federal register

Friday
May 30, 1997

23706
DA

OST-97-2550-1

Part IV

# Department of Transportation

Office of the Secretary

49 CFR Parts 23 and 26

Participation by Disadvantaged Business Enterprise in Department of Transportation Programs; Proposed Rule

373pp

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Parts 23 and 26

[Docket OST-97-2550; Notice 97-5]

RIN 2105-AB92

## Participation by Disadvantaged Business Enterprise in Department of Transportation Programs

AGENCY: Office of the Secretary, DOT.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: This document proposes revisions of the Department of Transportation's regulations for its disadvantaged business enterprise (DBE) program. The notice responds to comments on notices of proposed rulemaking issued December 1992 and October 1993 and also proposes responses to the Supreme Court's decision in *Adarand* v. *Peña*. It would replace the current DBE rule (49 CFR Part 23) with a new rule (49 CFR Part 26). The proposed changes in the latter category would modify the overall goal, contract goal, and good-faith efforts provisions of the rule, as well as add provisions concerning diversification in the DBE program and provide greater flexibility to recipients. A final rule based on this SNPRM would replace the existing DBE rule in its entirety.

DATES: Comments should be received no later than July 29, 1997. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Interested persons should send comments to Docket Clerk, Docket No. OST-97-2550, Department of Transportation, 400 7th Street, SW., Room 4107, Washington, DC 20590. We request that, in order to minimize burdens on the docket clerk's staff, commenters send three copies of their comments to the docket. Commenters wishing to have their submissions acknowledged should include a stamped, self-addressed postcard with their comments. The docket clerk will date stamp the postcard and return it to the commenter. Comments will be available for inspection at the above address from 10 a.m. to 5 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: For questions concerning Subpart G (airport concessions), David Micklin , FAA Office of Civil Rights, 800 Independence Avenue, SW., 20591, Room 1030, (202) 267-3270; or Kathleen Connon, FAA Office of Chief Counsel, same street address, Room 922-C, (202) 267-3473. For questions on other portions of the SNPRM, Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 400 7th Street, SW., Room 10424, Washington, DC 20590. Phone numbers (202) 366-9306 (voice); (202) 366-9313 (fax); 202-755-7687 (TDD).

SUPPLEMENTARY INFORMATION:

### Background

The Department first published 49 CFR Part 23 in 1980. The regulation required goals to be set for businesses owned or controlled by members of minority groups and women (MBEs/WBEs). This regulation has been amended several times. Many of these amendments responded to statutory changes. In 1983, Congress enacted the first statutory disadvantaged business enterprise (DBE) provision. This provision required the Department to ensure, except as the Secretary determined otherwise, that not less than 10% of the funds authorized for the highway and transit financial assistance programs be expended with DBEs. Under the 1983 statute, members of several minority groups were presumed to be socially and economically disadvantaged; women were not.

In 1987, Congress re authorized and amended the statutory DBE program. In this legislation, Congress added women to the groups presumed to be disadvantaged. In separate legislation, Congress added an identical provision applying to the FAA's airport grant program. The Department's 1987 amendments to Part 23 added FAA programs to the DBE portion of the rule and established a single DBE goal for firms owned by women and minority group members. In 1992, the Department added Subpart F, which implements a statutory requirement for DBE programs in airport concessions.

As a result of these changes, Part 23 became something of a patchwork. To clarify the rule, reflect program changes since 1980, incorporate updated interpretations of rule provisions, correct problems in implementation, and reduce burdens on state and local governments and small businesses, the Department issued a notice of proposed rulemaking (NPRM) on December 9, 1992 (57 FR. 58288). The December 1992 NPRM was intended to create a clearer regulation that deals explicitly with known implementation problems in the program. The Department received 601 comments in response. The Department has thoroughly considered these comments, and much of this SNPRM consists of the Department's responses to these comments. In October 1993, the Department issued a separate NPRM to amend Subpart F. This SNPRM's provisions concerning airport concessions are based on the October 1993 NPRM and the comments received in response to it.

In June 1995, the Supreme Court issued its decision in *Adarand* v. *Peña* (115 S. Ct. 2097). In this case, the Court determined that race-conscious affirmative action programs are subject to strict judicial scrutiny. To meet this heightened level of scrutiny, such a program must be based on a compelling government interest (e.g., remedying the effects of discrimination) and must be narrowly tailored to meeting its objective. In response to this decision, the Department has included in this SNPRM a wide range of ideas for revising the rule, particularly in the areas of overall and contract goals, good faith efforts, and other means of "narrowly tailoring" the provisions of the rule.

Following its review of the comments received in response to this SNPRM, the Department intends to publish a final rule that will constitute a comprehensive revision of the entire DBE rule. The SNPRM and the final rule will refer to 49 CFR Part 26, for clarity and to emphasize that Part 23 and guidance and interpretations pertaining to it are being replaced in their entirety by Part 26.

### Summary of Adarand-Related Proposals

In commenting on the Administration's review of affirmative action programs, President Clinton said his objective was to "mend it, not end it." This is the approach the Department is taking concerning the DBE program. We have submitted to Congress, as part of our highway/transit program reauthorization bill ("NEXTEA"), a proposal to reauthorize, without change, the statute underlying the DBE program. We believe that this statute is Constitutional and that it is based on the continuing compelling need for the government to remedy the effects of discrimination in DOT-assisted contracting. The material gathered by the Department of Justice (DOJ) in connection with review of Federal procurement affirmative action programs also supports our view that this compelling need exists.

The Department of Transportation's SNPRM is one part of the Administration's overall effort to revise affirmative action programs in light of Adarand. On May 9, 1996, the Department of Justice (DOJ) published proposed regulations concerning the use

of race-conscious remedies for the effects of discrimination in direct Federal contracting programs. Other agencies with significant Federal procurement responsibilities (the Department of Defense, General Services Administration, and National Aeronautics and Space Administration) expect soon to propose changes to the Federal Acquisition Regulation (FAR) concerning small disadvantaged businesses. These proposed changes would amend the FAR to be consistent with the proposed rules. The Small Business Administration is planning to issue a proposal to change the rules for its 8(a) and 8(d) programs, which are intended to foster the participation of small disadvantaged businesses in Federal agency procurement. These proposals will affect direct procurements by the Department of Transportation.

This SNPRM affects only the airport, transit and highway financial assistance programs of the Department. While the thinking behind this SNPRM is intended to be consistent with the proposals other agencies are making, the specific proposals are different because this SNPRM concerns state and local, rather than Federal, procurement actions.

This SNPRM is the Department's primary vehicle for "mending" the details of the DBE program, tailoring program implementation more precisely to the objective of remedying the effects of discrimination. Here is a summary of the most important proposals we are making toward this end. The section-by-section analysis discusses these provisions in greater detail.

*1. Overall Goals*

We propose to change the method for calculating overall goals. Under the existing rule, recipients determine the maximum amount of work they can obtain from DBEs available to them. They must also take into account their past performance in meeting their overall goals. This system is well-understood and accepted in the recipient and DBE communities. However, we believe the system can be tuned more precisely to obtain the amount of DBE participation needed to remedy the effects of discrimination.

In a world in which discrimination did not affect business opportunities for DBEs—a world, in other words, in which market forces operated on a level playing field—how much would DBEs participate in DOT-assisted contracts? The answer to this question would lead us to the level of DBE participation that recipients should expect for DBEs. This level is the appropriate DBE goal to remedy the effects of discrimination.

The SNPRM asks for comment on three alternative ways of estimating a goal consistent with this concept. Each of the proposed methods has strengths and weaknesses, and each raises question about the kind of data that is available to help recipients set goals. We ask commenters to participate fully in helping us determine how best to establish what the "level playing field" result for DBE participation would be, including whether recipients should be able to choose from a variety of methods.

The approach we propose is conceptually consistent with that developed by the Department of Justice (DOJ) in its Federal procurement affirmative action reform effort (see May 23, 1996 DOJ **Federal Register** notice). However, we are not proposing to require recipients to follow the "benchmarks" established by the Department of Commerce (DOC) as part of the procurement reform initiative. The proposal describes, however, some circumstances under which recipients may be able to use DOC benchmarks, goals established by other recipients, or other information (e.g., local disparity studies) in place of the goal-setting mechanism in this rule.

*2. Means of Meeting Overall Goals*

The SNPRM emphasizes that race/gender-neutral mechanisms (e.g., outreach, technical assistance) are the means of first resort for recipients to use in seeking to meet overall goals. Only to the extent that these means are insufficient to meet overall goals would recipients use race/gender-conscious mechanisms, such as contract goals or evaluation credits. Unlike the existing rule, contract goals would not be required on every DOT-assisted contract, regardless of whether they were needed to meet overall goals. More intrusive mechanisms (e.g., set-asides) could be used only if the recipient had legal authority independent of the Department's DBE rule and made a finding that other methods to reach overall goals had not worked. When it became apparent that the effects of discrimination were being addressed successfully (e.g., when the recipient had exceeded its overall goals over a significant period of time), the recipient would reassess its use of race/gender-conscious measures and would rely more on race/gender-neutral measures and less on race/gender-conscious measures to meet its overall goals.

*3. Good Faith Efforts*

The SNPRM emphasizes that when they use contract goals, recipients must take seriously their obligation to award a contract to a bidder who makes good faith efforts, even if the bidder does not meet the goal. To do otherwise would result in a de facto quota. Recipients must provide a reconsideration mechanism to a bidder who is denied a contract on the basis of a failure to make good faith efforts.

*4. DBE Diversification*

The SNPRM asks for comment on alternatives to reduce concentration of DBE firms in certain types of work in which, at least in highway construction, they are said to cluster. The aim is to diversify the types of work in which DBEs participate, as well as to reduce what is perceived as unfair competitive pressure on non-DBE firms attempting to work in certain fields.

*5. Added Flexibility for Recipients*

The SNPRM proposes that, with the Secretary's concurrence, recipients could obtain a waiver of provisions of DBE program requirements if they devised an alternative that would effectively redress the effects of discrimination in their DOT-assisted contracting. This added flexibility could allow states and localities to deal creatively with their specific circumstances. The SNPRM also would give recipients flexibility in choosing the mix of measures (race-neutral and race-conscious) they use to meet overall goals.

**Section-by-Section Analysis**

This portion of the preamble describes the Department's responses to comments on the December 1992 and October 1993 NPRMs and the rationales for the proposals in this SNPRM. Because the Department has already extensively considered comments on many of the provisions of this SNPRM, we request that commenters focus their comments on the *Adarand*-related provisions highlighted above and issues about which the preamble specifically asks for additional comment.

**A Style Note**

We are making one general stylistic change to the regulatory text. The text (except for Subpart G) is being organized in a question/answer format in the interest of greater clarity. This format directly addresses recipients (and other parties identified in the text), saying, for example, "You must * * *." in place of "The recipient shall * * *." We believe that this approach will make the regulation easier to read and use.

*Section 26.1 What are the Purposes of This Rule?*

Seventeen comments to the December 1992 NPRM addressed the purpose section. Ten of these comments favored retention of the purpose language in the existing rule, particularly its reference to providing the "fullest possible participation" to DBEs. Other comments included a suggested reference to the desirability of DBEs being able to compete on their own, outside the DBE program and a request to include language on the "equitable distribution" of DBE awards among various groups.

The SNPRM makes a few additions to the NPRM language. One addition states that a purpose of the program is to ensure, consistent with Federal law, significant opportunities for DBEs to participate in DOT-assisted contracts. In addition, we have added a paragraph emphasizing the importance to the program of keeping "fronts" and other ineligible firms out of the program. We also added a sentence stating the aim of the program as developing businesses that can compete independently.

