

Nevada Department of  
Transportation

**DISADVANTAGED  
BUSINESS  
ENTERPRISE  
PROGRAM**

June 2012

**Nevada Department of Transportation  
Disadvantaged Business Enterprise Program**

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## POLICY STATEMENT

### Nevada Department of Transportation Disadvantaged Business Enterprise Program

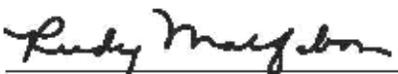
The Nevada Department of Transportation (NDOT) has established a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the U.S. Department of Transportation (USDOT), 49 CFR Part 26. The Nevada Department of Transportation receives Federal financial assistance from the United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

It is the policy of NDOT to ensure DBE firms, as defined in part 26, have an equal opportunity to receive and participate in USDOT-assisted contracts. It is our policy:

- To ensure nondiscrimination in the award and administration of USDOT assisted contracts in the Department's highway, transit and airport financial assistance programs;
- To create a level playing field on which DBEs can compete fairly for USDOT assisted contracts.
- To ensure that the DBE Program is narrowly tailored in accordance with applicable law.
- To ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs.
- To help remove barriers to the participation of DBEs in USDOT assisted contracts.
- To assist in the development of disadvantaged firms so that they can compete successfully in the market place outside the DBE Program.
- To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

The Contract Compliance Manager has been delegated as the NDOT DBE Liaison Officer. In that capacity, the Contract Compliance Manager is responsible for implementing all aspects of the DBE program. Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by NDOT in its financial assistance agreements with the USDOT.

NDOT will ensure that this policy statement will be disseminated to all division heads and all of the components of the organization. NDOT will distribute this statement by mail to DBE and non-DBE business communities that work for NDOT on USDOT assisted contracts, and by posting it on the NDOT website.

*for*   
Susan Martinovich P.E.  
Director

6-14-12  
Date

## **I) INTRODUCTION**

The Nevada Department of Transportation (NDOT) recognizes its responsibility to ensure that Disadvantaged Business Enterprise (DBE) firms have equal opportunity to participate in the performance of USDOT assisted contracts administered by NDOT. As part of our continued effort to fulfill this responsibility, NDOT has revised the DBE Program Plan to reflect the requirements and guidance contained in title 49 Code of Federal Regulations Part 26.

Significant changes in the Plan will be submitted to the local FHWA and FTA offices for approval.

### **A. Purpose**

The purpose for the DBE Program Plan is to provide guidance for NDOT personnel in implementing 49 CFR Part 26 and provide DBEs and other contractor's information on their responsibilities on USDOT assisted contracts and NDOT's implementing procedures. It assures USDOT that NDOT will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award or performance of any contract covered by 49 CFR Part 26 on the basis of race, color, sex or national origin.

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

### **B. Scope**

The DBE Program applies to all USDOT-assisted transportation-related contracts administered by NDOT and authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) and Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21). Also included are federal transit funds authorized by Titles I, III, V, and VI of ISTEA or by federal transit laws in Title 49, USC or Titles I, III and V of TEA-21. Airport funds authorized by 49 USC 47101, et seq., are also included. This program remains in effect until the end of the fiscal year in which all such funds from USDOT have been expended.

The Program's requirements also apply to USDOT-funded non-construction programs including:

- Professional Service Agreements (training, computer, etc.)
- Architectural/Engineering Contracts

Other NDOT Divisions that receive USDOT funds include the Right of Way Division and The Transit Division within Planning. These Divisions have reviewed, adopted, and assure compliance with the conditions of the NDOT DBE Plan. As appropriate, NDOT's Civil Rights Unit will develop, an annual DBE participation goal using the methodology established in this DBE Plan. The goal will be provided by NDOT to the appropriate USDOT administration.

In accordance with 49 CFR 26.49, transit vehicle manufacturers, as a condition of being authorized to bid on FTA-assisted transit vehicle procurements, will also be required to establish and submit for FTA's approval an overall DBE percentage goal.

Sub-recipients who receive USDOT (FTA and FAA) funds through NDOT as noted above and award more than \$250,000 in prime contracts in a fiscal year are required to comply with the provisions of 49 CFR Part 26 and develop their own DBE Program Plan, or adopt and utilize the NDOT DBE Program Plan.

Additionally, agreements between NDOT and all sub-recipients will contain assurances that sub-recipients will not discriminate on the basis of race, color, national origin, sex, age, disability/handicap, and income status in the performance of this contract as well as language that obligates sub-recipients to develop, and implement, their own DBE Plan or to adopt, and implement, the provisions of the NDOT DBE Program.

### **C. AUTHORITY AND APPLICABLE LAWS**

USDOT regulations, 49 CFR Part 23 (revised) and Part 26 (revised), published in the Federal Registers, Volume 75, No. 22, dated February 3, 2010 and Volume 76, No. 19 dated January 28, 2011, revised the Disadvantaged Business Enterprise Program established in 1980.

### **D. FEDERAL FINANCIAL ASSISTANCE AGREEMENT ASSURANCE**

NDOT has signed the following assurance, applicable to all USDOT-assisted contracts and their administration. Agreements with sub-recipients will also include this assurance:

*The Nevada Department of Transportation shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any USDOT-assisted contract or in the administration of its DBE Program or the requirements of 49 CFR Part 26. The recipient shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of USDOT-assisted contracts. NDOT's*

*DBE Program, as required by 49 CFR 26 and as approved by USDOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to NDOT of its failure to carry out its approved program, the USDOT may impose sanctions as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 USC 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 USC 3801 et seq.).*

Any person who believes that NDOT has failed to comply with its obligations under this program may file a written complaint with the appropriate USDOT Modal Administration as listed under 49 CFR 26.103 and 26.105.

NDOT will not intimidate, threaten, coerce, or discriminate against any individual or firm for any reason.

## **II) ADMINISTRATION**

### **A. DBE LIAISON OFFICER (DBELO)**

1. DBE program objectives are implemented and monitored by Contract Compliance Office personnel under the direction of the Contract Compliance Manager who is designated as the DBE Liaison Officer with overall responsibility for the program. While the Contract Compliance Manager reports to the Civil Rights Officer (CRO), he/she has direct independent access to the Director concerning DBE program matters as reflected on the organization chart. Duties and responsibilities include:
  - Advising the Director and the Transportation Board on DBE matters and achievements; and
  - Providing direction and guidance to the Civil Rights Officer (CRO) and other staff on implementing all aspects of NDOT's DBE Program.
2. The Contract Compliance Manager has responsibility for administering the day-to-day operation of the program, and reports to the CRO. Duties and responsibilities include:
  - Gathering and reporting statistical data and other information required by USDOT;
  - Working with all internal and external entities to set overall annual goals;
  - Identifying contracts and procurements so that DBE goals are included, when possible, in solicitations and monitor results;

- Analyzing NDOT's progress toward goal attainment and identifies ways to improve progress;
- Participating in pre-bid and Pre-Construction meetings;
- Participating in the UCP Certification Committee certifying DBEs according to the criteria set by USDOT and act as liaison to the Uniform Certification Program in Nevada.
- In collaboration with project managers and Resident Engineers, to determine contractor compliance with commercially useful function requirements; and reviewing Good Faith Effort Documents as required on bids and proposals.
- Ensuring that bid notices and requests for proposals are correct and to assist DBEs in a timely manner;
- Planning and participating in DBE training seminars;
- Providing outreach to DBEs and community organizations to advise them of opportunities;
- Maintaining NDOT's directory of certified DBEs; and
- Providing information to the Nevada UCP.

These tasks account for approximately forty (40%) percent of the Contract Compliance Manager's work time.

3. The CCM has a staff of two Program Officer III's and two Program Officer I's and an Admin Assistant II to provide program support to the CCM, accounting for twenty (20) percent of the program Officers I's work time.

In addition to the CCD staff, Resident Engineers and their staff assist in collecting data, conducting on-site interviews, and monitoring compliance with the DBE program.

## **B. OBJECTIVES OF THE DBE PROGRAM**

In meeting the objectives of the DBE Program, as stated in our Policy Statement above, NDOT will not use quotas in any way.

## **C. DBE DIRECTORY OF CERTIFIED FIRMS**

1. The CCM solicits potential DBE contractors for certification by working with the Nevada Small Business Development Center (NSBDC) through our DBE Supportive Service (DBESS) Program:
  - a) Outreach to ethnic and minority groups and DBE and small business advocacy organizations throughout Nevada;
  - b) Outreach through business fairs and statewide program presentations.

