its ties to a prime contractor, a DBE firm is not viable; it should not be regarded as independent. A firm must be independent to be eligible for DBE certification.

• In Appendix A, the Department mentions that it is appropriate for prime contractors to provide assistance to DBEs in a variety of areas, such as bonding, credit, insurance, equipment, materials and

supplies.

• In providing such assistance, a prime contractor should be careful not to provide so much assistance to a particular DBE in so many areas that a reasonable recipient or UCP would conclude that the DBE is not viable without the relationship to the prime contractor. It makes sense for a prime contractor to pick and choose ways of assisting a DBE that do not become so pervasive as to create independence issues. This assistance should be transparent and arms-length.

• As part of their contract performance oversight functions, recipients should continue to scrutinize the independence of DBEs as they work on projects. Recipients may require prime and subcontractors to report any contract performance issues that could call a DBE's independence into question.

• One situation that has been brought to the Department's attention concerns the use of cranes. Often, according to stakeholders, a crane provided by a prime contractor may be used jointly on a project by the prime contractor and subcontractors, including DBEs, as it is not practical or economically feasible for each contractor to have its own crane.

• In this situation, the Department believes that, as long as such arrangements are consistent with normal industry practice in a given jurisdiction, the joint use of a prime contractor's crane by a DBE should not cause the DBE to be regarded as failing to meet independence requirements for certification.

• We note, however, that as provided in 26.55(a) (1), the cost of equipment purchased or leased by a DBE from a prime contractor does not count for DBE credit. Consequently, if a charge for the use of a prime contractor's crane (as distinct from the DBE's labor in operating the crane) is part of the cost OF THE DBE's contract, it would be subtracted from the DBE credit allowed for the contract.

• There may be occasional short-term or emergency circumstances in which a DBE uses a prime contractor's equipment, supplies, etc. to a limited degree (e.g., the DBE's backhoe breaks down, and the DBE uses the prime contractor's backhoe for the rest of the day). Such short-term, limited use, as distinct from a pattern or practice of such use, would not usually result in a DBE being regarded as having lost the independence needed for certification and would not result in a subtraction from the DBE credit allowed for the DBE's work on the contract.

• It is possible that a group of prime contractors, or a state or local prime contractor's association, could join efforts to provide various kinds of assistance to a considerable number of DBEs in the jurisdiction in a way that would not create a dependent relationship between any given DBE and a particular prime contractor.

• Prime contractors with questions about the appropriateness of their assistance relationships with DBEs should consult in advance with recipients or the state's UCP, who should be prepared to provide advice about whether the relationship or some aspects of it may be problematic. If a recipient provides an opinion about the appropriateness of a relationship, the recipient should make clear that, even if the relationship appears appropriate on its face, dealings between the prime contractor and the DBE during the implementation of the contract could still run contrary to the independence requirements of the DBE rule.

• Mentor-protégé programs meeting the requirements of 26.35, which contain safeguards for the independence of DBE protégés, are another method through which prime contractors can assist DBEs without creating independence issues. Note that only a firm that the recipient has already certified as a DBE (necessarily including a determination that the firm is independent) can participate as a protégé.

When should recipients require owners of a DBE firm to submit a statement of disadvantage (Section 26.67(a) (1)) (Posted - 4/12/99)

• A "statement of disadvantage" is a signed, notarized certification by each presumptively disadvantaged owner of a firm that he or she meets part 26 standards for social and economic disadvantage.

• This certification of disadvantage is a separate requirement from the requirement of 26.67(a) (2) for a statement of personal net worth.

• When a recipient certifies the eligibility of a DBE firm, 27.67(a) (1) requires recipients to obtain a certification of disadvantage from each disadvantaged owner of the firm.

• By signing such a statement, the owner certifies that his or her net worth does not exceed $1,320,000

• Unlike the separate personal net worth statement, part 26 does not require owners to submit any supporting documentation with the statement of disadvantage. Therefore, it would be contrary to the rule for a recipient to require DBE owners to submit a narrative supporting their certification as it applies to social disadvantage.

How does the "home state first" provision of the DBE rule work when a firm seeks or has obtained certification in more than one state? (Section 26.81(d), 26.83(i))(Posted – 9/1/05)

• Under §26.81(d), a UCP "is not required to process an application for certification from a firm having its principal place of business outside the state if the firm is not certified by the UCP in the state in which it maintains its principal place of business."

• This provision is intended to prevent undue administrative burdens on certifying agencies. Given resource limitations, it could be very difficult for certifying agency personnel to travel to other parts of the country to conduct on-site reviews of applicant firms based in other states.

• Suppose that Firm X has its principal place of business in State A. It has never been certified there. It applies for certification in State B. State B's UCP is permitted to decline to consider its initial application.

• If Firm X has been certified in Home State A and then applies for initial certification in State B, State B's UCP must process its application. State A would transmit a copy of its on-site review report to State B for State B's consideration.

• If Firm X was originally certified in Home State A, was decertified there, and subsequently submitted an initial application for certification to State C, State C's UCP would be permitted to decline to consider its application, since the firm was not certified in its home state at the time it

applied to State C.

• If Firm X was originally certified in Home State A, then became certified in State B, and was subsequently decertified in State A, the firm remains certified in State B until and unless State B decertifies the firm through a §26.87 proceeding conducted by State B. Firm X does not lose its certification in State B automatically because it was decertified in Home State A.

• Certified DBEs have an obligation, under §26,83(i), to inform recipients in writing of any material change in their circumstances. This includes a loss of eligibility in any state in which the firm has been certified. Consequently, if Firm X is certified in its Home State A and in State B, and then is decertified in State A, it must notify State B of the decertification.

• In such a situation, State B should seriously consider whether to commence a §26.87 decertification action against the firm. Once State B learns of State A's action, State B should contact State A for information about the decertification. State B's UCP should use this and other available information in deciding whether to initiate a §26.87 decertification action.

If a firm is certified as a DBE or ACDBE in one type of business, under what circumstances can it be certified for another type of business? Section 26.71(e), (f), (n); 49 CFR 23.31, 23.37 (h) (Posted - 6/18/08)

• When a firm is certified for one type of business, it cannot work as a DBE or ACDBE in another type of business – whether individually or as part of a joint venture – unless it becomes certified for the additional type of concession.

• Section 26.71(n) provides as follows:

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

• These requirements apply to ACDBEs under Part 23 (see 23.31) as well as to DBEs under Part 26.

• The disadvantaged owners of a DBE or ACDBE can delegate some management and other functions to other persons. However, this does not eliminate the need of the disadvantaged owners to possess the requisite experience and expertise to control the overall business decisions and daily operations of the business seeking certification. See 26.71(e) and (f).

• For example, suppose an ACDBE is certified as the operator of a news/gift store. The firm wants to become part of a joint venture that will operate a restaurant. The ACDBE would first have to be certified as a restaurant operator, in accordance with 26.71(n) (which applies to certifications of ACDBEs under Part 23 as well as to those of DBEs under Part 26) before any ACDBE credit could be counted for its work with the restaurant joint venture.

• To certify the ACDBE as a restaurant operator in this example, the certifying agency would have to conclude that the firm carried its burden of proof that its disadvantaged owners can control the firm's operations in the restaurant business.

• In making its decision, the certifying agency should consider the general management experience of the disadvantaged owners in other types of business as a factor in determining whether the firm meets its burden of proof under 26.71(n). There is no presumption that management experience in another business necessarily provides everything that the owner must demonstrate in order to meet this burden, however.

• In considering what constitutes a "specific type of work" for purposes of 26.71(n), certifying agencies should look beyond the NAICS code applicable to the business. Some NAICS codes may be too broad for certification purposes.

• For example, the NAICS code for engineering services can encompass all types of engineering firms. An electrical engineer may not necessarily have the knowledge and experience to control the day-to- day operations of a firm engaged in civil engineering.

• There may be situations in which moving into an additional type of work does not require significantly different expertise. A firm may be able to move from one type of construction to another (e.g., sewer construction to demolition) simply by obtaining additional equipment. On the other hand, there can also be types of construction that it is more difficult to move into (e.g., sewer construction to asphalt paving) without significant additional expertise. Certifying agencies should try to distinguish between these types of situations and make certification judgments accordingly.

In the certification actions, how should certifying agencies describe the types of work a firm is certified to perform as a DBE? Section 26.71(n) (Posted - 7/15/09)

• Recipients and UCPs must certify firms as DBEs only with respect to specific types of work in which the certifying agency has determined that the socially and disadvantaged owners control the operations of the firm. Appendix F to Part 26 is a sample Uniform Certification Application Form. A DBE firm is asked to provide "the primary business and professional activities the firm is engaged in."49 CFR Part 26, Appendix F, Section 2(B) (1). In certifying a firm, a recipient or UCP "must grant certification only for the specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm" (sec. 26.71(n)). Consequently, there is no such thing as a "generic" certification of a firm as a DBE.

• The types of work a firm can perform (whether on initial certification or when a new type of work is added) should be described in terms of five-digit NAICS codes. Firms and recipients should check carefully to make sure that the NAICS codes cited in a certification are kept up-to-date and accurately reflect work which the UCP has determined the firm's owners can control.

• A correct NAICS code is one that describes, as specifically as possible, the principal goods or services which the firm would provide to DOT recipients. Multiple NAICS codes should be assigned, where appropriate. The Bureau of Census web site (www.census.gov/naics) provides additional information about the details of NAICS codes. The firm has the primary responsibility to provide the detailed company information the certifying agency needs to make an appropriate NAICS code designation.

• Program participants should rely on, and not depart from, the plain meaning of the NAICS code descriptions in determining the scope of a firm's certification. However, in situations in which a program participant believes that the NAICS codes on record for the firm do not adequately describe the scope of the work the firm's owner can control, program participants should use the guidance in the next two paragraphs of this Q&A.

• If a firm believes that there is not a NAICS code that fully or clearly describes the type(s) of work in which it is seeking to be certified as a DBE, the firm may request that the certifying agency, in its certification documentation, supplement the assigned NAICS code(s) with a clear, specific, and detailed narrative description of the type of work in which the firm is certified. A vague, general, or confusing description is not sufficient for this purpose, and recipients should not rely on such a description in determining whether a firm's participation can be counted toward DBE goals.

• A certifier is not precluded from changing a certification classification or description if there is a factual basis in the record. However, certifiers should not make after-the-fact statements about the scope of a certification, not supported by evidence in the record of the certification action.

• EXAMPLE: The Sagebrush State UCP certifies the W.E. Coyote Company (WEC) to do traffic control work in August. In November, WEC is proposed as a DBE subcontractor on a Sagebrush State Highway Administration (SSHA) highway project to do bird impact mitigation. Wildlife impact mitigation is not included within the NAICS code for traffic control.

○ (1) During its review of the bid/offer, SSHA asks the UCP to review its record of the WEC certification. The UCP determines that it had evidence at the time of the WEC's certification that the disadvantaged owner of WEC could control the operations of the firm with respect to wildlife impact mitigation. The UCP sends a letter to SSHA indicating that, based on the cited evidence, the scope of its certification should be amended to include this type of work. The UCP modifies WEC's entry in the UCP's directory accordingly. SSHA can consider UCP's letter in determining whether WEC can count toward the DBE goal on the project for its bird impact mitigation work.

○ (2) During its review of the bid/offer, SSHA asks the UCP to review its record of the WEC certification. There is no evidence in the UCP's record, contemporaneous with the UCP's certification of the firm, that the disadvantaged owner of WEC could control the operations of the firm with respect to wildlife impact mitigation. Under these circumstances, if the UCP sends a letter to SSHA stating its opinion that WEC is certified for wildlife impact mitigation, SSHA should not consider the UCP's letter in determining whether WEC can count toward the DBE goal on the project.

How do recipients determine the eligibility of firms owned by an Indian Tribe or an Alaska Native Corporation? (Section 26.73 (h) (i)) (Posted 2/12/02)

• Any Indian Tribe may own a DBE firm as an entity. It is not necessary, in these cases, that disadvantaged individuals (i.e., natural persons) own the firm.

○ However, the firm must be controlled by socially and economically disadvantaged individuals (see §26.71). For example, suppose the CEO of a firm owned by an Indian Tribe is a non-disadvantaged white male, or that such persons effectively control the day-to-day business operations of the firm. The firm would not be an eligible DBE, because it is not controlled by socially and

economically disadvantaged individuals.

○ The disadvantaged individuals who control the firm need not necessarily be members of the Tribe that owns the business. For example, the CEO of a tribally-owned business could be Hispanic.

○ One implication of the control requirement is that disadvantaged individuals involved in controlling the firm must meet personal net worth (PNW) standards (see §26.67(a)(2); (b)). Not every member of the Indian Tribe has to meet these standards or complete a PNW statement. Only the disadvantaged officers, board members, CEO, etc. who actually control the firm must do so. These individuals would also be responsible for submitting the certification of disadvantage required by §26.67(a) (1).

○ Recipients would look to these same disadvantaged individuals who must submit PNW statements to determine whether the persons claiming to control the firm meet other requirements of §26.71 (e.g., with respect to expertise).

○ The firm must also meet the regulation's size standards (see §26.65). These standards provide that the firm - including its affiliates -- must meet SBA size standards and the statutory DBE size cap.

○ Affiliation is an important concept in the DBE program. It does apply to firms owned by Indian Tribes. If it did not, then these firms could enjoy a significant competitive advantage over other DBE firms, because they could have access to the sometimes plentiful resources of their affiliates. At the same time, the Department recognizes that Indian Tribes often own a variety of businesses that could be considered affiliates because of common ownership by the entity. Literal application of the affiliation rule might therefore result in precluding firms owned by Indian Tribes from participating in the DBE program.

○ Consequently, the Department interprets its rule to treat firms owned by Indian Tribes as entities as not being affiliated with other businesses owned by the entities if there is a firewall (i.e., a legally binding mechanism) in place to prevent the firms from accessing the resources of the entities' other businesses. For example, suppose an Indian Tribe owns a small construction company that is seeking DBE certification. The Tribe also owns several non-transportation related businesses. To avoid being considered an affiliate of the other businesses, the construction company would have to be subject to a legally binding provision precluding it from receiving any funds or other resources, directly or indirectly, from the other businesses.

○ Alaska Native Corporations (ANCs) are treated differently from Indian tribes, as the result of a legislative mandate.

○ An ANC-owned firm, if it has been certified by SBA under the 8(a) or Small Disadvantaged Business program, is an eligible DBE.