We did not adopt the suggestion of including "equitable distribution" language, which appears to refer to a concept of ensuring that various groups (e.g., blacks, Hispanics, Asians, women) receive what is viewed, under a given concept of equity, as a fair market share of DBE contract awards. This concept would be difficult to implement, and mechanisms to carry it out appear to exceed the Department's discretion under the statutes authorizing the DBE program. The Department has adequate authority, under Title VI of the Civil Rights of 1964, to address any alleged discriminatory effects of its DBE program.

*Section 26.3 To Whom Does This Rule Apply?*

There was only one comment on this section of the December 1992 NPRM, from a DBE firm that objected to deleting the Federal Railroad Administration (FRA) from this rule. The Department continues to believe that it makes sense to drop FRA from the rule, since FRA—unlike FTA, FHWA, and FAA—does not have a statute establishing a DBE program. We have added a paragraph clarifying that Part 26 requirements would not apply to the non-Federally-assisted contracts of recipients of DOT funds.

It should be pointed out that Part 26 would be authorized not only by the specific DBE statutes Congress has enacted, but also by longstanding nondiscrimination statutes such as Title VI of the Civil Rights Act of 1964 and nondiscrimination provisions in the FHWA, FTA, and FAA program statutes. The original 1980 49 CFR Part 23 was based on these statutes, and the courts upheld that regulation even though specific DBE legislation had not yet been enacted.

*Section 26.5 What Do the Terms Used in This Rule Mean?*

Many of the comments to this section of the December 1992 NPRM recommended adding definitions to the Department's proposed list. Twelve comments, all from recipients and DBEs, suggested a definition of "affirmative action." Eight comments, mostly from recipients, asked for a definition of "commercially useful function." Other comments sought definitions of a variety of terms, including applicant, good faith efforts, graduation, real and substantial contribution, expertise, good cause, subsidiary, broker, complainant, precertification, business opportunity, normal industry practices, pro forma ownership, equitable distribution, regulated party, exemptions, exceptions, discrimination, dollar value, debarment, origin, and social and economic disadvantage, to name a few.

Several comments sought amplification of certain terms, such as joint venture and affiliate. Twenty-one comments, mostly from DBEs and recipients, concerned the key term "disadvantaged business enterprise." Most of these comments were not about the content of the definition but rather about the words of the term itself. A few preferred MBE/WBE terminology to DBE terminology. Others suggested terms having what they viewed as having more positive connotations, such as "emerging business enterprises" (EBEs) or "historically underutilized businesses" (HUBs).

Four comments recommended deleting persons of European Spanish or Portuguese origin from the definition of "Hispanic Americans," saying that the regulation should focus on persons whose origins were from Latin America (one of these comments preferred the term "Latino"). Four other comments suggested that Asian-Americans (e.g., persons of Japanese or Chinese descent) should be deleted from the definition and the program, because the comments perceived these persons as not being disadvantaged. Other comments requested clarification of the stock ownership requirement (i.e., does the regulation mean 51 percent of all stock combined, 51 percent of each class of stock, or both?).

In response to the comments, the SNPRM is not adding a definition of "affirmative action." The main point of a definitions section in a rule is to describe the meaning of terms of art that are used in the regulation. The rest of the regulation does not use the term "affirmative action." Nor does the SNPRM add a definition of "commercially useful function." This is an important term, which is given its operational meaning in the context of the counting section of the rule. In our view, an abstract definition of the term outside of that context would add little to users' understanding of the rule.

"Disadvantaged business enterprise" is a term that derives directly from the statutes authorizing this program, which by now is well known and understood among recipients and contractors. It is difficult to imagine a more apt term to use for businesses that, by statute, must be owned and controlled by socially and economically disadvantaged individuals. The suggested alternatives are not as suitable. Minority and women's business enterprise terminology suggests a program in which status as a minority group member or woman, standing alone, makes one an eligible business owner. EBE and HUB do not relate conceptually to the operation of the program. Part 26 would remain a DBE regulation. The stock ownership requirement—that 51 percent all stock be owned by disadvantaged individuals—would remain as part of the ownership criteria, and is discussed in more detail in the SNPRM.

The DBE statutes direct DOT to use the definitions of the "presumptive groups" found in SBA's rules implementing section 8(d) of the Small Business Act. The definitions of Hispanic Americans and Asian-Americans in the December 1992 NPRM are taken directly from SBA materials. We recognize that the inclusion of persons of European Spanish and Portuguese origin is controversial, but, absent legislative direction to the contrary, we believe it is necessary to leave the definition unchanged. Congress has determined that Asian-Americans are presumptively disadvantaged (a judgment that can be supported by a substantial history of discrimination against many Asian groups in this country), and the Department could not exclude them even if it wanted to.

It is not good regulatory drafting practice to place a great deal of the substance of the rule into the definitions section. Abstract descriptions of a word or term are often of little help in making decisions about how to apply a regulation to real-world situations. Regulatory concepts are best understood

in the context of the rule's operational provisions. For this reason, the SNPRM does not add definitions of the many terms suggested by various comments. However, the SNPRM does incorporate the text of SBA's definition of "affiliate" rather than merely cross-referencing SBA regulations, as some comments requested. The counting section in the SNPRM includes additional guidance concerning counting the participation of joint ventures.

*Section 26.7 What Discriminatory Actions Are Forbidden?*

There were few comments on this section of the December 1992 NPRM. One comment suggested that age, disability, and religion be added as prohibited grounds for discrimination. These grounds are not mentioned in the authorizing statutes for the program. To the extent that other statutes apply nondiscrimination requirements to actions of DOT recipients (e.g., the ADA re disability), these statutes can stand on their own. One comment said that the rule should clarify that someone need not discriminate in order to violate the rule. This is true: noncompliance can arise from a violation of a variety of provisions, but this does not need to be reiterated in regulatory text.

The provision would be left as proposed, with the exception of adding a paragraph clarifying that discrimination in the administration of a DBE program is prohibited. This clarification is proposed in order to avoid a potential loophole concerning actions by recipients (e.g., in the administration of their certification programs) that allegedly have the effect of discriminating against persons on one of the forbidden grounds, even if the award and performance of a contract is not directly involved.

This paragraph prohibits not only intentional discrimination but also actions that have the effect of discriminating against individuals on one of the forbidden grounds (e.g., that have a disparate adverse impact on members of a particular group). The language of paragraph (b) is similar to that in the Department's long-standing Title VI regulation (49 CFR§ 21.5(b)(2)) and is consistent with court interpretations of nondiscrimination statutes in other contexts. See, e.g., *Alexander* v. *Choate*, 469 U.S. 287 (1985); *Elston* v. *Talladega Board of Education*, 997 F.2d 1394 (11th Cir., 1993).

*Section 26.9 How Does the Department Issue Guidance, Interpretations, Exemptions and Program Waivers Under this Rule?*

The SNPRM would add paragraph (a) of this section to avoid confusion over the status of guidance and interpretations issued by DOT in the past concerning the current version of this DBE regulation (49 CFR Part 23). Language in this paragraph is intended to emphasize that it is interpretations of Part 26, not interpretations of Part 23, that definitively would set forth the meaning of the Department's DBE requirements.

As noted in the preamble to the December 1992 NPRM, a General Accounting Office (GAO) study criticized the Department's administration of the DBE program because guidance was uncoordinated, inconsistent and confusing. As part of our response to this problem, the December 1992 NPRM proposed creating a DBE Program Council to coordinate guidance and interpretations. Thirty-eight comments favored this idea, as a means of dealing with inconsistency, though some expressed reservations about potential bureaucratic delays. A number of the comments that supported the Council suggested that it be expanded into an Advisory Committee, with participation from outside the Department. Five comments opposed the Council, mostly on the grounds of potentially adding to bureaucratic delay.

The SNPRM references a DBE Coordination Mechanism, which is intended to be established within the Department by the time the rule becomes final. It would include representatives of all the DOT organizations—FHWA, FTA, FAA, the Office of General Counsel, the Office of Civil Rights, and the Office of Small and Disadvantaged Business Utilization—that are regular players in the DBE program. Because these offices are very familiar with the regulation, we do not anticipate that the review of guidance and interpretations through this mechanism would create undue delay. On the other hand, the presence of the mechanism would make it much more likely that guidance will be consistent and correct, which will result in much more reliable and useful customer service.

Because the kind of work we intend the mechanism to do is intrinsically a government task, it would not be appropriate to include non-DOT parties in its deliberations. However, the Department does believe that receiving input from interested parties on a regular basis is very useful, and we are exploring the creation of an advisory committee that would provide continuing input to the Department on the implementation of this program.

The Department proposes to maintain its existing exemptions mechanism, which is consistent with the way that all exemptions are handled in Office of the Secretary rules. The Department seeks comment on how participants view this process as working, and on any improvements commenters might want to suggest.

In addition, paragraph (d) proposes a new provision, not included in previous NPRMs. It permits recipients to apply for a program waiver, allowing them to construct a DBE program different from that called for in Subparts B, C or G (airport concessions), of the SNPRM (the general provisions of Subpart A and the certification standards and procedures of Subparts D and E would not be subject to waiver). Public participation would be required, and the Secretary could impose conditions on the grant of a waiver. The Department seeks comment on this concept, which is designed to provide recipients greater flexibility, as well as on the details of the proposed provision.

*Section 26.11 What Records do Recipients Keep and Report?*

The December 1992 NPRM proposed that recipients report DBE program data to the concerned operating administration (OA) quarterly, unless that OA determined a different frequency for the data. The preamble to the December 1992 NPRM included a draft Office of Small and Disadvantaged Business Utilization reporting form and asked whether this form, or a modification of it, should be required Department-wide.

Twenty-four comments generally favored the idea of a single, Department-wide reporting form, though some of these suggested allowing recipients to modify the form. Two comments favored annual, rather than quarterly, reporting. When it came to what the form should include, there was a wide divergence of views. Several comments each supported detailed breakouts of awards (i.e., by awards to DBEs owned by various minority groups and women) and tracking actual payouts to DBEs as well as commitments to DBE participation. Other comments suggested detailed changes in the data elements (e.g., distinguishing between awards to prime and subcontractors, counting of overhead, tracking areas of work), and two favored electronic reporting of data.

The Department believes, in view of these comments, that it needs to consider further the best way of obtaining program evaluation data for the DBE program. Specifically, the Department asks whether there are modifications the Department should make in order to adequately capture DBE participation through race/gender neutral means and mechanisms other than contract goals. Meanwhile, the SNPRM would maintain the status quo for reporting. We ask, however, for comment specifically on whether the frequency of reporting should be reduced (e.g., to twice a year) and, if so, whether this would continue to allow sufficient program oversight and evaluation. The SNPRM would add, as an aid to DOT oversight of recipients' programs, a three-year record retention requirement for basic program data. Again, recipients should rely on DOT guidance concerning the content of this material. As a general matter, the Department intends that recipients retain only basic data needed to allow DOT personnel to review and evaluate recipients' program compliance.

*Section 26.13 Assurances*

As under the old version of the rule, recipients and contractors have to subscribe to assurances of compliance with Part 26 requirements. There were few comments on the December 1992 NPRM assurances section. One comment preferred the lengthier language of the old rule's assurances section, another suggested adding more enforcement language, a third asked that contractors who fail to promptly pay DBEs should be told in the assurance that this will be in breach of contract, and a fourth asked how states will enforce the requirement for assurances in contracts.

In the assurance for recipients, the SNPRM would add references to additional remedies available to the Department, namely the Federal false statements statute (18 U.S.C. 1001) and the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 *et seq.*). We believe that the issue of prompt payment is better handled under the provision of the SNPRM dealing with that subject. Consistent with the language added to § 26.7, the SNPRM would add a statement to the assurance concerning nondiscrimination in the administration of DBE programs.

States can enforce the requirement for assurances in contracts by the same means that they enforce other requirements for the inclusion of contract clauses: a prospective contractor who fails to include Federally-required contract clauses in a Federally-assisted contract is not, presumably, a responsive bidder. We believe the shorter, more compact language of the new version of the assurances is clearer, less verbose, and more easily understood than the old version. In addition, an operating administration is permitted to prescribe a briefer assurance or certification of compliance in its grant agreements.