2. NDOT compiles and maintains a directory of firms currently certified as eligible to participate in transportation-related contracts under the DBE Program. The directory is available on the Internet at [www.nevadadbe.com](http://www.nevadadbe.com). Anyone interested in obtaining DBE services or supplies, may contact the following address:

Nevada Department of Transportation  
Contract Compliance Office  
1263 S Stewart Street  
Carson City, NV 89712  
(775) 888-7497

3. The Directory contains: firm name, address, telephone number(s) and the types of work (by NAICS code) that the firm has been certified to perform as a DBE.
4. The Nevada Department of Transportation has determined that there are no financial institutions owned and controlled by socially or economically disadvantaged individuals in the State of Nevada. NDOT will check on the availability of DBE financial institutions on an annual basis. If any financial institutions owned and controlled by socially or economically disadvantaged individuals are identified, NDOT will make reasonable efforts to use these institutions and encourage prime contractors to use such institutions.

#### **D. Small Business Element**

Effective on February 28, 2012, federal fund recipients such as NDOT must include a Small Business Element (SBE) in its DBE Program to foster the participation of small businesses in NDOT projects. More specifically, the regulations provide that:

1. The SBE program element, once approved by the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA) must be integrated into the body of the NDOT Civil Rights DBE program plan.
2. Following approval by the FHWA and the FTA, NDOT must implement the SBE element within nine months.
3. Pursuant to 49 CFR 26.39, NDOT as a recipient is responsible for taking **active, effective steps to increase small business participation.**

4. Recipients are not required to report on the level of small business participation; however, DBE participation on these contracts must be reported according to normal DBE reporting. Small business participation on these contracts must be tracked so that participation related questions, should they arise, can be answered.

**Legal authority for adding the proposed text to the DBE program: Reference 49 CFR Part 26, Section 26.39 - Fostering small business participation (see Appendix 1 of this document for entire text extracted from regulation).**

5. NDOT will foster small business participation by providing race-neutral small business goals on federally-assisted projects that do not have DBE goals. For purposes of this program, small businesses are defined as those firms that meet the small business size standards defined in section 3 of the Small Business Act (SBA) and the SBA regulations implementing it (13 CFR Part 121). Small businesses must also not exceed the cap on average annual gross receipts specified in §26.65(b) and the SBA program personal net worth size limit.
6. SBA size standards define whether a business is "small" and thus eligible for government programs and preferences reserved for "small business" concerns. Size standards are usually reflected in the business's number of employees and three year average annual receipts. SBA size standards have been established for types of economic activity, or industry, generally under the [North American Industry Classification System \(NAICS\)](#).

49 CFR Part 26 (DBE Program) caps business sizes to \$22.41 million in average gross receipts averaged over three years. In order to level the playing field between certified DBE firms and non-DBE firms awarded SBE contracts, we will strictly apply the SBA small business size standards and DBE program size limits. As a result, firms that meet the SBA small business size limit for a particular industry will not be any larger than a certified DBE firm in the same industry. This DBE program size limit, regardless of industry, restricts both certified DBE firms and non-DBE firms to average gross receipts of no more than \$22.41 million. For example, the SBA small business size limit for most

general contractors is \$33.5 million in receipts averaged over three years. The DBE program size limit is \$22.41 million in receipts averaged over three years. Therefore, general contractors averaging more than \$22.41 million in receipts would not be eligible for SBE contracts.

- a) NDOT must verify a firm's eligibility to participate in the SBE program element. First, to ensure that a firm is in fact eligible for a SBE contract and to minimize fraud and abuse, NDOT will outline eligibility requirements in bid documents. NDOT will then verify the eligibility of the apparent low bidder in meeting these requirements before the contract is awarded. A certified DBE is presumed eligible to participate in this small business program; the small business program complies with 49 CFR Part 26, Section 26.39.
- b) Firms currently certified by the SBA 8A, HUBZone or Small Disadvantaged Business programs need only provide evidence of that certification. In those cases where the firm has not been previously certified as a small business by the SBA, NDOT will provide a certification process administered by the Nevada Unified Certification Program (UCP), as follows:
- c) A firm who wishes to participate as an SBE on a federally-assisted NDOT project and has not been certified as a DBE or verified as an SBE by one of the certifying agencies of the Nevada Unified Certification Program within the preceding 12 months may apply for verification as an SBE by filing a Small Business Enterprise (SBE) Verification Form and submitting the form along with all required attachments at the time of bid.

Firms applying for verification as an SBE must provide all required information and documentation necessary to verify that they meet the definition of a Small Business Enterprise:

- d) To determine whether or not a firm's average three years gross receipts meet the SBA small business size limit, the firm will be required to provide the most current three years federal corporate income tax returns (including all

schedules). Firms with three year average gross receipts that exceed their SBA small business size limit or the DBE program size limit of \$22.41 million are not eligible for award of a SBE contract.

- e) SBE program eligibility is also contingent upon the personal net worth of the owner(s) of the firm. A personal net worth size limit of \$1.32 million will apply to the owner(s). Owner(s) of the firms will be asked to submit a personal net worth statement and a copy of each of their most current three years of federal personal income tax returns (including all schedules and W-2s). Those firms whose owner(s) personal net worth exceeds \$1.32 million are not eligible for participation in the SBE program.
- f) Owners must submit a signed, notarized statement of personal net worth, with appropriate supporting documentation. Before the firm can be eligible for the SBE program, the firm must provide a copy of the SBE personal net worth statement, three years of the owner's most recent personal and corporate income tax returns (including all schedules and W-2s), and a current balance sheet. Other supporting documents will be requested if verification questions arise.

7. In determining an individual's net worth, NDOT will observe the following requirements:

- a) Exclude an individual's ownership interest in the applicant firm;
- b) Exclude the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the firm).
- c) Contingent liabilities will not be used to reduce an individual's net worth.
- d) With respect to assets held in vested pension plans, Individual Retirement Accounts, 401(k) accounts, or other retirement savings or investment

programs in which the assets cannot be distributed to the individual at the present time without significant adverse tax or interest consequences, include only the present value of such assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time.

8. SBE contracts will not be restricted to any particular type of contract. SBE contracts are a subset within the DBE program; therefore, any federally-assisted contract opportunity funded through the Nevada Department of Transportation will be evaluated as a candidate for a SBE contract. SBE contracts can be prime contracts or subcontracts. NDOT funded construction contracts are typically managed within the State Transportation Improvement Program (STIP). The STIP is a four year plan of projects that are funded from a variety of sources (state gas tax, for example). The STIP is reviewed and approved during NDOT Transportation Board Meetings. Federally funded STIP construction projects will be evaluated and identified for solicitation as SBE contracts. NDOT staff will evaluate which construction contracts may be suitable for solicitation as SBE subcontracts or more suited for solicitation as prime contracts.

- a) SBE prime contract amounts are not size limited. Any federally-assisted NDOT project that the NDOT staff believes can be primed by a firm meeting the SBA business size and owner personal net worth limits, can be offered as a SBE contract. SBE prime contracts **will not** have **DBE** contract goals. SBE contracts and SBE goals will be a size that small businesses, including DBEs, can reasonably expect to perform.
- b) While not required, NDOT will set a SBE program goal requiring prime contractors to identify elements of the contract or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform. In multi-year design build or other large contracts (e.g. for “mega-projects”), NDOT will review the projects to accommodate utilization of DBEs and small businesses on SBE contracts.

NDOT will monitor the effectiveness of the Program goal approach to ensure that it is effective in fostering increased small business participation.

- c) On all NDOT federally-assisted prime contracts not having **DBE** contract goals, NDOT will examine the feasibility of setting SBE goals that require the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work involved. NDOT may identify the type of work provided under the SBE contract.
- d) NDOT will track the total dollar amount and number of SBE contracts awarded each year and will monitor to help ensure to meet or exceed the race neutral portion of our three year overall DBE goal. When practical, the SBE contracts will be prime contracts.
- e) The number of SBE contracts awarded each year will depend on the number and dollar amount of Federal funding received by NDOT.

9. Professional services, including engineering and design contracts and other contracts that have Federal funding will be reviewed by the appropriate NDOT staff to determine whether or not the contract is a candidate for a SBE contract.

10. This small business participation element will be implemented within nine months of Federal Transit Administration (FTA) and Federal Highway Administration (FHWA) approval.