○ Such a firm is not required to meet size, ownership, or control requirements applicable to other DBEs.

Are service-connected disabled veteran businesses eligible to participate in the dbe program? Section 26.5(Posted - 9/1/05)

• Executive order 13360 requires Federal agencies to set goals for and otherwise give special consideration to service-connected disabled veteran businesses in direct Federal contracting. This Executive Order concerns only direct Federal procurement by Federal agencies themselves.

• The Department's DBE program concerns only contracts let by state and local agencies in which DOT financial assistance participates. The Executive Order does not have the effect of creating a presumption that service-connected disabled veterans are socially and economically disadvantaged for purposes of the DBE program or establishing a goal for the use of firms owned by such veterans in state and local contracts receiving DOT financial assistance.

• The Department of Transportation encourages service-connected disabled veterans, as well as other individuals with disabilities, to apply for participation in the DBE program.

• A service connected disabled veteran who is a member of one of the groups presumed in the DBE program to be socially and economically disadvantaged can apply for DBE certification.

• Individuals with disabilities, including service-connected disabled veterans, can also apply for DBE certification on an individual basis, even if they are not members of groups presumed to be socially and economically disadvantaged for purposes of DBE program.

• Appendix E to Part 26 explains how an individual who is not a member of one of the groups presumed to be disadvantaged can show that he is disadvantaged on an individual basis. The discussion in this Appendix specifically provides that individuals with disabilities are among those who can use this approach to enter the DBE program.

Can a not-for-profit firm be certified as a DBE (posted – 2/23/99)

• No. Only a for-profit firm may be certified as a DBE.

• However, a firm owned by an Indian tribe or Alaska Native Corporation as an entity may be certified as a DBE.
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Fostering Small Business Programs

Section 26.21, etc. – What actions should a recipient take before implementing a small business program on federally assisted projects as a race- and gender-neutral means of facilitating DBE participation in meeting the recipient's overall goal? (Posted 7-15-09)

• Recipients are obligated to meet the maximum feasible portion of their overall goal through race- and gender-neutral means of facilitating DBE participation. See 49 CFR § 26.51.

• Since the program was substantially revised in 1999, the Department has long recognized that race- and gender-neutral small business set aside programs may be an acceptable means of achieving the objective of § 26.51 without running afoul of the prohibition in § 26.43 against the use of set-asides or quotas. See related Q&A entitled "Does the rule's limitation on the use of set-asides apply to race-

neutral small business set-asides? “ A small business goals program is another example of a race- and gender-neutral program that may provide opportunities for DBEs and non-DBEs to fairly compete for federally assisted contracts.

• If a recipient intends to implement a small business program as one means of achieving its annual overall DBE goal, the recipient must, pursuant to 49 CFR § 26.21(b) (2),
submit to the appropriate operating administration for prior approval an amendment to its DBE program plan to identify the program as an initiative implemented to provide contracting opportunities to DBEs and other small businesses.

• In amending the DBE program plan, the small business program does not replace the DBE program or otherwise operate as a substitute for the DBE program. It is simply another race- and gender-neutral tool that may offer additional contracting opportunities to DBEs. Recipients are not required to develop such a program.

• When a recipient uses a small business program to achieve DBE participation, it may count only the participation of small businesses that are certified under 49 CFR Part 26 toward its annual overall DBE goal. Race- and gender-neutral DBE participation obtained through the small business program must be calculated by dividing the total dollars to DBEs through the small business program by the total federal dollars. Race- and gender- neutral DBE participation is not calculated as a percentage of the total small business program.

• As required by 49 CFR § 26.51(d), a recipient is expected to establish DBE contract
goals to meet any portion of the annual overall goal it is unable to meet through the small business program or other race-neutral measures.

• A proposed DBE program plan amendment should, at a minimum, contain the following elements:
○ a detailed description of the small business program, its objectives, and how it is designed to operate (e.g., firm eligibility/size criteria and means of ensuring eligibility of participating firms);
○ assurance that the program is authorized under state law;
○ assurance that certified DBEs that meet the size criteria established under the program are presumptively eligible to participate in the program;
○ assurance that there are no geographic preferences or limitations imposed on any federally assisted procurement included in the program;
○ assurance that there are no limits on the number of contracts awarded to firms participating in the program but that every effort will be made to avoid creating barriers to the use of new, emerging, or untried businesses; and
○ assurance that aggressive steps will be taken to encourage those minority and women owned firms that are eligible for DBE certification to become certified.
○ assurance that the program is open to small businesses regardless of their location
(i.e., that there is no local or other geographic preference).

• As a condition of approval, operating administrations may, in consultation with the recipient, limit the size and type of federally assisted contracts that participate in the small business program to ensure effective competition based on the availability of small businesses in the particular industry or work code. The operating administration may not approve the small business program if it conflicts with other relevant federal requirements, and it may rescind its approval if it determines that the program is being implemented in a way that creates a de facto DBE set aside in violation of § 26.43.

Implementation of the small business program is subject to periodic review by the operating administration of its effectiveness in helping the recipient meet its annual overall DBE goal. Approval may be rescinded if the program is ineffective. The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR Part 26.

Does the Rule's limitation on the use of set-asides apply to race neutral small business set-asides? (Posted - 2/23/99)

• The DBE rule defines a set-aside as "a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms." (26.5)

• The rule limits set-asides, defined in this way, to "limited and extreme circumstances, when no other method could be reasonably expected to remedy egregious instances of discrimination." (26.43(b))

• A race-neutral small business set-aside (i.e., in which a recipient sets aside certain contracts for competition only among small businesses, regardless of race or gender) does not restrict contract eligibility solely to DBEs.

• For this reason, the rule's limit on DBE set-asides does not apply to a race-neutral small business set-aside.

• If it will help achieve the objective of the DBE program, a recipient may use a small business set-aside as one of its race-neutral measures.

What are recipients required to submit to the concerned operating administration (OA) to comply with 49 CFR § 26.39? (Posted - 12/06/11)

• Recipients must submit to the appropriate OA an amendment to their DBE program plan that sets forth in detail the steps to be taken to facilitate competition by small business concerns.

• The concerned OA will provide instructions to recipients on whether the amendment should be submitted for review as a stand-alone document or whether it should be incorporated into the recipient's existing DBE program plans. If the amendment is submitted for review as a stand-alone document, it must be integrated into the body of the recipient's DBE program plan document once approved.

• There is no requirement that the DBE plan amendment be signed by all recipients in the state.

• Recipients must submit the program amendment to the concerned OA by February 28, 2012.

By what date must the small business element be implemented? (Posted - 12/06/11)

• The implementation date should be established by the OA when it approves the small business element submitted by the recipient. This date should not be more than nine months after the approval date.

• Recipients are encouraged to include an implementation schedule as part of their submission to ensure the small business element is fully operational within nine months of approval.

Must the recipient address each of the strategies presented as examples in the rule as part of its submission? (Posted - 12/06/11)

• No. The list of strategies set out in the rule is designed to give you some ideas on how to accomplish the objectives of the rule. Additional suggestions may be found in the preamble discussion of the rule at 76 Fed. Reg. 5094. This is not an exclusive list, and you are not expected to explain why one strategy was chosen instead of others.

• Recipients may choose one or more of the listed strategies or may develop any alternative strategy that can be effective in creating contracting opportunities for small businesses.

• Recipients (particularly FTA and FAA recipients) also may collaborate with regional partners by pooling resources and/or creating joint programs, but each recipient in the collaborative must make a submission to the appropriate OA.

• In any case, we believe it to be advisable that your submission address unbundling contracts in the context of your procurement program, even if unbundling is not ultimately a strategy you choose.

• A recipient that has an existing race-neutral small business program that has been used to set aside state-funded contracts for competition among small businesses may decide to use that program for federally-assisted contracts to meet this requirement, subject to OA approval. However, the recipient is not required to do so. If an existing small business program is used to comply with the rule, recipients must take steps to separate state and federal contracts to ensure proper reporting to US DOT of DBE participation on
federally-assisted contracts only.

How should recipients define a small business when developing a small business program to foster small business participation? (Posted - 12/06/11)

• Since the small business element developed by a recipient will be a part of the recipient's approved DBE program plan, recipients should use the definition of small business concerns set out in 49 CFR §26.5.

• This will ensure that all small businesses allowed to participate in the recipient's program (DBEs and non-DBEs alike) are subject to the same size standards and, consequently, compete with similarly- sized businesses.

• A state or local MBE/WBE or other program, in which eligibility requires satisfaction of race/gender or other criteria in addition to business size, may not be used to comply with the rule.

Could a micro-small business program be an appropriate part of a small business element in a DBE program? (Posted - 12/06/11)

• Yes. A recipient may develop a program for very small businesses (e.g., those with annual gross receipts well below the SBA small business size criteria). As part of such a

program, a recipient could also have a lower PNW threshold for owners of the very small businesses.

• Where a recipient creates a micro-small business program, we believe it is a best practice to also provide opportunities to facilitate competition among small businesses that are larger than those eligible to participate in the micro-small business program.

Are small business goals required? (Posted - 12/06/11)

• No. The use of small business goals is optional.

• The use of race-neutral small business goals on the same contracts that have DBE contract goals can be difficult to administer. We recommend that recipients not do so unless they have a clear understanding of these complexities and how they expect to manage them.

Can supportive services programs be used to meet the requirements of section 26.39? (Posted - 12/06/11)

• The FHWA-funded "supportive service program" is intended to be used only to assist DBEs. Recipients should not include services to non-DBEs as part of that program.

• However, a state- or locally-funded supportive services-type program could be made available to non- DBE firms as a part of the recipient's small business program element.

• Outreach activities are not sufficient, standing alone, to meet the requirements of section 26.39.

• Recipients are responsible for taking active, effective steps to increase small business participation.

Should a small business program include a verification requirement? If so, may a recipient rely upon or accept the verification process used by another entity? (Posted - 12/06/11)

• Yes to both questions.

• To ensure that a firm is in fact a small business concern and to minimize fraud and abuse, it is advisable for a recipient to take steps to verify eligibility of a firm to participate in the recipient's program. This means that a program should not allow firms to self- certify/verify as small businesses. A recipient may rely on the certification/verification processes used by another entity as long as the process is designed to confirm eligibility consistent with small business criteria consistent with those of Part 26. A certified DBE is presumed eligible to participate in a small business program developed to comply with 49 CFR §26.39, unless it is a micro-small business program.

• While it is not necessary for a recipient to verify the small business status of every firm that might in some way benefit from the recipient's program, if participation will result in a tangible advantage for a firm (e.g., getting a contract via a small business set-aside program), verification is important to avoid program fraud.

Are recipients expected to report on the level of small business participation achieved through their program? (Posted - 12/06/11)

• No. Recipients will be required only to track and report any race-neutral participation by certified DBEs achieved through their small business element or program in the same way they report race-neutral DBE participation obtained through other methods (see by 49 49 CFR §26.11(a)). Nevertheless, recipients may find it useful to collect data on small business participation obtained through their program, in order to answer any future questions that could arise about the results of their programs.
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How is the small business program element requirement to be applied to sub-recipients? (Posted- 12/06/11)

• The required small business program amendment is part of your overall DBE program. Therefore, it applies to sub-recipients in the same way as your overall DBE program.

• Just as direct recipients are expected to ensure that their sub-recipients comply with goal- setting or certification requirements, so direct recipients are expected to ensure that sub- recipients implement the recipient's approved small business element made a part of the recipient's DBE program plan.
• In any case where a sub-recipient has its own DBE program, separate from that of a direct recipient, the sub-recipient is responsible for creating its own small business program and submitting it to the concerned operating administration for approval.

• In any case where a sub-recipient has its own DBE program, separate from that of a direct recipient, the sub-recipient is responsible for creating its own small business program and submitting it to the concerned operating administration for approval.

What actions should a recipient take before implementing a small business program on federally assisted projects as a race- and gender-neutral means of facilitating DBE participation in meeting the recipient's overall goal? (Posted - 12/06/11)

• In establishing a race-neutral small business set-aside as a measure under the small business program element required by section 26.39, you should follow the guidance in the July 2009 Q&A below.

• It is important to note that implementing a small business element or program is intended to facilitate compliance with the twin obligations in 49 CFR §26.51:
○ (1) to meet the maximum feasible portion of the overall goal by using race-neutral means of obtaining DBE participation and (2) to establish DBE contract goals to
meet any portion of the overall goal you are unable to meet using race-neutral means alone.

The DBE rule appears to prohibit set-asides. How, then, is it permitted to have small business set-asides as part of the small business program element? (Posted - 12/06/11)

• Section 26.43 generally prohibits the use of set-asides for DBEs. This means that limiting competition on a contract to DBEs – a category based on race- or gender-based classifications – is forbidden. It is the race-conscious nature of a DBE set-aside that necessitates this prohibition.

• A small business set-aside is different. In this case, competition is limited only on the basis of

business size. This is a race-neutral, rather than race-conscious, classification. Consequently, a small business set-aside does not fall under the prohibition applying to DBE set-asides.

What actions should a recipient take before implementing a small business program on federally assisted projects as a race- and gender-neutral means of facilitating DBE participation in meeting the recipient's overall goal? Section 26.21(b)(2); 26.43; 26.51(b)? (Posted - 7/15/09)

• Recipients are obligated to meet the maximum feasible portion of their overall goal through race- and gender-neutral means of facilitating DBE participation. See 49 CFR § 26.51.

• Since the program was substantially revised in 1999, the Department has long recognized that race- and gender-neutral small business set aside programs may be an acceptable means of achieving the objective of § 26.51 without running afoul of the prohibition in § 26.43 against the use of set-asides or quotas. See related Q&A entitled "Does the rule's limitation on the use of set-asides apply to race-neutral small business set-asides? " A small business goals program is another example of a race- and gender-neutral program that may provide opportunities for DBEs and non-DBEs to fairly compete for federally assisted contracts.

• If a recipient intends to implement a small business program as one means of achieving its annual overall DBE goal, the recipient must, pursuant to 49 CFR § 26.21(b) (2), submit to the appropriate operating administration for prior approval an amendment to its DBE program plan to identify the program as an initiative implemented to provide contracting opportunities to DBEs and other small businesses.

• In amending the DBE program plan, the small business program does not replace the DBE program or otherwise operate as a substitute for the DBE program. It is simply another race- and gender-neutral tool that may offer additional contracting opportunities to DBEs. Recipients are not required to develop such a program.