**Subpart B—Administrative Requirements for DBE Programs for Federally-Assisted Contracts**

*Section 26.13 What Assurances Must Recipients and Contractors Make?*

This section details which recipients have to establish DBE programs. There were several comments to the December 1992 NPRM about it. One comment said that FRA and port authorities should have to have DBE programs. The issue about including FRA under Part 26 was discussed above. With respect to port authorities, if a port authority receives FHWA, FTA, or FAA funds, it would be subject to the requirements of Part 26 like any other recipient. One comment asked whether the thresholds apply to prime recipients or subrecipients, while another disliked the change from the two-tier threshold system of the old regulation to the proposed one-tier system, saying it would involve duplicate work by prime recipients and subrecipients. If any recipient—prime or sub—receives the requisite amount of DOT financial assistance and lets DOT-assisted contracts, it must have a program. If the prime recipient is a pure pass-through agency that does not let any DOT-assisted contracts, it would not have to have a program.

A comment asked that the threshold level for airports be raised to $1 million, which would have the effect of exempting some airports (smaller ones, in most cases) from the DBE program requirement. The Department believes that airports, and other recipients that receive the proposed $200,000 in financial assistance, are likely to have adequate resources for establishing a DBE program and may let contracts of sufficient size to make DBE participation a realistic possibility. For this reason, we are leaving this portion of the proposal unchanged.

One comment asked that annual program updates not be required, and two others asked for updates at three-year rather than one-year intervals. Recipients would have to revise their programs to conform to Part 26, submit overall goals each year, and request the consent of the applicable DOT office for any significant program change. For these reasons, we do not believe it is necessary to require a formal update at any particular interval, so this proposed requirement is not included in the SNPRM. This would have the effect of reducing paperwork burdens.

The Department seeks comment on whether additional public participation mechanisms are desirable for recipients as they prepare DBE programs for submission to DOT. For example, do their need to be more explicit requirements for input from DBEs, non-DBEs, the public etc.?

*Sections 26.23–26.27 and 26.37 Other DBE Program Provisions*

This subpart contains a number of provisions incorporated from Part 23, concerning a DBE policy statement, a DBE liaison officer with direct access to the CEO of the organization, use of DBE financial institutions, and monitoring, compliance and enforcement mechanisms. There were few comments on these items, and we are incorporating them in the SNPRM with only minor changes. All these items are components of a recipient's DBE program that would have to be approved by the concerned operating administration.

*Section 26.29 Prompt Payment Mechanism*

The December 1992 NPRM proposed that recipients would establish a prompt payment mechanism, containing one or more of five options listed in the proposed provision. This provision, and its components, drew substantial interest from commenters.

Sixty-nine comments favored requiring a prompt payment clause in contracts, saying that it addressed a serious problem that had adverse consequences on subcontractors. Among ideas suggested by these comments were that contract goal attainment should not be counted until DBEs are paid and that subcontractors should be paid within a given period of time (e.g., 10 days) of the time the prime is paid by the recipient. Some of these comments suggested that sanctions be imposed for failure to comply with prompt payment clauses. On the other hand, 29 comments opposed prompt payment clauses and mechanisms in general, saying that they involved too great intrusion into the contract process and added cost to the system. All the suggested options were impractical, many of these comments said.

One of the five options listed was direct payment of DBE subcontractors by the recipient, who could ensure that the DBE was paid on time. Fifteen comments, mostly DBEs, supported this idea, while 44 comments, mostly prime contractors and some recipients,

opposed it. Proponents said that this approach would end the waiting game that they perceive prime contractors as playing, while subcontractors go dry awaiting payment. Opponents complained that prime contractors would lose control over subcontractors' performance and that delays in paying subcontractors are as often caused by delays in state payments to prime contractors as anything else.

Nine comments supported, and five opposed, mandatory alternative dispute resolution between prime and subcontractors as a way of addressing payment delay disagreements. There were smaller numbers of comments on other proposals, with scattered support for and opposition to them.

The Department, having reviewed the extensive comment on this issue, remains convinced that delays in payment to DBE subcontractors are a significant problem in the DBE program, which we should take steps to correct. The SNPRM would specifically authorize two such steps. Given the concerns expressed, particularly by recipients, about the problems that could arise in some cases from mandating prompt payment mechanisms, the Department is seeking further comment on whether these steps should be mandatory. (Under the SNPRM, recipients who use prompt payment mechanisms would do so under the legal authority of this rule, but using them would be optional.)

The first specifically authorized step would be a prompt payment clause that would be inserted in all contracts between recipients and prime contracts, obligating the prime contractor to pay DBE subs for work satisfactorily completed within a specific number of days (e.g., 10 days) of each payment by the recipient to the prime contractor. The contract would include appropriate penalties, chosen by the recipient, for failure to comply. In addition, the recipient could require prime contractors to get the written consent of the recipient, based on good cause, for any delay.

The second specifically authorized step would be a clause in both prime and DBE subcontracts committing the parties to participate in alternative dispute resolution (ADR) to resolve payment disputes. Recipients could specify the nature of these mechanisms in contract documents. In addition, recipients could take additional steps, such as withholding payments from primes until subcontractors are paid, or other steps devised by the recipient, to ensure prompt payment of DBE subcontractors. All prompt payment mechanisms would be incorporated in the recipient's DBE program, and would be subject to DOT approval.

Because they frequently lack working capital, access to credit, and a strong cash flow, DBEs are particularly vulnerable to delays in payment. However, we recognize that prompt payment is an issue for all subcontractors, and we therefore recommend that recipients apply prompt payment provisions to all subcontractors, not just DBEs.

One prompt payment-related issue of which we are aware concerns retainage payments. DBEs have complained that prime contractors often do not return retainage payments to DBE subcontractors until the recipient returns the prime contractor's retainage payment at the end of the entire project. This is true, DBEs have said, even in a large project in which a subcontractor's work has been inspected and approved long before the overall project has been completed. This can result in a lengthy delay in the subcontractor getting its money back. The Department seeks comment on whether prompt payment provisions should address this issue.

*Section 26.31 What Requirements Pertain to the DBE Directory?*

The statutes mandate that recipients have a DBE directory. Sixteen comments explicitly favored the December 1992 NPRM proposal on this subject. There was a good deal of debate among commenters on the issue of whether, as the December 1992 NPRM proposed, the directory should list the types of work DBEs preferred to do or whether recipients should limit (and reflect in the directory) DBEs' types of work to those in which the firm was qualified.

Twenty-six comments favored the latter approach, taking two different basic rationales. Some said that recipients should prequalify DBEs, certifying only those, and only in those types of work, that the recipient viewed as being qualified to perform the work. Others said that the "qualifications" of DBE firms were relevant only insofar as they affected control. The comments that favored the NPRM approach argued against both rationales, saying that prequalification overstepped the bounds of appropriate recipient discretion in the certification process and that certifying firms only in certain fields (as opposed to simply certifying them as DBEs) would "pigeon-hole" firms into a few areas and thwart their efforts at diversification.

The Department believes that a good case can be made that a firm should be certified only in those areas of work in which its disadvantaged owners are able to control its management and operations. It is reasonable, then, to reflect the recipient's determinations on this point in the directory, and we have modified this provision accordingly. The Department believes, however, that a firm wishing to move into a new area of work should not have to go through an entire new certification process. Also, the Department does not believe that "prequalification," as such, is an appropriate part of the certification process. In fact, the Department believes that requiring prequalification for DBE firms would be a discriminatory practice under Part 26, unless the recipient also requires prequalification of all other firms.

The directory would have to be republished at least annually. Updated information (e.g., who's in and who's out) would have to be made available, on request, in the meantime. This would ensure that, for example, prime contractors would be able to find information on new DBEs that had been certified between publications of the directory.

*Section 26.33 What Steps Must a Recipient Take To Foster DBE Diversification?*

This is a substantially new section proposed as part of the Department's efforts to narrowly tailor the DBE program. Paragraph (a) of this section proposes for comment four alternatives designed to foster diversification in the kinds of work DBEs perform in DOT-assisted contracts. Taking steps to reduce adverse impacts on non-disadvantaged parties is one of the ways in which it is appropriate to narrowly tailor an affirmative action program.

Over many years, the Department has received anecdotal information suggesting that DBE subcontractors in highway construction have been concentrated in a few specialty areas that require relatively modest capitalization (e.g., guardrail, landscaping, traffic control). Non-DBE contractors in these areas have complained that they are denied contracting opportunities because of the number of DBE firms obtaining subcontracts, a point also addressed in a 1994 GAO report. At the same time, some DBE firms have expressed the concern that it is difficult for them to expand and diversify.

The December 1992 NPRM asked for comment on a variety of ideas related to this issue, ranging from ceilings on DBE participation in certain areas to "extra credit" for the use of DBEs in "non-traditional" fields to financial or other incentives for prime contractors to involve DBEs in such fields. Generally, commenters had a negative reaction to

these suggestions. For example, only seven comments favored caps or ceilings on DBE participation in areas in which DBEs were heavily represented, while 49 comments opposed this idea. Opponents said that the problem may be over-hyped and that implementing a cap would be an administrative nightmare. One commenter preferred that recipients be encouraged to come up with their own innovative approaches.

Concerning incentive programs, 17 comments favored the idea and 28 opposed it. Among the opponents, one noted that it didn't make sense to pay people to obey the law, while another said that it had tried the idea for six years and it hadn't worked. Supporters mentioned a state incentive program that had worked, and others said that the incentives should be permitted, though not required.

The suggestion that comments received most favorably was for "extra credit." For example, if a contractor used a DBE outside certain traditional fields, it could receive $1.15 or $1.25 worth of credit toward its contract goal for every dollar it expended with the DBE. Twenty-one comments favored this approach, while four opposed it. Commenters pointed out that DOT or recipients would have to determine what constituted a "traditional" field to make this idea work.

This SNPRM asks for comment on a series of ideas for addressing the concentration issue. The first alternative focuses on types of work in which DBE firms receive a given percentage (e.g., 50%, 75%) or more of the contracts in Year 1. If this is the case, prime contractors and recipients in Year 2 could count only half the actual DBE participation in that field toward goals. The intent of the provision is that this shift in the incentives would reduce the concentration.

**Example:** Recipient X's highway construction contracts give rise to 100 subcontracts for landscaping in Year 1. Of these, 80 go to DBEs. In Year 2, any DBE firm's landscaping subcontract leads only to 50 percent credit toward the prime contractor's contract goal and the recipient's overall goal (e.g., a $50,000 subcontract counts for $25,000 toward these goals).

The Department seeks comment both on the concept and on what the percentage standard should be. We ask the same question about the level of DBE participation that would be allowed in the second year. In addition, we ask whether it would make more sense to tie the criterion to an average over a number of years rather than to a particular year. We also ask whether a provision of this type could have the unintended consequence of increasing concentration in these fields (e.g., because recipients might use more DBE contractors to meet a goal if credit for using a DBE is reduced).

The second alternative looks at the issue in terms of proportionality between the recipient's overall goal for all work and the DBE participation in a particular field of work. If DBE participation in a particular field far exceeds the overall DBE goal percentage, then the recipient would not credit toward DBE goals further work in that field during the year.

**Example:** Recipient X's overall goal for the year is 10 percent. The recipient estimates that it will spend $10 million for widget wrangling in all its contracts that year. By September 15, DBE widget wranglers have received contracts worth $4.1 million (i.e., more than four times 10 percent of the recipient's projection for widget wrangling expenses for the year). For contracts let after that date, the recipient would not count DBE participation for this worthy activity toward goals.

In addition to the concept itself, the Department asks commenters whether the multiple (four times the overall goal) is a reasonable one, whether the consequence should be no credit after the threshold is reached (as distinct from some other percentage), and whether it makes more sense to implement such a provision on a year-to-year basis than on a part-year basis.

