

Attachment 11

**AGREEMENT FOR UNIFIED CERTIFICATION PROGRAM
BETWEEN
DISTRICT DEPARTMENT OF TRANSPORTATION
AND
WASHINGTON METROPOLITAN AREATRANSIT AUTHORITY
(Revised December 2011)**

**AGREEMENT FOR UNIFIED CERTIFICATION PROGRAM
BETWEEN
WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY
AND
DISTRICT DEPARTMENT OF TRANSPORTATION**

(Revised March 2012)

PREAMBLE

THIS AGREEMENT is made and entered into by and between the Washington Metropolitan Area Transit Authority (WMATA), an interstate compact agency which includes the District of Columbia, State of Maryland and Commonwealth of Virginia, as well as, the District Department of Transportation (DDOT), a city agency of the District of Columbia.

WHEREAS, 49 CFR Part 26.81 requires recipients of federal transportation assistance to create a Unified Certification Program as part of its Disadvantaged Business Enterprise Program; and

WHEREAS, each party to this agreement certifies firms as disadvantaged business enterprises, and will continue to do so at their own expense, and are similarly situated as independent and overlapping jurisdictions, thus creating the likeness of a state with subdivisions, desire to combine their resources to perform certifications as a Unified Certification Program, as mandated under 49 CFR Part 26.81; and

NOW, THEREFORE, in consideration of the mutual promises and benefits that each party shall derive here from, the parties agree as set forth hereinafter.

POLICY

It will be the policy of the Metropolitan Washington Unified Certification Program (MWUCP) to ensure that only firms certified by the Metropolitan Washington Unified Certification Program, through its participating members (DDOT & WMATA), will be eligible to participate in the Disadvantaged Business Enterprise (DBE) programs operated by the participating members. Also, it will be the policy of the Metropolitan Washington Unified Certification Program to ensure that participating members shall continue to carry out Disadvantaged Business Enterprise programs until all federal funds from the U.S. Department of Transportation financial assistance have been expended. Updates will be provided to the U.S. Department of Transportation by the Metropolitan Washington Unified Certification Program representing significant changes in the unified certification program and the disadvantaged business enterprise programs of participating members, as required.

**DISADVANTAGED BUSINESS ENTERPRISE
METROPOLITAN WASHINGTON
UNIFIED CERTIFICATION PROGRAM**

SECTION 1.0 GENERAL PROVISIONS

Section 1.1 Objectives

The general objective of this Unified Certification Program is to:

- (a) Establish a Unified Certification Program (UCP) which meets the requirements of 49 CFR Part 26.81;
- (b) Establish the form, substance, parameters and purpose of the UCP;
- (c) Follow all DBE certification procedures and standards, as they apply under Part 26;
- (d) Fully cooperate with the oversight, review and monitoring activities of the U.S. Department of Transportation (DOT), the Federal Transit Administration (FTA) and the Federal Highway Administration (FHWA), respectively; and
- (e) Ensure that only firms that fully meet Metropolitan Washington Unified Certification Program (MWUCP) eligibility standards are permitted to participate as DBEs.

Section 1.2 Name

The name of the UCP shall be the Metropolitan Washington Unified Certification Program (MWUCP). It shall be comprised of the Washington Metropolitan Area Transit Authority (WMATA) and the District of Columbia Department of Transportation (DDOT).

Section 1.3 Definitions

Affiliation has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR Part 121.103

- (a) Except as otherwise provided in 13 CFR Part 121, concerns are affiliates of each other when, either directly or indirectly:
 - (1) One concern controls or has the power to control the other; or
 - (2) A third party or parties controls or has the power to control both; or
 - (3) An identity of interest between or among parties exists such that affiliation may be found.

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- (b) In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, previous relationships and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

Alaska Native means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

Alaska Native Corporation (ANC) means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, et seq.).

ACDBE means a firm that has been certified as an Airport Concession Disadvantaged Business Enterprise or ACDBE pursuant to 49 C.F. FR. parts 23 and 26.

Bidder, Offeror and Proposer are synonymous and mean any person or entity which seeks to do business with WMATA or DDOT and has submitted or seeks to submit a bid, offer or proposal to secure same.

Bona Fide Business concern is a DBE firm providing a service, such as professional, technical, consultant, or managerial services.

Committee refers to the Metropolitan Washington Unified Certification Program Committee.

Confidential Business Information means financial information obtained from a person and privileged or confidential. This means if disclosure by the government would be likely to harm the competitive position of the person who submitted the information and or detailed information on a company's marketing plans, profits, or costs can qualify as confidential business information. Information may also be withheld if disclosure would be likely to impair the government's ability to obtain similar information in the future.

Compliance means that a recipient has correctly implemented the requirements of 49 CFR Part 26.

Contract means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them. For purposes of this program, contract refers only to federally-funded contracts.

Contractor means one who participates on or through a contract or subcontract, at any tier, in any program covered by 49 CFR Part 26.

DDOT means the District of Columbia Department of Transportation.

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Department or DOT means the U.S. Department of Transportation including the Office of the Secretary and the Federal Transit Administration (FTA) and the Federal Highway Administration (FHWA).

Disadvantaged Business Enterprise or DBE means a for-profit small business concern (a) 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 (b) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

DOT-assisted contract means any contract between a recipient and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

DOT/SBA Memorandum of Understanding or MOU, refers to the agreement signed on November 23, 1999, between the Department of Transportation (DOT) and the Small Business Administration (SBA) streamlining certification procedures for participation in SBA's 8(a) Business Development (8(a) BD) and Small Disadvantaged Business (SDB) programs, and DOT's Disadvantaged Business Enterprise (DBE) program for small and disadvantaged businesses.

FTA means the Federal Transit Administration.

FHWA means the Federal Highway Administration.

Good Faith Efforts (GFE) means efforts to achieve a DBE goal or other requirement of 49 CFR Part 26 which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

Home State means the state in which a DBE firm or applicant for DBE certification maintains its principal place of business.

Immediate Family Member means father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, or father-in-law.

Indian tribe means any Indian tribe, band, nation or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. See definition of "tribally-owned concern".

Joint venture means an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

MCRP means Modified Certification Reciprocity Program, the program set forth herein for DBE/ACDBE firms that have Home State Certification. For purposes of this MOU, the UCP granting Home State Certification must be a Party to this MOU.

MWAA means Metropolitan Washington Airports Authority.

MWUCP means the Metropolitan Washington Unified Certification Program.

Native Hawaiian means any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.

Native Hawaiian Organization means any community service organization serving Native Hawaiians in the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

Operating Administration or OA means any of the following parts of DOT: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The "Administrator" of an operating administration includes his or her designees.

Participating Members collectively refers to the entities that make up the Metropolitan Washington Unified Certification Program.

Part 26 means 49 CFR Part 26.

Personal net worth (PNW) means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include: The individual's ownership interest in an applicant or participating DBE firm or the individual's equity in his or her primary place of residence. An individual's personal net worth includes his or her own share of assets held jointly or as community property with the individual's spouse.

Primary Industry Classification means the North American Industrial Classification System (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the North American Industry Classification Manual – United States, 1997 which is available from the Nations Technical Information Services, 5285 Port Royal Road, Springfield, VA 22161; by calling 1-800-553-6847; or via the Internet at:

(a) <http://www.ntis.gov/product/naics.htm>; (b) <http://www.naics.com>; or (c) <http://www.census.gov/naics>.

Primary Recipient means a recipient which receives U.S. DOT financial assistance and passes some or all of it on to another recipient.

Principal Place of Business means the business location where the individuals who manage the firm's day-to-day operations spend most working hours and where top management's business records are kept. If the offices from which management is directed and where business records are kept are in different locations, the recipient will determine the principal place of business for DBE program purposes.

Program means any undertaking on a recipient's part to use U.S. DOT financial assistance, authorized by the laws to which 49 CFR Part 26 applies.

Race-conscious means a measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

Race-neutral means a measure or program is one that is, or can be, used to assist all small businesses. For the purposes of this part, race-neutral includes gender-neutrality.

Recipient is any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FHWA, FTA, FRA or MWA .

Reciprocity is the mutual exchange of privileges and the recognition by members of a Unified Certification Program of the validity of DBE certification privileges granted by the other participating members WMATA, DDOT, MDOT, MWA, and VADMBE.

Secretary means the Secretary of Transportation or his/her designee.

Small Business Administration or SBA means the United States Small Business Administration.

SBA certified firm refers to firms that have a current, valid certification from or recognized by the SBA under the 8(a) BD or SBD programs.

Small Business Concern means, with respect to firms seeking to participate as DBEs in U.S. DOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and the Small Business Administration regulations implementing it (13 CFR 121) that also does not exceed the cap on average annual gross receipts specified in 49 CFR 26.65(b).

Socially and Economically Disadvantaged Individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is:

- (a) Any individual about whom the MWUCP finds to be a socially and economically disadvantaged individual on a case-by-case basis.
- (b) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
 - (1) "Black Americans" which includes persons having origins in any of the Black racial groups of Africa;
 - (2) "Hispanic Americans" which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

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- (3) "Native Americans" which includes persons who are American Indians, Eskimos, Aleut, or Native Hawaiians;
- (4) "Asian-Pacific Americans" which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U. S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;
- (5) "Subcontinent Asian Americans" which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
- (6) "Women"; and
- (7) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

State is a political entity formed and governed under the U.S. constitution and/or a recipient of DOT funds.

States as used here includes the District of Columbia.

Tribally-owned concern means any concern at least 51 percent owned by an Indian tribe as defined in this section.

WMATA means the Washington Metropolitan Area Transit Authority.

Washington Metropolitan Area Transit Authority Compact is an agreement, pursuant to Pub. L. No. 89-774, 80 Stat. 1324 (1966), between the District of Columbia, State of Maryland, and Commonwealth of Virginia to create the Washington Metropolitan Area Transit Authority (WMATA).

SECTION 2.0 - PROGRAM REQUIREMENTS

Section 2.1 Record Keeping and Reporting

- (a) The MWUCP shall transmit the Uniform Report of DBE Awards or Commitment and Payment to FTA at the required time.
- (b) The MWUCP shall provide data about its DBE program to FTA and FHWA as directed by the DOT operating administrations.
- (c) The MWUCP shall create a bidders list.

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- (1) The purpose of this list is to provide the MWUCP with as accurate data as possible about the universe of DBE and non-DBE contractors and subcontractors who seek to work on Federally-assisted contracts for use in helping to set the overall goals.
- (2) (A) The MWUCP members must obtain the following information about DBE and non-DBE contractors and subcontractors who seek to work on Federally-assisted contracts:
 - (i) Firm name;
 - (ii) Firm address;
 - (iii) Firm's status as a DBE or non-DBE;
 - (iv) Age of the firm; and
 - (v) The annual gross receipts of the firm.

(B) Gross receipts information may be obtained by asking each firm to indicate into what gross receipts bracket they fit (*e.g.*, less than \$500,000; \$500,000–\$1 million; \$1–2 million; \$2–5 million; etc.) rather than requesting an exact figure from the firm.
- (3) The individual member of the MWUCP may acquire the information for its bidders list in a variety of ways. For example, it can collect the data from all bidders, before or after the bid due date. It can conduct a survey that will result in statistically sound estimate of the universe of **DBE** and non-**DBE** contractors and subcontractors who seek to work on its Federally-assisted contracts. The individual member may combine different data collection approaches (*e.g.*, collect name and address information from all bidders, while conducting a survey with respect to age and gross receipts information).
- (c) MWUCP will provide comprehensive data, which shall include but not limited to its initial certification, about its DBE certification program to each of its member components on a monthly basis.
- (d) Pursuant to 49 CFR Part 26 109, the MWUCP will not release information that may be reasonably construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting documentation. This information can be released, upon written consent, to address issues concerning reciprocity and where the MWUCP must transmit the information to DOT in any certification appeal proceeding under section 26.89 in which the disadvantaged status of the individual is in question.
- (e) Notwithstanding any contrary provisions of state or local law, MWUCP will not release personal financial information submitted in response to the Personal Net Worth requirement to a third party (other than U.S. DOT) without the written consent of the submitter or a valid court subpoena.

- (f) *Record Keeping and Reports.* Participating members shall maintain their own records, recordings, assessments and statistics of DBE performance. The sitting chairperson, or his/her designee, shall be responsible for receiving the data and overseeing its compilation into an annual report and distribution to member agencies. A permanent record keeping site, for purposes of convenience, shall be determined by the members of the MWUCP.
- (g) The MWUCP will maintain and make available to interested persons its directories of certified DBEs in its program. The listing for each firm will include the address, phone number and the types of work the firm has been certified to perform as a DBE. The directory will be updated at least annually and the updated information will be made available to contractors and the public upon request. Websites to access our websites: www.wmata.com or www.metroopensdoors.com and <http://dbe.ddot.dc.gov>

Section 2.2 Home State Certification

- (a) In accordance with 49 CFR Part 26.81(d), a UCP shall not process an application for certification from a firm having its principal place of business outside the state if the firm is not certified by the UCP in the state in which it maintains its principal place of business. The MWUCP shall share its information and documents concerning the firm with other UCPs that are considering the firm's application.
- (b) For WMATA the purposes of the MWUCP, "*home state*" consists of the jurisdictions that comprise the Interstate Compact: Prince George's and Montgomery counties in Maryland, the District of Columbia and the Virginia jurisdictions of Alexandria, Falls Church and Fairfax cities and Arlington, Fairfax and Loudoun counties. Further, prospective DBE firms located in the Interstate Compact local area are not required to be certified by another home state as a requirement for becoming certified as a DBE firm by the MWUCP.
- (c) DDOT firms not certified in their home states are not eligible for DBE certification by the MWUCP until such time that the applicant firm's home state certification is obtained and evidenced to the MWUCP.

Section 2.3 Program Administration

- (a) Metropolitan Washington Unified Certification Committee.
 - (1) *Members.* The MWUCP shall be administered by a Metropolitan Washington Unified Certification Program Committee. The total number of Committee Members shall be six (6). Membership on the Committee shall be the DBE Liaison or his/her designee, from each member entity, and two (2) representatives from WMATA and DDOT. The representatives will be appointed by the DBE Liaison from WMATA and DDOT. Vacancies will be filled by the DBE Liaisons. (NOTE: It is recommended that the number of MWUCP voting members be changed to seven (7) to include representatives from DDOT

(CIVL), WMATA (PRMT), WMATA SBLPP, Finance PRMT,
Construction/Engineering Departments.)

- (2) *Chairperson.* The Committee shall be chaired by the DBE Liaison for each member entity on an alternating basis for a period of one calendar year. The calendar year shall begin on January 1st. The designated Chairperson may appoint a committee member to serve as the Chairperson for a specific meeting(s) throughout the year, as necessary.
 - (3) *Meetings.* The committee shall meet the second Thursday of each month. Meetings shall be held, on an alternating basis, in the offices of the participating members of the committee.
 - (4) *Quorum.* A majority of the membership shall be a quorum for doing business. All matters before the committee shall be subjected to a majority vote. In the event of a tie vote, the question shall fail for lack of a majority vote.
 - (5) *Amendments.* This Agreement shall only be amended upon the unanimous vote of the committee.
- (b) Forms and Documents.
- (1) The members of the MWUCP shall use common forms and documents for the certification of prospective DBE firms. (2) Each form of the MWUCP may bear the name of each participating member. All documents for the external dissemination may bear the address, and telephone numbers of each participating member.
- (c) Ad hoc Committees.
- An Ad hoc committee may be required by the MWUCP to conduct certain business. This committee shall be established upon the unanimous vote of the Metropolitan Washington Unified Certification Program Committee. This committee will be staffed by an equal number of representatives from each participating member for the MWUCP. The Ad hoc committee shall have a chairperson to guide its affairs and ensure adherence to the appropriate provisions of their establishment and will make all necessary recommendations/reports to the Metropolitan Washington Unified Certification Program Committee.
- (d) Over Concentration of DBEs.
- (1) If the MWUCP determines that the DBE firms are so over-concentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work, the MWUCP shall devise appropriate measures to address this over concentration.