• When a recipient uses a small business program to achieve DBE participation, it may count only the participation of small businesses that are certified under 49 CFR Part 26 toward its annual overall DBE goal. Race- and gender-neutral DBE participation obtained through the small business program must be calculated by dividing the total dollars to DBEs through the small business program by the total federal dollars. Race- and gender- neutral DBE participation is not calculated as a percentage of the total small business program.

• As required by 49 CFR § 26.51(d), a recipient is expected to establish DBE contract goals to meet any portion of the annual overall goal it is unable to meet through the small business program or other race-neutral measures.

• As a condition of approval, operating administrations may, in consultation with the recipient, limit the size and type of federally assisted contracts that participate in the small business program to ensure effective competition based on the availability of small businesses in the particular industry or work code.

• The operating administration may not approve the small business program if it conflicts with other relevant federal requirements, and it may rescind its approval if it determines that the program is being implemented in a way that creates a de facto DBE set aside in violation of § 26.43.

• Implementation of the small business program is subject to periodic review by the operating administration of its effectiveness in helping the recipient meet its annual overall DBE goal. Approval may be rescinded if the program is ineffective.

• A proposed DBE program plan amendment should, at a minimum, contain the following elements:

1. a detailed description of the small business program, its objectives, and how it is designed to operate (e.g., firm eligibility/size criteria and means of ensuring eligibility of participating firms);
2. assurance that the program is authorized under state law.
3. assurance that certified DBEs that meet the size criteria established under the program are presumptively eligible to participate in the program;
4. assurance that there are no geographic preferences or limitations imposed on any federally assisted procurement included in the program;
5. assurance that there are no limits on the number of contracts awarded to firms participating in the program but that every effort will be made to avoid creating barriers to the use of new, emerging, or untried businesses;
6. assurance that aggressive steps will be taken to encourage those minority and women owned firms that are eligible for DBE certification to become certified; and
7. assurance that the program is open to small businesses regardless of their location (i.e., that there is no local or other geographic preference).

Should a personal net worth (PNW) requirement be a part of any small business program used to comply with this requirement? (Posted - 12/06/11)

• A recipient has the option of establishing a PNW threshold as an eligibility criterion for its small business program element. Except in a micro-small business program (where a PNW threshold could be lower), if a recipient chooses to establish such a requirement as part of its program, the PNW threshold should be consistent with the one in 49 CFR Part 26.
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Commercially Useful Function

How should recipients evaluate the commercially useful function performed by DBE contractors performing "furnish and install" contracts? Section 26.55(c) (Posted - 5/24/12)

• Section 26.55 (c)(1) provides that "[t]o provide a commercially useful function, the DBE must . . . be responsible, with respect to materials and supplies used on a contract, for negotiating price, determining quality and quantity, ordering the material, and installing .

. . and paying for the material itself." This section instructs recipients to "evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid is commensurate with the work it is actually performing and the DBE credit claimed for the performance of the work, and other relevant factors."

• Section 26.55(c)(2) adds that a DBE does not perform a commercially useful function (CUF) "if its role is limited to that of an extra participant in a transaction, contract or project through which funds

are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, you [i.e., the recipient] must examine similar transactions, particularly those in which DBEs do not participate."

• In a "furnish and install" contract, a DBE subcontractor obtains the materials to be used for a project and then installs the material. In determining whether the DBE performs a CUF, it is appropriate for a recipient to look separately at the work of the DBE in obtaining the materials and installing them.

• With respect to installation, the DBE performs a CUF if it does the work of installation with its own forces. As section 26.55(c)(1) notes, the firm must be paid commensurate with the work it is actually performing and the amount of DBE credit claimed for its performance. If a firm meets these requirements, it can receive DBE credit for performing a CUF with respect to installation, regardless of whether it has also performed a CUF with respect to furnishing the materials it has installed.

• With respect to obtaining materials, the DBE must, in order to receive DBE credit, perform all four functions identified in section 26.55(c)(1). These are (1) negotiating price; (2) determining quality and quantity; (3) ordering the material; and (4) paying for the material itself. If the DBE does not perform all of these functions, it has not performed a CUF with respect to obtaining the materials, and the cost of the materials could not be counted toward DBE goals.

• While section 26.55(c)(1) also tells recipients to consider industry practices, this language does not overrule the requirement that a DBE "must" perform the four enumerated functions.

• The Department understands that there may be some kinds of transactions in which no subcontractor performs one of the four required functions (e.g., a prime contractor decides who will supply a commodity and at what price, with the result that a subcontractor cannot negotiate the price for the item). In such situations, the way the transaction occurs does not lend itself to the performance of a CUF by a DBE subcontractor, and it is not appropriate to award DBE credit for the acquisition of the commodity by the DBE subcontractor. All the DBE has done with respect to acquiring the commodity is to carry out, in a ministerial manner, a decision made by the prime contractor.

• Recipients should communicate with DBEs and non-DBE contractors to avoid unrealistic expectations of the credit that can be awarded in a particular type of transaction.

How does the part 26 requirement that a DBE firm must do 30 percent of the work of a contract with its own forces to perform a commercially useful function relate to some recipients' requirements that all firms perform a greater percentage (e.g., 50 percent) of the work on all contracts? Section 26.55(c)(3) (Posted - 4/12/99)

• A requirement that all firms perform at least 50 percent of the work of a contract with their own forces is a matter of recipient procurement policy that does not conflict with the dot DBE rules.

• For a recipient who has such a requirement, all contractors will necessarily perform more than 30 percent of the work of their contracts with their own forces.

• Consequently, all DBE firms subject to this requirement will automatically meet the 30 percent requirement for performing a commercially useful function, since they have to be performing more than that amount of work with their own forces to get a contract in the first place.

May a recipient require that a DBE trucking firm own more than one truck in order to be regarded as performing a commercially useful function? section 26.55(d), 26.73(a)(1) (Posted – 4/12/99)

• Section 26.55(d) provides that, to be regarded as performing a commercially useful function, a DBE trucking company must own at least one truck of its own (which is insured and operable). Consequently, it would be inconsistent with part 26 for a recipient to require DBE trucking companies to own two or more trucks in order to be regarded as performing a commercially useful function.

• This issue, like all issues involving the "commercially useful function" concept, focuses solely on counting DBE participation toward goals, and does not enter into certification decisions (see 26.73(a)(1)).
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Ownership

If there is a change in the ownership of a DBE-certified firm, is the firm automatically decertified?

• No. A certified DBE firm remains certified until and unless it is decertified. A recipient or UCP can decertify a firm only by using the procedures set forth in section 26.87.

• Under section 26.83(i), a certified DBE firm is required to notify the recipient or UCP in writing within 30 days of any material change in circumstances that could affect its ability to meet certification requirements, or any material change in the information provided in the firm's application form, including those pertaining to ownership and contact information (see 5th paragraph of Affidavit of Certification, in Appendix F of 49 CFR Part 26).

• The DBE must send this notice to all recipients or UCPs with which it is certified.

• If the firm fails to provide this written notice within 30 days of the occurrence of the change, the firm is subject to decertification for failure to cooperate as provided in sections §26.73(c) and 26.109(c).

• Along with the notice of change, the DBE must attach supporting documentation describing the change in detail, including documentation that supports the disadvantaged status of any new owner(s) and their ownership and control of the firm.

• The recipient or UCP may require the firm to provide additional documentation if necessary to determine whether the new owner meets disadvantage, ownership, and control requirements, and it may conduct a new on-site review of the firm.

• If the firm's notice and documentation concerning a change in ownership or other material change leads a recipient or UCP to determine that the firm has become ineligible (e.g., because the new owner is not a disadvantaged individual or does not control the business), the recipient or UCP should initiate a section 26.87 decertification proceeding. The firm remains certified pending the outcome of the proceeding.

• We urge recipients and UCPs to give priority to the review of the eligibility of firms whose circumstances have materially changed and, where appropriate, to conduct decertification proceedings expeditiously.
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Counting

What types of contracts can be counted toward DBE goals? (Section 26.3(a), 26.55) (posted 4-12-99)

• DBE participation can be counted toward goals for any contract let by the recipient in which Federal funds listed in 26.3(a) participate.

• If a recipient lets a contract to any type of contractor, and Federal funds listed in 26.3 participate in that contract, then the DBE's participation would count toward the recipient's DBE goals.

• Part 26 does not limit the type of contractors who can participate in the DBE program or the types of contracts appropriate for DBE participation. All DOT-assisted contracts, whether construction or non-construction (e.g., professional services, consulting, supplies) can be used for DBE participation.

• Recipients should be aware that there may be some types of contracts that are not eligible for the Federal assistance specified in 26.3 (e.g., contracts supporting transit operations for some FTA recipients). Participation by DBEs in such contracts does not count toward goals in the DBE program. Recipients should contact the concerned operating administration for further information about DBE participation in a particular contract or type of contract.

What should a recipient do in the case of a DBE manufacturer who, partway through a multi-year contract, becomes a broker? (posted 4/12/99)

• Under part 26 counting rules, 100 percent of the cost of the goods provided by a DBE manufacturer counts toward DBE goals. For "brokers," only the DBE's fee or commission, and no part of the cost of the goods, count toward DBE goals.

• Suppose that a prime contractor relied on goods from a DBE manufacturer to meet a portion of its contract goal. Halfway through the contract, the DBE ceases manufacturing the goods and begins to act as a broker who procures the goods from a non-DBE manufacturer and passes them on to the prime contractor. (For purposes of this hypothetical, we will assume that the DBE is not acting as a regular dealer.)

• From the point where the DBE's role changed from that of a manufacturer to that of a broker, DBE credit that the recipient and prime contractor can claim is much reduced,

since only its fees or commissions, rather than 100 percent of the cost of the goods, could count from that point forward.

• This places the recipient and contractor in a position analogous to the situation where a DBE is decertified or drops out of the contract.

• The recipient cannot count the "lost" DBE participation toward its overall goal.

• The prime contractor would make good faith efforts to obtain DBE participation to make up for the "lost" participation from the former manufacturer, to the extent needed to continue meeting the contract goal (see 26.53(f)(2)).

Section 26.55(f); 26.81(c) If a DBE firm is certified after the execution of a prime contract, are there any circumstances in which its use on the contract can be counted toward DBE goals? (posted – 6/18/08)

• Section 26.55(f) provides that if "a firm is not currently certified as a DBE…at the time of the execution of the contract, do not count the firm's participation toward any DBE goals…"

• To receive DBE credit toward meeting a contract goal in the context of the prime contract award process, a DBE firm must be certified before the due date for bids or offers on the prime contract. 49 CFR 26.81(c).

• There may be situations after the award of the prime contract, however, in which it is appropriate to count DBE credit for the use of a DBE subcontractor certified after the prime contract is executed. To be eligible to obtain DBE credit, a DBE subcontractor must be certified before the subcontract on which it is working is executed.

• EXAMPLE 1: A year after the award and execution of the prime contract, the prime contractor hires a certified DBE subcontractor to perform work on the contract beyond the DBE participation to which the prime contractor committed as part of the contract award process. The DBE was certified after the prime contract was executed but before this new subcontract is executed. The DBE's work should be counted toward the prime contractor's overall DBE achievements and toward the race-neutral portion of the recipient's overall goal.

• EXAMPLE 2: As part of the contract award process and in response to a race-conscious contract goal, a prime contractor has committed to the use of DBE Subcontractor X. Halfway through performance of its work on the subcontract, X goes out of business. The prime contractor hires DBE Subcontractor Y to finish the work that was originally committed to X. DBE Y was certified after the execution of the prime contract but before the execution of Y's subcontract. Y's participation should be counted toward the prime contractor's fulfillment of its commitment to meet the contract goal and to the race-conscious portion of the recipient's overall goal.

What options do recipients have for counting the participation of DBE trucking companies?? Section 26.55(d)(3)-(5) (Posted - 12/09/11)

• Section 26.55(d) provides that, to be regarded as performing a commercially useful function, a DBE trucking company must own at least one truck of its own (which is insured and operable).

• The first option is to count only the value of transportation services provided by a DBE trucking company itself, using trucks it owns, insures and operates, and using drivers it employs. As part of this first option, the DBE trucking firm can count the participation of other trucks leased from another certified DBE firm.

• In this option, if the DBE firm leases trucks from a non-DBE firm, it can count only fees or commissions it receives for arranging the participation of the non-DBE firm. No DBE credit can be awarded for the actual transportation services provided by the non-DBE firm and its trucks.

• The second option permits limited DBE credit to be obtained for the use of trucks leased from non-DBE sources. This option permits counting of credit for the use of non-DBE trucks not to exceed the value of transportation services on the contract provided by DBE trucks.

• The following example, from section 26.55(d)(5) of the DBE rule, illustrates how this second option works: DBE Firm X uses two of its own trucks on a contract. It leases two trucks from DBE Firm Y and six trucks from non-DBE Firm Z. DBE credit would be awarded for the total value of transportation services provided by Firm X and Firm Y, and may also be awarded for the total value of transportation services provided by four of the six trucks provided by Firm Z. In all, full credit would be allowed for the participation of eight trucks. With respect to the other two trucks provided by Firm Z, DBE credit could be awarded only for the fees or commissions pertaining to those trucks Firm X receives as a result of the lease with Firm Z.

• A recipient can choose either of these options. If it chooses the second option, the recipient must obtain the written consent of the appropriate DOT operating administration (e.g., the Federal Highway Administration for a state highway agency) before implementing that option. Whatever option a recipient chooses should be clearly stated in its DBE program.

Can a recipient count DBE participation for a firm toward contract and overall goals if the firm has not been certified to perform the particular type of work that it intends to perform on a given contract? Section 26.53(a); 26.71(n); 26.81(c)(Posted 7/15/09)

• No. Under Part 26, DBE firms are not certified in general terms, in a way that makes them eligible to perform any sort of work. Rather, under 49 CFR 26.71(n), a recipient or UCP must grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm.

• To be certified in an additional type of work, the owners of the firm must demonstrate to the certifying agency that they can control the firm with respect to the type of work involved. See also Q&A entitled "IF A FIRM IS CERTIFIED AS A DBE OR ACDBE IN ONE TYPE OF BUSINESS, UNDER WHAT CIRCUMSTANCES CAN IT BE CERTIFIED FOR ANOTHER TYPE OF BUSINESS?" (Posted 6/18/08) Under 49 CFR 26.71(n), if a DBE firm would like to be certified in "additional work," the firm needs to demonstrate that its socially and economically disadvantaged owners are able to control the firm regarding the type of work. The firm does not need to submit a new certification application.