### **III) DBE CERTIFICATION PROCESS**

NDOT's certification process attempts to identify those existing, for-profit, transportation-related firms that meet the eligibility criteria while ensuring that the benefits of the program are not extended to ineligible applicants.

#### **A. UNIFIED CERTIFICATION COMMITTEE**

As required in 49 CFR Part 26, the Nevada Unified Certification Program consists of six member agencies; NDOT, Washoe County Regional Transportation Commission, Southern Nevada Regional Transportation Commission, Carson Area Metropolitan Planning Organization, the McCarran Airport and the Reno, Tahoe Airport Authority. Decisions of the UCP on certification and denial of certification are administratively final (except for appeal to USDOT). Following denial of an initial certification a firm may reapply for certification after twelve months from the date of the denial letter.

The UCP meets monthly. Applications for certification are reviewed by the UCP to determine that all requirements have been met and that adequate, accurate information has been provided on which to determine eligibility. Firms applying for certification have the burden of demonstrating to the UCP, by a preponderance of the evidence, that they meet the requirements of presumptively disadvantaged groups (or individual disadvantage), business size, ownership, and control.

#### **B. CERTIFICATION ELIGIBILITY REQUIREMENTS**

The following criteria are used by NDOT and the UCP in determining whether a firm is owned and controlled by one or more disadvantaged individuals and whether the firm is eligible to be certified as a DBE (49 CFR 26 Subparts D and E and Appendix A to Part 26).

1. The size of the applicant firm, including its affiliates, cannot exceed the limits stated in 49 CFR Part 26 or the SBA business size limits.
2. Economic and Social Disadvantage can be determined in three ways:
  - a) The applicant firm's majority owner(s) must be citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Subcontinent Asian Americans or other minorities found to be disadvantaged by the SBA. These applicants, presumed to be disadvantaged, must also submit a signed, notarized certificate with its application attesting to its actual social and economic disadvantage. In addition to proving ancestry, the applicant owner(s) must document that they are recognized in their communities as members of one of these groups if

there is reason to question eligibility. NDOT will make a written request explaining when additional evidence is needed. The presumption of disadvantage may be rebutted by NDOT or third parties.

- **"Black Americans"** (persons having origins in any of the black racial groups of Africa)
  - **"Hispanic Americans"** (persons of Mexican, Puerto Rican, Cuban, Dominican, Central and South American, or other Spanish or Portuguese culture or origin, regardless of race)
  - **"Native Americans"** (persons who are American Indians, Eskimos, Aleuts or Native Hawaiians)
  - **"Asian-Pacific Americans"** (persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the US Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong)
  - **"Subcontinent Asian Americans"** (persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka)
  - **Women**
  - Any additional groups whose members are designated as socially and economically disadvantaged by the Small Business Administration.
- b) The applicant firm's owners have been certified by the Small Business Administration as being socially and economically disadvantaged under Section 8(a) of the Small Business Act as amended [15 USC 637(A)].
- c) The applicant firm's owners do not meet criteria in 2 a. or b. above, but can demonstrate, by a preponderance of the evidence that they are socially and economically disadvantaged. The DBE Certification Committee will evaluate each applicant (including those whose qualifications under 2.a. are in question) against the criteria established in 49 CFR 26 Appendix E.

Applicant's adjusted personal net worth (excluding his or her ownership interest in the firm; his or her equity in a primary residence; assets held in vested pensions plans, retirement accounts, 401 (k) account, or other retirement saving or

investment programs with adverse tax or interest consequences if distributed at the present time) cannot exceed \$1.32 million. All applicants whose ownership and control are relied upon for the DBE certification must submit a signed notarized certificate regarding their personal net worth accompanied by appropriate supporting documentation. Relevant information from the applicant's spouse may be requested on a case by case basis when there is a specific reason to look into the spouse's finances. Information submitted must be dated within the past six months.

3. Ownership - To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.
  - a) At least 51 percent ownership of each class of voting stock outstanding and at least 51 percent of the aggregate of all stock outstanding must be held by the disadvantaged owner(s) (in corporations); 51 percent of each class of partnership interest (as reflected in partnership agreements); or 51 percent of each class of member interest (in limited liability companies) must be held by socially and economically disadvantaged individuals.
  - b) The firm's ownership by socially and economically disadvantaged individuals must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.
    - i) Securities that constitute ownership must be held directly by disadvantaged persons. Under limited circumstances, securities held in trust by and for disadvantaged owners may be counted toward ownership.
    - ii) The contributions of capital or expertise by the disadvantaged owners to acquire ownership interests must be real and substantial.
      - Promises to contribute capital, unsecured notes payable to the firm or non-disadvantaged owners, or participation in the firm as an employee do not constitute adequate contributions; debt instruments from financial

institutions normally are considered adequate contributions.

- A significant financial investment in the firm must also accompany the disadvantaged owner's contributions of expertise. Expertise must be in a specialized field, of outstanding quality, critical to the firm's operations, indispensable to the firm's potential success, specific to the type of work the firm performs, and documented in the records of the firm.
- iii) Ownership interests obtained through property settlements, inheritance, gifts or transfers must be evaluated against specific criteria contained in 49 CFR 26.69(g).
- iv) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. NDOT does not count a greater portion of joint or community property assets toward ownership than state law recognizes as belonging to the socially or economically disadvantaged owner of the applicant firm.

A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.

4. Control of the firm will be determined by considering all the facts in the record viewed as a whole.
- a) Whether the firm is independent and viable - one that does not depend on its relationship with another firm. The following areas will be examined:
- The relationship between the disadvantaged owner(s) and non-DBE firm in the areas of personnel, facilities, equipment, financial or bonding support, and other resources;

- Recent employer/employee relationships between the disadvantaged owner(s) and a non-DBE firm;
  - Patterns of exclusive or primary dealings with a prime contractor; and
  - Normal industry practices related to the consistency of relationships between disadvantaged owner(s) and non-DBE firms.
- b) Whether the disadvantaged firm is subject to formal or informal restrictions in the areas of: corporate charter provisions, by-law provisions, contracts, cumulative voting rights, voting powers accompanying different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions of precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights that prohibit the disadvantaged owner(s) from making independent business decisions. Spousal co-signature on documents is not precluded.
- c) Whether the disadvantaged owner(s) possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long term decisions on matters of management, policy and operations. The disadvantaged owner(s):
- Must hold the highest officer position in the company;
  - Must control the Board of Directors in a corporation; and
  - Must be a general partner in partnerships, with control over all partnership decisions.
- d) Whether non-disadvantaged participants (owners, managers, etc.) have the power to control the firm or are disproportionately responsible for its operations.
- e) Whether disadvantaged owners retain the power to hire and fire or revoke the authority of non-disadvantaged persons to whom authority has been delegated. The disadvantaged owners must actually exercise control over the firm's operations, management, and policy.
- f) Whether the disadvantaged owners possess the experience, managerial and technical competence, and overall understanding of the firm's business; whether they can intelligently and critically evaluate information presented by other participants in the firm's activities and use the information to make independent decisions. (Generally,

office management, administration, or bookkeeping activities by themselves do not demonstrate control.)

- g) Whether the disadvantaged owner holds the required license(s) - craft or professional - for the firm's primary type of business as required by state or local law. Lack of licensure, by itself, does not disqualify the firm, but should be considered in evaluating whether the disadvantaged owner(s) controls the firm.
- h) Whether differences in remuneration between the disadvantaged and non-disadvantaged owners (or other participants) is significant (or explainable) vis-à-vis duties and responsibilities, normal industry practices, and the firm's reinvestment practices. All management positions will be evaluated to determine actual control of the applicant firm.
- i) Whether the disadvantaged owner engages in outside employment or other business interests that conflict with full-time management of the applicant firm during the firm's normal operating hours.
- j) Whether the presence of non-disadvantaged family members as owners, managers, or employees jeopardizes the disadvantaged owner's control of the firm. Participation by non-disadvantaged family members will be evaluated without regard to whether they are immediate family members. If it is not clear that the disadvantaged owner - as distinct from the family as a whole - controls the firm, then the applicant has failed to prove eligibility for certification.
- k) Whether the disadvantaged applicant can demonstrate that the transfer of ownership and control from a non-disadvantaged owner (family or not) to a disadvantaged owner by providing clear and convincing evidence that:
  - The transfer of ownership and control was not made solely to obtain DBE certification; and
  - The transfer was accompanied by real management, policy and operational control.
- l) Whether the applicant firm owns equipment necessary to perform the work, or leases (if standard industry practice) equipment from a source that does not jeopardize the firm's independence.
- m) Whether the applicant has the ability to control the specific type(s) of work identified in the application. When additional types of work are added to the certification, the applicant must demonstrate control of those operations also.