- (2) MWUCP either alone or in concert with other recipients, institute additional measures which by example may include the use of incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designated to assist DBEs in performing work outside of the specific field in which the MWUCP has determined that non-DBEs are unduly burdened. The MWUCP may also consider varying its use of contract goals, to the extent consistent with section 26.51 to ensure that non-DBEs are not unfairly prevented from competing for subcontracts.
- (3) The MWUCP will obtain the approval of FHWA or FTA for the MWUCP's determination of over-concentration and the measures that the MWUCP devises to address it. Once approved, the measures become part of the Plan.

(e) Fostering Small Business Participation.

- (1) The MWUCP DBE program shall develop an element to structure contracting requirements to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors.
- (2) As part of this program element the MWUCP may include, but are not limited to, the following strategies:
 - (A) Establishing a race-neutral small business set-aside for prime contracts under a stated amount (*e.g.*, \$1 million).
 - (B) In multi-year design-build contracts or other large contracts (*e.g.*, for "megaprojects") requiring bidders on the prime contract to specify elements of the contract or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform.
 - (C) On prime contracts not having DBE contract goals, requiring 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.
 - (D) Identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures consisting of small businesses, including DBEs, to compete for and perform prime contracts.
 - (E) To meet the portion of your overall goal you project to meet through race-neutral measures, ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform.

Section 2.4 Operations

- (a) *Separation of Function.* Each participating member of the MWUCP shall retain the responsibility for administering and operating its own DBE Program. Each participating member shall be responsible for conducting the certifications filed with the member by prospective DBE firms.
- (b) *Approvals and Denials.* Letters indicating the status and final disposition of applications for certification and re-evaluation will be the province of each member on behalf of the MWUCP.
- (f) *Training.* Each participating member shall bear the expense of providing training to its individual staff. This includes attendance at seminars, conferences and meetings where a fee is assessed upon participants.
- (g) *DBE Directory.* Each participating member shall bear the expense of providing and maintaining its own DBE Directory.

Section 2.5 Administrative Procedures

- (a) *Admission of New Members.* New members may be admitted to the MWUCP upon the unanimous consent of the membership. New members must agree to comply with 49 CFR Part 26 and this agreement and must also have a Federally-funded DBE Program, approved by the pertinent DOT administrative agency.
- (b) *Streamline Reciprocity Regional UCPs.* The MWUCP, with unanimous consent, may enter into agreements with other UCPs in order to form one or more regional UCPs.

Section 2.6 Finance

Each participating member of the MWUCP shall be responsible for its own financing, staffing and budget without recourse to the MWUCP for expenses of any kind, except that if there is an amendment to these provisions that allows the MWUCP to have a budget, the membership will determine such financial issues as expenses, reimbursements, fees and other considerations.

Section 2.7 Liability

Nothing contained in this agreement shall be construed or implied as creating any relationship between the signing parties other than the certification of Disadvantaged Business Enterprises. Each participating member shall indemnify the other, and the MWUCP, from practices committed by the participating member.

Section 2.8 Confidentiality

All financial information and other proprietary documentation may be shared among the membership and DOT or the respective FTA or FHWA when conducting a DBE Review. Financial and other proprietary documentation shall not be released to the third party, without the written consent of the firm that submitted the information pursuant to 49 CFR Part 26.109.

Section 2.9 Three (3)-year No Change and On-site Review

DBE firms shall be subject to a No Change Statement and On-site Review by the MWUCP every three (3) years to ensure that it is in compliance with 49 CRF Part 26.

Section 2.10 Certification Privilege

Pursuant to 26.83 (h), once the MWUCP has certified a DBE, it shall remain certified until and unless the MWUCP has removed its certification, in whole or in part, through the procedures of section 26.87. The MWUCP may not require DBEs to reapply for certification or require "recertification" of currently certified firms. However, the MWUCP may conduct a certification review of a certified DBE firm, including a new on-site review, three years from the date of the firm's most recent certification, or sooner if appropriate in light of changed circumstances (e.g., of the kind requiring notice under paragraph 26.83 (i)), a complaint, or other information concerning the firm's eligibility. If the MWUCP has grounds to question the firm's eligibility, it may conduct an on-site review on an unannounced basis, at the firm's offices and jobsites.

Section 2.11 Removal of Eligibility or Certification

The MWUCP may remove the eligibility or certification of a DBE firm, in accordance with the procedures set forth in 49 CFR Part 26, section 87, this Agreement and the affected participating member's program plan. Removal of the eligibility or certification of a DBE firm may occur subject to Section 5.5 of this Agreement.

Section 2.12 Return of Applications

In the event that an incomplete application is received, the participating member shall:

- (a) Not complete an incomplete application for a prospective DBE firm. The participating member shall notify the prospective DBE firm with Instructions to guide the firm in filing a complete application.
- (b) If withdrawal by the applicant is requested at any time by the applicant prior to the recipient beginning the review and evaluation procedure the application will be returned.
- (c) Pursuant to 49 CFR Part 26.73 (c), a participating member may determine that a prospective DBE fails to cooperate with the certification process. In that event the participating member will notify the proposed DBE using contact email or address information provided by the prospective DBE allowing ten (10) business days from receipt of the notice to respond.

- (d) **Failure to Cooperate.** DBE firms and firms seeking DBE certification shall cooperate fully with recipient's request (and DOT requests) for information relevant to the certification process pursuant to 26.73 (2)(c).

Section 2.13 Application Status

Applications that are incomplete or that do not conform to home state policies are not to be processed and denied certification. Rather, such applications are to be returned to the firms pursuant to the provisions set forth in (d) and (e), above. An applicant may withdraw his/her application at any time prior to certification. For the purposes of reevaluation of an application for DBE certification, an applicant may withdraw his/her request for reevaluation at any time.

- (a) *Application Fees.* Members of the MWUCP shall determine, by unanimous vote, whether prospective DBE firms should be assessed an application fee and shall then determine the amount of the fee. In the event that fees are assessed, banking and other relevant matters must be decided prior to implementation and collection of such fees.
- (b) *Existing Certifications.* The MWUCP shall adopt each existing certification of participating members as though the certifications had been conducted under the provisions set forth herein. Certifications that are not in conformity with Part 26 shall be reevaluated, under the provisions of Part 26, prior to acceptance by MWUCP for its roll and directory.
- (c) *Certification Log.* The MWUCP shall maintain a roll of all certified DBE firms as presented by each member entity. This log shall be periodically provided to each member for purposes of audits and determinations of compliance with certification provisions.
- (d) *Audits.* Reviews shall be performed by the MWUCP of participating members, as necessary, to determine compliance with 49 CFR Part 26 certification standards. MWUCP members shall submit to MWUCP audits and cooperate fully in the matter.
- (e) *Records.* Copies of complete application documents and final disposition reports, including hearings and appeals, shall be maintained in the files of the MWUCP.
- (f) *Hearings and Appeals.* No participating member shall hold any hearings or accept any appeals concerning denial decisions. Such proceedings are within the purview of DOT. This does not include the informal hearing that may be requested in conjunction with the removal of eligibility for certification or removal of certification. Likewise, the MWUCP may not

conduct hearings of appeals of denial of certification of a prospective DBE firm.

Section 2.14 Out-of-State Applications

Applications that are received from out-of-state that do not conform to the home state policy shall be returned to the firm with instructions to first gain certification within their home state to become eligible for certification by the MWUCP. The Out-of-State applicant shall submit the following:

- (a) A completed MWUCP application form, including the Affidavit of Certification, as set forth in 49 CFR Part 26, Appendix F;
- (b) Personal Net Worth Statement;
- (c) Individual Federal Tax Return for the three (3) latest tax years;
- (d) Firm's Federal Tax Returns for the three (3) latest tax years; and
- (e) A copy of the latest Letter of Certification received by the applicant from its Home State.

SECTION 3.0 - MWUCP DBE DIRECTORY

Section 3.1 - MWUCP DBE Directory (26.31)

- (a) *Annual Directory Required.* MWUCP will make available an annually revised directory identifying all firms eligible to participate as DBEs in the MWUCP's DBE certification program. These directories will be made available at the following websites; <http://dbe.ddot.dc.gov> and www.metroopensdoors.com or www.wmata.com
- (b) *Directory Listings.* The listing for each firm shall include its address, contact person, email address, telephone/facsimile, FAX numbers, NAICS Codes, and types of work the firm has been certified to perform as a DBE.
- (a) *Distribution.* MWUCP shall make its directory available to anyone wishing to receive a copy. Interested parties may request the directory by writing, telephoning or visiting: Washington Metropolitan Area Transit Authority, DBE/Contract Compliance Branch, 600 Fifth Street, N.W., Washington, DC 20001, (202) 962-1168 or the District Department of Transportation, Office of Civil Rights, 515 M Street, SE., Washington, D.C. 20009, (202) 671- 0479.

SECTION 4.0 - CERTIFICATION STANDARDS

Section 4.1 - Eligibility and Burdens of Proof (26.61)

Only bona fide business concerns meeting the definition set forth in Section 1.5 and the criteria and standards set forth in 49 CFR Part 26, Subpart D, shall be eligible for certification as a DBE. To be certified, the following criteria must be met:

- (a) The applicant firm has the burden of demonstrating, by a preponderance of the evidence, that it meets Part 26 requirements concerning group membership or individual disadvantage, business size, ownership and control.
- (b) The MWUCP must rebuttably presume that members of the designated groups identified in §26.67(a) are socially and economically disadvantaged. This means they do have the burden of proving to the MWUCP that they are socially and economically disadvantaged. In order to obtain the benefit of the rebuttable presumption, individuals must submit a signed, notarized statement that they are a member of one of the groups in §26.67(a). Applicants do have the obligation to provide the MWUCP information concerning their economic disadvantage (*See* §26.67).
- (c) Individuals who are not presumed to be socially and economically disadvantaged, and individuals concerning whom the presumption of disadvantage has been rebutted, have the burden of proving, by a preponderance of the evidence, that they are socially and economically disadvantaged (26.61(d) See Appendix E of this part).
- (d) The MWUCP in making determinations concerning whether individuals and firms have met their burden of demonstrating group membership, ownership, control, and social and economic disadvantage (where disadvantage must be demonstrated on an individual basis), shall consider all facts in the record, viewed as a whole.

Section 4.2 Group Membership (26.63)

- (a)(1) If, after reviewing the signed notarized statement of membership in a presumptively disadvantaged group (*See* § 26.61 (c)), the MWUCP has a well founded reason to question the individual's claim of membership in that group, the MWUCP must require the individual to present additional evidence that he or she is a member of the group.
 - (2) The MWUCP must provide the individual a written explanation of your reasons for questioning his or her group membership and a written request for additional evidence as outlined in paragraph (c) of this section.
 - (3) In implementing this section, the MWUCP must take special care to ensure that it does not impose a disproportionate burden on members of any particular designated group. Imposing a disproportionate burden on members of a particular group could violate §26.7(b) and/or Title VI of the Civil Rights Act of 1964 and 49 CFR part 21.
- (b) In making such a determination, the MWUCP must consider whether the individual has held himself or herself out to be a member of the group over a long period of time prior to making application for certification and whether the individual is regarded as a

member of the group by the relevant community. The MWUCP may require the applicant to produce appropriate documentation of group membership.

- (1) If the MWUCP determines that an individual claiming to be a member of a group presumed to be disadvantaged is not a member of a designated disadvantaged group, the individual must demonstrate social and economic disadvantage on an individual basis.
- (2) MWUCP decisions concerning membership in a designated group are subject to the certification appeals procedure of §26.89.

Section 4.3 Business Size (26.65)

- (a) To be eligible for certification by MWUCP as a DBE, the firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. Current SBA business size standards found in 13 CFR Part 121 will be applied by the MWUCP appropriate to the type(s) of work the firm seeks to perform on DOT-assisted contracts.
- (b) Even if the requirements of paragraph (a) of this section are met, a firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations, (see 13 CFR 121.402) over the firm's previous three years, pursuant to the federal size standard.

Section 4.4 Presumption of Disadvantage (26.67)

- (a) Citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are rebuttably presumed to be socially and economically disadvantaged individuals. The MWUCP requires the applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.
- (b) Each individual owner of a firm applying to participate as a DBE, whose ownership and control are relied upon for DBE certification, must submit a signed, notarized statement of personal net worth, with appropriate documentation and must not exceed the \$1.32 million.
 - (1) The firm seeking certification has the burden of demonstrating to the MWUCP, by a preponderance of the evidence, that it meets the requirements of 49 CFR PART 26.61(b) concerning group membership or individual disadvantage, business, ownership and control.
 - (2) Pursuant to 49 CFR Part 26.61(e), the MWUCP will make a determination concerning whether the individual s and firms have met their burden of proof demonstrating group membership, ownership, control, and social and economic disadvantage (where disadvantage must be demonstrated on

an individual basis) by considering all the facts in the record, viewed as a whole.

- (3) DBE firms must cooperate with the MWUCP requests for information relevant to the certification process.
- (c) The following are excluded when determining net worth:
- (1) an individual's ownership interest in the applicant firm;
 - (2) the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm).
 - (3) a contingent liability to reduce an applicant owner's net worth;
 - (4) assets held in a 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 with 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.

Section 4.5 Rebuttal of Presumption of Disadvantage (26.67(b))

- (a) If the statement of personal net worth that is submitted by the owner of an applicant under paragraph 4.5(b) of this section shows that the individual personal net worth exceeds \$1.32 million, the individual's presumption of economic disadvantage is rebutted. A proceeding under Section 4.5(b) is not required in order to rebut the presumption of economic disadvantage in this case.
- (b) If there is a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged, the MWUCP may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. MWUCP's proceeding, as prescribed by Section 26.87 of 49 CFR Part 26, includes the following procedures:
 - (1) MWUCP has the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. MWUCP will require the individual to produce information relevant to the determination of his or her disadvantage.
 - (2) When an individual's presumption of social and economic disadvantaged status has been rebutted, his or her ownership and control of the firm in question shall not be used for purposes of DBE eligibility, unless and until, he or she, makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is determination that the individual personal net worth exceeds \$1.32 million, the individual is no longer eligible for participation in the

program and cannot regain eligibility by making an individual showing of disadvantage.

Section 4.6 Individual Determinations of Social and Economic Disadvantage (26.67(d))

Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE Certification. The MWUCP must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE Certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to the MWUCP, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. Any individual whose personal net worth exceeds \$1.32 million shall not be deemed to be economically disadvantaged. Applicants are required to provide sufficient information to permit a thorough determination of individual economic disadvantage pursuant to guidelines the guidance of Appendix E of this Part.