• The DBE rule requires all certification actions, including those expanding the types of work a firm is authorized to perform as a DBE, to be made final before the date on which bidders or offerors on a prime contract must respond to a solicitation. See 49 CFR 26.81(c). The rule refers to such timely

certification actions as “pre-certifications.”

• If a DBE firm has not been certified in a timely manner for the type of work it is intending to perform on a given contract, then recipients cannot count the firm’s participation on that contract toward DBE contract or overall goals.

• If a bidder/offeror has submitted a bid or proposal with DBE participation in response to a contract goal, and the DBE firm named in the bid/offer documents has not been certified in the type of work that the DBE firm would perform on the contract, then the bid/offer must not be considered because it does not qualify as a responsible or responsive bid.

• EXAMPLE: Acme Corporation bids on a highway construction contract being let by the Sagebrush State Highway Administration (SSHA). The contract has a 5 percent DBE contract goal. Acme proposes that the W.E. Coyote Company (WEC) will meet the goal by performing a subcontract to provide mitigation measures for the effects of the project on a protected bird species. WEC is a certified DBE in the field of traffic control, but is not certified by the Sagebrush UCP in wildlife impact mitigation. SSHA cannot count WEC’s proposed work toward the DBE goal for the contract. Unless it has obtained 5 percent DBE participation from other sources, Acme has failed to meet the goal.

• A bidder/offeror is deemed to have made a good faith effort to meet a contract goal if it: (1) documents that it has obtained enough DBE participation to meet the goal; or (2) documents that it made adequate good faith efforts to meet the goal even though it did not succeed in obtaining enough DBE participation to meet the goal. 49 CFR 26.53(a). Recipients have an obligation to make sure all information is complete and accurate (e.g., all needed DBE certifications have been timely completed) and adequately documents the bidder/offeror’s good faith efforts before committing itself to the performance of the contract by the bidder/offeror. 49 CFR § 26.53(c).

• In the above example, SSHA would deem the Acme bid/offer as non-responsive for failing to meet the DBE contract goal of 5 percent unless it has obtained 5 percent DBE participation from other sources. Acme could not document good faith efforts under 49 CFR 26.53(a)(2) on the basis of a sincere but mistaken belief that WEC was certified to do the work proposed for the contract.

• If the bidder/offer or has neither met the goal nor documented good faith efforts, the bid/offer MUST be excluded from consideration as non-responsive or non-responsible. Under 49 CFR 26.53(a) when there is a contract goal, the recipient “must award the contract only to a bidder/offer or who makes good faith efforts to meet it” (emphasis added) in one of the two ways provided by the regulation. Were a recipient to award a contract despite this prohibition, it would be in noncompliance with 49 CFR Part 26. Federal funds cannot participate in a contract awarded in violation of Part 26. While recipients necessarily make determinations concerning whether a bidder/offeror has met the goal or made good faith efforts, the Department of Transportation retains the authority and responsibility to determine whether, with respect to such determinations, the recipient has acted consistently with the regulation.

• Any evidence related to fraud in the DBE program will be referred to DOT’s Office of Inspector
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General for investigation

How does the use of joint checks affect counting of credit for DBE participation and the eligibility of DBE firms for certification? Section 26.55(c)(1); 26.71(b)(Posted - 6/18/08)

• By a joint check, we mean a check issued by a prime contractor to a DBE subcontractor and to a material supplier or another third party for items or services to be incorporated into a project. (This Q&A does not discuss checks issued by a recipient to two or more parties.)

• The text of the DBE rule does not mention the use of joint checks. Consequently, the rule does not prohibit prime contractors and subcontractors from using joint checks.

• The preamble to the Department's 1999 DBE final rule had the following to say about this subject: A commenter suggested that the use of two-party checks by a DBE and another firm should not automatically preclude there being a CUF. While we do not believe it is necessary to include rule text language on this point, we agree with the commenter. As long as the other party acts solely as a guarantor, and the funds do not come from the other party, we do not object to this practice where it is a commonly- recognized way of doing business. Recipients who accept this practice should monitor its use closely to avoid abuse. (64 FR 5116, February 2, 1999)

• The Department understands that prime contractors, subcontractors and suppliers may wish to use joint check arrangements for a variety of legitimate reasons, such as assuring that timely payment will be made for the supplier's items or dealing with situations in which it is difficult for a subcontractor to obtain bonding at a competitive rate. Consequently, recipients and UCPs should not assume that the use of joint checks is illegitimate.

• However, the Department also understands that the use of joint checks can raise questions about whether it is proper to count DBE credit for the items purchased using the joint check and about whether the DBE firm's relationship with the prime contractor compromises the independence required for certification as a DBE. Consequently, recipients and UCPs may properly view the use of joint checks as a "red flag" calling for further scrutiny.

• As with other parts of the relationship among prime contractors and DBEs, openness and transparency are keys to using joint checks in an appropriate way. Historically, what has led to problems is not so much the use of joint checks in itself, but concealment or a lack of honesty concerning their use.
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Counting DBE Credit in Joint Check Situations

• To receive DBE credit for performing a commercially useful function with respect to obtaining materials and supplies, a DBE must "be responsible for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself" (emphasis added; 49 CFR 26.55(c)(1)). Only when a DBE meets all requirements of this provision should DBE credit be counted for the procurement of items by the DBE.

• By paying for the material itself, the regulation means that the DBE's own funds are used to pay for the material. As the preamble passage quoted above notes, it is not appropriate for the funds to come "from the other party" (e.g., the prime contractor). The use of joint checks can raise the question of whether the DBE's own funds, as distinct from those of the prime contractor, are really being used to pay for the material.

• To answer this question, a prime contractor and DBE should provide documentation to the recipient showing that the funds used to pay a supplier in fact came from the DBE's own funds. Accounts receivable to the DBE from the prime contractor for the costs of items procured by the DBE from the supplier generally may be regarded as representing the DBE's own funds. If a DBE which has received a joint check from the prime contractor documents that it has been in control of the funds provided in the check and has determined when the supplier or other third party has fulfilled its responsibilities under the contract, the recipient may conclude, absent evidence to the contrary, that the DBE is paying the third party with its own funds. The recipient should review this documentation before deciding whether to give DBE credit for the items in question.

• As part of the recipient's oversight of contracts on which joint checks are used, it is important to determine whether the requirements of 26.55(c)(1) other than payment from the DBE's own funds are being met. If the other requirements of 26.55(c)(1) are not met, then it is not appropriate to award DBE credit for the use of the items in question.

• Insistence by a prime contractor that a DBE must use a particular supplier or pay a specific price for an item is likely to be inconsistent with these requirements.

• If there is a significant disparity with respect to quantity or cost of items a DBE procures using a joint check arrangement, compared to the size of the contract and the expected ability of the DBE to obtain the items, the recipient should look carefully to ensure that commercially useful function requirements for counting DBE credit are being met.

• A DBE obtaining items for a construction contract normally should install them as well.
If the DBE obtains the items but the prime contractor or another party installs them, the DBE credit awarded may be limited to the fee or commission obtained by the DBE (see 26.55(e)(3)).
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DBE Independence in Joint Check Situations

• In answering questions about independence, recipients should determine whether or not there is a pattern of close, pervasive ties between a DBE and other firms. If it appears that, absent its ties to a prime contractor, a DBE firm is not viable, it should not be regarded as independent.

• Ties between DBEs and other firms that may be legitimate aspects of a business relationship, considered individually, can form part of a pattern of pervasive ties that compromises the independence of a DBE firm. Joint checks are one of the ties between DBEs and other firms that recipients should examine in determining whether such a pattern exists.
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Safeguards

• The Department strongly recommends that recipients put into place a series of safeguards to prevent the use of joint checks in ways that would result in the denial of DBE credit for items obtained from suppliers or would compromise the independence of a DBE firm.

• Recommended safeguards include the following steps by recipients:
○ Require prime contractors and DBEs wishing to use joint check arrangements to obtain prior approval from the recipient.
○ Require a written joint check agreement among the parties (including the suppliers concerned) providing full and prompt disclosure of the expected use of joint checks. The agreement should contain all information concerning the parties' obligations and consequences or remedies if the agreement is not fulfilled or a breach occurs.
○ Make sure there is a well-established monitoring process having oversight mechanisms such as review of invoices, cancelled checks and/or certification statements of payment.
○ Examine related financial transactions in which an alternative to the use of a joint check is used that may indicate a similar relationship between the prime contractor and a DBE subcontractor, such as the use of a cashier's check or bank check presented to the supplier by the DBE. In this type of situation, recipients should examine whether it was the prime contractor, and not the DBE subcontractor, that funded the transaction.
○ Caution prime contractors and DBE subcontractors to avoid exclusive relationships between one prime contractor and one DBE concerning the use of joint checks. If a prime contractor makes joint checks available to one (e.g., a DBE) subcontractor, the service should be made available to all subcontractors (DBEs and non-DBEs).
○ Emphasize to prime contractors and DBE subcontractors that the use of joint checks should be focused on accomplishing the procurement of materials needed for a particular purpose at a particular time. Long-term or open-ended joint checking arrangements can suggest a lack of independence for the DBE involved, and are a basis for further scrutiny by the recipient. Recipients may establish reasonable durational limits on joint checking arrangements that are subject to periodic review and renewal to ensure that the arrangement is not operating in a way that compromises the independence of the DBE.
○ Review the relationship between the prime contractor and DBE to ensure the DBE has retained final decision-making responsibility concerning the procurement of materials and supplies, even when joint checks are involved. That is, the relationship between the DBE and its suppliers should be established independently of and without interference by the prime contractor. The rights of parties to a joint check arrangement to terminate the arrangement should be consistent: for example, if the

prime contractor has the right to terminate the arrangement unilaterally, so should a DBE subcontractor.

- Ensure that joint checks issued by the prime contractor be delivered or mailed to the DBE for presentment and payment to the DBE's suppliers. The prime contractor should not make payment directly to the supplier.

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Regular Dealers

Should firms be certified as "regular dealers?" is a firm that acts as a regular dealer on one contract necessarily treated as a regular dealer on all contracts? Section 26.55(e)(2)-(3); 26.71(n); 26.73(a) (Posted - 12/090/11)

• No to both questions.

• Certification and counting are separate concepts in the DBE rule. Certification and counting matters should not be conflated or confused with one another.

• Firms are certified as DBEs if they are small business concerns owned and controlled by socially and economically disadvantaged individuals. DBE firms must be certified in the most specific NAICS code(s) for the type of work they perform. While a firm may be certified in a NAICS code related to performing supplier functions, it is not appropriate to certify any firm as a "regular dealer." In fact, there is no NAICS code for a "regular dealer." The only appropriate use of the term "regular dealer" concerns counting participation by DBE firms that have already been certified.

• If a certified firm acts as a "regular dealer" in a given transaction, it is awarded DBE credit equivalent to 60 percent of the value of the items it supplies on that contract. This credit is awarded in recognition of the value the DBE adds to transaction and the risks that it takes. The rules provide that a firm the role of which is that of a broker or transaction expediter cannot receive DBE credit beyond the fee or commission it receives for its services. Such a firm adds less value and takes fewer risks than a regular dealer.

• Whether a DBE firm meets the criteria of §26.55(e)(2) for being treated as a regular dealer is a contract-by-contract determination to be made by the recipient. In evaluating whether a DBE firm should receive 60 percent credit for items it supplies on a particular contract, a recipient should answer two questions. If the answer to either question is "no," then the firm should not receive 60 percent credit.

• First, does the firm "regularly" engage in the purchase and sale or lease, to the general public in the usual course of its business, of products of the general character involved in the contract and for which DBE credit is sought? Answering this question involves attention to the activities of the business over time, both within and outside the context of the DBE program. The distinction to be drawn is between the regular sale or lease of the products in question and merely occasional or ad hoc involvement with them.

• In answering this question, recipients should not insist that every single item the DBE firm supplies be physically present in the firm's store, warehouse, etc. before it is sold to a contractor. However,

the establishment in which the firm keeps items it sells to the general public should be more than a token location. For example, a mere showroom, the existence of a hard-copy or on-line catalog, or the presence of small amounts of material that make questionable the ability of the firm to effectively supply quantities typically needed on a contract, are generally not sufficient to demonstrate that a firm regularly deals in the items.

• Second, is the role the firm plays on the specific contract in question consistent with the regular sale or lease of the products in question, as distinct from a role better understood as that of a broker, packager, manufacturer's representative, or other person who arranges or expedites a transaction? For example, a firm that regularly stocks and sells Product X may, on a particular contract, simply communicate a prime contractor's order for Product Y to the manufacturer, acting in a transaction expediter capacity.

• This means that a firm that acts as a regular dealer on one contract does not necessarily act as a regular dealer on other contracts. For example, a firm that acts as a regular dealer on Contract #1 may act simply as a "transaction expediter" or "broker" on Contract #2. It would receive DBE credit for 60 percent of the value of the goods supplied on Contract #1 while only receiving DBE credit for its fee or commission on Contract #2.

• In some circumstances, items are "drop-shipped" directly from a manufacturer's facility to a job site, never being in the physical possession of or transported by a supplier. In many such cases, the supplier's role may involve nothing more than contacting the manufacturer and placing a job-specific order for an item that the manufacturer then causes to be transported to the job site.

• In such a situation, the supplier's role may often be better described as that of a "broker" or "transaction expediter" (see 26.55(e)(2)(ii)(C)) than as a "regular dealer." In such a case, DBE credit is limited to the fee or commission the firm receives for its services. If the firm does not provide any commercially useful function (i.e., it is simply inserted as an extra participant in a transaction), then no DBE credit can be counted.

The counting rules say that to be a regular dealer, a supplier of bulk goods who supplements its own distribution equipment must do so by a long-term lease. how long is long-term? (Section 26.55(e)(2)(ii)(B)) (Posted - 4/12/99)

• The key point is that a lease for trucks or other distribution equipment cannot be an ad hoc deal specific to the particular contract or distribution task.