- n) Whether the applicant operates under a franchise or license agreement and the extent to which the relationship impairs the applicant's ability to control the management and operation of the firm and assume the risks commensurate with ownership.
  - o) Whether the non-disadvantaged partner in the applicant firm has the power to arbitrarily bind the partnership or subject it to contract or tort liability.
  - p) Whether the disadvantaged owners who lease employees from leasing firms assume responsibility for hiring, firing, training, assigning and otherwise controlling the on-the-job activities of the leased employees and pay wage and tax obligations for these employees.
5. In addition, NDOT will consider the following requirements:
- a) Whether the firm has exhibited a pattern of conduct attempting to evade or subvert the requirements of the DBE program;
  - b) Whether the applicant firm currently meets the requirements of the program. New firms will not automatically be denied certification, nor will firms that previously failed ownership and control criteria be rejected without full evaluation;
  - c) Whether the applicant firm has cooperated and furnished all information required by NDOT for certification; and
  - d) Whether an applicant firm that is an eligible subsidiary of a parent or holding company or is owned by an Indian Tribe as described in 49 CFR 26.73 (e)(1) and (2) and 49 CFR 26.73(h).
  - e) Special rules that apply to the certification of firms related to Alaska Native Corporations (ANCs) as stated in 49 CFR 26.73(i).
6. Detailed guidance on evaluating information presented by applicant firms is contained in Section III) B. Certification Eligibility Requirements.

## C. APPLICATION PROCEDURE FOR CERTIFICATION

1. Forms – (All Certification related forms can be found on [www.nevadadbe.com](http://www.nevadadbe.com)) A certification application is attached in Exhibit B.

Submission of the DBE Uniform Certification Application with all supporting documentation as requested. Certification reviews will be conducted as required by 49 CFR Part 26.

SBA 8(a) - certified firms applying for NDOT DBE status may submit the SBA certification application form and documentation in lieu of the Unified Certification Application form. An on-site review will still be required prior to certification approval. When SBA and USDOT certification standards conflict, USDOT standards will prevail.

2. UCP Review

- a) The Certification Committee meets on the last Tuesday of each month. This date can change from time to time to accommodate the needs of the UCP members.
- b) The committee evaluates the application documentation and the information obtained from the On-Site Review as required in 49 CFR Part 26.

Information furnished by the applicant which can reasonably be considered proprietary or confidential business information, as well as personal net worth statements and other personal or financial information, will not be made available to third parties without written consent of the applicant, except when USDOT requires the information in determining disadvantaged status in an appeal procedure.

- c) After thorough examination of all relevant information viewed as a whole, the Committee may:
  - Withhold certification pending receipt of additional information.  
If certification is withheld pending receipt of additional information, the certifying agency obtains the information and resubmits the application at a subsequent committee meeting.
  - Certify the firm.  
If the application is approved, a certificate is prepared by the Contract Compliance Office and sent, with a cover letter, to the DBE firm.
  - Deny certification.

If certification is denied, the certifying agency notifies the applicant by certified mail, of the committee's decision, reasons for denying certification, and the procedure for appeal to the USDOT. Upon request, all documents and other information on which denial is based will be made available to the applicant.

**Applicants denied certification may reapply twelve months from the date of denial.**

3. Decisions on eligibility of in-state firms will be made within ninety (90) days of receipt of all required information. This time period may be extended once for an additional sixty (60) days with written notice to the firm. NDOT's failure to make a decision during this time frame constitutes constructive denial of the application. Applicants may appeal to USDOT. Decisions on eligibility on out-of-state applicants will be made within ninety (90) days of receipt of all required information or as otherwise mandated by 49 CFR Part 26.
  - a) NDOT certifies DBEs continuously unless and until certification has been removed (i.e., another state, or NDOT). This continuous certification is contingent on receipt of an Annual no Change Affidavit and supporting documentation as required by NDOT.
  - b) When requested for purposes of certification, NDOT will make available to states or other financial recipients of USDOT funds, all relevant information pertaining to an applicant's eligibility, including on site reviews and other information as requested.
  - c) DBEs must inform NDOT in a sworn affidavit of any change in circumstances affecting its ability to meet size, disadvantaged status, ownership and control requirements, management changes or any material change in the information provided in the application form within thirty days of the change. Supporting documentation describing in detail the nature of the changes must be attached. If a DBE fails to make timely notification of such changes, it will be deemed to have failed to cooperate under 49 CFR 26.109(c).

#### **D. APPEAL TO USDOT ON DENIAL OF INITIAL CERTIFICATION**

1. Applicants who believe they have been wrongly denied certification as a DBE may file an appeal in writing to: U.S. Department of Transportation, Departmental Office of Civil Rights, External Civil Rights Program Division (S-33), 1200 New Jersey Avenue, SE. Washington, DC 20590, within ninety (90) days after certification has been denied. The process for appealing, and content of the appeal, are described in 49 CFR 26.89. (Exhibit C).

2. The decision of NDOT and the Nevada UCP from which the appeal action is taken is binding within Nevada. However, this decision is not binding to other recipients.

NDOT will take the following action when a USDOT determination is applicable:

- a) If the USDOT determines that NDOT erroneously certified a firm, NDOT must remove the firm's eligibility upon receipt of the determination. Removal of the firm's eligibility will be effective as of the date of the receipt of the USDOT determination.
- b) If the USDOT determines that NDOT erroneously failed to find reasonable cause to remove a firm's eligibility, NDOT must expeditiously commence procedures to determine if the firm's eligibility should be removed.
- c) If the USDOT determines that NDOT erroneously declined to certify or removed the eligibility of a firm, NDOT must certify the firm effective on the date NDOT received the USDOT determination.
- d) If the USDOT determines that NDOT erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, NDOT must take appropriate corrective action as determined by the USDOT.
- e) If the USDOT affirms NDOT's determination, then no further action is necessary.

#### **E. "NO CHANGE" AFFIDAVIT**

Annually, the Contract Compliance Office will advise DBEs they must complete a sworn affidavit, declaring that there have been no changes in the firm's circumstances affecting its ability to meet the SBA size standard, disadvantaged status, ownership, or control requirements or any material changes in the information provided in its application form, except for changes about which the DBE has notified NDOT.

Documentation of the firm's size and gross receipts must accompany the affidavit. Typically, the most recent tax year returns will be requested to document the firm's gross receipts.

#### **F. REMOVAL OF DBE CERTIFICATION**

NDOT will initiate actions for removal of a DBE firm certification:

- If it is determined that it does not meet one or more of the eligibility standards listed in III) B. of this plan; or

- A DBE “fails to cooperate” or is “unresponsive” to requests for annual “no change” affidavit, or fails to submit an application form at the end of a 3-year review period.
- Firms will not be totally decertified due to exceeding the size standard for one or more of its activities. If a firm meets the size standard for one type of work (e.g., as a general contractor), it will continue to be certified and receive DBE credit for that type of work, even if it has exceeded the size standard for another type of work (e.g., as a specialty subcontractor).

NDOT will initiate an investigation and removal from the program proceedings when notified by third parties, or USDOT that they are in possession of evidence which questions the eligibility of currently certified DBE firm(s) via the standards and acceptable operating procedures contained in this plan and 49 CFR 26.

The DBE firm remains eligible to participate on NDOT contracts during the pendency of NDOT removal of certification proceedings and hearing but not during appeals to USDOT.

1. Third party complaints submitted to NDOT must be written and contain specific reasons why the complainant believes the DBE is ineligible to participate in the DBE Program. General allegations or anonymous complaints will not be addressed.
  - a) If the complainant(s) request their identities be kept confidential, NDOT will honor that request unless it hinders the investigation, hearing, or denies due process to other parties. In these circumstances, complainants will be requested to waive confidentiality and advised that failure to do so may result in closure of the investigation or dismissal of the hearing.
  - b) After investigation, NDOT will consider allegations in the complaint and evaluate additional information from the DBE firm or other sources. After a thorough review of the record, NDOT will either:
    - Advise the complainant and the DBE firm in writing that it finds no reasonable cause to believe that the firm is ineligible, the specific reasons for that determination, and the evidence on which the reasons are based; or
    - Advise the DBE firm in writing that it proposes to find the firm ineligible, specifying the reasons for its determination, and the evidence on which those reasons are based. The letter will further offer the DBE firm an opportunity to respond to NDOT's

decision at an informal hearing described in 49 CFR Part 26.87.