The third alternative would focus on fields in which there is a concentration of DBEs, again defined as one in which DBEs in general get a given percentage of the contracts. Unlike the first alternative, however, the limitation on receiving credit for contracts would fall not on all DBEs in a field but only those that had received several recent contracts. The intention is to address situations in which the same DBE firms repeatedly receive contracts, to the exclusion of others.

**Example:** Recipient X's highway construction contracts give rise to 100 subcontracts for guardrail in Year 1. Of these, 80 go to DBEs. DBE Q has received four guardrail subcontracts during Year 1 and the preceding three years. In Year 2, no credit toward goals can be counted for a guardrail subcontract awarded to DBE Q.

The questions asked about the appropriate percentage level for determining concentration under Alternative 1 apply here as well. In this alternative, in a field in which there is a DBE concentration, in Year 2 the recipient would not count toward goals participation from any particular DBE firm that had received four or more contracts in that field over the previous four years. The Department seeks comment on the concept and on the number of contracts over the number of years that would be most appropriate.

The fourth alternative would again focus on fields in which there was DBE concentration at a given percentage level (the same questions apply). This alternative would direct the recipient to establish contract goals that gave special emphasis to DBE participation in other fields.

**Example:** Recipient X's highway construction contracts give rise to 100 subcontracts for fencing in Year 1. Of these, 80 go to DBEs. In Year 2, Recipient X sets contract goals to emphasize steel erection, widget wrangling, barrier placement etc. (i.e., fields in which there is not a concentration of DBEs).

The Department seeks comment on whether this concept would be practical to administer (e.g., it would require setting somewhat more complex contract goals than is now the case).

These alternatives are not necessarily mutually exclusive, and it might be possible to combine some of them. It might also be possible to offer recipients a menu of such alternatives from which they could choose. The Department also seeks comment on any other ideas for encouraging DBE participation in particular fields, including those mentioned in the December 1992 NPRM and the comments on it. We note that these alternatives focus on situations in which contract goals are used, and we seek other ideas that may work in situations where contract goals are not used.

Paragraphs (b) and (c) focus on the other side of the coin, fields in which DBEs are poorly represented. The proposed definition of such a field is one in which DBEs receive 25 percent or fewer of the contracts. The Department seeks comment on whether 25 percent is an appropriate level for this purpose and whether the standard ought to refer to a specific period of time, such as the previous year or an average over a number of previous years.

Paragraph (b) would direct recipients to give priority to "underrepresented" fields in operating their outreach and technical assistance programs. The recipients' focus would be on assisting firms to enter such fields. The Department seeks comment on whether any greater degree of specificity in terms of what recipients are to do in this respect is advisable.

Paragraph (c) is based on a proposal for business development programs (BDPs) in the December 1992 NPRM. Thirty-two comments, mostly from recipients, thought this was a bad idea, primarily because it would result in costly, administratively burdensome,

new requirements for them. Some also said it would be burdensome for firms and would duplicate other government programs. The 21 comments supporting the idea, including recipients and some DBE and non-DBE contractors, thought that providing additional training for DBEs would be beneficial. They differed on whether the program should be voluntary or mandatory for DBEs and on other details, and several mentioned that additional funding would be needed to make the idea work.

The SNPRM continues to propose the BDP concept, which gains added importance as a means of helping to meet the narrow tailoring requirements of current law. Having a BDP would be mandatory for a recipient, however, only if an operating administration decided it must have such a program. Recipients would also have the option to create such a program on their own, subject to DOT program approval.

The Department recognizes that BDPs can be costly and burdensome. Consequently, the size and scope of a recipient's BDP could vary with the recipient's resources. The SNPRM does not propose a given level of resources or activity for a BDP, even where an operating administration mandates the creation of BDPs. The Department also intends that recipients would have considerable flexibility in the creation of BDPs, which can be adapted, within the regulatory framework, to each recipient's circumstances. The NPRM's safeguards for the integrity of the BDP process, on which there was little comment, have also been retained in the SNPRM.

Like the December 1992 NPRM, the SNPRM permits recipients, as part of their BDPs, to create a mentor-protégé program. Sixteen comments favored this NPRM proposal, which was a modification of an existing non-regulatory FHWA initiative. These comments generally favored the limitations on the use of protégé firms incorporated in the proposal, which were designed to avoid the abuse of mentor programs. A few thought that the restrictions would make it too hard to attract participants, however. Three comments opposed the proposal, out of concern that such programs make it too easy for fronts to participate. As a discretionary, limited program, the Department believes that a mentor-protégé program can be useful as part of a strategy to help DBEs diversify, and so we are retaining this provision in the SNPRM. It should be noted that this is the only context in which a mentor-protégé program would be authorized.

The SNPRM includes appendices setting out guidelines for the operation of BDPs and mentor-protégé programs. The Department seeks comments on this guidance material.

One suggestion that has been made would tie together the idea of quality inspections of DBEs' work and mentor-protégé programs. Under this suggestion, recipients would inspect the work performed by DBE firms. Those that were not performing at an appropriate level would be referred to a mentor-protégé program for additional training, with incentives provided to the mentor firms. The Department seeks comment on the merits of this suggestion.

One of the key issues affecting virtually all parts of this section is how to define a "field" in which DBEs may be either over- or underrepresented. The SNPRM proposes a two-pronged approach. First, a field could be viewed as an industry defined by a SIC code in the SBA small business regulations. (Should this be a four-digit SIC code in all cases, or are there circumstances in which other levels of SIC codes would work?) Second, a "field" could mean a readily identifiable field of work designated by the recipient (e.g., landscaping or guardrail in highway construction). The Department seeks comment on whether it would be desirable and feasible for the Department to devise at least a partial list of "fields" in the second sense and, if so, what should be included on such a list.

**Duration**

One of the elements the courts have identified as part of narrow tailoring is that affirmative action programs should not be established in perpetuity. The duration of DBE program, as currently structured by statute, is narrowly tailored in this respect. That is, Congress reauthorizes the program from time to time. If Congress determines that the effects of discrimination have been eliminated, Congress would have a justification for ending the program.

The issue of duration is also sometimes discussed in terms of limits on the participation of individual firms in the program. In the December 1992 NPRM, the Department raised this issue under the heading of "graduation." There were 110 comments opposed to the idea of graduation. The point of many of these comments, particularly those from DBEs, was that it takes more than several years for a firm to be able to overcome disadvantage and survive in the open market. Being thrown into the open market could prove fatal to many DBE firms, comments said, given that discrimination has not disappeared from the marketplace.

Some prime contractors said that it was hard enough to find qualified DBEs as it is, without adding to the problem by graduating firms. Other comments pointed out that there are significant differences between the DBE program and the 8(a) program, which ties a very complex graduation formula to the success of the 8(a) program's systematic business development efforts.

On the other hand, 61 comments favored a graduation requirement or suggested an approach to graduation. Some of these comments favored "term limits" for firms (e.g., 5–10 years) in order to clear the way for other, newer firms in the DBE program. Others suggested approaches based on such factors as success in business development, gross receipts, number of projects or contracts in which a firm participated, a sunset provision for unsuccessful firms, etc. Graduation, comments suggested, could provide an incentive to DBE firms to become more competitive.

In one sense, the structure of the DBE program already provides for a limit on the participation of individual DBE firms. If a DBE firm grows to the point where it no longer meets SBA small business size standards or the statutory DBE size cap, it becomes ineligible. But as long as a firm remains a small business, and as long as there is a compelling need to remedy the effects of discrimination on small businesses owned and controlled by socially and economically disadvantaged individuals, it is difficult to find a sound rationale for excluding an otherwise eligible DBE from the program just because it has participated for a certain number of years or has had a degree of success in the program.

Arguments by opponents of graduation programs have considerable force. Unlike the 8(a) program, the DBE program does not provide for an encompassing business development program, with substantial agency assistance. The DBE program does not provide a comparable program for DBEs to graduate from. Experience has shown that, when firms leave the 8(a) program, or when state or local MBE/WBE programs are eliminated (e.g., in response to the Supreme Court's decision in Croson), the firm's success or the state or local government's MBE/WBE participation is imperiled. To force otherwise eligible DBEs out of the program would, given a marketplace in which the effects of discrimination persist, set up those firms to fail.

Therefore, while the Department will consider comments concerning how best to address the duration element of narrow tailoring, we are not proposing

any "graduation" mechanisms in the SNPRM.

**Subpart C—Goals, Good Faith Efforts, and Counting**

*Section 26.41 Overall Goals*

The statutes underlying this program direct the Department to ensure, unless the Secretary determines otherwise, that 10 percent of the funds authorized by the statutes be expended with DBEs. This statutory formulation is important for two reasons. First, it constitutes a determination by Congress (in the context of the highway, transit, airport, and airport concessions programs) that discrimination in contracting opportunities has existed, that the problem is nationwide in scope, and that remedial efforts are needed to address this problem. Second, it constitutes a determination by Congress that, unless the Secretary determines otherwise, expending 10 percent of authorized funds with DBEs is a reasonable nationwide level of effort to achieve the remedial objective of the statutes.

These actions by Congress form an important part of the Department's basis for concluding that there is a compelling government interest in maintaining the DBE program, meeting the first part of the strict scrutiny test articulated in Adarand. We note that Department of Justice proposals for modifying affirmative action programs in Federal procurement are backed by an appendix citing substantial evidence of the compelling need for programs of this kind. The Department also relies on this appendix and similar evidence.

Strict scrutiny also requires that the program be narrowly tailored to address the compelling government interest. In our view, some aspects of narrow tailoring are best addressed at the recipient level. Under Part 23, recipients set overall goals, and we believe that recipients should continue to perform this function. The SNPRM proposes to modify how recipients set overall goals, with the aim of improving and strengthening the process from a narrow tailoring point of view. These proposals are, in the Department's view, consistent with Congressional action establishing the nationwide ten percent level of effort, which the Department anticipates continuing to use as a guide for evaluating the overall success of the DBE program.

Under the *current* overall goal requirements (49 CFR § 23.45(g)(5)), recipients set overall goals based on two factors: (1) a projection of the number and types of contracts the recipient will award and a projection of the number of DBEs likely to be available to compete for the contracts; and (2) past results of the recipient's DBE efforts. These factors are used to implement the DBE program goal of supporting "the fullest possible participation of [DBE firms]" § 23.1). Recipients must make a special showing to obtain DOT approval for an overall goal of less than 10 percent (this showing has been made on a few occasions). As a practical matter, recipients have often implemented these provisions by looking at their potential contracting opportunities, estimating how much DBE participation could be obtained from existing DBEs, and setting a goal to maximize this potential participation. The recipient's past performance often has operated as an informal "maintenance of effort" provision with respect to the level of overall goals.

In the context of narrow tailoring, a recipient's goal would remedy the effects of discrimination if it led to the results we could expect if the playing field for all businesses were level. The Department seeks comment on three conceptually similar, but mechanically different, means of setting a goal to approximate the results of a level playing field.

The first alternative would compare DBEs with all businesses. If we know the percentage that DBEs make up of all businesses that are available to work for the recipient, then the results of a level playing field will be DBE participation in the same proportion. The calculation looks like this:

$$\frac{\text{DBEs}}{\text{All businesses (large and small, DBEs and non - DBEs)}} = \text{DBE capacity}$$

By all businesses in this context, we mean all businesses in types of work relevant to the recipient's DOT-assisted contracting. We seek comment on the use of SIC codes or other information to identify the relevant business types. Also, would it make better sense to compare DBEs to only small businesses?