• The leased equipment should be used over an extended period of time to serve a variety of customers and/or contracts.
• There is not a specific number of months or years that the Department believes it is useful to rely on in all cases. The scrutiny that a recipient gives a lease arrangement should become stricter the shorter the period of the lease is.
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Size Standard

If a firm has exceeded the size standard for the most specific available NAICS code for the type of work it does, is it appropriate for the firm to continue working in that type of work in a

broader NAICS code? Section 26.71(n) (Posted - 12/09/11)

• Generally not. Section 26.71(n)(1) provides that the types of work a firm can perform as a DBE "must be described in terms of the most specific available NAICS code for that type of work." Suppose a firm's work is in Specialty Subcontracting Field X. The most specific available NAICS code is one that describes only Field X and does not include other types of work. That is the only NAICS code that should be assigned to the firm.

• If the firm exceeds the size standard for the specific NAICS code relating to Field X, then it is no longer eligible to work as a DBE. If there is a broader NAICS code that includes not only Field X, but also Fields A, B, C, and D, and which has a higher size standard, the firm should not be assigned that broader code.

• The only exception to this principle would be in a situation where the firm actually performs all or some of the types of work in Fields A, B, C, and D and demonstrates to the certifying entity that the disadvantaged owners can control the activities of the firm in those areas.

How do recipients determine the size of a firm that performs different types of work? Section 26.65(a)(Posted - 2/12/02)

• In the DBE program, a firm may perform more than one type of work. For example, it may work as a general contractor on one project and a specialty subcontractor on another. For another example, a firm may perform one contract as an architect/engineer and another as an electrical subcontractor. The Department's DBE rule provides that, as a recipient, you must apply current SBA size standards "appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts" (?26.65(a)). Suppose the size of Firm X (e.g., determined through looking at the firm's gross receipts) is $5 million, and X is seeking certification as a DBE in classification codes yyyy and zzzz. The SBA small business size standards for these classifications are $3.5 and $7 million, respectively. Firm X would be a small business that could be certified as a DBE, and that could receive DBE credit toward goals, in code zzzz but not in code yyyy.

• Likewise, suppose that the SBA size standard for a specialty subcontractor in a particular field is $4 million. Firm Y sometimes performs work in that field, but other times acts as a general contractor. The SBA size standard for general contractors is in excess of the Department's $23.98 million dollar statutory size cap. Firm Y's gross annual receipts are $10 million. Firm Y can be certified as a DBE and receive DBE credit toward goals in its capacity as a general contractor. It cannot be certified as a DBE, and cannot receive DBE credit toward goals, in its capacity as a specialty contractor.

• It is important for recipients to make these distinctions. It is not appropriate for a recipient to decline to certify a firm for all purposes when the firm meets SBA size standards with respect to some of its activities. However, recipients must be careful to award DBE credit to a firm only in those areas in which it does meet size standards.

After a firm loses eligibility for exceeding size limits, or an individual's presumption of social and economic disadvantage is rebutted for exceeding the personal net worth cap, can the individual or business ever participate in the DBE program in the future? Section 26.65; 26.67(b);26.85(b) (Posted - 2/12/02)

• When a firm is denied certification, the recipient must establish a waiting period of 12 months or less for reapplication. Once this waiting period has expired, the firm can reapply for certification.

• This provision applies regardless of the basis for the denial of certification. A denial based on business size or personal net worth grounds is no different, for this purpose, from a denial based on ownership or control grounds.

• For example, suppose a firm is denied certification in Year 1 because it exceeds the business size standard, or because its owner has a personal net worth that exceeds $1,320,000. In Year 2, after the recipient's reapplication waiting period expires, the firm applies for certification again. If the size of the business in Year 2 is under the applicable standard, or the personal net worth of the owner has fallen below $1,320,000, respectively, then the recipient would certify the firm, assuming it met all other certification requirements.

What information may a UCP appropriately consider in determining whether a firm meets small business size standards based on gross receipts? Section 26.5, 26.65

• Part 26 refers to Small Business Administration (SBA) regulations (13 CFR Part 121) for the definitions of what constitutes a small business for purposes of the DBE program.

• Many of the SBA business size standards, as well as the statutory cap on participation in the DBE program, are defined in terms of the gross receipts of businesses. If a firm's gross receipts, averaged over three years, exceed a certain amount, the firm is ineligible to participate as a DBE.

• The basic SBA definition of "receipts, " in 13 CFR §121.104(c), is "total income" ("gross income" in the case of a single proprietorship) of the business, "as these terms are defined or reported on Internal Revenue Service (IRS) Federal tax return forms," such as Form 1120 for corporations.

• For this reason, the first resource to which recipients should refer in determining a firm's receipts is the firm's tax returns.

• The most recent SBA interpretation of §121.104 makes clear that it is appropriate to consider evidence beyond a firm's tax returns, when the other information provides a reason to believe that the tax return information is false. "False," in this context, is not limited to meaning fraudulent, provided with actual knowledge that it is incorrect, or provided with reckless indifference to the actual facts. If the information from the tax returns is false in the commonly understood sense of the word (i.e., incorrect, erroneous, not corresponding to reality), then it is appropriate to use other information to construct a more accurate picture of the firm's receipts.

• DOT's position on all certification matters is that UCPs should focus on the substance and reality of a firm's circumstances, not merely on the form of its arrangements or what is shown on paper (cf.§26.69(c)).

• Consequently, if information available to the recipient (e.g., from a company's books, from financial records provided by other recipients) shows that the picture of a firm's receipts painted by a tax return does not correspond to the firm's financial reality, or is misleading (even without any intent to deceive on the firm's part), the recipient is entitled to consider this information in making a

size determination.

• The fact that information extrinsic to the firm's tax returns may be considered does not mean that this information necessarily has controlling significance. As in all certification matters, the UCP must take into account all the evidence and all of the firm's circumstances, weigh the credibility of the information, and make an informed, balanced judgment concerning whether a firm meets the rule's small business size criteria.
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Waivers or Exemptions

Can a recipient ask for a program waiver in conjunction with its revised DBE program? Section 26.21 - 26.15(Posted - 2/23/99)

• Yes. If, in revising its DBE program, a recipient decides it wants to pursue an alternative to a requirement of Subparts B or C, then it must apply for a waiver. Subparts B and C concern such subjects as goals, good faith efforts, and program administration.

• The waiver request would apply to the features of the program that differed from Subpart B or C requirements.

• For example, suppose a mass transit recipient submitted a program that conformed to Subpart B and C for the most part, but proposed to use price credits rather than contract goals as a race-conscious measure. With respect to this issue the recipient would have to meet the procedural requirements of 26.15(b). In this example, FTA would review the recipient's program in the normal way, except that the portion requiring the waiver request would be forwarded to the Secretary for decision.

• In case the program as a whole has been approved, but a decision has not been made on the accompanying waiver request, the recipient would comply with all provisions of Subparts B and C pending the Secretary's decision on the waiver.
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Subrecipients

Section 26.21 Can subrecipients have their own DBE programs and overall goals? If so, who reviews them? (Posted – 6/18/08)

• In another Question and Answer, "Must a primary recipient's DBE program and goals apply to contracts let by subrecipients?" the Department describes how subrecipients could administer contract goals on their contracts under the umbrella of their primary recipient's DBE program and overall goals.

• That Q&A notes that subrecipients are not required to have their own, independent DBE programs and overall goals. However, a subrecipient may -- only if permitted by the DOT operating administration providing its financial assistance and subject to the approval of the concerned primary recipient -- have its own, independent DBE program and overall goal. Generally, this is an option that would make sense only for larger subrecipients who are receiving considerable amounts of DOT

financial assistance.

• Following coordination with the primary recipient, the subrecipient would submit its DBE program and overall goals to the appropriate DOT operating administration for review and approval, in the same way that primary recipients submit their program and goals for DOT review and approval. A written agreement between the primary recipient and subrecipient is desirable.

• Subrecipients that have their own DBE programs must participate in their state's unified certification program (UCP).

• The amount of DOT financial assistance provided to a subrecipient with its own DBE program via the primary recipient is deleted from the base from which the primary recipient calculates its goals, and the subrecipient's DBE participation is not counted toward the primary recipient's DBE participation.

• If a subrecipient has its own independent DBE program and overall goals, the subrecipient would submit DBE participation reports to both the primary recipient and the DOT operating administration involved, the frequency and content of which would be determined through the subrecipient's consultation with the primary recipient and DOT operating administration.

Must a primary recipient's DBE program and goals apply to contracts let by subrecipients? (Section 26.45(a), 26.53) (Posted - 9/1/05)

• The DBE program and overall goal of a primary recipient (e.g., a state DOT) apply to all the Federal funds that will be expended in DOT-assisted contracts.
o This includes not only the Federal funds expended in contracts that the primary recipient itself lets, but also the Federal funds that subrecipients let in DOT-assisted contracts.
o The primary recipient is responsible for administering its DBE program and is legally accountable for expenditure of DOT financial assistance in accordance with Federal requirements.
o Subrecipients do not have to have their own, independent DBE programs or overall goals, since the primary recipient's DBE program and overall goals cover the DOT- assisted contracting activities of the subrecipients.
o However, if a subrecipient is letting a DOT-assisted contract with subcontracting possibilities, then part 26 provisions concerning contract goals apply to that
contract. These provisions include determining whether race-conscious measures are appropriate for a particular contract. (Contract goals do not apply to certain kinds of contracts in any case, such as contracts for purchases of transit vehicles, or contracts
in which there are no realistic subcontracting possibilities.)
o In a case where it is appropriate for there to be a contract goal on a subrecipient's contract, the primary recipient may establish the goal for the
subrecipient. Alternatively, the subrecipient may set the contract goal in consultation with the primary recipient. In either case, the subrecipient would follow the contract award procedures of §26.53.

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Overall Goals

How does a recipient obtain census bureau data to use in calculating its overall goal? Section 26.45(c) (1) (Posted - 4/12/99 - Edited 12/7/01)

• The regulation's first example of how a recipient can do Step 1 of the overall goal process involves using data from the Census Bureau's County Business Pattern (CBP) database.

• The Department intends to create a web site that will provide ready access to this information. We hope this site will be up and running in plenty of time to be of use to recipients as they prepare to submit their FY 2000 overall goal.

• Meanwhile, you can obtain this data from the Census Bureau web site. All of the data is available, however their web site does not have the features we intend to provide to make it easier to search, compile and retrieve the particular data you need.

• To access the data, go to http://www.census.gov.

• There are at least 2 areas of the site that have relevant CBP data. You can access them by going to the "Subjects A to Z" listing and:
○ Click on "C": then, under "County", click on "County Business Patterns", or paste the following URL into your web browser: http://www.census.gov/econ/cbp/index.html
○ Click on "B"; then, under "Business", click on "Statistics of United States Businesses (Tabulations by Size and Metropolitan Area)", or paste the following URL into your web browser: www.census.gov/csd/susb/susb.htm

• Both pages offer ways to select particular data (i.e. state or county) and different compilations of useful CBP data, some of which can be downloaded for easy use in spreadsheet format.

• No. Prior concurrence of a DOT operating administration with your overall goal for the next fiscal year is not required.

• However, if we determine that there are problems with the goal (e.g., it was not calculated properly, the method used to calculate it was inadequate); we will work with you to fix the problems and, if necessary, adjust the goal.

• Note that your projections of your expected use of race-conscious and race-neutral measures to meet goals are subject to our approval (26.51(c)).

• DOT operating administrations may review and approve or disapprove your contract goals, even if review of your overall goal is not complete.

• For example, suppose you submit your overall goal for the next fiscal year to FHWA on August 1. FHWA identifies concerns about the overall goal itself or your projection of participation to be obtained by race-neutral and race-conscious means, respectively. You and FHWA are continuing to discuss the goal as the new fiscal year begins. If you are letting a contract during October, after the new fiscal year has begun, you could use the submitted overall goal as a reference point for setting a contract goal, but FHWA retains the discretion to review and approve or disapprove your contract

goal.

What types of contracts can be counted toward DBE goals? (Section 26.3(a), 26.55,) (Posted - 4/12/99)

• DBE participation can be counted toward goals for any contract let by the recipient in which Federal funds listed in 26.3(a) participate.

• If a recipient lets a contract to any type of contractor, and Federal funds listed in 26.3 participate in that contract, then the DBE's participation would count toward the recipient's DBE goals.

• Part 26 does not limit the type of contractors who can participate in the DBE program or the types of contracts appropriate for DBE participation. All DOT-assisted contracts, whether construction or non-construction (e.g., professional services, consulting, supplies) can be used for DBE participation.

• Recipients should be aware that there may be some types of contracts that are not eligible for the Federal assistance specified in 26.3 (e.g., contracts supporting transit operations for some FTA recipients). Participation by DBEs in such contracts does not count toward goals in the DBE program. Recipients should contact the concerned operating administration for further information about DBE participation in a particular contract or type of contract.

What steps are recipients expected to take to satisfy the consultation component of the public participation required for goal setting? (Section 26.45(g)) (Posted – 6/18/08)

• The goal setting process used by recipients to establish their annual overall goal submitted to the operating administrations for approval must include “consultation with minority, women’s and general contractor groups, community organizations, and other officials or organizations” which could be expected to have information concerning the availability of DBEs and non-DBEs. This consultation process is also intended to gather information concerning the effects of discrimination on opportunities for DBEs, if present, - and establishing a level playing field for the participation of DBEs.

• By definition, the process of consultation involves a scheduled face-to-face conference or meeting of some kind with individuals or groups of interested persons for the purpose of developing and/or assessing a proposed goal and methodology and seeking information or advice before a decision is made. Publication of the proposed goal to the general public is not synonymous with, or a substitute for, consultation with interested or affected groups.

• Recipients should identify groups within their contracting market that are likely to have information relevant to the goal setting process or that have a stake in the outcome of the process. Those groups should be contacted and invited to participate in a face-to-face exchange (which may occur at a public meeting) aimed at obtaining the kind of information set out in the regulation regarding establishing the overall DBE goal. Efforts should be made to engage in a dialogue with as many interested stakeholders as possible. An advisory committee may be one method of consultation (but not the exclusive method, since this could lead to a recipient talking only to the same people all the time). A description of the consultation process and its purpose should be provided to all invitees.

• Consultation is expected to occur before the proposed goal is established and prior to publication of the proposed overall goal for inspection and comment by the general public.

• The consultation process must be documented in the recipient's annual goal submission.