The complainant or DBE firm may appeal the decision by NDOT to the USDOT. Appeals need to be sent to the U.S. Department of Transportation, Departmental Office of Civil Rights, External Civil Rights Program Division (S-33), 1200 New Jersey Avenue, SE, Washington, D.C. 20590.

2. NDOT initiated proceedings may be based on notification by the DBE firm that its circumstances have changed or by information received from outside sources that suggests the DBE is ineligible and should be investigated for potential removal of certification.
  - a) If the Contract Compliance Office receives a written complaint alleging a firm is not eligible to be certified as a DBE or if the contract compliance staff believes there is reasonable cause to find the firm ineligible for the DBE Program, the information will be investigated and a determination will be made.
  - b) If NDOT concludes that the evidence points to ineligibility, the Contract Compliance Office will advise the DBE firm in writing that NDOT proposes to find the firm ineligible, specifying the reasons for its determination, and the evidence on which those reasons are based. The letter will further offer the DBE firm an opportunity to respond to NDOT's decision at an informal hearing, which may be held in person or via written arguments, at the firm's election. The hearing will be conducted by a member of the UCP who was not involved in the decertification decision but knowledgeable about the certification and decertification rules in 49 CFR Part 26.
3. USDOT-initiated proceedings begin when the FTA or FHWA advises NDOT that information in a DBE's certification records or other information in their possession gives them reason to believe that a certified firm does not meet the eligibility criteria, and further directs NDOT to initiate proceedings to remove the firm's certification.
  - a) FTA or FHWA provides NDOT and the DBE firm a notice setting forth the reasons for the directive and supplying other relevant documentation.
  - b) NDOT then begins certification removal procedures as outlined in this Plan.

4. Informal Hearing Procedures. In these proceedings, NDOT bears the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards.

*Note: No hearing is necessary if the DBE firm exceeds the personal net worth cap and does not dispute that fact or the DBE firm submits a written request to be decertified.*

- a) The Civil Rights Officer will select a Hearing Officer. The CCM is responsible for arranging the time and place for the hearing in coordination with the DBE firm and the Hearing Officer. The identified Hearing Officer is responsible for evaluating written and verbal arguments and information if the DBE elects to respond to the certification removal notice in that manner. The identified Hearing Officer must be knowledgeable about the certification requirements of the DBE program. (Reasonable extensions of time may be allowed at any step of the following procedure.)
- b) The DBE firm is advised in the Notice of Intent to Remove Certification that it has 10 working days in which to request a hearing and the hearing options available - oral or written - and the procedures accompanying each option:
- i) Oral hearings are scheduled in a timely manner from the receipt of the DBE's request for hearing, contingent on the schedules of the Hearing Officer, NDOT, and DBE owners.
- Oral hearings should be audio taped. At the hearing, the DBE owner(s), and the DBE's attorney may present evidence and call/question witnesses. The Civil Rights Officer or the Contract Compliance Manager will present NDOT's position. NDOT will retain the original record of the hearing. Hearing tapes and transcripts will be available on appeal to USDOT.
- ii) If the DBE requests that arguments be submitted in written form, all arguments and information must be submitted within 15 calendar days from receipt of request for hearing. The Hearing Officer will make a decision within 15 calendar days of receipt of all written information.

Written arguments and information from the DBE are evaluated against the written arguments and information presented by NDOT.

- c) If the DBE fails to attend the scheduled hearing (without reason and notification) or to submit written arguments within time limits established, the firm will be sent a final notice of decertification. The firm may choose to appeal, as provided in subsection (e) below.
- d) The decision by the Hearing Officer on the arguments in either oral or written arguments will be based on any one or more of the following conditions:
- Changes in the DBE's circumstances since certification that render the DBE ineligible;
  - Receipt of information or evidence not available at the time of certification;
  - Receipt of information that was concealed or misrepresented before or during certification proceedings;
  - Changes in USDOT standards for certification; and/or
  - Documented findings that certification was factually erroneous.
- e) NDOT notifies the DBE by certified mail of the Hearing Officer's decision and reasons for it, including specific references to the evidence in the record that supports each reason for the decision.

If the decision removes eligibility, the notice must further inform the DBE of the consequences of the decision and the DBE's right to appeal to the USDOT. A copy of 49 CFR 26.89 (Process for Certification Appeals to the Department of Transportation) will be sent with the certification removal notice. Copies of the notice are also sent to third party complainants or USDOT, if appropriate.

If the applicant appeals to USDOT, NDOT will provide USDOT (within 20 days of request) the administrative record, including a hearing transcript. The record will be well organized, indexed and paginated. Upon notification by USDOT, NDOT will immediately take action as directed.

If the decision states no reason to remove certification, the DBE is so notified, and the proceedings are closed.

NDOT will list on the Department of Transportation Office of Civil Rights (DOCR's) online database information on any firm whose certification is removed. This data will include the following information:

- Name of firm
- Name(s) of the firm's owner(s)
- Type and date of action
- Reason for action

NDOT will monitor the DOCR web site as required and when needed request any required information from other UCPs within the 7 day time frame. The requested information will be consider for determining any needed actions in respect to certified DBE firms or applicants in Nevada.

5. Effects of Removal of Certification on Contracts

- a) If NDOT has made a commitment to use an ineligible DBE prime contractor, or a prime contractor has committed to using an ineligible DBE, but a contract or subcontract has not been executed before the removal of certification notice has been issued, the ineligible firm does not count toward the contract or overall goal. The prime contractor must meet the contract goal with an eligible DBE firm or demonstrate that it has made good faith effort to do so.
- b) If NDOT has executed a contract with a subsequently ineligible DBE prime contractor, or a prime contractor has executed a subcontract with a subsequently ineligible DBE firm, NDOT and the prime contractor will receive credit toward the DBE goals. However, in either case, that portion of the DBE's contract remaining after Notice of Removal of Certification will not count toward NDOT's overall goal, but will count toward the contract goal, EXCEPT if the ineligibility stems solely from having exceeded the size standard during the performance of the contract, the DBE's performance will be counted toward both contract and overall goals.

**IV) OVERCONCENTRATION IN SUBCONTRACTING AREAS**

If the DBE Liaison Officer, in coordination with other NDOT personnel, determines that DBEs in one or more areas of work are so over concentrated as to unduly burden the opportunity of non-DBE firms to participate in this type of work, a request will be submitted to the FTA or FHWA for approval of the determination and the remedial action proposed as provided in 49 CFR 26.33.

**V) DBE GOALS**

**A. OVERALL GOALS (for FHWA, and FTA funded programs)**

- 1. NDOT implemented the use of race-conscious goals in May 2010, pursuant to the directive of the FHWA. Race conscious goals are required when DBE program goals cannot be met through race

neutral measures alone. Accordingly, NDOT reviews all proposed NDOT federally-assisted projects, prior to solicitation, to determine if and how much of a DBE goal to set, based on among other things, the overall NDOT DBE Program goal to be met and the availability of DBEs to perform subcontract work on the project.

2. NDOT has hired a firm to conduct a disparity study in 2012. This study will determine the DBE goal for the upcoming three year period for both FHWA and FTA funded contracts. The study will also provide a goal setting methodology that NDOT will use, after the study has ended, to set DBE goals in the future.

## **B. CONTRACT GOALS**

Contract goals will be used to meet the portion of the overall goal not projected to be met by race-neutral means and will be expressed as a percentage of the federal portion of USDOT-assisted contracts. If during the course of the year it becomes apparent that NDOT will exceed its overall goal based on race-neutral means, contract goals will be reduced to the extent required so as not to exceed the overall goal. If it appears the race-neutral portion will not be met, NDOT will increase the amount of contract goals.

Before soliciting bids, the appropriate NDOT personnel and the Contract Compliance Office personnel will review each contract to determine the percentage goal, if any, that will be assigned to the contract. Those contracts with limited or no subcontracting potential will have a zero goal. Criteria for developing goals on individual contracts include:

- Availability of qualified DBEs
- Location of the project
- Type of project
- Estimated total cost of the project, or portions of the project
- Number of contract line items with the most DBE subcontracting, service, or supplier potential

Contract goals can be met only by Nevada UCP certified DBEs; goals will not be subdivided into group-specific goals. The contract goal will pertain to the entire project.