Section 4.7 8(a) and SDB Firms (26.84) and Modified Certification Reciprocity Program (MCRP) Firms

In lieu of conducting its own certification proceeding, and in accordance with Section 5.1, (d) MWUCP will accept eligible DBE as established under 49 CFR 26.83:

- (a) MWUCP may accept the certification of another DOT recipient for this purpose.
- (b) The MWUCP recognizes that the participating Members are partners in the Modified Certification Reciprocity Program (MCRP) that was enacted at the September 12, 2008, regional summit by Maryland's Governor- Martin O'Malley, Virginia's Governor ThomasKaine, the District of Columbia's Mayor Adrian Fenty, the General Manager of the Washington Metropolitan Area Transit Authority- John B. Catoe, and the Washington Metropolitan Airports Authority, Vice President Stanley Baker to streamline the certification process for local Disadvantaged Business Enterprise(DBE) firms and Airport Concession Disadvantaged Enterprises (ACDBE) wanting to participate in federally funded transportation projects throughout the Washington Metropolitan region.
- (c) Pursuant to the MCRP, any Maryland, Virginia or District of Columbia firm that is certified as a DBE/ACDBE in its Home State by the Maryland Department of Transportation (MDOT), the Commonwealth of Virginia, Department of Minority Business Enterprise (DMBE) and the Metropolitan Washington Airports Authority (MWAA) is able to apply for certification with one of the Participating Member through the streamlines process.

- (1) Under the MCRP, DBE firms applying for certification that are already certified by one of these entities above will need to submit only the following documents to one of the Participating Members to initiate the certification process: the Uniform Certification Application, a Personal Net Worth statement, individual current federal tax return for latest tax year, firm's current federal tax return for the latest tax year and a copy of the current letter of certification received by the DBE/ACDBE from its Home State and a Certificate of Good Standing from the Maryland State Department of Assessments, and Taxation, where applicable. The Reciprocity Member may request additional information from the applicant, if needed, to complete the certification process.
- (2) Once the applicant has submitted the appropriate information, the Participating Member will request a copy of the On-site Report from the Home State Certifier. The Participating Member will evaluate the documents provided by the applicant along with the onsite report from the Home State Certifier to ensure the following: the firm's applications complete, the disadvantaged owner's of the firm personal net worth(s) does not exceed the \$1.32 million, the firms average gross receipts for the last three years (from the date of the DBE application) does not exceed the SBA size limits not the DBE/ADBDE Program limits nor the DOT size limit, as applicable, and the assigned NAICS codes of the applicants from the Home State Certifier meet the needs of the Participating Member. The reciprocity process will be completed within a minimum of 30 days.
- (3) If the correct documents are present and the applicant meets the standards of the preceding paragraph and no additional information is needed, the DBE Liaison for the Participating Member may certify the firm under the MCRP and add the firm to its directory, pursuant to Section 3.1 MWUCP DBE Directory, of this Agreement. The decisions of the DBE Liaison concerning MCRP Certifications will be reflected in the semi-annual report provided to the MWUCP Committee.
- (4) If the Home State has not conducted an on-site visit of the firm within three years of the submission date of the application, the Participating Member will request the Home State to conduct a new on-site. If the Home State Certifier is unable to conduct the on-site the applicant will be removed from the MCRP and be processed pursuant to Section 4.7 of this Agreement.
 - (A) If, upon review of the Home State On-site Report and the applicant's documents, its Member determines that the applicant does meet the requirements for certification, the Participating Member will consult with the Home State Certifier to: clarify the basis for the Home State's determination of eligibility for certification and clarify the specific goods/services the applicant firm is certified to provide, especially where the assigned NAICS codes may cover broad categories.

- (B) If upon consultations with the Home State Certifier, it is determined that the applicant does not meet the requirements for certification, the Participating Member may elect to remove the applicant from the MCRP and be processed pursuant to Section 4.7 of this Agreement or the Participating Member may deny certification. In the case of a denial, the Participating Member will send a copy of the Letter of Denial to the Home States with 30 days of the date of the letter.
- (d) Should the denial be appealed to the USDOT, the Participating Member will also send a copy of any final determination made by the US Department of Transportation to the Home State within 30 days of the date of the determination.

Section 4.8 Rules Governing Ownership Determinations (26.69)

- (a) In determining whether the socially and economically disadvantaged participants in a firm own the firm, the MWUCP must consider all the facts, in the record, viewed as a whole.
- (b) To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.
- (1) In the case of a corporation, such individuals must own at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding.
- (2) In the case of a partnership, 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged individuals. Such ownership must be reflected in the firm's partnership agreement.
- (3) In the case of a limited liability company, at least 51 percent of each class of member interest must be owned by socially and economically disadvantaged individuals.
- (c) 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.
- (d) All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Except as provided in this paragraph (d), no securities or assets held in trust, or by any guardian for a minor, are considered as held by disadvantaged persons in determining the ownership of a firm. However, securities or assets held in trust are

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regarded as held by a disadvantaged individual for purposes of determining ownership of the firm, if -

- (1) the beneficial owner of securities or assets held in trust is a disadvantaged individual, and the trustee is the same or another such individual; or
 - (2) the beneficial owner of a trust is a disadvantaged individual who, rather than the trustee, exercises effective control over the management, policymaking and daily operational activities of the firm. Assets held in a revocable living trust will be counted only in the situation where the same disadvantaged individual is the sole grantor, beneficiary, and trustee.
- (e) The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.
- (f) The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership:
- (1) The owner's expertise must be:
 - (A) in a specialized field;
 - (B) of outstanding quality;
 - (C) in areas critical to the firm's operations;
 - (D) indispensable to the firm's potential success;
 - (E) specific to the type of work the firm performs; and
 - (F) documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.
 - (2) The individual whose expertise is relied upon must have a significant financial investment in the firm.
- (g) MWUCP will always deem as held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual-

- (2) 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.
- (j) MWUCP may consider the following factors in determining the ownership of a firm. However, the MWUCP shall not regard a contribution of capital as failing to be real and substantial, or find a firm ineligible, solely because –
- (1) A socially and economically disadvantaged individual acquired his or her ownership interest as the result of a gift, or transfer without adequate consideration, other than the types set forth in Paragraph (h) of this section;
 - (2) There is a provision for the co-signature of a spouse who is not a socially and economically disadvantaged individual on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents; or
 - (3) Ownership of the firm in question or its assets is transferred for adequate consideration from a spouse who is not a socially and economically disadvantaged individual to a spouse who is such an individual. In this case, MWUCP shall give particularly close and careful scrutiny to the ownership and control of a firm to ensure that it is owned and controlled, in substance as well as in form, by a socially and economically disadvantaged individual.

Section 4.9 Rules Governing Determinations Concerning Control (26.71).

- (a) In determining whether socially and economically disadvantaged owners control a firm, the MWUCP shall consider all the facts in the record, viewed as a whole.
- (b) Only an independent business will be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.
 - (1) In determining whether a potential DBE is an independent business, the MWUCP shall scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.
 - (2) MWUCP shall consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm.
 - (3) MWUCP shall examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm.

- (4) In considering factors related to the independence of a potential DBE firm, the MWUCP must consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.
- (c) A DBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm. This paragraph does not preclude a spousal co signature on documents as provided for in Section 26.69(j) (2).
- (d) The socially and economically disadvantaged owners must 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.
 - (1) A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president).
 - (2) In a corporation, disadvantaged owners must control the board of directors.
 - (3) In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.
- (e) Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers and/or directors. Such individuals shall not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.
- (f) The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority shall be revocable, and the socially and economically disadvantaged owners shall retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs shall be such that MWUCP can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management and policy.
- (g) The socially and economically disadvantaged owners shall have an overall understanding of, and managerial and technical competence and experience directly

related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners shall have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management and policymaking. Generally, expertise limited to office management, administration or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

- (h) If state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control the potential DBE firm of that type shall possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a firm, MWUCP shall not deny certification solely on the ground that the person lacks the license or credential. However, MWUCP may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.
- (i)
 - (1) MWUCP may consider differences in remuneration between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a firm as a DBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm. MWUCP may determine that a firm is controlled by its socially and disadvantaged owners although that owner's remuneration is lower than that of some other participants in the firm.
 - (2) In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, MWUCP may consider the difference in the remuneration of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the non-disadvantaged individual remains involved with the firm and continues to receive greater compensation than the disadvantaged individual.
- (j) In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or week/ends, if the individual controls it all the time it is operating.

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- (k) (1) A socially and economically disadvantaged individual may control a firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, MWUCP shall make a judgment about the control the socially and economically disadvantaged owner exercises vis-a-vis other persons involved in the business as the applicant does in other situations, without regard to whether or not the other persons are immediate family members.
- (2) If MWUCP cannot determine that the socially and economically disadvantaged owners - as distinct from the family as a whole - control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.
- (l) Where a firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged individual, and the non-disadvantaged individual remains involved with the firm in any capacity, the disadvantaged individual now owning the firm shall demonstrate to MWUCP, by clear and convincing evidence, that:
 - (i) The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
 - (ii) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who formerly owned and/or controlled the firm.
- (m) In determining whether the firm is controlled by its socially and economically disadvantaged owners, MWUCP will consider whether the firm owns equipment necessary to perform its work. However, MWUCP shall not determine that a firm is not controlled by socially and economically disadvantaged individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.
- (n) MWUCP shall grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm. To become certified in an additional type of work, the firm need demonstrate to MWUCP only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. MWUCP will not, in this situation, require that the firm be recertified or submit a new application for certification, but MWUCP shall verify that disadvantaged owner's control of the firm in the additional type of work.

- (o) A business operating under a franchise or license agreement will be certified if it meets the standards in this subpart and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, MWUCP should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided that the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.
- (p) In order for a partnership to be controlled by socially and economically disadvantaged individuals, any non-disadvantaged partners must not have the power, without the specific written concurrence of the socially and economically partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.
- (q) The socially and economically disadvantaged individuals controlling a firm may use an employee leasing company. The use of such a company does not preclude the socially and economically disadvantaged individuals from controlling their firm if they continue to maintain an employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

Section 4.10 Other Rules Affecting MWUCP DBE Certification (26.73)

- (a)
 - (1) Consideration of whether a firm performs a commercially useful function or is a regular dealer pertains solely to counting toward DBE goals the participation of firms that have already been certified as a DBE. Except as provided in paragraph (a) (2) of this section, MWUCP may not consider commercially useful function issues in any way in making decisions about whether to certify a firm as a DBE.
 - (2) MWUCP may consider, in making certification decisions, whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program.
- (b)
 - (1) MWUCP must evaluate the eligibility of a firm on the basis of present circumstances. MWUCP shall not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of this part.
 - (2) The MWUCP must not refuse to certify a firm solely on the basis that it is a newly formed firm, has not completed projects or contracts at the time of its application, has not yet realized profits from its activities, or has not

demonstrated a potential for success. If the firm meets disadvantaged, size, ownership, and control requirements of this section, the firm is eligible for certification.

- (c) DBE firms and firms seeking DBE certification shall cooperate fully with MWUCP requests (and DOT requests) for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial or removal of certification.
- (d) Only firms organized for profit will be eligible DBEs. Not-for-profit organizations, even though controlled by socially and economically disadvantaged individuals, are not eligible to be certified as DBEs.
- (e) An eligible DBE firm must be owned by individuals who are socially and economically disadvantaged. Except as provided in this paragraph, a firm that is not owned by such individuals, but instead is owned by another firm - even a DBE firm - cannot be an eligible DBE.
 - (1) If socially and economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, MWUCP will certify the subsidiary if it otherwise meets all requirements of this subpart. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.
 - (2) MWUCP may certify such a subsidiary only if there is cumulative 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals.
- (f) Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is an independent business, owned and controlled by socially and economically disadvantaged individuals.
- (g) Pursuant to 49 CFR 26.73(g) the MWUCP will not require a DBE firm to be prequalified as a condition for certification provided that it requires all firms that participate in its federal contracts and subcontracts to be prequalified.
- (h) A firm that is owned by an Indian tribe, or Native Hawaiian organization as an entity, rather than by Indians, or Native Hawaiians as individuals, may be eligible for certification. Such a firm must meet the size standards of 49 CFR, Section 26.35. Such a firm must be controlled by socially and economically disadvantaged individuals, as provided in section 26.71.
- (i) The following special rules apply to the certification of firms related to Alaska Native Corporations (ANCs).

(1) Notwithstanding any other provisions of this subpart, a direct or indirect subsidiary corporation, joint venture, or partnership entity of an ANC is eligible for certification as a DBE if it meets all of the following requirements:

(A) The Settlement Common Stock of the underlying ANC and other stock of the ANC held by holders of the Settlement Common Stock and by Natives and descendants of Natives represents a majority of both the total equity of the ANC and the total voting power of the corporation for purposes of electing directors;

(B) The shares of stock or other units of common ownership interest in the subsidiary, joint venture, or partnership entity held by the ANC and by holders of its Settlement Common Stock represent a majority of both the total equity of the entity and the total voting power of the entity for the purpose of electing directors, the general partner, or principal officers; and

(C) The subsidiary, joint venture, or partnership entity has been certified by the Small Business Administration under the 8(a) or small disadvantaged business program.

(2) As a recipient to whom an ANC-related entity applies for certification, the MWUCP does not use the DOT uniform application form (*See* Appendix F of this part). The MWUCP shall must obtain from the firm documentation sufficient to demonstrate that entity meets the requirements of paragraph (1) (A) of this section. The MWUCP shall also obtain sufficient information about the firm to allow it to administer the DBE program (*e.g.*, information that would appear in the DBE Directory).

this (3) If an ANC-related firm does not meet all the conditions of paragraph (1)(A) of section, then it must meet the requirements of paragraph (h) of this section in order to be certified, on the same basis as firms owned by Indian Tribes or Native Hawaiian Organizations.

SECTION 5.0 - CERTIFICATION PROCEDURES

Section 5.1 Procedures to be Followed in Making Certification Decisions (26.83)

- (a) MWUCP shall ensure that only firms certified as eligible DBEs under section 26.83 participate in this program.
- (b) MWUCP shall determine the eligibility of firms as DBEs consistent with the standards set forth by 49 CFR Part 26.
- (c) MWUCP shall take all the following steps in determining whether a DBE firm meets the prescribed standards:

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- (1) Perform an on-site visit to the offices of the firm; interview the principal officers of the firm and review their resumes and/or work histories. MWUCP shall also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation within the Metropolitan Washington, D.C. area. MWUCP may rely upon the site visit report of any other recipient with respect to a firm applying for certification;
- (2) If the firm is a corporation with stock, MWUCP will analyze the ownership of stock in the firm;
- (3) If the firm is a partnership or limited liability company, MWUCP will analyze the ownership interests in the firm;
- (4) Analyze the bonding and financial capacity of the firm;
- (5) Determine the work history of the firm, including the contracts it has received and work it has completed;
- (6) Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program and its preferred locations for performing the work, if any;
- (7) Obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the DBE program;
- (8) Required potential DBEs to complete and submit an appropriate form, unless the potential DBE is an SBA certified firm applying pursuant to the DOT/SBA MOU.
 - (A) MWUCP shall use the application form provided in Appendix F to this part without change or revision. However, MWUCP may provide in our DBE program, with the approval of the concerned operating administration, for supplementing the form by requesting additional information not inconsistent with this part.
 - (B) If an SBA 8(a) firm applies to the MWUCP, the 8(a) firm may submit its SBA application package in lieu of a new DBE application package. The MWUCP shall conduct an on-site review of the firm.
 - (C) The MWUCP shall request additional information from the applicant to ensure that all Part 26 requirements are met and that all information has been updated.
 - (D) MWUCP will make sure that the applicant attests to the accuracy and truthfulness of the information on the application form. This shall be done either in the form of an affidavit sworn to by the applicant before a person who is authorized by state or local law

to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States.