Can a recipient or recipients set a project overall goal (e.g. for a large, multi-year project)? How does such a project goal relate to annual overall goals? Can such a project goal cut across modal lines? (Section 26.45(f2); 26.53(e)) (Posted - 2/12/02)

• A recipient of DOT funds - whether from FAA, FTA, or FHWA - may set a project overall goal for a particular project. Typically, such a goal would be used for a large multi-year project.

• The recipient's overall project goal for the project would be separate from the recipient's annual overall goal for the rest of its DOT-assisted contracting activities.

• The recipient's submission of the overall project goal would have to meet the same requirements as for any other overall goal (see 26.45(f) (3)), specifically including breakout of the participation anticipated through race-neutral and race-conscious means. DOT would review the goal submission just as it does in other cases.

• With respect to its other DOT-assisted contracting activities, the recipient would also submit its regular annual overall goal for review. In so doing, the recipient, in calculating the annual goal for a given fiscal year, would not consider funds or contracting opportunities attributable to the project covered by the separate contract goal.

• For example, suppose a recipient will expend $150 million on Project X in Years 1-3.
The recipient will also expend $40 million on other projects in each year during the same period. The recipient could submit a single project overall goal for Project X, based on the $150 million to be expended over the life of the project. The recipient would also submit an overall goal each year for its other DOT-assisted contracting activities in Year 1, Year 2, and Year 3, based on the $40 million the recipient was expending in each of those years.

• A project overall goal can be used for a multi-modal project. For example, suppose FHWA Recipient W and FTA Recipient Z are cooperating on a project, which involves the expenditure of $500 million between them. Recipients W and Z can jointly submit a single overall project goal for the project. W and Z would also each submit regular annual overall goals for their other activities during the time that the project was under way.

• Many large projects on which it could be useful to establish a project overall goal may be design-build projects. The overall project goal, in such a case, would serve as the goal for the master contractor. The master contractor would then establish contract goals on the contracts it is letting at a level appropriate to meet the race-conscious portion of the project overall goal.

• Currently Part 26 explicitly authorizes the use of project goals in FAA and FTA projects.
While nothing in the rule precludes the use of project goals in FHWA projects, the rule does not explicitly mention FHWA projects in this context. However, it is the Department's view that recipients of funds from all three operating administrations can make use of project goals.

How do recipients project what portion of their overall goal they will meet through race-neutral means? Section 26.51(a) - (d)) (Posted - 2/17/00)

• It is important to keep in mind that a recipient must not only submit its projections to DOT, but also its basis for the projection. This consists of a sound analysis of the recipient's market and the race-neutral measures it employs, on the basis of which the recipient realistically can project attaining a certain amount of DBE participation without the use of contract goals or other race-conscious measures.

• The analysis cannot be simply guesswork or based on a hope or policy preference. It must rest on information about the real world of contracting in the recipient's contracting area.

• Recipients know their own markets and the types of contracts most likely to be let. In determining the level of participation to be achieved through race-neutral means, the recipient should use its experience concerning the availability of DBEs in particular types of contracts in their market.

• Here are some examples of questions recipients could ask in making this analysis:
- What is the participation of DBEs in the recipient's contracts that do not have contract goals?
- There may be information about state, local, or private contracting in analogous areas where contract goals are not used (e.g, in situations where a prior state/local affirmative action program was ended). What is the extent of participation of minority or women's businesses in programs without goals?
- What is the extent of race neutral efforts that the recipient will have in place for the next fiscal year?
- Are there firm, written, detailed commitments in place from contractors to take concrete steps sufficient to generate a certain amount of DBE participation through race-neutral means?
- To what extent have DBE primes participated in the recipient's programs in the past?
- To what extent has the recipient oversubscribed its DBE goals in the past?

• Where there is not systematic data in existence, recipients could conduct quick, informal surveys and use the results as part of the basis for their projections.

• Recipients should closely monitor DBE participation relative to their projections to determine whether mid-course corrections are needed.

As a recipient, do you have to wait for dot approval of your overall goal before starting to use it in the next fiscal year? Section 26.45(f) (4); 26.51(c), (e) (3) (Posted - 2/17/00 - Edited 12/7/01)

• No. Prior concurrence of a DOT operating administration with your overall goal for the next fiscal year is not required.

• However, if we determine that there are problems with the goal (e.g., it was not calculated properly, the method used to calculate it was inadequate); we will work with you to fix the problems and, if necessary, adjust the goal.

• Note that your projections of your expected use of race-conscious and race-neutral measures to meet goals are subject to our approval (26.51(c)).

• DOT operating administrations may review and approve or disapprove your contract goals, even if review of your overall goal is not complete.

• For example, suppose you submit your overall goal for the next fiscal year to FHWA on August 1. FHWA identifies concerns about the overall goal itself or your projection of participation to be obtained by race-neutral and race-conscious means, respectively. You and FHWA are continuing to discuss the goal as the new fiscal year begins. If you are letting a contract during October, after the new fiscal year has begun, you could use the submitted overall goal as a reference point for setting a contract goal, but FHWA retains the discretion to review and approve or disapprove your contract goal.
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Contract Goals

How do recipients determine whether a DBE prime contractor has met a contract goal? (Posted 02/07/01)

• However, recipients count toward DBE goals the value of work actually performed by DBEs (see 26.55(a)).

• In most cases, this means that a DBE bidder on a prime contract will meet the contract goal by virtue of the work it performs on the prime contract with its own forces.

• For example, suppose DBE Firm X is the apparent low bidder on a prime contract with a 10 percent contract goal. Firm X will perform 30 percent of the work on the contract with its own forces (the minimum possible if a DBE is to perform a commercially useful function, see 26.55(c)(3)). This means that 30 percent of the contract amount counts toward the DBE contract goal. This exceeds the 10 percent contract goal. Therefore, Firm X meets the contract goal. (In this example, the entire 30 percent DBE participation on the contract would be counted as race-neutral participation, since Firm X obtained the contract solely on the basis of its low bid.)

• There could be unusual situations in which a DBE prime contractor would have to provide some additional DBE participation through subcontracting. In the example above, suppose the contract goal is 35 percent instead of 10 percent. Firm X is credited with 30 percent DBE participation on the basis of the work it does with its own forces. This leaves the firm 5 percent short of meeting the contract goal. Firm X would have to seek an additional 5 percent DBE participation through subcontracting with another DBE or document the good faith efforts it made in attempting to secure this additional participation.

• It is appropriate to ask any prime contractor who has met its obligations to continue to make outreach efforts to additional DBEs. However, once a DBE prime contractor has met a contract goal through the work it performs with its own forces, recipients should not require the DBE prime to obtain additional DBE participation through use of DBE subcontractors or to document good faith efforts. DBE prime contractors are required to document good faith efforts only in situations, like those in the previous paragraph, where they do not fully meet contract goals through the work they perform with their own forces.

• When any prime contractor who has met its contract goal obligations provides work to additional DBE subcontractors, the prime contractor is contractually obligated to meet its commitments to those firms. In this case, because the participation of the additional DBE subcontractors is over and above what is needed to meet the goal, the recipient would count it as race-neutral participation.

• When a certified DBE firm bids on a contract that contains a contract goal, the DBE firm is responsible for meeting the goal or making good faith efforts to meet the goal, just like any other bidder.

Do the DBE Program and DBE contract goals apply to change orders in contracts? (Posted 9/1/05)

• A recipient's DBE program applies to all its DOT-assisted contracting, including change orders to an existing contract which have more than a minimal impact on the contract amount.

• If there is a change order to a contract on which there is a DBE contract goal, then that contract goal applies to the change order as well as to the original contract. This is true regardless of whether the recipient or the contractor initiates the change order.

• For example, suppose that a recipient awards a $1 million contract to Firm X. The contract goal is 15 percent. Firm X meets the contract goal by obtaining DBE participation from subcontractors or suppliers amounting to $150,000.

• Part way through performance of the contract, the recipient determines that additional work is necessary, and issues a change order that will add $500,000 to the total contract price. The 15 percent contract goal applies to this additional $500,000.

• To meet the contract goal as applied to the change order, Firm X would have to make good faith efforts to obtain an additional $75,000 in DBE participation. It could meet this obligation either by obtaining the additional $75,000 in work by DBE subcontractors or suppliers or by documenting good faith efforts.

• The recipient would determine, on a case-by-case basis, what would constitute good faith efforts in the context of a particular change order. This could include modifying the contract goal amount applicable to the change order if circumstances warrant.

* There may be situations in which a change order has such a minimal effect on the overall contract amount or the expected DBE participation on a contract that it would not be sensible to alter DBE requirements affecting the contract. If a recipient believes that a change order has such a minimal effect, the recipient should contact the relevant DOT operating administration for guidance on whether it is necessary to alter DBE requirements affecting the contract.

If a DBE firm is certified after the execution of a prime contract, are there any circumstances in which its use on the contract can be counted toward DBE goals? (Posted - 6/18/08)

• Section 26.55(f) provides that if "a firm is not currently certified as a DBE…at the time of the execution of the contract, do not count the firm's participation toward any DBE goals…"

• To receive DBE credit toward meeting a contract goal in the context of the prime contract award process, a DBE firm must be certified before the due date for bids or offers on the prime contract. 49 CFR 26.81(c).

• There may be situations after the award of the prime contract, however, in which it is appropriate to count DBE credit for the use of a DBE subcontractor certified after the prime contract is executed. To be eligible to obtain DBE credit, a DBE subcontractor must be certified before the subcontract on which it is working is executed.

• EXAMPLE 1: A year after the award and execution of the prime contract, the prime contractor hires a certified DBE subcontractor to perform work on the contract beyond the DBE participation to which the prime contractor committed as part of the contract award process. The DBE was certified after the prime contract was executed but before this new subcontract is executed. The DBE's work should be counted toward the prime contractor's overall DBE achievements and toward the race-neutral portion of the recipient's overall goal.

• EXAMPLE 2: As part of the contract award process and in response to a race-conscious contract goal, a prime contractor has committed to the use of DBE Subcontractor X. Halfway through performance of its work on the subcontract, X goes out of business. The prime contractor hires DBE Subcontractor Y to finish the work that was originally committed to X. DBE Y was certified after the execution of the prime contract but before the execution of Y's subcontract. Y's participation should be counted toward the prime contractor's fulfillment of its commitment to meet the contract goal and to the race-conscious portion of the recipient's overall goal.

What requirements apply to recipients' use of contract goals? (Posted-2/17/00)

• The most important regulatory requirements for recipients to consider in making decisions about using contract goals are the following:

• Recipients must meet as much as possible of their overall goals through race-neutral measures (26.51(a)).

• Recipients must project how much of their overall goals they can meet through race- neutral and race-conscious measures, respectively. Recipients must submit this projection and the basis for it to DOT along with their overall goals (26.51(c)).

• Recipients "must establish contract goals to meet any portion of [their] overall goal [they] do not project being able to meet using race-neutral means" (26.51(d)).

• Recipients are not required to set contract goals on every DOT-assisted contract, but must set contract goals that will cumulatively result in meeting any portion of overall goals recipients do not project meeting through the use of race-neutral means (26.51(d)(2)).

• Decisions concerning the use of contract goals must be based on sound analysis. This analysis forms the basis for the projection of the portion of goals the recipient expects to meet through race-neutral or race-conscious means.

Section 26.53(f) Do recipients apply post-award good faith efforts requirements to contracts on which there is no contract goal? (Posted – 2/12/02)

• No. The post-award good faith efforts requirements of 26.53(f) apply only to a contract in which there is a contract goal.

• These requirements (1) prohibit prime contractors from terminating a DBE for convenience and then substituting the prime contractor's own forces, and (2) require the prime contractor to make good faith efforts to replace a DBE firm that could not complete its contract with another DBE firm, to the extent needed to meet the contract goal.

• These provisions are premised on there having been a contract goal that the prime contractor has committed itself to make good faith efforts to meet. When there is a contract goal, the provisions of 26.53(f) are necessary to prevent a prime contractor from circumventing its good faith efforts obligation after the contract has been awarded.

• Where there is no contract goal (i.e., a race-neutral procurement), these provisions are not relevant.
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Decertification

When a recipient determines that an owner of a certified DBE firm exceeds the $ 1,320,000 personal net worth cap, what happens? Must the firm be decertified? If so, must the recipient use the procedures of 26.87 to decertify the firm? (Section 26.67(a) (2) and (b) (1); 26.87*)* (Posted 4/12/99 and updated PNW 7/22/2014)

• The PNW cap concerns the issue of whether a particular individual owner of a DBE firm is a socially and economically disadvantaged individual.

• Under 26.67(b) (1), when an individual's PNW shows that his or her PNW exceeds $1.32 million, it is not necessary to have a proceeding under 26.87 to conclusively rebut his or her presumption of economic disadvantage. No other hearing or proceeding is called for (see 64 FR 5118, February 2, 1999).

• Therefore, when the owner does not dispute that his or her owner's net worth, as shown in the PNW statement, exceeds $1.32 million, the recipient need not hold further proceedings under 26.87 before determining that the owner is not a disadvantaged individual.

• However, if there is dispute about the facts of a case (e.g., the individual owner challenges the recipient's determination that his or her PNW exceeds $1.32 million), then a 26.87 proceeding is necessary to remove the disadvantaged status of the individual.

• In any case in which the recipient determines that a DBE firm's owner is not a disadvantaged individual because his or her net worth exceeds $1.32 million, the recipient must then determine whether the individual's loss of disadvantaged status causes the firm's ownership by disadvantaged individuals to fall below 51 percent.

• For example, suppose that a DBE firm is owned by presumptively disadvantaged individuals X, Y, and Z, who respectively own 40 percent, 15 percent, and 20 percent of the company.

• If either Y or Z exceeds the PNW cap, but the other two owners do not, the firm can still be certified, assuming that control and other requirements continue to be met, because the ownership interest of the other two disadvantaged owners combined is more than 51 percent.

• On the other hand, if either X or both Y and Z exceed the $1.32 million cap, then the firm cannot remain certified, because ownership by disadvantaged individuals will fall below 51 percent.

• When the disadvantaged ownership of a DBE falls below 51 percent as the result of an owner losing his or her status as a disadvantaged individual, the recipient should decertify the firm. If the firm does not dispute that its disadvantaged ownership has fallen below 51 percent, the recipient should decertify the firm without a 26.87 proceeding. If the firm contends that its disadvantaged ownership is still at or above 51 percent, then the recipient would conduct a 26.87 proceeding.

• If there were disputes both as to the PNW of an owner and the percentage of ownership remaining in the hands of disadvantaged owners, these issues could be decided in the same 26.87 proceeding. Two separate proceedings would not be necessary.