## **C. RACE-NEUTRAL METHODS**

To obtain the maximum feasible portion of its overall DBE Goal through race neutral means, NDOT uses the following methods:

- Implementation of the SBE program which will include the use of SBE goals on federally-assisted contracts without DBE goals

- Publicizing construction project notices and consulting requests for proposal in order to encourage DBEs and other small businesses to participate;
- Implementing a supportive services program for DBE and other small businesses to develop record-keeping and business management skills;
- Providing training to DBE and other small businesses to improve management, record keeping, financial and accounting capabilities;
- Providing services to DBE and other small businesses to improve long-term development, ability to handle increasingly significant projects, and achieve eventual self-sufficiency;
- Assisting DBE and other small businesses to develop their capability by utilizing emerging technology and conducting business through electronic media;
- Providing other technical assistance to DBE and other small businesses as needed
- Review and identify projects that can be unbundled in order to promote small businesses including DBEs to perform as a prime

#### **D. DESIGN-BUILD CONTRACTING**

If NDOT uses design-build contracting, DBE goals will be established as outlined in 49 CFR 26.53(e) for both the design phase and construction phase of the design-build project.

### **VI) PRE-BID, CONTRACT, AND AWARD PROCEDURES**

#### **A. CONTRACT ASSURANCE**

NDOT includes in its USDOT-assisted contracts, and reviews all sub-contracts for inclusion, the following clause:

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

## **B. DBE NOTIFICATION**

NDOT notifies certified DBE firms of contract opportunities by:

- Assisting DBEs in accessing the; "Notice to Contractors" website and related pages.
- Providing the "Plan Holders" list to DBEs on line.
- Post on-line and forward "Invitations to Bid" from prime contractors to qualified DBE firms through the bidding opportunities page of [www.nevadadbe.com](http://www.nevadadbe.com).

## **C. PRIME CONTRACTOR NOTIFICATION**

1. When a contract contains a DBE goal, the goal is included in Section 103.08 of the Special Provisions. Contracts without a DBE goal include a notice to utilize SBE and DBE firms.
2. Contractors may contact the Contract Compliance Office staff at 775-888-7497 for assistance in meeting the goal.

## **D. AWARD OF CONTRACT**

1. The apparent successful bidder is the bidder (DBE or non-DBE) who submits the lowest bid, and who is responsive and responsible. The contractor must sign the proposal document accompanying the bid stating that the firm will perform the work of the contract and comply with the various regulations and special provisions, including the appropriate DBE Special Provisions and the DBE goal, when applicable. These provisions require the contractor to identify, within two hours of the bid, the DBE(s) that will be used, or to document the contractor's good faith efforts to meet the DBE goal when the contract includes a DBE goal requirement that was not met with Nevada certified DBE firms.

After bid opening, NDOT Contract Compliance Office analyzes the bids and notifies the Administrative Services Division that the DBE goals have or have not been met or that a good faith effort was or was not made. Specific bidding processes may be changed from time to time to accommodate electronic or standard bidding procedures. Further information regarding bidding processes can be found in the NDOT Standard Specifications for Road and Bridge Construction.

## E. GOOD FAITH EFFORTS (GFE) TO CONTRACT WITH DBE GOALS

The following procedures apply to USDOT assisted Contracts. If a contractor or proposer provides a bid or proposal and does not meet the DBE goal stated in the bidding documents, the bidder/proposer must provide detailed documentation of the steps they took to meet the DBE goal. These documents must be provided no later than the next working day after the opening of the bids or with the proposal in the case of a Request for a Proposal.

1. If the apparent low bidder's DBE commitment(s) do not meet the contract goal, the bidder must provide a detailed document outlining the steps they took to meet the DBE goal. These steps must have been **aggressive and designed to meet the goal**.
2. The CCM will evaluate information submitted by the bidder to determine what efforts were made, when they were made, and how intensely those efforts were undertaken. These efforts may include but are not limited to:
  - a) Whether the bidder solicited DBEs through all reasonable and available means, allowing adequate time for response, and following up on initial solicitations;
  - b) Whether the bidder selected portions of the work to be performed by DBEs in order to increase the likelihood of meeting the DBE goals (including, where appropriate, breaking down contracts into economically feasible units to facilitate DBE participation);
  - c) Whether the bidder provided interested DBEs with information about the plans, specifications, and requirements of the contract in a timely manner;
  - d) Whether the bidder negotiated in good faith with interested DBEs, not rejecting DBEs as unqualified without sound reasons based on a thorough investigation of their capabilities;
  - e) Whether the bidder made efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance required by NDOT or the bidder;
  - f) Whether the bidder made efforts to assist interested DBEs in obtaining equipment, supplies, materials, or related assistance or services; and
  - g) Whether the bidder effectively used the services of available minority/women community organizations, contractors

groups, government business assistance offices, or others that might assist in identifying DBE firms.

3. After evaluation of the bidder's good faith efforts, the CCM with the approval of the Civil Rights Officer, will notify the bidder that either:
  - The bidder's explanation/documentation has been accepted and will forward the "Notice to Proceed"; or
  - The bidder's good faith effort, has been rejected and state the reason(s) for the rejection, in writing, and offer the bidder an opportunity for administrative reconsideration by providing written documentation or oral hearing.
4. If the apparent low bidder fails to respond within five (5) days from the date of the rejection, the bid will be considered non-responsive. NDOT will then follow Department procedures regarding non-responsive bids.
5. If the bidder requests reconsideration, a meeting will be scheduled with a reconsideration official knowledgeable of the DBE program at a time and place convenient for both participants.
6. The reconsideration official will advise the bidder in writing of his/her decision within ten (10) working days of the meeting. If the reconsideration official determines that good faith effort was not made, the letter will state the reasons for that decision. The decision of the reconsideration official is administratively final.

#### **F. GOOD FAITH EFFORTS WHEN REPLACING DBEs**

Prime contractors cannot terminate a DBE subcontractor without the written consent of NDOT.

1. Prior to termination the contractor must notify the NDOT Resident Engineer (RE), the Contract Compliance Office and the DBE firm in writing, of the intent to terminate the DBE. The DBE must respond within 10 calendar days regarding the termination. If the DBE fails to respond within the allotted time frame the termination may be authorized by NDOT.
2. In the event the DBE fails to respond, the contractor must notify the RE who will forward the request to the CCM with recommendation for approval or denial. The CCM then requests written release from the defaulting DBE and will notify the RE on whether the commitment is or is not terminated.
3. The contractor must make a good faith effort to replace the defaulting DBE with another DBE to the extent needed to meet the contract goal. The contractor must document good faith efforts

made to replace the DBE with another DBE firm. See section E above for GFE requirements.

4. The contractor must obtain written approval of substitute DBE(s) from the CCM before signing and submitting copies of the revised or new subcontracts.
5. If the contractor is unable to obtain substitute DBEs, he must submit documentation of good faith efforts (listed above) in obtaining substitute DBEs to complete the unfinished work, or break out other contract items to subcontract. NDOT may waive or adjust the goal as appropriate, depending on project circumstances.

#### **G. COUNTING DBE PARTICIPATION TOWARD CONTRACT GOALS**

1. Only the value of the work actually performed by and paid to DBEs is creditable toward the DBE goal, including the cost of supplies and materials obtained by the DBE for work on the contract (except supplies and equipment purchases or leases from the prime contractor or their affiliate).
2. When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE; work contracted to a non-DBE firm does not count toward the goals.
3. A DBE must be certified by the Nevada UCP for their participation to be counted toward meeting the DBE goal. If a DBE is declared ineligible after the execution of a contract or subcontract, the DBE may complete the work. The DBE's participation will be counted toward the contract goal, if applicable. However, the work remaining after Removal of Certification will not count toward NDOT's overall Program goal. If the DBE firm's certification is removed before the DBE has signed a contract, the ineligible firm does not count toward the contract goal or Program goal. The prime contractor will be directed to meet the contract goal with an eligible DBE firm or demonstrate good faith efforts to do so.
4. Credit toward DBE goals varies with the type of DBE firm:
  - **Joint Ventures between DBE and Non-DBE Firms**  
That portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals. Joint venture agreements must be approved by the DBELO and NDOT Legal Counsel before contracts are signed.