This option parallels the way we calculate DBE achievements, which looks like this:

$$\frac{\text{Contracting dollars to DBEs}}{\text{Contracting dollars to all businesses}} = \text{DBE participation}$$

Under the second alternative, the recipient would estimate the number of minority-and women-owned businesses in the state or locality in which it operates. This estimate could be made on the basis of U.S. Department of Commerce data. The data are broken down by 2-digit SIC codes. The recipient would make the estimate using only those SIC codes that represent a major portion of its DOT-assisted contracting work (e.g., for a state highway agency, those SIC codes encompassing construction, architects and engineers, etc.) The Department seeks comments on whether the Department should standardize the SIC codes used for this purpose by various categories of DOT recipients, and, if so, what those SIC codes should be (e.g., for state highway agencies, airports, transit authorities).

Second, the recipient would determine the total number of all businesses in these SIC codes within the state or locality. There is U.S. Census data available that provides this number. The recipient would then determine what percentage minority- and women-owned businesses were of the total. This percentage, absent adjustments (see discussion below), would become the recipient's overall goal. The goal would be expressed in terms of a percentage of the recipient's DOT-assisted contracting dollars. This is the result we would expect from a level playing field. The calculation would look like this:

$$\frac{\text{Minority/Women-Owned Businesses in Relevant SIC Codes in the State/locality}}{\text{All Businesses in Relevant SOC Codes in the State/locality}} = \text{DBE capacity}$$

It may be possible for the Department to calculate these goals, saving recipients the time and effort required. The Department will consider doing so, and we invite comment on whether this would be a good idea.

We note that there are limitations to the data currently available. The 2-digit SIC code data on which the numerator of this equation would be based could have significant error rates for some states, leading to a degree of statistical uncertainty. At the present time, however, this appears to be the best state-by-state data available on a nationwide basis.

Data are available by single-digit SIC codes for construction. However, this code tends to aggregate data for a greater number of businesses than those usually found in highway or transit construction. On the other hand, the state-by-state one-digit SIC data is likely to have a lower error rate than two-digit state-by-state data. We invite comment on whether this alternative should use one-digit rather than two-digit SIC data.

We also recognize that there may be differences between localities and states concerning the relative availability of minority-and women-owned businesses. Federal data is not currently available, however, in a useful form to make the calculation needed for the numerator for localities. Where there is not better local data, however, we may have to rely on statewide data, for lack of a practicable alternative.

The third alternative differs from the others in that it focuses on actual participation by both DBEs and other firms. The approach would determine the percentage that DBEs make up of all firms that actually work for the recipient, in any capacity, on DOT-assisted contracts. To avoid having short-term trends skewing the calculation, we propose to use a five-year average as the basis for the calculation. (We seek comment on whether this is an appropriate time period for this purpose.) The calculation looks like this:

$$\frac{\text{Average number of DBE firms actually working on DOT-assisted contracts for the recipient, over five years}}{\text{Average number of all firms actually working on DOT-assisted contracts for the recipient, over five years}} = \text{DBE capacity}$$

This approach uses data that are readily available to the recipient. Since it is based on actual experience, it does not rely on projections about potential participation.

Each of these alternatives describes the shape of a level playing field in a somewhat different way. Each may have its advantages and disadvantages. We seek comment on the relative merits and problems of each approach, or other approaches that commenters may suggest.

In considering how to analyze capacity for Federal procurement, the Departments of Justice and Commerce are considering whether it is possible to include information on whether firms are ready, willing, and able to work on Federal contracts. Is this a relevant consideration for calculating DBE capacity in this program, and is data available that would make it possible?

As a means of reducing potential burdens on recipients, § 26.41(c) would permit recipients to use a DBE capacity figure calculated by another agency in certain circumstances. First, as part of the Federal government's proposed direct procurement rules, the DOC will calculate "benchmarks" for various industries. These benchmarks, which are likely to be established on a national or regional basis (e.g., a regional basis for construction), could form a basis for a recipient's DBE capacity calculation.

To use the benchmark for this purpose, however, the recipient would have to determine that the area from which it obtained contractors was generally similar to the area for which DOC prepared the benchmark. That is, if DOC calculates a benchmark for construction in a particular region, a recipient could use the benchmark (and not calculate its own DBE capacity figure) if it obtained construction contractors from the same general region. (Since DOT does not permit its grantees to use geographic preferences in contracting, such comparisons may be readily demonstrable.) In some fields, of course, there might be a national market that everyone uses (e.g., transit vehicle purchases). One of the issues in using DOC figures is that DOC benchmarks, because of differences between Federal procurement and the DBE program, will not include women-owned firms. Consequently, recipients would have to adjust DOC benchmarks to account for women-owned DBEs. We seek comment on whether data are available for this purpose.

Closer to home, recipients may find that other recipients have established overall goals. For example, all state DOTs will establish such goals. A transit authority in a particular state could use the state DOT's goal, assuming the transit authority did its procurement in the same general area. Likewise, recipients (e.g., airports and transit authorities) in a metropolitan area might use one another's goals, or work together on a combined goal, again assuming that their procurement areas are generally similar. The objective is for recipients to use the best possible data to arrive at DBE capacity, while not unnecessarily duplicating the relevant work that others may have done.

As noted in proposed § 26.41(d), recipients may also use other means to establish goals (e.g., a local disparity study). In the interest of promoting flexibility in the program, these could include methods a recipient has devised that are not mentioned anywhere in Part 26. Under § 26.41(d), the recipient would need the operating administration's approval to use alternative goal-setting methods, to ensure that its tailoring was appropriately narrow to meet *Adarand* standards.

The SNPRM (§ 26.41(e))asks for comment on one additional consideration in goal setting. The goal-setting analysis is based primarily on present DBE capacity. But it is very possible that the effects of discrimination have suppressed the formation of DBE firms (e.g., by having made capital more difficult to obtain over a long period, by having deterred potential DBE owners from entering businesses relevant to DOT-assisted

contracting). To account for this suppression of DBE business formation, the proposed rule would require the recipient to increase the goal, if the recipient had evidence to support a finding that DBE business formation had been suppressed. DOJ has proposed a similar mechanism in its NPRM on Federal procurement affirmative action issues.

We seek comment on what data sources would be relevant and available, or would need to be created, to complete this so-called "but for" analysis. Other relevant information might include evidence of discrimination in the public and private sectors in such areas as obtaining credit, bonding, and licenses. It could include evidence of discrimination in pricing and contract awards. If, through analysis of such information, the recipient could make a quantitative estimate of DBE suppression, the recipient would increase its overall goal proportionately.

The SNPRM would require recipients to seek information relevant to DBE suppression as part of their public participation process, but it would not require recipients to calculate a suppression factor where data was unavailable. At the same time, where recipients have some information (e.g., anecdotal information that cannot readily be quantified) that the capacity analysis understates the appropriate goal, recipients could take appropriate action in administering their programs to attempt to account for this factor. The Department seeks comment on the issue of how recipients would best obtain data and how they would best proceed in the absence of quantifiable data.

The Department is also aware that, under *Adarand*, programs for women-owned firms may be subject to different legal standards than minority-owned firms. Nonetheless, because the Department's statutes call for operating a unified DBE program, including both minority-and women-owned firms, this SNPRM proposes to use the same administrative mechanisms for all DBEs. We invite comments on alternative ways of viewing the overall goal process, in the post-*Adarand* legal climate, as well as alternative mechanisms. We would also be interested in seeing data that might illustrate the effects on DBE goals of making the calculation this way, as well as through alternative means commenters might suggest.

The Department wants very much to work with recipients and other commenters to flesh out the mechanics of the new goal-setting process. (The costs of making changes in the goal-setting process are eligible for reimbursement from Federal funds on the same basis as the funds are available for other program administration costs.) Since this proposal is intended, in large part, to conform to the legal requirements enunciated in *Adarand*, the Department also seeks comment on the extent to which it succeeds in doing so. The Department also seeks any other suggestions commenters may have on ways of adjusting the overall goal provisions of the rule in light of *Adarand*.

Comments to the December 1992 NPRM raised only a few issues concerning overall goals. Sixteen commenters, mostly recipients, favored dropping the current rule's requirement for a public notice and comment procedure prior to the adoption of each annual overall goal. They said it was an administrative requirement that did not result in the receipt of useful comments. Some of these comments said the requirement should be retained in cases where a goal of less than 10 percent was requested. Three commenters, also recipients, favored its retention. As noted above, we believe that there are values in public participation, and the SNPRM includes such a requirement.

A few comments requested the deletion of the existing requirement that the Governor or other politically responsible official at the head of a governmental jurisdiction sign a request for a goal of less than 10 percent. We believe that this change would be beneficial, in that it would remove an administrative step that can delay goal submissions, so the SNPRM does not include it. We believe that, by this time, the process of goal-setting is likely to be well institutionalized in most recipients' organizations, making a political official's sign-off less important than when we began the program in 1980.

One issue related to goal-setting that was the subject of considerable comment to the December 1992 NPRM is that of group-specific goals. The Department received 32 comments to the December 1992 NPRM, principally from minority-owned DBE firms and their organizations, as well as some recipients, urging the adoption of either separate goals for minority-owned and women-owned DBEs or of multiple goals for different designated groups. Twelve comments, principally from recipients and women-owned DBEs, opposed changing the program to permit separate DBE goals.

The reason most often advanced for adopting separate "MBE/WBE" or group-specific goals was a concern on the part of minority firms that they were losing market share to firms owned by white women. Since Congress included women in the DBE program in 1987, comments said, the proportion of contracts going to women-owned DBEs has increased while the proportion of contracts going to minority-owned DBEs has decreased (FHWA statistics appear to support this observation in a number of states). Many of these comments suggested that firms owned by white women are, in effect, less disadvantaged than those owned by minorities. They perceive women-owned firms as having better access to capital, credit, and business opportunities than minority-owned firms. Many women-owned firms are simply fronts, in the view of some of these comments. Even if they are not fronts, strictly speaking, they still can ride on the coat-tails of spouses, relatives, or established businesses.

Women-owned firms countered by asserting that bias against their firms by recipients in the certification process made it more difficult for them to get certified. The main reason these comments suggested for the perceived bias was a desire by some certifying officials to ensure that minority-owned firms retained the lion's share of contracting opportunities under the program.

The Department understands the views of commenters favoring group-specific goals, recognizing that many minority participants in the program have a genuine concern with the market share of DBE work that is available to them. We also note that some of the comments (particularly one from the Mexican-American Legal Defense and Education Fund) made interesting arguments that such goals are constitutionally permissible. However, the use of group-specific goals could raise a variety of policy and administrative problems, and we believe for legal reasons that we cannot propose making group-specific goals part of the Department's program.

The problem that we believe precludes the Department from permitting group-specific goals in the DBE program is a statutory one. The Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA) added women as a "presumptive group" within the definition of disadvantaged business enterprises. The legislative history of STURAA was quite explicit about the intent of this change. The Senate report on the bill said the following:

> This provision extends the [DBE] program through 1990 and adds women (WBEs) to the rebuttable presumption of being disadvantaged. * * * It is the intention of this language that prime contractors performing Federal-aid highway construction

contracts and State transportation departments will now be able to use WBEs to meet their DBE contract goals. It is not intended that the overall DBE requirement set by this section be increased as a result of the inclusion of WBEs as a presumptive group. (S. Rept. 100–4 (1987) at 11–13).

The STURAA Conference Report directly addressed the issue of separate goals. It said the following:

It is the intention of the conferees that firms owned and controlled by women (WBEs) be included, as a presumptive group, within the definition of Disadvantaged Business Enterprise (DBE). The conferees intend that contractors bidding on Federal-aid highway projects will now be able to make best efforts to meet DBE contract goals using DBEs (as they were defined prior to this Act),WBEs, or combinations thereof. Additionally, *the conferees intend that the Department of Transportation and the States no longer should require contractors . . . to meet separate goals for DBEs (as defined prior to this Act) and WBEs.* (H. Rept. 100–27 (1987) at 148, emphasis added).

In the 1987 amendment to Part 23, the Department's contemporaneous construction of this statutory change was that Congress mandates a single goal encompassing both minority and women-owned DBEs.