Can a certified DBE firm voluntarily withdraw from the DBE program? Section 26.87 (Posted - 12/09/11)

• Yes. Generally, a certified DBE firm remains certified until and unless it is decertified, using the procedures set forth in section 26.87.

• However, a DBE firm can voluntarily withdraw from the DBE program. It can do so by sending a notarized letter to the certifying agency and saying that it wants to cease participating in the program.

• When it receives such a letter, the recipient or UCP should send an acknowledgement letter to the firm saying that, unless the recipient or UCP hears to the contrary from the firm within a given number of days, the firm's DBE certification will be terminated.

• The recipient/UCP can then remove the firm from its Directory, and the firm would not, in the future, be eligible to participate as a DBE unless it later applied for certification through an initial application.

• If a firm takes other action conclusively demonstrating that it does not intend to continue to compete for contracts, such as filing paperwork with a state's Secretary of State or other regulatory agency terminating its ability to do business in the state, the firm has taken action equivalent to voluntarily withdrawing from the DBE program. In such a case, the recipient/UCP may remove the firm from the DBE Directory without pursuing a decertification proceeding under section 26.87.

• This is also true if the recipient/UCP has other conclusive evidence that the firm is no longer a going concern (e.g., there is documentation that the firm has been liquidated in bankruptcy).

Can a recipient remove the eligibility of a currently certified firm through any means other than those of 26.87? (Posted - 9/22/00)

• The exception involves a situation in which there is no dispute that the firm's owners have exceeded the personal net worth limit. (See Q&A entitled "When a recipient determines that an owner of a certified DBE firm exceeds the owner's $1,320,000 personal net worth cap, what happens? Must the firm be decertified? If so, must the recipient use the procedures of 26.87 to decertify the firm?").

• In all other cases in which a recipient questions a currently-certified firm's eligibility, 26.87 applies. This is the case whether the firm was originally certified under Part 26 or former Part 23.

• Firms certified under former Part 23 did not automatically lose their eligibility when Part 26 went into effect. When a recipient seeks information from a firm to ensure that it continues to meet Part 26 eligibility criteria or asks it to reapply for certification, the firm does not automatically lose its eligibility even if it fails to make a timely response. In all these cases, firms continue to be eligible unless and until their eligibility is removed through a 26.87 proceeding (e.g., on the ground of noncooperation), unless the firm states in writing that it no longer chooses to participate in the DBE program.
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Termination/Substitution of DBE

Can a prime contractor reduce the amount of work committed to a dbe firm at contract award without good cause? (Posted - 12/09/11)

• No. The Department views such a reduction as a partial termination of the DBE's contract with the prime contractor. Recipients should dissuade contractors from reducing amounts of work committed to DBEs.

• Reducing the amount of work committed to a DBE at contract award, where this commitment was part of the prime contractor's good faith efforts to meet a contract goal, is subject to the requirements of section 26.53(f). This means that the prime contractor can reduce the amount of work committed to the DBE only for good cause and only with the written concurrence of the recipient.

• This is true even if the contractor continues to meet its contract goal through other means.

• For example, suppose a prime contractor commits $500,000 to each of two DBE subcontractors, thereby meeting a 10 percent goal on a $10 million prime contract. Part way through the performance of the contract, the prime contractor finds it necessary to expend an additional $100,000 in the work being performed by DBE subcontractor #1. The contractor then wishes to reduce the work assigned to DBE subcontractor #2 by
$100,000, reasoning that the 10 percent goal will still be met. In such a situation, the prime contractor cannot act on its own to reduce the work assigned DBE subcontractor
#2. It would have to comply with section 26.53(f).
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Reporting Requirements

Should recipients keep track of DBE "commitments," "achievements," or both? Section 26.37(b), 26.55(g) (Posted - 2/17/00)

• Both. Section 26.37(b) requires recipients to have a mechanism to verify that the work committed to DBEs at contract award is actually performed by the DBEs. Obviously, recipients need to track both commitments and actual achievements in order to perform this task.

• Final information on actual achievements will often not be available in the same year in which contracts are let. Recipients will often have to rely on commitments information in order to administer their programs (e.g., make needed adjustments with respect to the use of race-neutral and race-conscious measures).

• On the other hand, keeping track of actual achievements is crucial to evaluating the operation of recipients' programs. As 26.55(g) provides, actual achievements are not counted toward goals until DBEs receive payment for their work. If the actual achievements of particular contractors, or a recipient's program in general, falls short of commitments, this is an indication that corrective action should be taken to improve program performance.

GUIDANCE ON COMPLETING THE ONGOING PAYMENTS PORTION OF THE UNIFORM REPORT OF DBE COMMITMENTS/AWARDS AND PAYMENTS (Posted 2/11/16)

Section C of the Uniform Report is designed to capture information on current actual payments made to DBEs for work performed on ongoing federally-assisted contracts. This payment data provides a "snapshot" of dollars actually paid to DBEs as compared to dollars committed or awarded to DBEs but not yet paid during the reporting period. In column A, the total numbers of ongoing contracts on which payments were made during the reporting period are the prime contracts.

Similarly, in column B, the total dollars paid to prime contractors for work performed on prime contracts by both the prime contractor and its subcontractors is to be reported. Payments by recipients for all work performed on the contract are made to the prime contractor, who in turn is obligated to promptly pay its DBE and non-DBE subcontractors. See 49 C.F.R. §26.29.
In column C, the total number of ongoing contracts performed by DBEs includes both prime contracts and subcontracts. The term contract refers to any legally binding relationship obligating a seller to furnish supplies, material, or services to a buyer who is obligated to pay. It includes, but is not limited to, subcontracts, supplier agreements, and trucking arrangements.

The inclusion of prime contracts in Column C likely will be the exception and not the rule since most DBE participation is obtained through subcontracts. However, when DBE prime contracts are included in column C, you should in a footnote include the number of DBE prime contracts reported. The number of contracts reported in column C may be larger, smaller, or the same as the number in column A. To illustrate the point, assume that only one prime contract is underway during the reporting period. If the prime contractor is a non-DBE with 3 DBE subcontractors, the number

reported in column C (3) will be higher than column A (1). By contrast, if a non-DBE prime contract reported in column A has no DBE subcontractors, the number reported in column C (0) will be less than column A (1). If the prime contract involves a DBE prime contractor with no DBE subcontractors, the number in column A (1) and column C (1) would be the same, with appropriate notation that column C includes a DBE prime contract.

The total dollars paid to prime contractors reported in column B (which covers all work that resulted in payment) is used to derive the percentage payments to DBEs reported in column F based on the actual dollars paid to DBEs reported in column D. Column E captures the number of DBE firms paid during the reporting period. If one firm performs work on multiple contracts and is paid for that work during the reporting period, the firm should be counted only once.
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Certification Appeals

Must a recipient have an internal appeal system for applicants who are denied certification or decertified? if there is such a process, must it include providing a verbatim transcript of the original proceeding to the firm for purposes of the internal appeal? Section 26.83 - 26.89 (Posted - 4/12/99)

• No. There is no requirement for recipients to establish an internal appeal system. Recipients have the discretion to establish such a system, however.

• Once a recipient has made an administratively final denial or decertification decision (i.e., one that means the firm cannot participate in the recipient's DOT-assisted contracts as a DBE), the firm may appeal the result to DOT under 26.89.

• If a recipient has established an internal appeals system, a firm is not required to exhaust this remedy before appealing an administratively final decision to DOT under 26.89. However, if a firm chooses to appeal through the recipient's internal appeal process, the Department will not act on a 26.89 appeal until completion of the recipient's proceeding.

• The details of any internal appeal process a recipient establishes should be part of the recipient's revised DBE program. DOT will look at the process to make sure that it is fair.

• A verbatim record is required in decertification actions (see 26.87(d)(2)). For denials of applications for certification, part 26 does not require a verbatim record. Either a verbatim record or another means that gives the appellant the opportunity to review the record of the initial proceeding in detail is permissible. This is important to a fair appeal proceeding, since it gives the appellant the opportunity to make effective arguments about the initial proceeding.
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Mentor Protégé Programs

Does the department of transportation encourage recipients to establish mentor-protégé programs? (Posted - 2/17/00 - Edited 12/7/01)

• Yes. A well-run mentor-protégé program can be an important asset to a recipient's efforts to ensure equal opportunities for DBEs.

• Besides providing important experience and training to emerging companies, such a program may be an additional source of race-neutral DBE participation to the recipient.

• For the first time in the history of the Department's DBE regulations, Part 26 explicitly authorizes recipients to establish mentor-protégé programs as a part of their DBE programs.

• Under this authority, recipients may cooperate with private-sector mentor-protégé plans that are consistent with the safeguards against fronts and frauds established in Part 26.
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Confidentiality of Information

How should a recipient respond to a request, under a state freedom of information or open records law, for confidential business information submitted by a DBE? Section 26.67. 26.109(a)(2) (Posted - 4/12/99 - Edited 12/7/01)

• Particularly in the certification process, firms provide recipients with much financial and other information that applicants may wish to safeguard from disclosure.

• 26.109((a)(2) directs recipients, as a general matter, to "safeguard from disclosure to unauthorized persons information that may reasonably be considered to be confidential business information, consistent with Federal, state, and local law."

• 26.67(a)(2)(ii) provides that, with respect to personal financial information submitted in response to the personal net worth statement requirement of 26.67, part 26 specifically intends to pre-empt disclosure under state law. Recipients may not release these records to a third party (other than DOT in some circumstances) without the consent of the submitter.

• In summary, the effects of part 26 on disclosure of information submitted by applicants for certification and DBEs are the following:
○ Notwithstanding any contrary provision of state law, recipients are prohibited from releasing personal financial information submitted in response to the personal net worth statement requirement of 26.67(a)(2).
○ With respect to other information, the recipient must comply with a state freedom of information or open records law, even if it results in the disclosure of confidential business information about DBEs and applicants.
○ It should be noted that such laws themselves often contain exceptions for certain kinds of confidential business information. Recipients should use such

exceptions to the fullest extent permitted by state law to protect from disclosure confidential business information submitted by DBEs or applicants for certification.

• The Federal Freedom of Information Act and Privacy Act apply only with respect to records in the possession of DOT and other Federal agencies (see 26.109(a)(1)), not records in the possession of state or local government agencies who receive Federal financial assistance.

• If any provision of Federal law prohibits recipients from disclosing certain records in their possession, then that law would control.

Are recipients and UCP required to keep confidential documents or communications produced in the course of a certification proceeding? Section 26.67, 26.109(a)(2) and 23.11 (Posted - 6/18/08)

• Under the DOT DBE regulation, a recipient or UCP is prohibited from disclosing to any third party, without the submitter's written consent, a personal net worth statement or supporting documentation. Recipients and UCPs are likewise prohibited from disclosing confidential business information, including applications for DBE certification and supporting information.

• These prohibitions apply even in the face of a request under a state freedom of information or open records law.

• In the course of reviewing an application or otherwise considering the eligibility of a firm, the recipient or UCP and its staff may produce documents (e.g., memoranda, evaluations, records, notes, other working papers) that reproduce or refer to the information subject to the disclosure prohibitions of the DOT rule.

• Any information found in these "work product" documents that reproduces, refers to, or cites information required to be kept confidential by DOT rules is likewise protected from disclosure.

• In some cases, it could be possible for a recipient or UCP to carefully redact a document so that all references or citations to protected information were blacked out prior to the release of the documents. In other cases, references to protected information may be so pervasive in the document that the entire document cannot be released.

• Personal information, including PNW or confidential business information that is submitted to a UCP or recipient for DBE program purposes, is protected from disclosure, even if it is simultaneously submitted to the UCP or recipient for another purpose, such as certification in a local minority or women's business program. The information does not lose its character as protected information under the DBE rules just because it may also
be used for another purpose.
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WESTERN STATES DECISION

Questions and answers concerning response to western states paving company v. Washington state department of transportation

• These questions and answers apply only to recipients of Federal financial assistance from the Federal Highway Administration (FHWA), Federal Transit Administration (FTA), and Federal Aviation Administration (FAA) located in the states comprising the 9th Federal Judicial Circuit. These states are California, Oregon, Washington, Alaska, Arizona, Idaho, Montana, Nevada, and Hawaii.

• These questions and answers do not apply to recipients in other states.

• These questions and answers apply only to the disadvantaged business enterprise programs (DBE) of recipients of Federal financial assistance governed by 49 CFR Part 26.

What did the court say in Western States? (Posted - 1/12/06)

• Like other Federal courts that have reviewed the Department of Transportation's DBE program, the 9th Circuit panel held that 49 CFR Part 26 and the authorizing statute for the DBE program in TEA-21 were constitutional. The court affirmed that Congress had determined that there was a compelling need for the DBE program and the Part 26 was narrowly tailored. The court agreed that Washington State did not need to establish a compelling need for its DBE program, independent of the determinations that Congress made on a national basis.

• However, the court said that race conscious elements of a national program, to be narrowly tailored as applied, must be limited to those parts of the country where its race- based measures are demonstrably needed.

• Whether race-based measures are needed depends on the presence or absence of discrimination or its effects in a state's transportation contracting industry. In addition, even when discrimination is present in a state, a program is narrowly tailored only if its application is limited to those specific groups that have actually suffered discrimination or its effects.

• The court concluded that Washington State DOT's DBE program was not narrowly tailored because the evidence of discrimination supporting its application was inadequate.

• The court mentioned several ways in which the state's evidence was insufficient:

• Washington State DOT had not conducted statistical studies to establish the existence of discrimination in the highway contracting industry that were completed or valid.

• The court cited the 8th Circuit's decision in Sherbrooke Turf v. Minnesota Department of Transportation. In that case, the court said, Minnesota and Nebraska had hired outside consulting firms to conduct statistical analyses of the availability and capacity of DBEs in their local markets, which the 8th Circuit had relied on in holding that the two states'
DBE programs were constitutional as applied.

• Washington State DOT's calculation of the capacity of DBEs to do work was flawed because it failed to take into account the effects of past race-conscious programs on current DBE participation.

• The disparity between DBE participation on contracts with and without affirmative action components did not provide any evidence of discrimination.

• A small disparity between the proportion of DBE firms in the state and the percentage of funds awarded to DBEs in race-neutral contracts (2.7% in the case of Washington State DOT) was entitled to little weight as evidence of discrimination, because it did not account for other factors that may affect the relative capacity of DBEs to undertake contracting work.