- **Professional, Technical, Consultant, or Managerial, Bonding or Financial Services** (provided a determination is made that the fees are reasonable)..... 100%
- **Construction Firms** (supply labor and materials to perform a distinct element of the work)..... 100%
- **Manufacturers** (must operate a factory that produces, on the premises, the materials, supplies, articles or equipment required under the contract and of the general character described in the specifications) ..... 100%
- **Regular Dealer** (must own, operate or maintain a store or warehouse that regularly sells materials or supplies to the general public)..... 60%  
*(NOTE: To be a regular dealer, the firm must be an established business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A regular dealer in bulk products (petroleum, steel, etc.) does not need to maintain a place of business, but must own and operate distribution equipment for the products. Any supplementing of a dealer's own distribution equipment shall be by a long-term lease agreement)*
- **Packagers, Brokers, Manufactures' Representatives** (no credit for materials or supplies themselves)  
 .....Brokerage Fee (if reasonable)
- **Trucking Firm:** (As defined by 49 CFR Part 26.53)

## VII) CONTRACT PERFORMANCE

### A. **COMMERCIALLY USEFUL FUNCTION (CUF)**

In order for DBE contractor payments to be counted toward DBE goals, the DBE contractors must perform a commercially useful function, i.e., it must be responsible for execution of the work of the contract and must carry out its responsibilities by actually performing, managing and supervising the work involved, consistent with standard industry practices.

This means that:

1. The DBE must be responsible for ordering its own materials and supplies, determining quantity and quality, negotiating price, installing (where applicable) and paying for the material itself;
  - a) The use of joint checks will be allowed for the payment of materials and supplies when the following conditions are met:

- i. Second party (typically the prime contractor) acts solely as a guarantor
  - ii. DBE must release the check to the supplier
  - iii. Use of joint checks is a commonly recognized business practice in the industry
  - iv. DBE submits request for pre-approval to NDOT
  - v. All CUF conditions are met and documented by DBE and prime.
2. The DBE must perform work commensurate with the amount of its contract;
  3. The DBE's contribution cannot be that of an extra participant or a conduit through which funds are passed in order to obtain the appearance of DBE participation;
  4. The DBE must exercise responsibility for at least fifty (50) percent of the total cost of its contract with its own workforce;
  5. None of the DBE's work can be subcontracted back to the prime contractor, nor can the DBE employ the prime's, or other subcontractor's supervisors currently working on the project;
  6. The DBE's labor force must be separate and apart from that of the prime contractor or other subcontractors on the project. Transferring crews between primes, subcontractors, and DBE contractors is not allowed;
  7. The DBE owner must hold a Public Works license and any other professional or craft licenses required for the type of work he/she performs on the project;
  8. The DBE may rent or lease, at competitive rates, equipment needed on the project from customary leasing sources or from other subcontractors on the project ; and
  9. The DBE trucking firm must be responsible for management and supervision of the entire trucking operation for which it is responsible. The following rules also apply to DBE trucking firms:
    - a) Must own and operate at least one fully licensed, insured and operational truck used on the contract. Owner/operators must have an agreement with the contractor or subcontractor that contains:
      - Owner/operators name
      - Social security number

- Copy of vehicle registration receipt
  - Current vehicle license number
  - Vehicle identification number
  - Method of payment (hour, ton or load)
- b) Leases must indicate that the DBE has exclusive use of and control over the truck, but does not preclude the leased truck from working for others during the term of the lease with consent of the DBE, provided the lease gives the DBE absolute priority for the use of the leased truck.
- c) Leased trucks must display the name and identification number of the DBE.
- d) Lease/rental/contract agreements must be approved by the Resident Engineer.

## **B. MONITORING COMPLIANCE**

NDOT will bring to the attention of the FHWA or USDOT any false, fraudulent, or dishonest conduct in connection with the program so that USDOT can take the steps (e.g., referral to Justice Department or USDOT Inspector General) provided in 26.109. NDOT will also consider similar action under its own legal authority.

A copy of the contract DBE Special Provisions for Race/Gender Conscious Projects and Race/Gender Neutral Projects, containing provisions and contract remedies is attached as Exhibit D.

When the DBE subcontractor begins work on the project, the Resident Engineer reviews the DBE's operation and completes 052-073, Commercial Useful Function Determination.

1. The Resident Engineer ensures that DBE owners, supervisory personnel and employees are distinguishable from other personnel on the job.
2. If the Resident Engineer determines that a DBE firm is not performing a commercially useful function, he/she will notify the Contract Compliance Office who will notify the prime contractor in writing, specifying those actions which violate the terms of the contract.
3. If the contractor fails to remedy the violation, the Resident Engineer in conjunction with the Contract Compliance Office shall impose one or more sanctions, and the payments made to that DBE will not be credited toward the contract goal.
4. At the request of the Resident Engineer, the Contract Compliance Office will investigate the non-performing DBE to determine if its

job performance contains a pattern of relationships with non-minority businesses that brings the DBE's independence and control, and therefore its eligibility to participate, into question.

## **C. RECORD KEEPING**

1. Contractors and Subcontractors
  - a) All contract records relating to DBE participation must be maintained by contractors and subcontractors through the project and will follow provisions of the retention schedule from that point. NDOT, FTA, and FHWA employees must be allowed to interview contractors and DBE employees as necessary. (If a claim, audit, or investigation is underway, records must be retained until final resolution.)
  - b) All DBE records maintained by contractors and subcontractors must be made available to NDOT as required by the retention schedule.
  - c) Failure to comply with a) and b) above may result in the imposition of sanctions.
2. Nevada Department of Transportation
  - a) NDOT obtains through a Bidder Registration Form a Bidders List, of all prime and subcontractors bidding on NDOT contracts. It contains the following information:
    - Firm Name
    - Firm Address
    - Firm's Status as a DBE or Non-DBE
    - Age of the Firm
    - Gross Receipts range of the Firm
    - Business Type
    - Work areas
  - b) NDOT maintains a database to monitor contracts obtained by DBE firms, regardless of whether the DBE participation was race-neutral or race-conscious. The prime contractor provides a certified notice that payment has been made to the DBE firms on a monthly basis.
  - c) NDOT reports DBE participation semi-annually to the FTA, the FHWA and to other USDOT modal administrations as directed.

## **D. SANCTIONS**

1. After investigating and obtaining evidence that the contractor or DBE subcontractor is not complying with the terms of the contract the CCM in conjunction with the Resident Engineer will take the following action:
  - a) Advise the contractor, in writing, that specific (listed) infractions have been observed which must be corrected. and that failure to take corrective action will result in withholding all or part of progress payments;
  - b) If deficiencies are not corrected, the Resident Engineer will withhold progress payments; and
  - c) If violations persist, the CCM and the Resident Engineer, in coordination with the District Engineer and the Construction Division develop a proposed course of action. After consultation with the CCM and the Civil Rights Officer, NDOT may take any of the following actions, as provided in section 103.08 of the Standard Specifications for Road and Bridge Construction:
    - Continue to withhold progress payments until the contractor is in compliance;
    - Deduct as damages
    - Suspend or terminate the contract, No progress payment is made during this time and no time extension made;
    - Deduct as damages to the contractor an amount equal to the unmet portion of the DBE commitment.
    - Notify the FTA or FHWA to impose additional sanctions through the USDOT Inspector General's office, up to and including suspension and debarment.
    - Refer the matter for criminal prosecution.

## **E. PAYMENTS TO SUBCONTRACTORS**

NDOT includes the following clause in each USDOT-assisted contract:

*The contractor shall pay each subcontractor for satisfactory performance of its contract items no later than fifteen (15) calendar days from receipt of each payment the contractor receives from the Department. The contractor shall return retainage payments to each subcontractor within fifteen (15) calendar days after the subcontractor's work is satisfactorily completed. The contractor shall certify that payment to each subcontractor has been made on certification forms provided by the Department.*

These requirements shall apply to first or lower tier subcontracts.