- (E) MWUCP shall review all information on the form prior to making
a decision about the eligibility of the applicant firm.
- (d) When another recipient, in connection with its consideration of the eligibility of a firm, makes a written request for certification information which the MWUCP has obtained about the firm, (e.g., including application materials or the report of an on-site visit, if MWUCP has made one to the firm), the MWUCP must make the information available to the other recipient. MWUCP will share information regarding a DBE applicant's denial for certification with other recipients, as appropriate.
- (e) Except as provided in Sec 4.11, 8(a) and SDB firms (26.85) and in Reciprocity firms (III), when another DOT recipient has certified a firm, MWUCP will make an independent certification decision based upon documentation provided by the other recipient, augmented by any additional information MWUCP requires the applicant to provide. This section is consistent with section 26.86 (a) through (k).
- (f) MWUCP shall safeguard from disclosure to unauthorized persons information gathered as part of the certification process that may reasonably be regarded as proprietary or other confidential business information, consistent with applicable federal, state, or local law.
- (g) Once MWUCP has certified a DBE firm, it shall remain certified unless and until its certification has been removed through the procedures of Section 26.87. MWUCP may not require DBEs to reapply for certification or require "recertification" of currently certified firms. However, you may conduct a certification review of a certified DBE firm, including a new on-site review, three years from the date of the firm's most recent certification, or sooner if appropriate in light of changed circumstances (e.g., of the kind requiring notice under paragraph (g) of this section), a complaint, or other information concerning the firm's eligibility. If you have grounds to question the firm's eligibility, you may conduct an on-site review on an unannounced basis, at the firm's offices and jobsites. .
- (h) The DBE must inform MWUCP in writing of any change in circumstances affecting the firm's ability to meet size, disadvantaged status, ownership, or control requirements under 49 CFR Part 26 or any material change in the information provided in the firm's application form.
 - (1) Changes in the management responsibility among members of a limited liability company are covered by this requirement.
 - (2) The DBE must attach supporting documentation describing in detail the nature of such changes.

- (3) The notice must be in the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or of an unsworn declaration executed under penalty of perjury of the laws of the United States. The DBE shall provide the written notification-within 30 days of the occurrence of the change. If the DBE fails to make timely notification of such a change, the DBE will be deemed to have failed to cooperate under 49 CFR Part 26.109(c).
- (i) Certified DBEs shall provide to the MWUCP, every year on the anniversary date of certification, an affidavit sworn to by the firm's owner(s) before a person who is authorized by state or local law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of 49 CFR Part 26 or any material changes in the information provided in its application form, except for changes about which the DBE has notified MWUCP under Paragraph (i) of this section. The affidavit shall specifically affirm that the DBE continues to meet SBA business size criteria and overall gross receipts cap of Part 26, documenting this affirmation with supporting documentation of the DBE's size and gross receipts. A DBE will be deemed to have failed to cooperate under 49 CFR 29.109(c), if the DBE fails to provide this affidavit in a timely manner.
- (j) MWUCP shall make decisions on applications for certification within 90 days of receiving from the applicant firm all information required under 49 CFR Part 26. MWUCP may extend this time period once, for no more than an additional 60 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension. MWUCP may establish a different time frame in your DBE program, upon a showing that this time frame is not feasible, and subject to the approval of the concerned operating administration. may establish a different time frame in your DBE program, upon a showing that this time frame is not feasible, and subject to the approval of the concerned operating administration. MWUCP's failure to make a decision by the applicable deadline shall be deemed a constructive denial of the application, on the basis of which the firm may appeal to DOT under 49 CFR 26.89.
- (k) MWUCP must advise each applicant within 30 days from its receipt of the application whether the application is complete and suitable for evaluation and, if not, what additional information or action is required.
- (l) Except as otherwise provided in this paragraph, if an applicant for DBE certification withdraws its application before the MWUCP have issued a decision on the application, the applicant can resubmit the application at any time. The MWUCP shall not apply the waiting period provided under §26.86(c) of this part before allowing the applicant to resubmit its application. However, the MWUCP may place the reapplication at the "end of the line," behind other applications that have been made since the firm's previous application was withdrawn. MWUCP may also apply the waiting period provided under §26.86(c) of this part to a firm that has established a pattern of frequently withdrawing application before the MWUCP makes a decision.

Section 5.2 Interstate Certification (26.85)

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- (a) This section applies with respect to any firm that is currently certified in its home state.
- (b) When a firm currently certified in its home state ("State A") applies to MWUCP for DBE certification, the MWUCP may, at its discretion, accept State A's certification and certify the firm, without further procedures.

(1) To obtain certification in this manner, the firm must provide the MWUCP a copy of its certification notice from its home state.

(2) Before certifying the firm, the MWUCP shall confirm that the firm has a current valid certification from its home state. The MWUCP can do so by reviewing the home state electronic directory or obtaining written confirmation from the home state.

- (c) In any situation in which the MWUCP chooses not to accept the home states certification of a firm as provided in paragraph (b) of this section, the applicant firm must provide the MWUCP information in paragraphs (c)(1) through (4) of this section.

(1) The applicant firm must provide to the MWUCP a complete copy of the application form, all supporting documents, and any other information it submitted to the home state or any other state related to your firm's certification. This includes affidavits of no change (*see* §26.83(j)) and any notices of changes (*see* §26.83(i)) that was submitted to the home state, as well as any correspondence had with the home state's UCP or any other recipient concerning the firms application or status as a DBE firm.

(2) The applicant firm must also provide to MWUCP any notices or correspondence from states other than the home state relating to its status as an applicant or certified DBE in those states. For example, if the applicant firm has been denied certification or decertified in another state, or subject to a decertification action there, it must inform MWUCP of this fact and provide all documentation concerning this action.

(3) If applicant firm have filed a certification appeal with DOT (*see* §26.89), it must inform the MWUCP of the fact and provide its letter of appeal and DOT's response to MWUCP.

(4) The applicant firm must submit an affidavit sworn to by the firm's owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States.

(A) This affidavit must affirm that you have submitted all the information required by 49 CFR 26.85(c) and the information is complete and, in the case of the information required by §26.85(c) (1), is an identical copy of the information submitted to the home state.

(B) If the on-site report from the home state supporting the applicant firm's certification in the home state is more than three years old, as of the date of its application to the MWUCP, the MWUCP may require that the

affidavit also affirm that the facts in the on-site report remain true and correct.

- (d) MWUCP after receiving from an applicant firm all the information required by paragraph (c) of this section, shall take the following actions:

(1) Within seven days contact the home state and request a copy of the site visit review report for the firm (*see* §26.83(c)(1)), any updates to the site visit review, and any evaluation of the firm based on the site visit. If in the instance that the MWUCP is the home state, it shall transmit this information to State B within seven days of receiving the request.

(2) Determine whether there is good cause to believe that the home state's certification of the firm is erroneous or should not apply in your State. Reasons for making such a determination may include the following:

(A) Evidence that the home state's certification was obtained by fraud;

(B) New information, not available to the home state at the time of its certification, showing that the firm does not meet all eligibility criteria;

(C) The home state's certification was factually erroneous or was inconsistent with the requirements of this part;

(D) The State laws of the MWUCP require a result different from that of the State law of the home state.

(E) The information provided by the applicant firm did not meet the requirements of paragraph (c) of this section.

(3) Unless the MWUCO determines that there is good cause to believe that the home state's certification is erroneous or should not apply in your State, it shall, no later than 60 days from the date on which all the information was received from the applicant firm required by paragraph (c) of this section, send to the applicant firm a notice that it is certified and place the firm on its directory of certified firms.

(4) If MWUCP determines that there is good cause to believe that the home state's certification is erroneous or should not apply in the District of Columbia, it shall, no later than 60 days from the date on which all the information was received from the applicant firm required by paragraph (c) of this section, send to the applicant firm a notice stating the reasons for your determination.

(A) This notice must state with particularity the specific reasons why MWUCP believes that the firm does not meet the requirements of this Part for DBE eligibility and must offer the firm an opportunity to respond to the home state with respect to these reasons.

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- (B) The firm may elect to respond in writing, to request an in-person meeting with MWUCP's decision maker to discuss the MWUCP's objections to the firm's eligibility, or both. If the firm requests a meeting, the MWUCP shall schedule the meeting to take place within 30 days of receiving the firm's request.
- (C) The firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements of this Part with respect to the particularized issues raised by the MWUCP's notice. The firm is not otherwise responsible for further demonstrating its eligibility to the MWUCP.
- (D) The decision maker for the MWUCP must be an individual who is thoroughly familiar with the provisions of this Part concerning certification.
- (E) MWUCP shall issue a written decision within 30 days of the receipt of the written response from the firm or the meeting with the decision maker, whichever is later.
- (F) The firm's application for certification is stayed pending the outcome of this process.
- (G) A decision under this paragraph (d)(4) may be appealed to the Departmental Office of Civil Rights under §26.89 of this part.
- (e) If the MWUCP has not received from the home state a copy of the site visit review report by a date 14 days after it has made a timely request for it, the MWUCP may hold action required by paragraphs (d)(2) through (4) of this section in abeyance pending receipt of the site visit review report. In this event, the MWUCP shall, no later than 30 days from the date on which you received from an applicant firm all the information required by paragraph (c) of this section, notify the firm in writing of the delay in the process and the reason for it.
- (f)(1) When the MWUCP denies a firm's application, reject the application of a firm certified in its home state or any other State in which the firm is certified, through the procedures of paragraph (d)(4) of this section, or decertify a firm, in whole or in part, the MWUCP shall make an entry in the Department of Transportation Office of Civil Rights' (DOCR's) Ineligibility Determination Online Database. The MWUCP shall enter the following information:
- (A) The name of the firm;
- (B) The name(s) of the firm's owner(s);
- (C) The type and date of the action; and
- (D) The reason for the action.

(2) The MWUCP shall check the DOCR Web site at least once every month to determine whether any firm that is applying for certification or that it has already certified is on the list.

(3) For any such firm that is on the list, the MWUCP shall promptly request a copy of the listed decision from the UCP that made it. As the UCP receiving such a request, the MWUCP shall provide a copy of the decision to the requesting UCP within 7 days of receiving the request. If the MWUCP receives the decision, it shall then consider the information in the decision in determining what, if any, action to take with respect to the certified DBE firm or applicant.

Section 5.3 Rules Governing MWUCP's Denial of Initial Requests for Certification (26.86)

- (a) When MWUCP denies a request by a firm, which is not currently certified with MWUCP, to be certified as a DBE, MWUCP shall provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based shall be made available to the applicant, on request.
- (b) When a firm is denied certification, twelve months must elapse before the firm may reapply to MWUCP for certification. The time period for reapplication begins to run on the date the explanation required by Paragraph (a) of this Section is received by the firm.
- (c) When MWUCP makes administratively final denial of certification concerning a firm, the firm may appeal the denial to the Department under 49 CFR 26.89:

Section 5.4 Procedures to Remove a DBE's Eligibility (26.87)

- (a) Ineligibility Complaints.
 - (1) Any person may file with MWUCP a written complaint alleging that a currently certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. MWUCP is not required to accept a general allegation that a firm is ineligible or an anonymous complaint. The complaint shall include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not continue to be certified. The confidentiality of a complainant's identity shall be protected as provided in 49 CFR 26.109 (b).
 - (2) The DBE Liaison or designee shall review its records concerning the firm, any material provided by the firm and the complainant, and other available information. The DBE Liaison or designee may request additional information from the firm or conduct any other investigation that MWUCP deems necessary.
 - (3) If it is determined, based on its review, that there is reasonable cause to believe that the firm is ineligible, the DBE Liaison shall provide written notice to the firm that it proposes to find the firm ineligible, setting forth the reasons for the proposed determination. If the DBE Liaison or designee determines that such

reasonable cause does not exist, MWUCP shall notify the complainant and the firm in writing of this determination and the reasons for it. All statements of reasons for findings on the issue of reasonable cause shall specifically reference the evidence in the record on which each reason is based.

(b) Participating Member - Initiated Proceedings.

If, based on the notification by the firm of a change in its circumstances or other information that comes to MWUCP's attention, MWUCP determines that there is reasonable cause to believe that a currently certified firm is ineligible, MWUCP shall provide written notice to the firm that MWUCP proposes to find the firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause shall specifically reference the evidence in the record on which each reason is based.

(c) U.S. DOT Directive to Initiate Proceeding.

- (1) If the FTA and FHWA determines that information in the MWUCP's certification records, or other information available to the FTA and the FHWA, provides reasonable cause to believe that a firm MWUCP has certified does not meet the eligibility criteria of 49 CFR Part 26, the FTA and FHWA may direct MWUCP to initiate a proceeding to remove the firm's certification.
- (2) The FTA must provide to MWUCP and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.
- (3) MWUCP shall immediately commence and prosecute a proceeding to remove eligibility as provided by paragraph (b) of this section.

(d) Decertification Hearing.

If MWUCP determines that there is reasonable cause to remove a DBE firm's eligibility, as provided in Paragraph (a), (b), or (c) of this section, the MWUCP shall do the following: (1) provide written notice to the firm that it proposes to find the firm ineligible; (2) setting forth the reasons for the proposed determination; and (2) give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.

- (1) During the hearing, the MWUCP bears the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part.
- (2) The MWUCP shall maintain a complete record of the hearing, by any means acceptable under the laws of the District of Columbia for the retention of a verbatim record of an administrative hearing. If there is a 49 CFR Part 26.89 appeal to DOT, MWUCP shall provide a transcript of the hearing to DOT and, on

request, to the firm. MWUCP shall retain the original record of the hearing. MWUCP will charge the firm only for the cost of copying the record.

- (3) The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, MWUCP bears the same burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards, as MWUCP would during a hearing. The panel shall be comprised of persons representing each jurisdiction that constitutes the member-components of MWUCP.

(e) Separation of Functions.

MWUCP must ensure that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

- (1) The MWUCP shall select a Chairman and two members to constitute an Decertification Panel.
- (2) The Chairman of the Decertification Hearing Panel shall be an individual who is knowledgeable about the certification requirements of MWUCP's DBE program and 49 CFR Part 26.
- (3) The MWUCP shall forward all files, records, documents and information to the Chairman of the Decertification Hearing Panel to review 14 days prior to the hearing date.
- (4) The Decertification Hearing Panel shall prepare a written decision, based upon the documents and oral testimony presented and forward it to the MWUCP 10 days after the hearing.

(f) Grounds for Decertification Decision.

MWUCP shall not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to MWUCP at the time of its certification of the firm. MWUCP will base such a decision only on one or more of the following:

- (1) Changes in the firm's circumstances since the certification of the firm by MWUCP that render the firm unable to meet the eligibility standards of this part;
- (2) Information or evidence not available to MWUCP at the time the firm was certified;

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- (3) Information that was concealed or misrepresented by the firm in previous certification actions by MWUCP or another recipient;
- (4) A change in the certification standards or requirements of the Department since the firm was certified; or
- (5) A documented finding that MWUCP's determination to certify the firm was factually erroneous.

(g) Notice of Decision.