• This small statistical disparity is not enough, standing alone, to demonstrate the existence of discrimination. To demonstrate discrimination, a larger disparity would be needed. Washington State DOT did not present any anecdotal evidence of discrimination.

• The affidavits required by 49 CFR 26.67(a), in which DBEs certify that they are socially and economically disadvantaged, are not evidence of the presence of discrimination.

• Consequently, the court found that the Washington State DOT DBE program was unconstitutional as applied.

What should recipients' studies include? (Posted - 1/12/06)

• Based on the 9 th Circuit decision, recipients should consider the following points as they design their studies:

• The study should ascertain the evidence for discrimination and its effects separately for each of the groups presumed by Part 26 to be disadvantaged.

• The study should include an assessment of any anecdotal and complaint evidence of discrimination.

• Recipients may consider the kinds of evidence that are used in "Step 2" of the Part 26 goal- setting process, such as evidence of barriers in obtaining bonding and financing, disparities in business formation and earnings.

• With respect to statistical evidence, the study should rigorously determine the effects of factors other than discrimination that may account for statistical disparities between DBE availability and participation. This is likely to require a multivariate/regression analysis.

• The study should quantify the magnitude of any differences between DBE availability and participation, or DBE participation in race-neutral and race-conscious contracts. Recipients should exercise caution in drawing conclusions about the presence of discrimination and its effects based on small differences.

• In calculating availability of DBEs, the study should not rely on numbers that may have been inflated by race-conscious programs that may not have been narrowly tailored.

• Recipients should consider, as they plan their studies, evidence-gathering efforts that Federal courts have approved in the past. These include the studies by Minnesota and Nebraska cited in Sherbrooke Turf, Inc. v. Minnesota Department of Transportation, 345 F.3d 964 (8 th Cir. 2003), cert. denied 124 S. Ct. 2158 (2004) and the Illinois evidence cited in Northern Contracting, Inc. v.State of Illinois, et al. 2005 WL 2230195, N.D.Ill., September 08, 2005 (No. 00 C 4515)

Will the process used by the modal administrations to review and approve goal submissions made by recipients in the ninth circuit change? (Posted - 1/12/06)

• For FHWA recipients in the 9th Circuit, FY 2006 DBE goal submissions will require concurrence by the FHWA Office of Civil Rights and the Office of Chief Counsel in Washington, D.C. before approval by the appropriate FHWA division office.

• FTA's process will remain the same.

• For FAA recipients in the 9th Circuit, FY 2006 DBE goal submissions with a race- conscious component will require concurrence by the FAA Headquarters Office of Civil Rights and a legal sufficiency review by the Office of Chief Counsel in Washington, D.C. before being approved by the appropriate FAA Regional Office of Civil Rights and Office of Chief Counsel. Those with an all race- neutral overall goal will be approved by the Regional Office of Civil Rights.

Will federal funds help to defray the costs of recipients' studies? (Posted - 1/12/06)

• Yes. FHWA, FTA, and FAA have all stated that the costs of conducting disparity studies are reimbursable from Federal program funds, subject to the availability of those funds.

• Recipients should contact their operating administration for more detailed information.

Can there be statewide or regional studies, as opposed to a separate study for each individual recipient? (Posted - 1/12/06)

• If feasible, studies may be undertaken on a regional or statewide basis to reduce the costs that would be involved if each recipient conducted its own separate study.

• We would expect that each State DOT would conduct a statewide study. Such a study should be conducted in cooperation with transit and airport recipients in the state, so that the study would apply to recipients in all three modes.

• Larger transit and/or airport recipients may want to conduct their own study, since the demographics of large urban areas may differ from that of the state as a whole.

If recipients will be operating an all race-neutral DBE program in FY 2006 or subsequent years, what should such a program include? (Posted - 1/12/06)

• With few exceptions, generally there is no difference in how the DBE program regulations apply to a race- and gender-neutral program (hereafter race-neutral) as compared to a race- and gender-conscious program (hereafter race-conscious).

• In a wholly race- neutral program (e.g., the annual overall DBE goal has been approved with no portion of it projected to be attained by using race- and gender-conscious means) the recipient does not set contract goals on any of its US DOT-assisted contracts for which DBE subcontracting possibilities exist. Recipients having an all-race-neutral program are not required to establish contract goals to meet any portion of their overall goal.

• Recipients should take affirmative steps to use as many of the race-neutral means of achieving DBE participation identified at 49 CFR 26.51(b) as possible to meet the overall goal and to demonstrate that you are administering your program in good faith. The Department expects that recipients using all race-neutral programs will use methods such as unbundling of contracts, technical assistance, capital and bonding assistance, business development programs, etc., rather than waiting passively for DBEs to participate.

• The good faith efforts requirements in 49 CFR 26.53 that apply when DBE contract goals are set have no required application to recipients implementing a race-neutral program. However, recipients must continue to collect the data required to be reported in the Uniform Report of DBE Awards or Commitments and Payments Form (see §26.11) and to monitor compliance with the commercially useful function requirements.

• The prompt payment and retainage requirements of 49 CFR 26.29 are race-neutral mechanisms designed to benefit all subcontractors, DBEs and non-DBEs alike. Recipients using all race-neutral programs must continue to implement them.

• The requirement that DBEs must perform a commercially useful function to receive credit toward the overall goal applies to race neutral programs just as it does to programs that use race-conscious means to meet program objectives.

• It is helpful for recipients to maintain an effective monitoring and enforcement program to track DBE participation obtained through race neutral means that the recipient claims credit (see 49 CFR 26.37 (b)).

If a recipient lacks sufficient evidence of discrimination or its effects, what should it do to remedy the lack of information? (Posted - 1/12/06)

• A recipient in this situation should immediately begin to conduct a rigorous and valid study to determine whether there is evidence of discrimination or its effects.

• The Department expects recipients who submit an all-race neutral goal for FY 2006 because they lack sufficient evidence of discrimination to ensure that this evidence- gathering effort is completed expeditiously.

• Studies to determine the presence of discrimination or its effects are often referred to as “disparity” or “availability” studies, though there can also be rigorous and scientifically valid studies which may have different names. Whatever label is applied to a study, however, the key point is that it be designed to determine, in a fair and valid way, whether evidence of the kind the 9th Circuit decision determined was essential to a DBE program including race-conscious elements exists.
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Program Administrator

Section 26.3 – If another Federal Agency Administers a Federal-Aid Contract or Undertakes a Federal-Aid project at the Request of a Recipient, Is the Other Federal Agency Subject to the Requirements of Title 49 CFR Part 26? (Posted-9/1/03)

• No. The USDOT DBE program requirements apply to the activities of non-Federal recipients of DOT financial assistance specified in 49 C.F.R. § 26.3. The purpose of the USDOT DBE program is to ensure that Federal funds distributed to state, local, and regional authorities are not used to engage in discriminatory conduct or to perpetuate the past effects of discrimination by denying contracting opportunities to small disadvantaged businesses.

• Similarly, it is the policy of the Federal government to ensure that small disadvantaged businesses have the maximum practicable opportunity to participate in the performance of contracts let by Federal agencies. Establishing and implementing a DBE program consistent with the requirements of Title 49 part 26 is a condition the Federal government places on the receipt of Federal funds by non-Federal authorities. It is not a condition that Congress intended to impose on Federal agencies through Federal assistance programs created to support state, local, and regional authorities. Federal agency conduct in this regard is governed by different statutory and regulatory requirements.

• Most Federal agencies have programs analogous to the DBE program aimed at ensuring equal opportunity for minority and women owned businesses to participate in Federal contracting. If another Federal agency is authorized to administer a Federal-aid contract or project on behalf or at the request of a recipient of USDOT financial assistance, the other Federal agency and the recipient should agree on how the other Federal agency will contribute to the recipient's achievement of its annual overall DBE goal. The other Federal agency must be willing to report to the recipient its DBE achievements on DOT assisted contracts for inclusion in the reports made by the recipient to the appropriate operating administration.

• The Federal Acquisition Regulations would govern the procurement activities undertaken by the other Federal agency.

Section 26.21 – Are recipients required to collect all bidders' list information at the time of bid (posted – 2/17/00)

• No. The regulation permits recipients to collect bidders' list information in a variety of ways and at various times.

• For example, it may be less burdensome on bidders if the recipient permits them to provide the names and addresses of firms a reasonable time after bids are due. The information provided at such a time may also be in a more easily usable form to the recipient.

• Not all bidders' list information need necessarily be collected through the bid process. For example, a recipient could conduct a survey of a sample of firms that have bid or quoted on its projects to determine the age and annual gross receipts of the firms on the bidders' list.

Section 26.21 – Can a new recipient be eligible to receive Federal financial assistance if it does not have an approved DBE program?

• Section 26.21(c) provides that "You are not eligible to receive DOT financial assistance unless DOT has approved your DBE program and you are in compliance with it and this part."

• If you are a new recipient (e.g., a transit grantee beginning service for the first time, who has never had an approved DBE program), you must have an approved DBE program before you are eligible to begin receiving Federal financial assistance. This was also true under the old DBE rule.

• For example, if you are a new transit grantee, hoping to begin receiving FTA funds in the next fiscal year, you must have an FTA-approved DBE program conforming to part 26 before receiving those funds.

What impact do state anti-affirmative action laws have on the DOT DBE program? (Posted - 4/12/99)

• None. State laws regarding affirmative action do not pre-empt the Federal DBE statues and regulations.

• Some states have laws that prohibit the use of race-conscious affirmative action measures on state or locally funded contracts led by public agencies in the state (e.g., California Proposition 209; Washington Initiative 200). Such states must still implement the DOT DBE Program, as a condition of receiving DOT financial assistance.

• State anti-affirmative action laws of this kind typically have provisions that authorize state or local public agencies to comply with Federal affirmative action requirements that are a condition of Federal financial assistance. Consequently, compliance with part 26 does not create any conflict with such state laws**.**
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Recovery Act

Section 26.45, 26.47, 26.51, 26.53 How should recipients administer their DBE programs in the context of potentially large increases in funding that may become available as the result of the proposed Economic Recovery Package (posted – 1/26/09)

• The Department anticipates that the DBE program and regulations will apply to Federally-assisted contracts receiving funds from the proposed recovery package. All of a recipient's funds – whether derived from SAFETEA-LU or the recovery package – should be viewed as part of a single, combined funding base to which DBE goals apply.

• Given the flexibility built into the DBE regulations, recipients can successfully administer their DBE programs under these rules in the context of funding increases provided by the recovery legislation. Particularly because a major purpose of the proposed legislation is to increase opportunities for businesses and workers in a challenging economic climate, the Department expects

recipients to do so.

• The Department is aware of concerns expressed by recipients that there may not be sufficient availability of certified DBEs to meet existing overall goals, as applied to recipients' expanded programs.

• To help address such concerns, recipients should begin, as soon as possible, outreach to affected persons. This outreach should include dialogue with representatives of the contracting industry and the DBE community to begin to understand recipient- specific issues. This outreach will allow recipients and DOT operating administrations to be better prepared to react to Congressional direction in new legislation.

• Recipients should make use of race-neutral measures, such as small business programs, owner-provided insurance, technical and financial assistance, and unbundling of contracts to increase the ability and capacity of DBEs and other small businesses to perform contracts receiving recovery package funding. The Department of Transportation's Office of Small and Disadvantaged Business Utilization also operates a short-term lending program, which can help to increase DBE capacity.

• Recipients should take steps to mobilize underutilized DBE capacity:
o Recipients should reach out to firms that may potentially be eligible for DBE certification, but are not yet part of the program, urging them to apply.
o Recipients should expedite the processing of applications for certification.
o In many cases, there are substantial numbers of certified firms that are seldom used on contracts. This can be an additional source of DBE capacity. Recipients should make vigorous efforts to work with such firms and prime contractors to take advantage of this resource.
o Recipients and prime contractors should be as inclusive as possible in utilizing all available DBE firms, not ruling certified firms out based on preconceptions about their competence to do a particular job.

• Recipients should use existing regulatory tools to address concerns about capacity:

o Recipients can take the projected availability of DBEs for any particular contract into consideration in determining the contract goal for that contract. This is consistent with the existing regulation (see 49 CFR
26.51(e)(2)).
o If a bidder on a prime contract cannot find sufficient certified DBE participation to meet a contract goal (e.g., because all DBE capacity for the types of work involved is absorbed by other projects), the bidder can
meet DBE requirements by documenting its good faith efforts to find DBE
participation. This is also consistent with the existing regulation (see 49
CFR 26.53(a)(2)).
o The Department believes that modifications to overall goals will be needed rarely, if at all, to deal with administration of recovery package funds. It is important to remember that recipients are not penalized for failing to "hit the number" with respect to overall goals, as long as they are operating their programs in good faith (see 49 CFR 26.47). However, if a recipient believes it necessary to adjust an overall goal, it could propose such an adjustment to the relevant DOT operating administration. The requirements of 49 CFR 26.45 would apply to such an adjustment.

• Recipients should communicate regularly with DOT agencies concerning operating their DBE programs in context of recovery package funding. If a recipient believes that is has problems or issues that are not addressed by the DOT regulations or program guidance, the recipient should contact the relevant operating administration to discuss the matter.

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Race-Neutral Measures

Would the provision of plans or specifications for a project at no charge to DBEs, when other firms are charged a fee for this information, be considered a race-neutral measure? (Section 26.51) (posted – 4/12/99)

• If plans and specifications are provided to DBEs without charge, but other firms are charged a fee for the same service, this would not be a race-neutral measure. This is because the DBE status of a firm determines whether or not the firm has to pay a fee for the information.

• On the other hand, if such plans and specifications are provided free to all small businesses, or a subcategory of "smaller" small businesses, or to all new businesses (e.g., that have been in operation less than three years), or to all businesses in a particular field, etc., then no distinction is being made on the basis of DBE status. Such an approach would be race-neutral.

• While this question concerns a measure that we view as race-conscious, there may be other measures used to facilitate increased DBE participation that we would consider to be race-neutral. For example, outreach or technical assistance measures aimed primarily at DBEs may be viewed as race-neutral.

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Updated: April, 15, 2016

*****The General Counsel of the Department of Transportation has reviewed these questions and answers and approved them as consistent with the language and intent of 49 CFR Part 26. These questions and answers therefore represent the institutional position of the Department of Transportation.*****

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