Congress extended the DBE program in section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA). Congress made clear that "[t]his section provides for an ongoing Disadvantaged Business Enterprise (DBE) program. This section is a continuation of section 106(c) of the STURAA of 1987* * *." (H. Rept. 102–404 (1991) at 307). Twice, during the House Public Works and Transportation Committee's consideration of ISTEA and in a subsequent floor vote, the House rejected amendments that would have authorized or required separate MBE/WBE goals.

The present DBE program statute, then, is a continuation of section 106(c) of STURAA, concerning which Congress expressed its explicit intent that contractors should not have to meet separate goals for minority-owned and women-owned businesses. Congress had opportunities to change that direction in 1991 and did not do so. In these circumstances, it is difficult to see how the Department could, consistent with the language and legislative history of the statute, require or authorize separate, let alone group-specific, goals. (This same point applies to DBE airport concessions under Subpart G, since the airport program DBE legislation—49 U.S.C. 47102 and 47113—incorporates the same DBE definition).

*Section 26.43 How Are Overall Goals Established for Transit Vehicle Manufacturers?*

There were few comments on the December 1992 NPRM section on transit vehicle manufacturers (TVMs), which proposed to continue the existing Part 23 TVM section. Two comments supported the section, one asked for greater clarity, and another said it would be useful if acquisition of specialized equipment obtained by non-transit recipients (e.g., airport fire trucks) could benefit from the same approach. Another comment said that recipients, rather than TVMs themselves, should be responsible for certifying DBEs who work for TVMs.

The Department has adopted one of these comments, and the SNPRM would permit an FAA or FHWA recipient to use the procedures of this section with respect to meeting DBE requirements in the acquisition of specialized equipment, subject to the approval of the concerned operating administration. The Department would make one additional change, intended to provide greater flexibility to recipients, particularly when dealing with a large vehicle procurement. In such a case, the recipient may, with the approval of the concerned operating administration, establish a project-specific goal instead of relying on this section.

Transit vehicle production is clearly a national market, in which it does not make sense for individual transit authorities to set goals for DBE participation individually. Consequently, under the SNPRM, FTA would set a goal for manufacturers. The goal would be set by a means similar to the means the Department chooses for establishing overall goals under § 26.41.

*Section 26.45 What Means Do Recipients Use To Meet Overall Goals?*

In narrowly tailoring a nondiscrimination regulation, one of the important steps the Department can take is to place greater emphasis on race-neutral approaches such as outreach and technical assistance to meet program objectives. Consequently, the Department is proposing that recipients' first resort in meeting overall goals be to use these means. The proposed, non-exclusive, list of steps that recipients can take include several measures mentioned in the existing Part 23 and the December 1992 NPRM.

The recipient would use means like those listed in paragraph (a) to meet its overall goal to the extent it was able to do so. In many cases, however, it will probably be necessary to use race-conscious means to overcome the effects of discrimination. The Department does not intend, in this section, to say that race-neutral means must be used "before" race-conscious measures in any crude chronological sense. We anticipate that a variety of measures will be used in combination to provide appropriate flexibility to recipients.

The basic means to be used when a recipient cannot meet its overall goal wholly through race-neutral methods is contract goals. Because the recipient may meet at least a portion of overall goals using other means, this proposed rule differs from the existing rule and the December 1992 NPRM by not necessarily requiring a contract goal on every contract that has subcontracting possibilities. It would be up to the recipient to determine when use of contract goals is needed to meet the overall goal. For example, if a recipient had met its overall goal for a given year by the end of September, it might use paragraph (a) techniques rather than contract goals the rest of the year.

The proposed regulatory text does not change the existing rule's provision that contract goals are calculated on the basis of the entire amount of the contract (i.e., Federal plus non-Federal shares). We solicit comments, however, on whether there should be any change in this provision, particularly in situations where there is only a small percentage of Federal funds in the contract.

The SNPRM also seeks comment on including an "evaluation credit" approach. Under this approach, if a DBE's bid or offer on a prime contract falls within a price differential designated by the recipient (from one to ten percent of the lowest non-DBE offer), the DBE would get the contract. Alternatively, as among non-DBE bidders on prime contracts, a bidder who had a designated level of DBE participation (set by the recipient in a way equivalent to the way contract goals are set) would receive the contract if its bid fell within a given percentage differential of the lowest bid by a bidder who did not achieve that level of DBE participation.

We emphasize that, as proposed, this mechanism would apply only to bidding on prime contracts (though we seek comment on whether there is any feasible way of using it or a similar mechanism on subcontracts). For example, suppose a recipient established a price credit of 7 percent for bidders who had at least 10 percent DBE participation. Bidder A bids $105,000 on a contract, and has 10 percent DBE participation. Bidder B bids $100,000 for the same contract, but has only 5 percent DBE participation.

Bidder A would receive the contract, since it achieved the targeted DBE participation and was within the 7 percent evaluation credit range established by the recipient.

If race-neutral means are the first resort under this proposed section, then set-asides and other more intrusive means, such as a "conclusive presumption," are the last resort. By a set-aside, we mean a procurement practice that permits no one but DBEs to compete for a given contract. Only if the recipient documents that there are no other, less intrusive, ways to meet DBE goals, and only if the recipient has state or local authority independent of Part 26, should the recipient use means of this kind on a DOT-assisted contract.

When a recipient uses race-conscious measures, and these measures appear to have significant success in combating the effects of discrimination, what happens next? Given that, under Adarand, measures must be narrowly tailored to achieve nondiscrimination, we believe that recipients must consider changing their use of race-conscious measures when it appears that DBEs are closer to competing on a level playing field.

For example, suppose a recipient significantly exceeds its overall goals over a number of years. This suggests to us that the recipient should rethink its use of race-conscious measures to achieve overall goals (e.g., to rely more on race-neutral measures). Note that we are not suggesting shutting down the program or getting rid of overall goals in this situation, just changing the mix of measures used to achieve overall goals.

Another way of looking at the slope of the playing field shifts the focus to the broader economy. It is likely that, in many places, DBE participation is better in DOT-assisted contracting than in many other sectors of the economy, simply because of the existence of this program over the last 17 years. Were it not for the DBE program, it is likely that the picture of DBE participation in DOT-assisted contracting would resemble that in similar sectors of the broader economy.

Suppose that, in a given state, minority-and women-owned contractors account for 20 percent of the contractors, but only 10 percent of the business volume. Whatever DBE participation achievements may be in DOT recipient contracting, this suggests that the playing field is not altogether level in the state. If we took away the use of race-conscious measures in the DOT program, its achievements would probably fall to a level approximating that of the broader economy. This is a rationale for maintaining the use of race-conscious measures. If this rationale disappears in the broader economy, then the recipient should rethink its use of race-conscious measures to achieve overall goals (e.g., rely more on race-neutral measures). The Department asks for comments on the data that would be needed to make this approach work.

One concern that disadvantaged businesses have expressed is that recipient sometimes do not apply measures to obtain DBE participation evenly through their various contracting opportunities. For example, DBEs have said that some recipients meet their goals entirely through construction contracting, largely ignoring other types of businesses (e.g., suppliers, architects and engineers, other professional services). The Department's intention is that recipients explore all opportunities for DBE participation, in all fields in which DOT-assisted contracting occurs. We seek comment on whether any regulatory provisions are needed on this subject and, if so, what they should say.

*Section 26.47 What Are the Good Faith Efforts Procedures Recipients Follow in Situations Where There Are Contract Goals?*

The concept of good-faith efforts is a very broad one, applicable in some senses in a variety of contexts under the rule. Section 23.47, however, applies only in the case where a recipient uses contract goals, one of the intermediate level of mechanisms available to meet overall goals. When the recipient has set a contract goal, the recipient would award the contract to the apparent successful bidder if either of two things happen: the bidder meets the contract goal by providing sufficient DBE participation or the contractor documents adequate good faith efforts (GFE), despite not meeting the contract goal with DBE participation. This section emphasizes that either showing is acceptable. It would not be consistent with the rule for the recipient to insist on a bidder meeting the goal, disregarding its showing of GFE. To do so would establish a *de facto* quota system. At the same time, it is not consistent with the rule for a recipient to award a contract based on merely *pro forma* or perfunctory efforts by a bidder. This is equally inconsistent with the rule.

In order to reinforce the point that the good faith efforts provision is meant to be taken seriously, the SNPRM proposes that recipients would implement an administrative reconsideration process when the apparent successful bidder had been denied the contract for failing to make adequate good faith efforts. This process is intended to be informal and minimally burdensome, but it is also intended to cause recipients to make sure that their decisions on GFE are well-founded.

One suggestion made by DBEs was that, rather than the recipient itself, a committee made up of recipient, DBE, prime contractor, etc. representatives should make GFE decisions. Is this a good idea, either at the initial decision or review level? Should the Department include such a provision in the final rule?

One issue related to GFE that was the subject of a good deal of comment on the December 1992 NPRM was whether DBE prime contractors should have to meet contract goals. It is clear that the existing Part 23 does not permit recipients to require DBE prime contractors to do so, as pointed out in the preamble to the December 1992 NPRM. (Any recipient programs to the contrary are inconsistent with the Department's rule; FHWA has provided guidance to its recipients emphasizing that any programs containing inconsistent provisions on this point need to be changed.) Under the existing rule, a DBE prime contractor meets a contract goal by virtue of being a DBE. Since the entire amount of a contract to a DBE is counted toward the contract goal, a DBE prime contractor's goal attainment is 100 percent.

Thirty-six comments to the December 1992 NPRM favored changing this provision, so that a DBE prime contractor would have to meet subcontracting goals just like any other prime contractor. Commenters taking this position said that requiring DBE primes to meet goals would help to maximize DBE participation and that it was fair to impose the same requirements on all prime contractors. In some cases, these comments said that DBE primes should only meet goals when they would otherwise subcontract work, or should only have goals applying to that part of the work of a contract they did not plan to perform with their own forces.

Twenty-four comments opposed adding a regulatory requirement for DBE prime goals. Some of these agreed with the rationale of the existing rule, saying that there was already, in effect, 100 percent participation. Others said that requiring DBE primes to meet goals would hinder their growth and productivity, or that recipients should have discretion on this matter. Some comments said that DBE primes should have to meet goals only if they subcontracted work.

The Department seeks additional comment on this issue. We note that there are two competing notions of

equity involved in the debate. On one hand, requiring DBE primes to meet subcontracting goals imposes the same requirements on all prime contractors. On the other hand, since DBE primes are implicitly viewed as not enjoying a level playing field with non-DBE primes, requiring both to meet the same subcontracting requirement can be viewed as simply maintaining the inequity.

With respect to subcontracting, the SNPRM, with certain exceptions, would not count toward DBE goals work performed by non-DBE second tier subcontractors. This approach for subcontractors is more consistent conceptually with a requirement for DBE primes to meet subcontracting goals. On the other hand, it can be argued that to make a DBE prime meet subcontracting goals in effect requires over 100 percent DBE participation on DBEs' prime contracts.

The SNPRM proposes the two approaches in the alternative. We also seek comment on a third alternative, specifying that a DBE prime has to use its own forces for a sufficient percentage of the contract to meet the contract goal. If the DBE prime were subcontracting out so much of its work that it would not cover the goal amount with work performed by its own forces, then the DBE would have to make up the difference with other DBE participation.

The most commented-upon issue in the December 1992 NPRM section on GFE concerned whether compliance with the requirement to supply information about goal attainment or GFE should be a matter of responsiveness or responsibility. If a matter of responsiveness, the bidder must submit all the required information with its bid. Failure to do so results in the bid being non-responsive. If a matter of responsibility, the apparent successful bidder is given a certain amount of time to submit the information following the opening of bids. Under Part 23, recipients had the option of whether to use the responsiveness or the responsibility approach. The December 1992 NPRM proposed that the responsiveness approach be used in all cases, in order to mitigate the problem of "bid-shopping," in which the apparent successful bidder uses the compliance time after bid opening to conduct a sort of reverse auction among prices of DBEs interested in the job.