Following its decision, the MWUCP forwards to the firm written notice of its decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice will inform the firm of the consequences of MWUCP's decision and, under 49 CFR Part 26.89, the availability of an appeal to the Department of Transportation. MWUCP shall send copies of the notice to the complainant in an ineligibility complaint or to the FTA, when it has directed MWUCP to initiate the proceeding.

(h) Status of the Firm During Proceeding.

- (1) A firm remains an eligible DBE during MWUCP's proceeding to remove its eligibility.
- (2) The firm does not become ineligible until the issuance of the notice provided for in Paragraph (g) of this Section.

(i) Effects of Removal of Eligibility.

MWUCP shall take the following action when removing a firm's eligibility.

- (1i) When a prime contractor has made a commitment to use the ineligible firm, or WMATA or DOT has made a commitment to use a DBE prime contractor, but a subcontract or contract has not been executed before MWUCP issues the decertification notice provided for in Paragraph (g) of this section, the ineligible firm does not count toward the contract goal or overall goal. MWUCP shall direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate to MWUCP that it has made a good faith effort to do so.
- (2) If a prime contractor has executed a subcontract with the firm before MWUCP has notified the firm of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE goal for the firm's work. In this case, or in a case where WMATA, DPW or DDOT has let a prime contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after MWUCP has issued

the notice of its ineligibility shall not count toward MWUCP's overall goal, but will count toward the contract goal.

- (3) Exception: If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, MWUCP will continue to count its participation on that contract toward overall and contract goals.

(k) Availability of Appeal.

After the MWUCP removes a firm's eligibility under this section, the firm may file an appeal to the Department of Transportation pursuant section 26.89.

Section 5.5 Actions the MWUCP Will Take Following US DOT Certification Appeal Decisions (26.91)

- (a) If the MWUCP is the entity from whose action an appeal under 49 CFR 26.89 is taken, the decision is binding. It is not binding on other recipients.
- (b) If the USDOT determination under 49 CFR 26.89 is applicable, the MWUCP shall take the following action:
 - (1) If the USDOT determines that MWUCP erroneously certified a firm, MWUCP shall remove the firm's eligibility on receipt of the determination, without further proceedings on MWUCP's part. The consequences of a removal of eligibility set forth in Part 26.87(i) will take effect on the date of MWUCP's receipt of the USDOT's determination.
 - (2) If USDOT determines that MWUCP erroneously failed to find reasonable cause to remove the firm's eligibility, MWUCP shall expeditiously commence a proceeding to determine whether the firm's eligibility should be removed as provided in section 26.87.
 - (3) If US DOT determines that MWUCP erroneously declined to certify or removed the eligibility of the firm, MWUCP shall certify the firm, effective on the date of receipt of the Department's written notice of the
 - (4) If US DOT determines that MWUCP erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, MWUCP shall take appropriate corrective action as determined by the Department.
 - (5) If US DOT affirms MWUCP's determination, no further action is necessary.

SECTION 6.0 STANDARD OPERATING PROCEDURES

Section 6.1 Incomplete Applications for Certification of DBE Firms

- (a) MWUCP shall not proceed to certify any DBE firm that does not provide a fully completed application for certification, inclusive of all statutory and MWUCP required materials, information and documents, in the manner or format indicated as acceptable by MWUCP.
- (b) Applications for initial certification determined to be incomplete shall be returned, in their entirety, to the applicant firm without any amount of processing except that necessary to establish a checklist to indicate to the applicant the deficiencies that caused the application to be returned.
- (c) Applications returned for incompleteness shall not be entered upon MWUCP records as an application having been received or provided a tracking identification number or symbol.
- (d) In circumstances involving incomplete applications for re-evaluation, the MWUCP shall follow the procedure set forth in paragraphs (a) and (b) of this section. In the event that an incomplete application for a firm's Three Year Review is returned to the applicant and its Three Year Review date occurs in the interim, the DBE firm will be given by letter an additional ninety (90) days from the date of its three year anniversary to provide the necessary documentation needed to continue the review. If the additional 90 days pass and the DBE firm has not submitted the required documents, the firm will be processed pursuant to Section 6.3, Expired Certifications.

Section 6.2 Elapsed Certifications

- (a) Where a DBE firm's certification has elapsed without the firm submitting the necessary information for the MWUCP to conduct a Three Year (3) Review of the firm, the MWUCP will give notice to the DBE firm that it has sixty (60) days from the date of the notice to submit the necessary documentation. If the DBE firm does not respond within the sixty (60) days, the firm will be required to submit a full application and all of the necessary documents. The firm shall be given an additional sixty (60) to submit the full application.
- (b) In the event that a certified DBE has timely filed an application for re-evaluation with MWUCP and same is not processed prior to the expiration due date, the DBE firm shall continue to enjoy the benefits of certification as though the firm had been re-evaluated in a timely manner by MWUCP.

Section 6.3 Uniform Application Form

The participants in the MWUCP will use a single application form. The application form will be used without modification for DBE eligibility. The application for DBE certification may be

received in the offices of any MWUCP participant. Processing of the uniform application shall be the responsibility of the MWUCP member entity that received it.

Section 6.4 Filing Date

Registration and filings shall be considered filed or registered as of the date and time stamp affixed by the electronic service for purposes of determining whether a registration or filing is timely.

SECTION 7.0 COMPLIANCE AND ENFORCEMENT

Section 7.1 Enforcement Actions Applicable in FTA/FHWA Programs (26.103)

The provisions of this section apply to enforcement actions under FTA and FHWA .

- (a) *Noncompliance complaints.* Any person who believes that a recipient has failed to comply with its obligations under this part may file a written complaint with the concerned operating administration's Office of Civil Rights. If you want to file a complaint, you must do so no later than 180 days after the date of the alleged violation or the date on which you learned of a continuing course of conduct in violation of this part. In response to your written request, the Office of Civil Rights may extend the time for filing in the interest of justice, specifying in writing the reason for so doing. The Office of Civil Rights may protect the confidentiality of your identity as provided in §26.109(b). Complaints under this part are limited to allegations of violation of the provisions of this part.
- (b) *Compliance reviews.* The concerned operating administration may review the recipient's compliance with this part at any time, including reviews of paperwork and on-site reviews, as appropriate. The Office of Civil Rights may direct the operating administration to initiate a compliance review based on complaints received.
- (c) *Reasonable cause notice.* If it appears, from the investigation of a complaint or the results of a compliance review, that MWUCP , as a recipient, are in noncompliance with this part, the appropriate DOT office promptly sends you, return receipt requested, a written notice advising you that there is reasonable cause to find you in noncompliance. The notice states the reasons for this finding and directs the MWUCP to reply within 30 days concerning whether it wishes to begin conciliation.
- (d) *Conciliation.*
 - (1) If MWUCP request conciliation, the appropriate DOT office shall pursue conciliation for at least 30, but not more than 120, days from the date of the request. The appropriate DOT office may extend the conciliation period for up to 30 days for good cause, consistent with applicable statutes.

- (2) If MWUCP and the appropriate DOT office sign a conciliation agreement, then the matter is regarded as closed and you are regarded as being in compliance. The conciliation agreement sets forth the measures you have taken or will take to ensure compliance. While a conciliation agreement is in effect, MWUCP remains eligible for FTA or FHWA financial assistance.
- (3) The concerned operating administration shall monitor your implementation of the conciliation agreement and ensure that its terms are complied with. If MWUCP fail to carry out the terms of a conciliation agreement, it is in noncompliance.
- (4) If MWUCP does not request conciliation, or a conciliation agreement is not signed within the time provided in paragraph (d)(1) of this section, then enforcement proceedings begin.

(e) *Enforcement actions.*

- (1) Enforcement actions are taken as provided in this subpart.
- (2) Applicable findings in enforcement proceedings are binding on all DOT offices.

Section 7.2 Rules Governing Information, Confidentiality, Cooperation, Intimidation and Retaliation (26.109)

(a) *Availability of Records.*

- (1) In responding to requests for information concerning any aspect of the DBE program, the Department complies with provisions of the Federal Freedom of Information and Privacy Acts(5 U.S.C. 552 and 552a). The Department will make available to the public any information concerning the DBE program release of which is not prohibited by federal law.
- (2) Notwithstanding any provision of Federal or state law, the MWUCP shall not release information that may not be reasonably construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting documentation. However, the MWUCP shall transmit this information to DOT in any certification appeal proceeding under Section 26.89 or to any other state to which the individual's firm has applied for certification under Section 26.85.

- (b) *Confidentiality of Information on Complainants.* Notwithstanding the provisions of Paragraph (a) of this section, the identity of complainants shall be kept confidential, at their election. If such confidentiality will hinder the investigation, proceeding or hearing, or result in a denial of appropriate administrative due process to other

parties, the complainant shall be advised for the purpose of waiving the privilege. Complainants are advised that, in some circumstances, failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing.

- (c) *Cooperation.* All participants in the Department's DBE program (including, but not limited to, recipients, DBE firms and applicants for DBE certification, complainants and appellants, and contractors using DBE firms to meet contract goals) are required to cooperate fully and promptly with DOT and recipient compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so shall be a ground for appropriate action against the party involved (e.g., with respect to recipients, a finding of noncompliance; with respect to DBE firms, denial of certification or removal of eligibility and/or suspension and debarment; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment).
- (d) *Intimidation and Retaliation.* MWUCP, a contractor, or any other recipient in the program shall not intimidate, threaten, coerce or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by this part or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. If any entity violates this prohibition, it is in noncompliance with this part.

This Unified Certification Agreement accepted and agreed to by and between the Washington Metropolitan Area Transit Authority and the District Department of Transportation.

By: _____
Heather A. Obora, Chief Procurement Officer
Office of Procurement and Materials
Washington Metropolitan Area Transit Authority

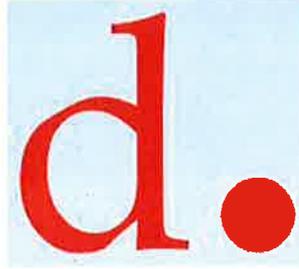
Date: _____

By: _____
Terry Bellamy, Director
District Department of Transportation

Date: _____

Attachment 12

DBE Contract Compliance guide/Commercial Useful Function Form



District Department of Transportation

FEDERAL AID PROJECT
CONTRACT COMPLIANCE PROCESS GUIDE
OFFICE OF CIVIL RIGHTS

August 23, 2013

BY: Mohammed Kabir, PHR/ Sr. EO Local and Federal Compliance Officer DDOT Office of Civil Rights

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GENERAL

A. Issuing Agency

District Department of Transportation
Office of Civil Rights
55 M Street, SE, 3rd Floor
Washington, DC 20003

B. Effective Date

August 23, 2013

C. Statutory Authority

The District Department of Transportation's (DDOT) Disadvantaged Business Enterprise (DBE) Program applies to federal aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 105 Stat. 1914, or Titles, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, 112 Stat. 107. It also applies to federal transit funds authorized by Titles I, III, V, and VI of ISTEA, Pub. L. 102-240 or by federal transit law in Title 49, U. S. Code, or Titles I, III and V of the TEA-21, Pub. L 105-178. The program further applies to airport funds authorized by 49 U.S.C, 47101, *et seq.* USDOT's legal authority for 49 CFR Part 23 (as amended) and Part 26, include various Executive Orders, 23 U.S.C 304 and 324; 42 U.S.C. 200d, *et seq.*; and 49 U.S.C. 47107, 47113, and 47123; Sec. 1101(b), Pub. L. 105-178, 112 Stat. 107, 113.

D. Definitions

This DBE Program incorporates the definitions of terms included in 49 CFR Sections 23.3 and 26.5. In addition, the following are definitions and terms used by DDOT in conjunction with this DBE Program.

Affiliation has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR § 121.

(1) Except as otherwise provided in 13 CFR § 121, concerns are affiliates of each other when, either directly or indirectly:

(i) One concern controls or has the power to control the other; or

(ii) A third party or parties controls or has the power to control both; or

(iii) An identity of interest between or among parties exists such that affiliation may be found.

(2) In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

Attainment means the actual percentage of entire value of the contract that a Prime Contractor has actually paid to certified DBE firms.

Commercially Useful Function (CUF) means that a DBE is considered to perform a CUF when it is responsible for the execution of a distinct element of work on a contract and carries out its responsibilities by actually performing, managing and supervising the work involved in accordance with normal industry practice.

Commitment means the percentage of entire value of the contract that a Prime Contractor or Consultant has committed to provide to certified DBE firms at the time of the award of the contract.

Compliance means that a recipient has correctly implemented the requirements of the DBE Program.

Disadvantaged Business Enterprise or DBE means a for-profit small business concern --

(1) 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) Management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

Goal - Contract Level means the specific race conscience goal set for a contract, which establishes a percentage of entire value of the contract, work that a Prime Contractor or Consultant would strive to commit to certified DBE firms.

Goal - Overall means a Department wide DBE goal, which accounts for the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on USDOT-assisted contracts which can be adjusted to reflect changing market conditions, changing DBE capacity, and disparity studies.

Good Faith Efforts (GFE) means the effort necessary to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

Joint Check means payment of a balance due by a check issued to two or more payees. Typically used when a general contractor unilaterally issues a joint check to a subcontractor and its supplier.

Joint venture means an association of a firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in a case which includes a DBE they are responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

Letter of Intent means written documentation of a contractor's intent for each DBE that will be utilized to meet the DBE goal of the contract indicating the bidder's commitment to use the DBE in the contract.

Noncompliance means that a recipient has not correctly implemented the requirements of the DBE Program.

Personal net worth means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include: The individual's ownership interest in the applicant DBE firm; or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

Primary industry classification means the North American Industry Classification System (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the *North American Industry Classification Manual -- United States, current version* which is available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA, 22161; by calling 1 (800) 553-6847; or at: <http://www.naics.com/search.htm>.

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

Principal place of business means the business location where the individuals who manage the firm's day-to-day operations spend most working hours and where top management's business records are kept. If the offices from which management is directed and where business records are kept are in different locations, the recipient will determine the principal place of business for DBE program purposes.

Race-conscious measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

Race-neutral measure or program is one that is, or can be, used to assist all small businesses. For the purposes of this part, *race-neutral* includes gender-neutrality.

Recipient is any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, by the programs of the FAA, FHWA, or FTA, or who has applied for such assistance.

Small Business Administration or *SBA* means the United States Small Business Administration.

SBA certified firm refers to firms that have a current, valid certification from the SBA under the 8(a) BD or SDB programs.

Small business concern means, with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR § 121) that also does not exceed the cap on average annual gross receipts specified in 49 CFR §26.65(b).

Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is:

(1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis.

(2) Any individual in the following groups, members of which are rebuttable presumed to be socially and economically disadvantaged:

- (i) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;
- (ii) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
- (iii) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
- (iv) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;

- (v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
- (vi) Women;
- (vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

Sub-recipient (for the purposes of this document) is any entity, public or private, who receives USDOT financial assistance through DDOT (sometimes referred to as a Local Sponsor).

USDOT-assisted contract means any contract between a recipient and a contractor or consultant (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

II. Introduction

Policy

The District Department of Transportation (DDOT) is committed to a Civil Rights Program which administers and promotes participation of Disadvantaged Business Enterprises (DBEs) in DDOT contracting opportunities in accordance with 49 Code of Federal Regulations (CFR) § 26, as currently revised.