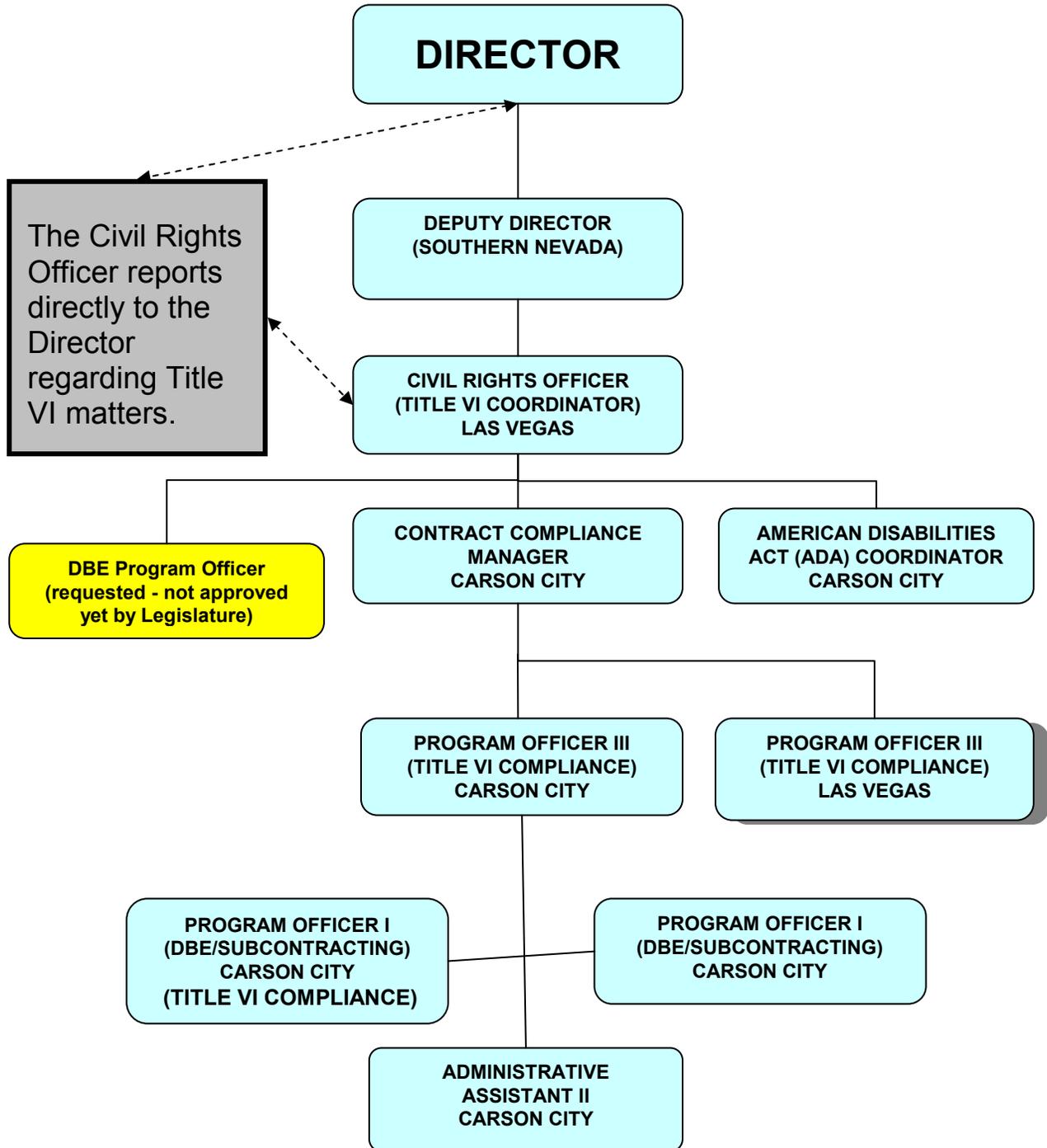
In accordance with 49 CFR 26.29, a subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented.

# EXHIBITS

## DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

- A. Civil Rights Unit Organization Chart
- B. DBE Application
- C. Appeals Process
- D. Special Provisions

Exhibit A



**EXHIBIT B**

***ATTACHED***

## EXHIBIT C

### ***Appeals Process***

The process for appealing the denial of a certification application is provided in 49 CFR Subsection 26.89 and is provided below:

(a)(1) If you are a firm that is denied certification or whose eligibility is removed by a recipient, including SBA-certified firms applying pursuant to the DOT/SBA MOU, you may make an administrative appeal to the Department.

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

(3) Send appeals to the following address: Department of Transportation, Office of Civil Rights, 1200 New Jersey Avenue, S.E., Washington, DC 20590.

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

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

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

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

(d) When it receives an appeal, the Department requests a copy of the NUCP's complete administrative record in the matter. If you are the recipient, you must provide the administrative record, including a hearing transcript, within 20 days of the Department's request. The Department may extend this time period on the basis of a NUCP's showing of good cause. To facilitate the Department's review of a NUCP's decision, you must ensure that such administrative records are well organized, indexed, and paginated. Records that do not comport with these requirements are not acceptable and will be returned to you to be corrected immediately. If an appeal is brought concerning one recipient's certification decision concerning a firm, and that recipient relied on the decision and/or administrative record of another recipient, this requirement applies to both recipients involved.

(e) The Department makes its decision based solely on the entire administrative record. The Department does not make a de novo review of the matter and does not conduct a hearing. The

Department may supplement the administrative record by adding relevant information made available by the DOT Office of Inspector General; Federal, state, or local law enforcement authorities; officials of a DOT operating administration or other appropriate DOT office; a recipient; or a firm or other private party.

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

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

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

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

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

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

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

(7) The Department provides written notice of its decision to you, the firm, and the complainant in an ineligibility complaint. A copy of the notice is also sent to any other recipient whose administrative record or decision has been involved in the proceeding ( see paragraph (d) of this section). The Department will also notify the SBA in writing when DOT takes an action on an appeal that results in or confirms a loss of eligibility to any SBA-certified firm. The notice includes the reasons for the Department's decision, including specific references to the evidence in the record that supports each reason for the decision.

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

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

##### End #####

## EXHIBIT D

**102.16 DBE Certification and Bidding Requirements.** Add the following after the first paragraph of this Subsection of the Standard Specifications:

**Commercially Useful Function.** A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, you must evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.

**Disadvantaged Business Enterprise.** Disadvantaged business enterprise or DBE means a for-profit small business concern:

1. That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and
2. Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

Add the following after the first full paragraph on page 12 of the Standard Specifications:

When a DBE participates in a contract, expenditures toward DBE goals will only count if the DBE is performing a commercially useful function on the contract. The value of the work actually performed by the DBE toward DBE goals will count according to the following:

1. The entire amount of that portion of a construction contract (or other contract not covered by paragraph number 2 below) that is performed by the DBE's own forces will count. The cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate) will count.
2. The entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, toward DBE goals, will count provided the fee is determined to be reasonable and not excessive as compared with fees customarily allowed for similar services.
3. When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.
4. When a DBE performs as a participant in a joint venture, a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals will count.

Expenditures for materials or supplies will count toward DBE goals according to the following:

1. If the materials or supplies are obtained from a DBE manufacturer, 100 percent of the cost of the materials or supplies will count. A manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.
2. If the materials or supplies are purchased from a DBE regular dealer, 60 percent of the cost of the materials or supplies will count. A regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.

**103.08 DBE Verification and Award Requirements.** This Subsection of the Standard Specifications is in effect for this contract and the Department has established a DBE participation goal of \_\_\_\_\_%.

The second paragraph of this Subsection of the Standard Specifications is hereby deleted and the following substituted therefore:

If it is determined that the bidder has failed to meet the DBE requirements, the bidder will be provided an opportunity for administrative reconsideration prior to the award of the contract to the next apparent low bidder.

As part of this reconsideration, the bidder will have the opportunity to provide written documentation or argument concerning the issue of whether they met the goal or made adequate good faith efforts to do so.

The decision on reconsideration will be made by an official who did not take part in the original determination that the bidder failed to meet the goal or make adequate good faith efforts to do so.

The bidder will have the opportunity to meet in person with the reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so.

A written decision on reconsideration will be sent to the bidder explaining the basis for finding that they did or did not meet the goal or make adequate good faith efforts to do so.

The result of the reconsideration process is not administratively appealable to the Department.

Subparagraph (d) of the third paragraph of this Subsection of the Standard Specifications is hereby deleted and the following substituted therefore:

- (d) Written notice from each DBE firm named in the bid to meet the DBE goal, stating that they agree to perform the work committed to, for the price committed to in the bidding documents. This written confirmation must be on the DBE firm's letterhead and must be received by the Department no later than 5:00 P.M. on the next business day following the bid opening.