Thirty-eight comments, mostly recipients and DBEs, supported the NPRM proposal. Many of these comments said that it would be an effective means of limiting prime contractors' opportunity to bid-shop. Others pointed to specific recipients' programs that successfully used the responsiveness approach. A few comments suggested modifications to this approach, such as allowing 5–7 days for contractors who did not meet the goal to show GFE. We have also received a suggestion that, given what some DBEs perceive as abuses of the "letter of intent" or "commitment" process by prime contractors, that the Department should establish a firm policy of requiring the use of the DBEs that a prime contractor originally names.

Sixty-five comments, mostly prime contractors but including a few recipients, opposed the December 1992 NPRM proposal. These comments said that bid shopping was not that big a problem, or that some degree of bid shopping was appropriate. Their main objection was that the proposal was too burdensome for prime contractors. They painted a picture of contractors submitting multiple bids after a hectic whirl of last-minute negotiations involving quotes from a variety of subcontractors. The time frame for finalizing bids is too short to make the responsiveness approach practical, they said. Some recipients said that they had tried this approach and found it didn't work. Other comments suggested variations on the responsibility approach, such as limiting the time after bid opening in which a contractor could submit the required information or considering as evidence of GFE only those actions a contractor had taken prior to bid opening.

Both sides of this debate make some valid points. Based on DOT's experience with the contracting process, bid shopping appears to be a significant problem that negatively affects the ability of DBE subcontractors to succeed in performing contracts for a profit. Requiring information to be submitted as a matter of responsiveness, in our view and that of a number of comments, appears to be a reasonable means of mitigating that problem. On the other hand, the responsiveness approach would probably be more difficult administratively for prime contractors, though it is being used successfully in some places.

Given that there are valid points to be made in favor of both responsibility and responsiveness, and that the circumstances of different recipients may well differ concerning the desirability of one approach or the other, the significance of a bid-shopping problem in a particular jurisdiction, etc., the SNPRM would continue the existing practice of allowing recipients to choose which approach to follow. The Department seeks additional comment on this issue. In particular, the Department would be interested in receiving examples of how one system works, or fails to work, in current practice.

Sixteen comments to the December 1992 NPRM asked for clarification or greater guidance concerning what constitutes GFE. Some of these comments asked for more "objective" GFE criteria, though they did not suggest what the objective criteria should be. Others suggested tightening up informational requirements. For example, some agreed with a proposal in the December 1992 NPRM that the prime should actually have a contract with the DBE in hand to present to the recipient.

The Department is responding to these comments in two ways. First, the Department has rewritten and expanded the rule's GFE guidance (see Appendix B) to provide greater assistance to recipients and contractors. There would also be a new definition in § 26.5 which says that GFE are "efforts to achieve a DBE goal or other requirement of this Part which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement." Second, while it may not be necessary to have a written contract between the DBE and the prime contractor presented to the recipient, the SNPRM would require that the prime contractor present a letter from each DBE submitted to meet the goal confirming that the DBE is going to perform the contract as represented in the prime contractor's submission.

One of the features of the existing guidance concerning GFE is that a contractor is not viewed as making GFE if it rejects a quote from a DBE in favor of a quote from a non-DBE when the former is higher than the latter, but the DBE has still offered a "reasonable" price. Seventeen comments asked for clarification of what a reasonable price is, four supported the existing guidance, while 14 opposed the concept. Opponents said the requirement makes the system more expensive, since it does not allow prime contractors to get the lowest price they can for subcontracts. Some of these comments also said they did not want to have specific "reasonable price" requirements (e.g., a percentage) in their bid documents.

The Department believes it would be difficult to mandate a "reasonable price" differential that would make sense across the board for DOT-assisted contracts. However, the Department does believe that recipients should have the discretion to do so. Appendix B would specifically provide this

discretion to recipients. The Department notes that in Federal procurement, a range of 1–10 percent is suggested. The Department seeks comment on whether this is a reasonable range, and whether Appendix B should include a specific numerical range of this kind. The Department seeks comment on whether it would be desirable and feasible to establish a national standard concerning award of a subcontract to a DBE which quoted a higher price than another subcontractor, consistent with the narrow tailoring standard of *Adarand*.

The GFE guidance would provide that in determining whether a bidder has made good faith efforts, a recipient may take into account the success of other bidders in meeting goals. That is, if Bidder A has met the goal, but lower Bidder B has not, it is fair for a recipient to inquire if Bidder B's efforts were sufficient. We also seek comment on whether additional provisions would be useful. For example, should there be additional language concerning good faith efforts in subcontracting initiated by a prime contractor after award of the initial prime contract, particularly when the prime contractor may not have met its original commitments to DBE participation?

The December 1992 NPRM proposed that a prime contractor could terminate a DBE only for breach of contract. This proposal would have prohibited terminations for convenience of DBEs. Sixteen comments, primarily from recipients and some DBEs, favored the NPRM proposal, while 19 comments, mostly from prime contractors, opposed it. The opponents said that terminations for convenience were an often-necessary part of doing business and that prohibiting them would add to expense, delay, and litigation. The Department takes a middle ground in the SNPRM. As a general matter, the rule would not prohibit terminations for convenience. However, a contractor could not terminate a DBE for convenience and then turn around and perform the work with its own forces or subcontract to a non-DBE subcontractor, absent the prior written consent of the recipient. We believe that this approach will stop a potential source of abusive conduct by primes while not denying primes needed flexibility.

The December 1992 NPRM also proposed that when a DBE was dropped from a contract, the prime contractor would have to make GFE to find a substitute DBE, even if the prime was meeting its goal by using other DBEs. Twenty comments, principally prime contractors, opposed this proposal. They did not think that requiring substitution even when a prime contractor was already meeting its goal from other sources was a good idea. It would, they said, be a disincentive to prime contractors oversubscribing their goals. Four comments supported the proposal.

The Department has decided not to adopt this proposal in its entirety. As under the existing rule, recipients would still have to make good faith efforts to find a DBE substitute for a DBE that has been unable to complete its planned participation. However, a requirement to replace DBE participation, even when doing so is not needed to meet a contract goal, departs too far from the objective of race-conscious remedies, which is to remedy the effects of discrimination. Consequently, the SNPRM would propose requiring substitution only as needed to meet a contract goal. The Department seeks comments, however, on whether there is a supportable rationale for requiring substitution of DBEs simply on the basis of contract law (i.e., meeting the original commitment to the recipient).

The December 1992 NPRM proposed that recipients have a liquidated damages or penalty provision in their contracts to sanction noncompliance by recipients with the termination and substitution provisions of this section. Two comments favored this idea, while 20 opposed it, saying that liquidated damages or penalty clauses were contrary to state procurement laws in many cases. The SNPRM adopts the suggestion made by one of these comments that recipients be required to have appropriate administrative remedies available to deal with noncompliance, without prescribing what they should be.

*Section 26.49 How Is DBE Participation Counted Toward Goals?*

One of the issues most commented upon in response to the December 1992 was that of whether the cost of materials obtained from non-DBE sources, but used by DBE contractors, should be counted toward goals. The December 1992 NPRM solicited comment on this issue because the present regulation (49 CFR 23.47(a)) results in an inconsistency in the way credit is counted for materials, providing that the entire value of a contract with a DBE is counted toward goals. This has been interpreted, since the beginning of Part 23 in 1980, to include the cost of materials the DBE contractor obtains, from whatever source, for performance of the contract.

For example, suppose a DBE steel erection firm buys structural steel from a major steel company, which is not a DBE. The steel accounts for 75 percent of the cost of the contract, the rest being accounted for by labor, overhead, profit, etc. Under the present rules, the entire cost of the contract, including 100 percent of the cost of the steel, would be counted toward DBE goals.

The inconsistency arises because of the way that supplies and materials are counted in other situations. If a non-DBE steel erection company bought the same steel from the same steel manufacturer at the same price, none of the value of the steel would count toward DBE goals. If the non-DBE steel erection company bought the steel through a DBE regular dealer, 60 percent of the cost of the steel would count toward DBE goals. The inconsistency could be removed if all materials and supplies were counted the same way: that is, if only materials and supplies produced by a DBE manufacturer or purchased through a DBE regular dealer could count toward DBE goals, regardless of whether the contractor was a DBE or not. This approach would result in the DBE steel erection company, in the example above, being able to count only 25 percent of the value of its contract toward DBE goals.

The great majority of comments on this point (83) opposed resolving the inconsistency in this way, saying that the entire amount of DBE contracts—including materials obtained from non-DBE sources—should continue to count toward DBE goals. Recipients, DBEs, and non-DBE contractors were all represented in this group. They said that materials are always included in the cost of any contract, and so it was meaningless to talk about counting the value of a contract and yet not counting the cost of materials. DBEs, like other contractors, take a financial risk in obtaining materials, and this should be taken into account. Also, since materials often make up a significant portion of the value of a contract, not counting materials would mean a significant reduction in goal attainment, and goals would have to be lowered accordingly. Some comments said that DBE supplies or manufacturers were not available in their areas, making reliance on other sources inevitable.

Fourteen comments, including some recipients and DBEs, favored limiting the counting of materials from non-DBE sources. Some of these suggested treating DBE and non-DBE contractors alike with respect to the counting of materials. In this scenario, only the work actually performed by the DBE would count toward goals. Others suggested limiting to 60 percent the amount of credit for non-DBE source supplies that could be counted toward

goals (placing a DBE contractor in an analogous position to that of a DBE regular dealer).

The Department has decided not to propose changing this provision. There are advantages, from the point of view of consistency and logic, in counting supplies and materials the same way in all cases. These advantages are outweighed, in our view, by the potential disruption that would be caused to the program by changing this basic counting policy. Making the change would have significant effects on goal attainment and would cause recipients and contractors to reorient the way that they do business. We also believe that comments have a good point when they say that since a DBE contractor takes a risk in acquiring materials, and must manage their acquisition and use, it should receive credit for using them in the context of the contract. We do agree with a comment saying that credit should be allowed only for materials that the DBE contractor actually obtains and uses for the contract, and we have added language to this effect.

Another issue of interest to commenters was an NPRM proposal that, for the value of a DBE contract to be counted toward goals, at least 30 percent of the work of the contract must be performed with its own forces. The idea behind this proposal was that such a requirement would limit the possibility of "pass-throughs." Twenty-six comments favored a requirement of this type set at a level of at least 30 percent (a number of these comments favored higher levels, such as 60–75 percent, or supported recipient discretion to establish such a limit). Seventeen comments opposed such a provision, most saying that it would hurt contractors whose work is material-intensive.

The Department believes that a mechanism of this kind would be useful in preventing pass-throughs and in making sure that DBEs really have a sufficient role in performing contracts for which they obtain credit. The SNPRM therefore would provide that a DBE contractor that does not perform at least 30 percent of the contract is rebuttably presumed not to be performing a commercially useful function. The comments opposing this proposal may have misunderstood its implications for material-intensive contracts. This provision (and the existing FHWA practice for prime contractors on which it is based) does not interfere with such contracts: if the contractor is responsible for the materials (i.e., as the comment referred to above suggested, if the DBE negotiates price, determines quantities, orders the material, and installs and pays for the material itself), the portion of the contract represented by the materials is viewed as being performed by the contractor. Language referring to this concept has been included in the SNPRM.

Another issue raised by the December 1992 NPRM is so-called "back-subbing." A non-DBE prime contractor subcontracts a portion of the work of the contract to a DBE. The DBE, in turn, subcontracts a portion of its work back to the prime contractor. Forty-eight comments agreed that work subcontracted back to the prime contractor by a DBE subcontractor should not be counted toward the goals, since it is work performed by the prime contractor, not by the DBE. A number of these comments suggested that the prohibition on counting work subcontracted out by DBEs should apply to work subcontracted to any non-DBE, not just a prime contractor. Some of these comments would make exceptions for what they viewed as customary practices such as equipment rental in certain industries. Ten comments opposed this proposal, saying that such practices as backcharging from the prime to the subcontractor or equipment rental from non-DBEs are normal, constructive industry practices.