It is the policy of DDOT to ensure nondiscrimination on the basis of race, color, sex or national origin in the award and administration of the U.S. Department of Transportation (USDOT) assisted contracts. It is the intention of DDOT to create an equitable environment in which DBEs can compete fairly for contracts and subcontracts relating to the procurement, contracting and professional service activities of USDOT-assisted work.

To obtain additional information on this Contract Compliance program, please contact the Office of Civil Rights at:

Mohammed Kabir, PHR/ Sr. EO Local and Federal Compliance Officer
District Department of Transportation
55 M Street, S.E., 3rd Floor
Washington, DC 20003
(202) 671-2628
Mohammed.Kabir@dc.gov

Program Objectives

The DDOT Disadvantaged Business Enterprise (DBE) Program seeks to achieve the following objectives (49 CFR §26.1):

- A. To ensure nondiscrimination in the award and administration of DDOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs;
- B. To create a level playing field on which DBEs can compete fairly for DDOT-assisted contracts;
- C. To ensure that the Department's DBE program is narrowly tailored in accordance with applicable law;
- D. To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs;
- E. To help remove barriers to the participation of DBEs in DDOT-assisted contracts;
- F. To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and
- G. To provide appropriate flexibility to sub-recipients of federal financial assistance in establishing and providing opportunities for DBEs.

This program plan also provides assurance to the USDOT that DDOT complies with federal mandates regarding the Assistance Program for DBEs.

Purpose of DBE Compliance Process Guide

The purpose of this Guide is to document:

- a) Guidance on the regulations as to when, where and by who the program will be administered;
- b) The procedures and criteria for evaluating contractor and consultant commitments to DBE goals;
- c) The procedures to ensure contract level DBE utilization and compliance.

Prohibited Discrimination

The District Department of Transportation (DDOT) shall not exclude persons from participation in, deny benefits to, or otherwise discriminate against any persons in connection with the award and performance of any contract governed by 49 CFR § 26 on the basis of race, color, sex, and national origin. DDOT shall 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 purpose of this program with respect to individuals of a particular race, color, sex, or national origin (49 CFR §26.7).

III. Certification

Certification Process

Individuals seeking to participate in the DBE Program must become certified. The certification process requires that applicants provide information concerning social and economic status, gender, ownership, independence and control of their firms. Under a mutual agreement between certifying agencies, creating “one-stop shopping” for DBE certification in the District of Columbia (DC), DDOT’s Office of Civil Rights certifies eligible firms within the District of Columbia, along with the Washington Metropolitan Area Transit Authority (WMATA).

DDOTs Disadvantaged Business Enterprise (DBE) online certification website: www.dbe.ddot.dc.gov explains the advantages, the requirements, and the process of becoming a certified DDOT DBE.

Minimum requirement for DBE eligibility include:

- A firm must be at least 51% independently owned and controlled by socially and economically disadvantaged individuals who are US citizens or lawfully admitted permanent residents of the US.
- A firm must be a small business according to U.S. Small Business Administration (SBA) standards and does not exceed \$22.41 million in gross annual receipts.
- Personal Net Worth (PNW) of each socially and economically disadvantaged owner must not exceed \$1.32 Million, excluding the individual's ownership interest in the applicant firm and the equity in his/her primary residence.
- A firm must be a for-profit business.

Contact the following personnel for more information:

Glenda Payne, Equal Opportunity/DBE Program Specialist
DDOT Office of Civil Rights
55 M Street, S.E., 3rd Floor
Washington, D.C. 20003
(202) 671-0479

Luisa Portillo, Equal Opportunity/DBE Program Specialist
DDOT Office of Civil Rights
55 M Street, S.E., 3rd Floor
Washington, D.C. 20003
(202) 671-0630

DBE Directory

Our DBE Directory is great resource for our Prime Contractors to identifying partners that are DBE Certificated with District Department of Transportation and Washington Metropolitan Area Transit Authority. Our DBE Directory is updated daily.

<http://ddotfiles.com/db/DBE/dbe.php>

If a proposed partner from the Prime Contractors is not in the DDOT DBE Directory. Please contact our office.

Luisa Portillo, Equal Opportunity/DBE Program Specialist
DDOT Office of Civil Rights
55 M Street, S.E., 3rd Floor
Washington, D.C. 20003
(202) 671-0630

Renewal of Certification

DBE certifications are Valid indefinitely as long as the firm compliance with all of the requirements under (49 CFR §26.1):. During the time of certification, the DBE is obligated to notify the Office of Civil Rights of any and all changes in the ownership or financial position of the firm that would impact its eligibility under the regulations. The DBE firm is required to submit an annually a No Change Affidavit. It is the responsibility of the DBE to keep their certification current.

IV. GOALS, GOOD FAITH EFFORTS AND COUNTING

DBE Commitment for Contract Award

DBEs listed by the prospective contractors for participation in the contract must be certified as eligible DBEs (for work with District Department of Transportation) prior to the Notice to Proceed (NTP) is issued for the type of work they are expected to perform. Each prospective contractor's submittal shall be reviewed to confirm each DBE firm's certification status.

Contractors will receive the NTP for a contract, which includes a DBE goal, if they (49 CFR §26.53(a)):

- 1) *Meet the goal by documenting commitments for participation by DBE firms sufficient for this purpose; or*
- 2) *Document adequate good faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so. This means that the*

bidder must show that it took all necessary and reasonable steps to achieve a DBE goal by their scope, intensity, and appropriateness to the objective, and could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful (49 CFR §26 Appendix A-1). Prospective contractors who do not demonstrate good faith efforts shall be deemed non-responsive and therefore shall be ineligible for award of the contract.

DBE Commitments

All contractors (including DBEs), shall submit the required DBE utilization documentation prior to receiving the Notice to Proceed (NTP).

In accordance with 49 CFR 26.55(e), applicable credit toward meeting the contract goal varies with the type of work being performed by the DBE firm.

Counting DBE Participation towards Meeting Goals

DBE participation is credited using the following procedures. For construction contracts, refer also to the current DDOT Standard Specifications.

- 1) Only the work actually performed by a DBE will be counted towards DBE attainments. All work performed by a certified DBE firm will be counted as long as the DBE performs a Commercially Useful Function (CUF). The cost of supplies and materials obtained by the DBE or equipment leased (except from prime contractor or its affiliate), and used directly in the performance of the work (not overhead type items) will also be counted.
- 2) Work that a DBE prime subcontracts to a non-DBE firm, does not count towards the DBE goal.
- 3) If materials or supplies are obtained from a DBE manufacturer, one hundred percent (100%) of the cost will be counted. If the materials and supplies are purchased from a DBE regular dealer, sixty percent of the cost will be counted. If services are brokered or materials or supplies are purchased from a broker, only the brokerage fee will be credited.
- 4) The entire amount of fees or commissions charged by a DBE for providing a service such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of the contract will be counted towards the DBE goal, provided the fee is consistent with fees for that industry and geographical area.
- 5) Equipment rental firms: equipment that is owned leased or rented and operated by the DBE's employees or another DBE qualifies for 100% credit.

6) Prime/DBE Joint Venture: The contractor may count toward its DBE goal only that portion of the work that the DBE firm actually performs with its own forces. Should the joint venture be comprised of DBEs only, the entire contract award amount shall be counted toward meeting the DBE assigned goal on the project.

7) DBE attainment will not be counted toward the overall contract attainment until the DBE actually receives payment from the prime. Documentation must be maintained (as part of the contract records) of the participation by and payments to all DBEs on all contracts.

DBE Participation towards Contract Specific Goals (DBE Attainments)

The contractor shall count DBE participation toward meeting its DBE goal for only those expenditures originally committed to DBEs referenced on the approved original DBE Utilization form, or increased expenditures committed to DBEs on an approved modified DBE Utilization form.

Credit shall be authorized for DBE subcontractor participation only when the DBE provides a commercially useful function.

If a DBE is no longer certified at the time of payment for the work by the contractor, then the dollar value of the payment for work performed under the contract after the date of decertification will not be counted towards the overall goal.

The participation of a DBE subcontractor shall be counted, but will not be credited towards the prime contractor's DBE achievement of the overall project goal until the amount payable to the DBE has actually been paid.

Crediting for DBE Prime Contractors

In determining whether a prospective DBE contractor has met a contract goal, only the work the DBE has committed with its own forces, as well as the work that it has committed to be performed by DBE subcontractors or suppliers will be counted.

DBE Contract requirements can be satisfied through means that allow an approved DBE firm to obtain work and payment for project related items, such as the following:

- 1) The Contractor may count the entire expenditure for actual work subcontracted and performed by any approved DBE firm, including supplies purchased or equipment leased by the DBE, for the work of the contract (except supplies and equipment the DBE subcontractor purchased or leased from the prime contractor or its affiliate.)

2) The Contractor may count the expenditure to a DBE manufacturer (i.e., a supplier that actually produces goods from raw materials or substantially alters them for resale.)

3) The Contractor may count sixty percent (60%) of the expenditures to DBE suppliers that are not manufacturers, provided that the DBE supplier meets the criteria of Commercially Useful Function (CUF)

Good Faith Efforts for Substituting DBEs

If a DBE subcontractor withdraws from the contract, is terminated, or fails to complete its work on the contract for any reason, the prime contractor shall make good faith efforts to find another DBE subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work or value of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal established for the project.

Good Faith Efforts Methodology

The methodology to produce a good faith effort requires a similar approach and uses similar evaluation criteria as used for setting DBE goals, except many of the business assumptions used to set goals can now be specifically determined by the contractor through direct solicitations with DBE firms. The following recommended methodology is critical to substantiating a prospective contractor's good faith efforts.

1) Identify all potential work items, which are not part of the "primary work operation" and could potentially be subcontracted to DBEs. Select portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces. For work types that are not conducive to subcontracting, consideration is to be given for materials manufacturing, supply, brokerage, and trucking opportunities.

2) Consult the Metropolitan Washington Unified Certification Program (MWUCP) Directory to identify all DBEs who perform the types of work which could be subcontracted, as well as the materials that could be manufactured, supplied, or provided via brokerage, and for trucking firms.

3) Solicit the above identified DBEs by ... "all reasonable and available means ... (e.g. attendance at pre-bid meetings, written correspondence, phone calls)" (49 CFR §26, Appendix A-IV.A). Second follow up attempts (if no initial response) by

different medias of communication will be necessary to document and confirm DBE interest in participation.

- 4) Solicitations to identified DBEs should be for the same relative geographic area of the contract.
- 5) Document communications, including both responses or lack of responses, and the resulting commitments.
- 6) Complete all contract required forms for the DBE Utilization plan and good faith efforts. Include required information such as work item numbers, material names or services and amount of DBE program commitment claimed.
- 7) Submit completed forms and all backup documentation such as trucking plans, joint venture plans, and explanations of partially-subcontracted work items, by contract deadlines. For DDOT administered contracts, all information should be submitted (pre award) to the Office of Contracts and Procurement and (post award) to the Office of Civil Rights.

Good Faith Efforts Documentation

In the event a prospective contractor has determined that they are unable to meet the DBE goal set for a contract, that prospective contractor shall provide complete information and documentation regarding their "good faith efforts" towards achieving the DBE goal (49 CFR §26.53(b.2)). The following list of information and documentation is to be provided by the prospective contractor of their proposed DBE utilization. Non-A&E RFPs include a specific form for consultants to use and submit.

- 1) The names, addresses and contact information of all certified DBE firms that were contacted. This list should include the number of attempted contacts, the mode of attempted contact, and the reason for rejection or non-use of each DBE.
- 2) For each DBE to be utilized during the contract, include a description of the work that they will perform (item numbers), and the NAICS code under which they are certified to perform this work.
- 3) Indicate the applicable percentage of each work claimed towards the DBE commitment, and state the total dollar value of the participation for each DBE firm.
- 4) Include documentation of each DBE subcontractor commitment to be utilized. Also provide supporting documentation when applicable, such as

trucking plans, joint venture plans, and explanations of partially-subcontracted work items.

5) Include examples of solicitation form letters, faxes or emails, which describe what information or contract clarification assistance was provided to the DBE.

6) Include copies of newspaper advertisements, if used, to solicit for DBEs.

7) For each case when a DBE quote was not accepted and a non-DBE firm was selected, a written explanation is required of why the DBE was not selected.

Review of DBE Good Faith Efforts (GFE)

The contractor must show that it took all necessary and reasonable steps to achieve the DBE goal which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.

The following steps are paraphrased from 49 CFR §26 with some additional guidance added. Review and evaluation of Good Faith Efforts shall consider the following:

1) The efforts employed by the prospective contractor should be that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere pro forma efforts are not good faith efforts to meet the DBE contract requirements.

2) Ensure that all information is complete and accurate and adequately documents the prospective contractor's good faith efforts. This may require follow-up confirmations with DBEs of solicitation attempts.

3) Securing participation by only certified DBE firms for work that they are listed to perform that is in the contract. Only DBEs certified by the Metropolitan Washington Unified Certification Program (MWUCP) shall be used to fulfill the established goal on Federal-Aid contracts. Construction and engineering consultant contracts should initially search by applicable DDOT work codes, and non-A&E contracts should search either by applicable DDOT work codes or by NAICS work codes and business descriptions.

4) Solicitations should be targeted for specific work items to be offered to those DBEs who are certified in those work items.

5) Soliciting through all reasonable and available means (e.g., attendance at pre-bid meetings ...solicitation letters, phone calls, email, and faxes) ...the interest of

all certified DBEs who have the capability to perform the work of the contract. The prospective contractor ...must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The prospective contractor ...must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations...and document the results. Reasonable attempts by the prospective contractor to solicit quotes from DBEs shall include the use of a least two different communication media to contact each DBE by at least two separate attempts.

6) DBEs also have a responsibility (prior to Bid or Proposal Opening) to respond to prospective contractor solicitations within a reasonable and timely manner. DBEs should be allowed five business days upon receipt of a solicitation to respond.

7) Prospective contractors on construction contracts should, at a minimum, seek certified DBEs in the same relative geographic area on a construction contract.

8) The prospective contractor should select definable ... portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goal(s) will be achieved. This includes, where appropriate, breaking out contract work items ... (decoupling) or combining like or related operations ...into economically feasible and separate work units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces ...or with their own materials.

9) The prospective contractor should provide ...interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation ...and assist with any questions asked by a DBE.

10) It is the prospective contractor's ...responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. In addition to the list of proposed DBEs to be used during the contract, the prospective contractor shall provide additional documentation of attempts to solicit additional DBEs ... includes the names, addresses, and telephone numbers of each DBE that was considered; a description of the information provided to the DBEs regarding the plans and specifications for the work selected for subcontracting ...(e.g.,: copy of solicitation letter); ...the NAICS codes for which they are certified; and evidence as to why additional agreements could not be reached for DBEs to perform the work ...(e.g.,: response letters, emails, faxes or phone logs).

11) A prospective contractor using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be additional costs involved in finding and using DBEs is not in itself sufficient reason for a ...prospective contractor's... failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prospective contractor to self-perform the work of a contract does not relieve the ...prospective contractor... of the responsibility to make good faith efforts. Prospective contractors ...are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

12) Prospective contractors shall not reject DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities ...from multiple references and which shall be documented as good faith efforts. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the prospective contractor's efforts to meet the project goal.

13) Prospective contractors should make ...efforts to assist interested DBEs in obtaining bonding, lines of credit or insurance as required by the recipient or contractor.

14) Prospective contractors shall only use the UCP Certified DBE Vendor Directory of Certified DBEs towards meeting the DBE goal.

15) Prospective contractors should make ...efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

16) Prospective contractors should...effectively use the services of available minority/women community organizations, local, state, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs. All outreach efforts (including participation at pre-bid meetings or industry-sponsored DBE targeted outreach meetings) can be documented as part of good faith efforts.

17) As part of the evaluation of good faith efforts, consideration should be made as to the historical performance of all contractors in meeting the contract goal for similar types of contracts and within similar geographical location. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with

additional reasonable efforts, the apparent successful bidder could have met the goal.

If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts.

Good Faith Efforts Review Process

*TO BE DISCUSSED WITH OFFICE OF CIVIL RIGHTS *

Mohammed Kabir, PHR/ Sr. EO Local and Federal Compliance Officer

Office of Civil Rights

District Department of Transportation

55 M Street, SE, 3rd floor

Washington, DC 20003

(Via E-Mail)

Mohammed.Kabir@dc.gov

V. **COMMERCIALLY USEFUL FUNCTION (CUF)**

The contractor is responsible for ensuring that DBEs working on the project perform a commercially useful function (CUF). The contractor shall receive credit toward meeting the assigned DBE goal and payment for DBE commercially useful function performed work only.

49 CFR §26.55 defines commercial useful function as "A DBE is considered to perform 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."

The CUF review/audit will be performed by DDOT or its designee. CUF reviews will be performed on a routine basis and: whenever there is any indication that a DBE may not be performing a CUF; whenever a DBE performs work which varies from the bid items indicated in the contractor's commitment forms; whenever a change in the performance of the DBE occurs; whenever a substitution of work or a change order occurs which affects the work to be accomplished by a DBE and, whenever a replacement or substitution of a DBE occurs. APPENDIX further details the CUF review process and forms.

When a DBE is initially determined not to be performing a CUF as defined above, the DBE may present evidence to rebut this determination. DDOT OCR will determine if firm is performing a CUF given the type of work involved and normal industry practices.

Decisions on CUF matters are subject to review by the concerned operating administration () but are not appealable to USDOT.

Determinations of CUF are defined in accordance with 49 CFR §26.55 as follows:

DBE Management

The DBE majority owner(s) must manage the work contracted. The management shall include scheduling work operations, ordering equipment and materials (if materials are part of the contract), preparing and submitting payrolls and all other required reports and forms, and hiring and firing employees, including supervisory employees.

Daily work operations must be under the direct supervision of the DBE majority owner(s) or a job site supervisor (on a full-time basis) who is the employee and under the direct control of the DBE majority owner(s) only. If the non-socially and economically disadvantaged owners of the firm are disproportionately responsible for the operation of the firm, then the firm is not controlled by socially and economically disadvantaged person, shall not be considered a DBE, and constitutes a failure to perform a CUF.

The supervision of the work by personnel normally employed by another contractor or by personnel not under the control of the DBE constitutes a failure to perform a CUF.

DBE Workforce

The DBE must solicit, hire, place on its payroll, direct, and control all workers performing work under its contract. The DBE owner or its job site supervisor must, on a full-time basis, supervise and control the work of the contract.

The DBE may, with the prior written consent of DDOT OCR or the project manager with prior written notification to DDOT OCR, augment its work force with personnel of another firm. The project manager shall approve the request only when:

- (1) Specialized skills are required, and
- (2) The use of such personnel is for a limited time period.

DBE Equipment

The DBE is expected to perform the work with its own operators and with equipment that is owned, being purchased, leased or rented by the DBE under a written agreement that has been consented to by DDOT OCR prior to the DBE starting work.

No credit will be given for the cost of equipment leased or rented and used in the DBE firm's work when payment for those costs is made by a deduction from the prime contractor's payment(s) to the DBE firm.

- 4) Equipment Leased From the Prime Contractor

The DBE may lease equipment from the prime contractor provided a written rental agreement, separate from the subcontract specifying the terms of the lease arrangement, is consented to by DDOT OCR prior to the DBE starting work.

The DBE must hire, direct, supervise, control and carry the operator of the equipment on its payroll. The cost of leasing or renting from the prime contractor shall only be approved if it is at the accepted or going industry rates and approved by DDOT OCR prior to starting work.

Specialized equipment and operator leased from the prime contractor is appropriate when a written rental agreement is provided separate from the subcontract specifying the terms of the lease arrangement, and is consented to by DDOT OCR prior to the DBE starting work.

DDOT OCR shall consent to the lease agreement only when:

- (1) the equipment is of a specialized nature,
- (2) the equipment is readily available at the job site,
- (3) the operation of the equipment is under the full control of the DBE,
- (4) the lease arrangement is for a short term, and
- (5) the lease arrangement is a normal industry practice.

According to 49 CFR 26.55, a DBE is considered performing a Commercially Useful Function when:

- 1) The DBE is responsible for the execution of a distinct element of work on a contract and carries out its responsibilities by actually **performing, managing, and supervising** the work involved in accordance with normal industry practice. Regardless of whether an arrangement between the Contractor and the DBE represent standard industry practice, if the arrangement erodes the ownership, control or independence of the DBE, or in any other way does not meet the commercially useful function requirement, the Contractor shall receive no credit toward the goal(s) and may be required to backfill the participation. A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction or contract through which funds are passed in order to obtain the appearance of DBE participation.
- 2) The DBE shall employ a **work force**, (including administrative and clerical) separate and apart from that employed by the Contractor, other Subcontractors on the contract, or their affiliates. This does not preclude the employment by the DBE of an individual that has been previously employed by another firm involved in the contract, provided that the individual was independently recruited by the DBE in accordance with

- customary industry practice. The routine transfer of work crews from another employer to the DBE shall not be allowed.
- 3) All work performed by the DBE must be controlled and **supervised** by the DBE without duplication of supervisory personnel from the Contractor, other Subcontractors on the contract, or their affiliates. This does not preclude routine communication between the supervisory personnel of the D/M/WBE and other supervisors necessary to coordinate the contract work.
- 4) DBE Subcontractors may **supplement their equipment** by renting or leasing additional equipment in accordance with customary industry practice. Required documentation shall be maintained to support supplemental equipment agreements. The documentation shall include, but not be limited to, copies of the rental or leasing agreements, and the names, addresses, and terms of equipment.

A regular dealer is defined in 49 CFR Subtitle A as: —a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials or supplies required for the performance of the contract are bought, kept in stock, and regularly sold to the public in the usual course of business.

- a) To be a regular dealer, the firm must engage in, as its principal business, and in its own name, the purchase and sale of the products in question.
- b) A regular dealer in such bulk items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock, if it owns or operates distribution equipment.
- c) Brokers and packagers shall not be regarded as manufacturers or regular dealers within the meaning of this section.

The Contractor may count the entire expenditure to DBE firms for fees or commissions charged by an approved DBE firm providing a bona fide service. This service includes professional, technical, consultant or managerial services and assistance in procuring essential personnel, facilities, equipment, materials or supplies required for completing the Contract. The Department determines the fee or commission to be reasonable and not excessive as compared to similar services.

The Contractor may count the entire premium for Performance and Payment Bonds and product-related insurance purchased from a DBE agency. The Contractor may count the entire amount of expenditures to regular DBE dealers for rental of equipment. The Contractor may count the entire expenditures to DBE firms when a DBE subcontracts part of the work of its contract to another firm, only if the firm is a DBE. The value of the subcontracted work can only be counted if the DBEs subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm will not count toward DBE goal.

Trucking Participation

DBE subcontractors may issue second tier subcontracts (e.g., Truckers) only to DBE contractors if the work is to be counted toward the DBE goal. The Contractor may count expenditures to DBE firms that have contracted to perform trucking operations. To receive credit for this, the DBE firm must perform a Commercially Useful Function.

- 1) The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.
- 2) The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.
- 3) The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
- 4) The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.
- 5) The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE lessees not to exceed the value of transportation services provided by DBE-owned trucks on the contract. Additional participation by non-DBE lessees receives credit only for the fee or commission it receives as a result of the lease arrangement. If a recipient chooses this approach, it must obtain written consent from its prime contractor or from DDOT's Office of Civil Rights.
- 6) A lease must indicate that the DBE has priority use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck.
- 7) Leased trucks must display the name and identification number of the DBE Subcontractor on the outside of the truck.
- 8) DBE credit for furnishing, hauling and placing stone (actual product) may only be allowed if the DBE purchases the stone, hauls the stone, and places the stone using a spreader owned by the DBE and operated by personnel on the DBE Subcontractor's payroll. Individuals seeking to participate in the DBE Program must comply with the regulations in accordance with 49 CFR Part 26.

VI. CONTRACT PERFORMANCE

Counting DBE Participation towards Meeting Goals

DBE participation is credited using the following procedures. For construction contracts, refer also to the current DDOT Standard Specifications.

- 1) Only the work actually performed by a DBE will be counted towards DBE attainments (49 CFR§ 26.55). All work performed by a certified DBE firm will be counted as long as the DBE performs a Commercially Useful Function (CUF). The cost of supplies and materials obtained by the DBE or equipment leased (except from prime contractor or its affiliate), and used directly in the performance of the work (not overhead) will also be counted.
- 2) Work that a DBE prime subcontracts to a non-DBE firm, does not count towards the DBE goal.
- 3) If materials or supplies are obtained from a DBE manufacturer, one hundred percent (100%) of the cost will be counted. If the materials and supplies are purchased from a DBE regular dealer, sixty percent (60%) of the cost will be counted. If services are brokered or materials or supplies are purchased from a broker, only the brokerage fee will be credited.
- 4) The entire amount of fees or commissions charged by a DBE for providing a service such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of the contract will be counted towards the DBE goal, provided the fee is consistent with fees for that industry and geographical area.
- 5) Equipment rental firms: equipment that is owned leased or rented and operated by the DBE's employees or another DBE qualifies for 100% credit.
- 6) Prime/DBE Joint Venture: The contractor may count toward its DBE goal only that portion of the work that the DBE firm actually performs with its own forces. Should the joint venture be comprised of DBEs only, the entire contract award amount shall be counted toward meeting the DBE assigned goal on the project.
- 7) DBE credit towards an overall goal shall be counted, but shall not be attainment until the DBE actually receives payment from the prime. Documentation must be maintained (as part of the contract records) showing the participation by and payments to all DBEs on all contracts. Additionally, DBE participation that is attained and paid for after the certification of the DBE has been removed or expired during the performance of a contract shall not be included.

VII. PROCESSES

A. DBE Approval

Every DBE proposed for use on a contract towards meeting a DBE goal, requires approval by the DDOT OCR. Criteria for approval of participation of a DBE includes that they shall be certified under the MWUCP either with DDOT or WMATA. Work codes, or if not applicable, -NAICS codes or business descriptions which are consistent with the work activities being performed under the contract and provide a commercially useful function.

B. Joint Checks

Prime contractors and DBEs wishing to use joint check arrangements must submit a request in writing prior to starting work. Prior approval must be obtained from DDOT Office of Civil Rights.

Forward the Joint Check request to the Office of Civil Rights. See sample DBE Joint Check Request form in Appendix A. This request must include the following:

- The actual document requesting the arrangement, i.e., the original request presented from the DBE vendor, or DBE.

The Joint Check Arrangement Monitoring form should be completed and maintained throughout the joint check arrangement. See the attached DDOT Joint Check Arrangement Monitoring form in the Appendix A.

Please be advised of the following:

- 1) A written joint check agreement among the parties (including the suppliers concerned) should provide full and prompt disclosure of the expected use of joint checks. The agreement should contain all information concerning the parties' obligations and consequences or remedies if the agreement is not fulfilled or a breach occurs.
- 2) Prime contractors and DBE subcontractors must avoid exclusive relationships concerning the use of joint checks. If a prime contractor makes joint checks available to one DBE subcontractor, the service should be made available to all subcontractors (DBEs and non-DBEs).
- 3) Prime contractors and DBE subcontractors that make use of joint checks should limit the use to the procurement of materials needed for a particular purpose at a particular time. Long-term or open-ended joint checking arrangements may suggest a lack of independence for the DBE involved, and are a basis for further scrutiny by DDOT.
- 4) DDOT reserves the right to establish reasonable durational limits on joint checking arrangements that are subject to periodic review and renewal to

ensure that the arrangement is not operating in a way that compromises the independence of the DBE.

- 5) DBE contractor must retain final decision-making responsibility concerning the procurement of materials and supplies, even when joint checks are involved. The relationship between the DBE and supplier should be established independently and without interference by the prime contractor. The rights of parties to a joint check arrangement to terminate the arrangement should be consistent: for example, if the prime contractor has the right to terminate the arrangement unilaterally, a DBE subcontractor shall have the same right.
- 6) Joint checks issued by the prime contractor must be delivered or mailed to the DBE for presentation and payment to the DBE's suppliers. The prime contractor should not make payment directly to the supplier.

C. Termination of a DBE Contractor

A prime contractor who, in the course of meeting its good faith efforts requirements on a procurement involving a contract goal, has submitted the names of one or more DBEs to work on the project, cannot terminate a DBE firm without the written consent of the DDOT Office of Civil Rights.

Forward the written request to terminate a DBE contractor to:

(Hard Copy)

Mohammed Kabir, PHR/Sr. EO Local and Federal Compliance Officer
Office of Civil Rights
District Department of Transportation
55 M Street, SE, 3rd floor
Washington, DC 20003

(Via E-Mail)
Mohammed.Kabir@dc.gov

Please be advised of the following:

The firm can be terminated only for good cause.

- 1) Good cause includes a situation where the DBE subcontractor has failed or refused to perform the work of its subcontract in accordance with normal industry standards. However, good cause does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor (e.g., the failure of the prime contractor to make timely payments or the unnecessary placing of obstacles in the path of the DBE's work). Good cause also does not exist if the prime contractor seeks to terminate a DBE it relied upon to obtain the contract

so that it can self-perform the work in question or substitute with another DBE or non-DBE firm.

2) In addition to the enumerated grounds, a recipient may permit a prime contractor to terminate a DBE for "other documented good cause that the recipient determines compels the termination of the DBE subcontractor." This means that the recipient must document the basis for any such determination, and the prime contractor's reasons for terminating the DBE subcontractor make the termination essential, not merely discretionary or advantageous.

3) When a DBE subcontractor is terminated, or fails to complete its work on the contract for any reason, a prime contractor shall make good faith efforts to find another DBE subcontractor to substitute for the original DBE.

4) These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal that DDOT has established for the procurement.

D. DBE Substitution

On construction contracts, DDOT monitors the performance of the work items sub-contracted to DBEs to ensure that the commitments are being met by the prime contractor. ***"No terminations or substitutions of DBEs are allowed without the written prior approval by the Office of Civil Rights and following all requirements in 49 CFR Part 26.53 (f) (1)-(6)."*** The Contractor must immediately notify the OCR. Substitution of DBE firms will not be considered without proper written documentation, then take appropriate measures in good faith to replace the firm with another certified DBE firm. If no such substitution is possible, your company may request an additional help through the Office of Civil Rights. For non-A/E contracts, substitute DBEs rates or costs should not exceed those of the original DBE. Exceptions require justifications subject to DDOT OCR approval.

Forward the written request to substitute a DBE contractor to:

(Hard Copy)

Mohammed Kabir, PHR/Sr. EO Local and Federal Compliance Officer
Office of Civil Rights
District Department of Transportation
55 M Street, SE, 3rd floor
Washington, DC 20003
Mohammed.Kabir@dc.gov

Please be advised of the following:

Approval for replacement will be granted only if it is demonstrated that the DBE is unable or unwilling to perform and that the contractor exercised good faith efforts to enable the DBE to perform, and the work/amount is being replaced by another certified DBE or the contractor has submitted written documentation of good faith efforts to obtain a substitute DBE.

The contractor's ability to negotiate a more advantageous contract with another subcontractor will not be considered a valid basis for replacement. Requests to substitute committed DBEs will be scrutinized closely, and approved by DDOT OCR. The contractor must document efforts made at the time of commitment to determine that the DBE was capable of performing the work and subsequent efforts made to enable the DBE to perform.

The evidence must show that the contractor investigated the DBE's capacity and capability of performing at the time of the commitment. The DBE must have possessed or have had access to adequate resources and workforce. The evidence must also show that the contractor assisted the DBE with supportive actions to enable the DBE to perform.

The notice from the contractor requesting termination or replacement must include the following:

- A. Documentation showing the contractor's investigation at the time of the commitment of the DBE's capacity to perform work;
- B. Documentation showing the contractor's good faith efforts to enable the DBE to perform;
- C. All documentation describing and citing specifications or inaction of the DBE, which constitute their unwillingness or inability to perform;
- D. Identification of the DBE proposed for replacement with the work codes, pay items and amounts to be performed by the replacement; and
- E. The total dollar amount, per pay item, paid to date to the DBE to be replaced.

E. Timely Payments

According to the contract documents signed by the Prime Contractor, DDOT requires that all DBEs are paid within seven (7) days of payment from DDOT.

F. Monitoring Payments to DBEs

It is the contractor's responsibility (both prime and subcontractors) to maintain records and documents for seven (7) years following the performance of the contract. These records will be made available for inspection upon request by any authorized representative of DDOT or USDOT.

DDOT will monitor the continuous summation of payments actually made to DBE firms and require prime contractors and DBE subcontractors and suppliers to report monthly

appropriate information for verification of such payments. Credit toward DBE contract goals will only be given upon satisfactory evidence that payments were actually made to DBEs who were certified at the time of payment, and who have met the criteria for performing commercially useful function.

Contractors are required to submit the DDOT DBE Contractor Payment form monthly by the 15th of each month for the previous month payments. Completion and submittal of the form and the required copies (front & back) of cancelled check payments to DBEs is mandatory. See the DDOT DBE Contractor Payment form in the Appendix for instructions and details.

DDOT may perform interim audits of contract payments to DBEs. The audit will review payments to DBE subcontractors to verify that the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts stated in the report of proposed DBE participation.

G. Adding DBEs to the DBE Utilization Plan

In the event that the contractor desires to add a DBE to a project, the contractor must complete and submit the DDOT DBE Utilization form. The proposed modified DBE Utilization form shall be reviewed and approved/denied keeping with requirements set forth in 49 CFR 26.53.

See the DBE Utilization Form in the Appendix D.

H. Commercially Useful Function (CUF) Reviews

CUF Reviews are for the purpose of reviewing DBEs for compliance with the Commercially Useful Function (CUF) requirements. A CUF must be performed for each DBE on a federally assisted project and should be conducted when the DBE is on-site and working. A CUF must be performed throughout the course of a project.

Review the Commercially Useful Function section of this document to understand a CUF. Use the CUF Review Form, Appendix C when performing a CUF.

Appendices

Appendix A: Joint Check Notification Form
JOINT CHECK NOTIFICATION FORM

(FOR DBE FIRMS ONLY)

CONTRACT/PROJECT NUMBER:	NAME OF PRIME CONTRACTOR:
---------------------------------	----------------------------------

DBE_Subcontractor _____

Name of Material Supplier _____

Items of work _____

Who requested joint check utilization? _____ Prime _____ DBE/Sub _____ Supplier

Why? _____

Information:

DDOT will closely monitor the use of joint checks. This practice will be subject to review by DDOT's Office of Civil Rights. To receive DBE credit for performing a "commercially useful function" (CUF) with respect to obtaining materials and supplies, a DBE must "be responsible for negotiating price, determining quality and quantity, ordering the material, installing (where applicable), and paying for the material. Only when a DBE meets all requirements will credit be counted for the procurement of materials/supplies by the DBE.

If the proper procedures are not followed or the department determines that the arrangements results in a lack of independence for the DBE involved, this may represent a violation of CUF and credit for the DBEs participation related to the material cost will NOT be used toward the contract goal. If participation is denied, the prime contractor will be responsible for making up the lost DBE participation credit elsewhere on the project.

I have read and understand the above information and the attached Joint Check Procedures. I hereby acknowledge that the information provided on this form is true and accurate.

Authorized Subcontractor Representative:

 Signature Title _____ Date

Authorized Material Supplier Representative:

 Signature Title _____ Date

Authorized Prime Contractor Representative:

 Signature Title _____ Date

DDOT Contract Administrator _____ Date _____

Appendix A: Joint Check Arrangement Form

JOINT CHECK ARRANGEMENT FORM

JOINT CHECK ARRANGEMENT/MONITORING FORM

This form is for the purpose of approving, managing and monitoring a "Joint Check Agreement". A primary concern with allowing joint checks is that such a practice may make it difficult to determine whether the DBE is performing a commercially useful function. Also, this practice makes it much difficult to determine whether a DBE is controlling its operations (independent of other parties involved in the joint check arrangement.)

Project Number		Project Name	
Prime Contractor		DBE Contractor	
VENDOR		VENDOR TYPE:	
REASON FOR JOINT CHECK ARRANGEMENT			
WHICH PARTY REQUESTED THE JOINT CHECK ARRANGEMENT:			
<input type="checkbox"/> <i>DBE</i> <input type="checkbox"/> <i>PRIME</i> <input type="checkbox"/> <i>VENDOR</i> <input type="checkbox"/> <i>OTHER</i>			
		YES	NO
Was the DBE responsible for negotiating price?		<input type="checkbox"/>	<input type="checkbox"/>
Did the DBE determine the quality and quantity when ordering the materials/supplies?		<input type="checkbox"/>	<input type="checkbox"/>
Will the DBE install the supplies/materials during the contracted Scope of Work?		<input type="checkbox"/>	<input type="checkbox"/>
Is the Prime acting solely as a "GUARANTOR"?		<input type="checkbox"/>	<input type="checkbox"/>
Does the DBE release the check to the supplier?		<input type="checkbox"/>	<input type="checkbox"/>

SIGNATURE
VERIFIED BY: _____
PRINT NAME

SIGNATURE
APPROVED BY: _____
PRINT NAME

Joint Check DETERMINANTS

If any Red Flag Conditions are identified, contact the Chief of the Office of Civil Rights.

GENERAL CONDITIONS FOR ALLOWANCE:

- DBE submits request to DDOT for action.
- Subject of formalized agreement between all parties that specify the conditions under which the arrangement will be permitted.
- Full and prompt disclosure of the expected use of joint checks.
- Require prior approval.
- DBE remains responsible for all elements of 49 CFR Part 26.55(c)(1).
- The DDOT Office of Civil Rights clearly determines that independence is not threatened because the DBE retains final decision making responsibility.
- The DDOT Office of Civil Rights determines that request is not an attempt to artificially inflate DBE participation.
- Standard industry practice is only one factor.
- The DDOT Office of Civil Rights is to have a well-established monitoring process that has oversight mechanisms in place.
- No requirement by prime contractor that DBE is to use a specific supplier nor the prime "contractors" negotiated unit price.

GENERAL CIRCUMSTANCES:

- Standard Industry practice applies to all contractors.
- Use of joint checks must be available to all subcontractors.
- Material industry sets the standard industry practice, not prime contractors.
- Short term not to exceed reasonable time to establish/increase a credit line with the material supplier.
- No exclusive arrangement between one prime and one DBE in the use of joint checks that might bring independence into question.
- Non-proportionate ratio of DBE's normal capacity to size of contract and quantity of material to be provided under the contract.
- DBE is normally responsible for both to install and furnish the work item.
- DBE must be more than an extra participant in releasing the check to the material supplier.

RECORDS/DOCUMENTS

- Subcontract Agreement, Joint Check Agreement or Purchase Order must be executed by all parties.

RED FLAGS

- The DBE must provide the check to the vendor?
- The Prime Contractor negotiates the price and quantity.
- Invoices do not indicate that DBE is the customer.
- Prime's employee is listed as the contact person on invoices.
- Materials come from Prime's stockpiles.
- Materials are delivered by the Prime Contractor.
- Materials are ordered, and invoiced to the Prime Contractor.

RECORDS/DOCUMENTS

- Invoices
- Haul tickets or Bills of Lading
- Material on-hand documentation
- Joint check agreement
- Cancelled checks

Appendix B: DBE Contractor Payment Form

DDOT DBE Contractor Payment Form

OFFICE OF CIVIL RIGHTS

DBE Contractor Payment Form

CONTRACTOR:	CONTRACT VALUE:		
PROJECT NAME:	CONTRACT NO:		
DBE GOAL:	TOTAL DBE CONTRACT AMOUNT:	TOTAL DBE PAYMENTS TO DATE:	
FOR MONTH OF (MO./YR.):	% PROJECT COMPLETE		

In order to receive credit toward the DBE Goal, the Prime Contractor must complete the DBE Contractor Payment Form and submit MONTHLY to the District Department of Transportation's (DDOT) Office of Civil Rights. Failure to submit this form will result in no credit toward the contract DBE requirements and a delay in payment.

NAME OF DBE SUBCONTRACTOR	SUBCONTRACT AMOUNT	WORK/SERVICE PERFORMED	\$ AMOUNT PAID THIS PERIOD	TOTAL \$ PAID TO DATE
TOTALS			\$	\$

Credits towards the DBE goal can only be claimed after the amount being claimed toward the goal has been paid to the DBE. Prime Contractor shall submit documentation regarding all payments made from the Prime to all DBE Subcontractors on Federally Aided projects which validates said payments made. **Attach a copy of the cancelled checks.** This form must be completed and submitted monthly by the 15th of the next month for the period indicated above. This report must be submitted even if NO Activity took place during the period being reported

REPORT PREPARED BY: _____

DATE: _____

Print Name of Authorized Representative

Signature of Authorized Representative

OFFICE OF CIVIL RIGHTS

DBE Contractor Payment Form Instructions

For more information, please contact the District Department of Transportation's Office of Civil Rights.

Contractor: Name of Contractor

Contract Value: Contract Award Amount

Project Name: Enter the Project Name as it appears on the Contract/Solicitation documents

Contract No: Enter the Project/Contract Number

DBE Goal: Enter the DBE Goal Percentage **DBE Contract Value:** Enter the Contract Value Amount multiplied by DBE Goal Percentage

DBE Payments to Date: Enter the total amount of payments made to ALL DBE Firms to date.

For Month of (Mo./Yr.): Enter the Month and Year reporting

% Project Complete: Enter the Project % Complete at the time of the reporting

PAYMENT LOG

Name of DBE: Enter the DBE Name

DBE Subcontract Amount: Enter the Contract Value awarded to the DBE for the scope of work to be performed as indicated in the Description of Work

Work/Services Performed: Enter a brief description of the work performed by the DBE for the payment listed.

Amount Paid this Period: Enter the Total Amount Paid to the DBE (**Attach copies of the Cancelled Checks**)

Total Paid to Date: Enter the total paid to the DBE to date (cumulative).

Totals: Enter the totals for this period of the columns, "AMOUNT PAID THIS PERIOD" AND "TOTAL PAID TO DATE"

REPORT PREPARED BY: Print the Authorized Representative Name, Signature of the Authorized Representative, Date form was signed

Forward the completed DBE Contractor Payment Form and copies of Cancelled Checks: via E-Mail: Mohammed.Kabir@dc.gov. Scanned copies of the completed original DBE Contractor Payment Forms and copies of Cancelled Checks are acceptable to fulfill this requirement.

Appendix C: CUF Review Form

CUF REVIEW FORM

Appendix D: DBE Utilization Form

DBE UTILIZATION FORM

OFFICE OF CIVIL RIGHTS

DBE UTILIZATION FORM

CONTRACT/BID NO: _____ DBE GOAL: _____

PROJECT NAME: _____ CONTRACT TYPE: _____

CONTRACT VALUE: _____ DBE GOAL VALUE: _____

Please check one: Original Plan Modified Plan

I/We, (THE CONTRACTOR) _____ hereby submit the following proposed plan for DBE participation, in keeping with requirements set forth in 49 CFR 26.53. I/We understand and agree that the District Department of Transportation's Office of Civil Rights will review the below information and issue a decision as to approval or denial. The Notice to Proceed (NTP) will not be issued until this document and all required attachments have been received and approved by the DDOT Office of Civil Rights!

DBE PLAN			
Name & Address of DBE	Description of Work to be completed by DBE	Estimated Dollar Value of DBE Participation	% of DBE Participation
TOTALS		\$	%

Failure to comply with these directives may prevent/delay the issuance of the NTP for this project.

The undersigned hereby further assures that the information included herein is true and correct, and that the DBE firm(s) listed herein have agreed to perform a commercially useful function stated in the work description noted for each firm. The undersigned further understands that no changes to the DBE Plan may be made without prior approval from the DDOT Office of Civil Rights.

Contractor

Print Name of Authorized Representative

DATE: _____

Signature of Authorized Representative

APPROVED: _____

DENIED: _____

OFFICE OF CIVIL RIGHTS

DBE Utilization Form Instructions

For more information, please contact the DDOT's Office of Civil Rights.

Contract/Bid No: Enter the Project Number or Solicitation Number

DBE Goal: Enter the DBE Goal noted in the Contract/Solicitation documents

Project Name: Enter the Project Name as it appears on the Contract/Solicitation documents

Contract Type: Enter the Contract Type, i.e., Construction, Design, Construction Management, etc.

Contract Value: Contract Award Amount

DBE Goal Value: Enter the value of the Contract Award Amount multiplied by DBE Goal Percentage

Original or Modified Plan: Indicate whether this is an original DBE Plan or a request for modification due to change in circumstances or as a result of denial of an original plan.

DBE PLAN

Name & Address of DBE: Enter the DBE Name and Address

Description of Work to be completed by DBE: Enter a summary of the scope of work to be performed by the DBE. Specify type of work and the percentage of the type of work to be performed by the DBE, i.e., Type: Trucking, Supplies, Materials, Labor or a combination thereof.

Estimated Dollar Value of DBE Participation: Enter the Estimated Contract Value to be awarded to the DBE for the work to be performed. This Contract Value should appear on the Certification of Binding Agreement. If the DBE is a supplier, indicate the amount of expenditures allocated for services separate from supplies.

% of DBE Participation: Divide the Contract Value noted on the Letter of Intent by the Contract Value awarded by DDOT to determine the % of DBE participation for each DBE listed.

Totals: Enter the total of the "Estimated Dollar Value of DBE Participation" and "% of DBE Participation" columns.

Print the Contractor Name

Print the Authorized Representative Name

Signature of the Authorized Representative

Date form was signed

Attach a copy of the DBE Certification Letter, DBE Quote to the Contractor and the Certification of Binding Agreement for all DBE's listed on the DBE Plan.

For questions or to forward the completed DBE Utilization Form and all required documents for processing, please contact by e-mail: Mohammed.Kabir@dc.gov.