Work performed by non-DBE contractors (primes or others) on the basis of subcontracts from DBE subcontractors may well be legitimate in various contexts, as distinct from an attempt to circumvent the DBE program. Whatever else it is, however, it is not work performed by a DBE. The Department believes it makes sense to count toward DBE goals only work that is actually performed by DBEs, and the SNPRM proposes that work performed by a non-DBE subcontractor on the basis of a subcontract from a DBE subcontractor would not count toward DBE goals.

In response to the comments concerned about equipment rentals, the SNPRM provision includes an exception for such rentals, as long as the equipment is rented from someone other than the prime contractor or its affiliate. Supplies would be treated in the same way. This approach recognizes the legitimacy of the DBE's need to acquire equipment and supplies from outside sources in some instances, while guarding against attempts by prime contractors to claim DBE credit for the use of their own materials and equipment.

One issue that comments addressed here, as well as under other provisions of the rule, concerns what happens to DBE credit from a firm that a recipient decertifies while a contract is underway. Six comments favored continuing DBE credit for a contract begun in good faith with a then-certified DBE. One recipient suggested that the credit could continue to be counted toward the prime contractor's goal, but not toward the recipient's overall goal. The SNPRM adopts the recipient's suggestion, which seems a good balance between fairness to contractors and the point that credit to non-DBE firms should not be reflected as DBE goal achievements.

There were a variety of comments on other matters. Eight comments favored, and eight opposed, not crediting DBE participation to prime contractors until the DBE is paid. For purposes of awarding contracts, of course, recipients must operate on the basis of commitments to DBE participation. However, it is administratively feasible not to credit DBE participation to a contractor's goal *attainment* until the DBE has been paid for the work in question, and the SNPRM proposes such a provision.

Other comments asked for clarification of the commercially useful function, regular dealer, and normal industry practices concepts. A few comments asked for clarification on awarding DBE credit for DBE trucking companies, a particular concern being companies that lease all or most of their trucks from non-DBEs. The SNPRM would presume that a DBE trucking company that does not own at least 50 percent of the trucks it uses for a particular contract does not perform a commercially useful function on that contract. This presumption could be overcome by a determination by the recipient that the firm is performing a commercially useful function in light of normal industry practices.

Finally, a few comments supported the notion of the "carry-forward" of DBE credit. That is, if a prime contractor gets 15 percent DBE participation on a contract with a 10 percent goal, then the "extra" 5 percent credit could be applied to meeting its goal on its next prime contract with the recipient, allowing it to obtain only five percent "new" DBE participation on the second contract. The Department has not adopted this idea, because we believe it would lead to an inappropriate focus on merely meeting minimum requirements.

Only the work of DBEs, of course, may be counted toward DBE goals. If a formerly certified firm does not have a certification that is current at the time a contract is executed (e.g., it has been decertified, it has allowed its certification to lapse), then it cannot satisfy DBE requirements. For example,

suppose a DBE prime contractor is identified as the apparent successful bidder for a contract in July. The contract is to be executed in September. In August, however, the firm loses its certification. The recipient cannot use the contract to meet DBE goals, and the firm would have to meet a DBE contract goal (assuming there was one on the contract) the same way any other non-DBE prime contractor would.

**Subpart D—Certification Standards**

The clarification of certification standards is one of the most important purposes of this SNPRM. Recipients and contractors should be aware that the certification standards in this subpart, while not yet formally in effect, represent the Department's interpretations of current Part 23 standards. Recipients should use this material as guidance in applying existing standards to the facts of certification cases.

The SBA is proposing new certification standards and procedures for the 8(a) and 8(d) program, which concern Federal procurement. These standards and procedures are similar in some ways, and differ in other ways, from the proposed Part 26 standards and procedures. The Department seeks comment on whether, in various specific respects, DOT should alter any of its proposed standards to more closely resemble the proposed SBA standards. During and after the comment period, DOT anticipates working with SBA to explore areas where greater convergence between the standards and procedures of the two agencies may be useful.

*Section 26.51 How are Burdens of Proof Allocated in the Certification Process?*

The purpose of this section is to state clearly who must prove what in certification matters. The December 1992 NPRM proposed that the applicant must bear the burden of proof that it meets eligibility criteria. Forty two comments agreed with this proposal, 36 of them supporting the "preponderance of the evidence" standard, which the SNPRM proposes to adopt. This standard means, in essence, that on balance, the recipient must be able to determine that the applicant more likely than not meets each of the basic certification standards: group membership, business size, ownership, and control. The applicant is responsible for demonstrating to the recipient that it meets each of these standards by a preponderance of the evidence. If the applicant fails to carry this burden, then the recipient would not certify it. Six comments favored the higher "clear and convincing evidence" standard, which the Department believes is too stringent for this purpose.

There is a major exception to the general rule that the applicant bears the burden of proof on the elements of certification. Because the statutes authorizing this program provide that members of the designated groups are presumed to be socially and economically disadvantaged, applicants who are members of these groups do not have the burden of proving to the recipient that they are disadvantaged. (As noted above, these individuals do have a burden of proof with respect to group membership, however.) Other individuals, as well as designated group members whose presumption of disadvantage has been rebutted, would have the burden of proving, by a preponderance of the evidence, that they are disadvantaged. How the presumption is rebutted is discussed below in the section on social and economic disadvantage.

The December 1992 NPRM said that recipients should avoid "single factor" determinations about certification and should make determinations based on all the facts. Eleven comments supported this position, while 13 others opposed it or asked for clarification. Most of the latter noted that there could be a single large factor (e.g., the disadvantaged individual didn't own the company) that outweighed everything else. To avoid the confusion that some commenters noted, we have not incorporated the "single factor" language in the SNPRM, but it clearly states that the recipient would have to consider all the facts in the record, viewed as a whole, in deciding whether an applicant has met its burden of proof. A single fact or problem would prevent certification only where it prevented the applicant from making its case by a preponderance of the evidence.

*Section 26.53 What Rules Govern Group Membership Determinations?*

Group membership is important in making certification decisions because only members of the designated groups enjoy the presumption of disadvantage. Individuals outside these groups must make individual showings of disadvantage in order to be eligible. In many cases, membership in a designated group will be obvious (e.g., women, many Black Americans). The SNPRM does not require recipients to make any special inquiry in these cases. Rather, the recipient would simply accept the obvious. In other cases (e.g., some American Indians, Hispanics, or Asian-Americans) there may be individuals whose membership in a designated group is not obvious to the recipient. When the recipient has reason to question the claimed group membership of an individual, the recipient would require the individual to demonstrate, by a preponderance of the evidence, that he is a member of the group.

There were few comments on this section. Most of them concerned American Indians, a category which a number of comments thought was subject to abuse by persons with little Indian ancestry and little connection with Indian communities. These comments proposed that guidance concerning group membership of Indians be clarified and that recipients be authorized to require documentation of group membership. The Department agrees, and we intend to provide additional guidance concerning group membership when the final rule is issued. The SNPRM would specifically authorize recipients to require applicants to produce appropriate documentation of group membership.

*Section 26.55 What Rules Govern Business Size Determinations?*

The Department's business size criteria are established by statute. There are two criteria, both of which a firm must meet in order to be eligible. First, a firm must meet SBA small business size criteria, which are found in 13 CFR Part 121. Second, a firm must not exceed an average annual receipts cap required by statute. The proposed section reflects the Department's contemplated adjustment of the current cap ($16.6 million) to $17.77 million. The Department anticipates publishing a **Federal Register** notice in the near future making this adjustment.

Many of the comments on size standards asked for changes that could be accomplished only by legislative amendments. Eight comments thought the gross receipts cap was too high (e.g., one comment said that even non-DBE prime contractors in its jurisdiction fell under the cap) while four (e.g., a petroleum products distributor) thought it was too low. Commenters in both camps, plus a few additional comments, thought that recipients should have discretion to adjust the cap to fit local conditions better. Four commenters thought that we should use only the cap, without involving the SBA size standards. Six other comments thought that DOT should develop its own size standards to replace reliance on SBA standards.

Six comments said that the SBA size standard for architectural and engineering (A & E) firms was too low

and had not changed in many years. We suggest that, if members of a particular industry believe that their SBA size standard is inappropriate, they work with SBA to see if SBA will alter the standard. Such firms are in a better position than DOT to advocate the merits of such a change to SBA.

One comment said that there needed to be different size standards for airport concessionaires. Subpart G contains FAA-developed size standards for airport concessionaires that differ from the size standards of this section, and which control for airport concession purposes. Finally, three comments asked for guidance on how to deal with situations in which a firm may work in more than one area. The size standard for each area may differ. The Department plans to issue guidance on this subject when the final rule is issued.

*Section 26.57 What Rule Determine Determinations of Social and Economic Disadvantage?*

The presumption of social and economic disadvantage for members of the designated groups has always been rebuttable in the Department's DBE program. The problem has been how to determine when the presumption has been rebutted. There has been substantial uncertainty on recipients' parts on what is necessary to rebut the presumption, with the result that there have been few proceedings under current § 23.69 to remove the presumption from members of the designated groups.

The December 1992 NPRM proposed to address this problem by directing each presumptively disadvantaged owner of an applicant firm to submit a statement of personal net worth (PNW) with the application. If the statement showed that the individual's net worth was over $750,000, then the presumption of that individual's social and economic disadvantage would be rebutted, and the individual would have to demonstrate his or her disadvantage on a case-by-case basis. (The $750,000 number was suggested by SBA's PNW standard for owners of 8(d) program firms. See 13 CFR 124.106(b)). This relatively simple, bright line, across-the-board approach was also intended to prevent the possibility of abuses in which recipients might target a particular firm or class of firms for inquiry into social and economic disadvantage.

This proposal was the subject of extensive comment. Forty comments supported the NPRM approach, or something like it, basically for the reasons stated in the December 1992 NPRM. A few of these comments supported a more draconian approach, in which an applicant with a PNW of over $750,000 would be barred from participating in the program, with no possibility of an individual showing of disadvantage. Another 24 comments disagreed with the $750,000 number. Exactly half of this group thought the number should be lower (e.g., $250,000–$500,000) while the other half thought it should be higher (e.g., $1–$2.75 million). Those who wanted it lower generally thought that the program should not include persons who were affluent enough to have PNW in the mid-six figures range, while those who wanted it higher said that a low figure would limit the borrowing power and ability to expand of DBE firms. A few comments also supported recipients having discretion to set their own threshold.

Fifty-six comments opposed using a PNW threshold at all. They said that the bias that creates disadvantage for minority and women owners has little to do with personal net worth, and that until that bias is eradicated, a PNW threshold was inappropriate. They said it penalizes success. Some of these comments said that PNW was based on a paper accounting of assets, including many that had little to do with the ability of someone to succeed in business. It would be difficult to administer, particularly where firms have multiple owners. It would limit the ability of businesses to expand (i.e., banks and bonding companies often demand that the personal assets of a small business owner guarantee the loan or bond, and if personal assets are limited by this rule, then financing or bonding becomes more difficult). Many comments expressed strong concern about the adverse impact on personal financial privacy of being required to submit personal financial statements to the recipient with all applications. Requiring this information with the application is inconsistent with the statutory presumption, other comments asserted, as well as being a substantial additional paperwork burden on applicants. Many also disagreed with using a number derived from SBA programs, which they saw as very different from the DBE program.

Among other miscellaneous comments were suggestions that spouse's assets, the owner's house, and/or business assets be counted in calculating PNW. Some comments suggested that owners should certify that their PNW was within the threshold or only send PNW information to the recipient as part of a due process proceeding that was challenging the firm's disadvantage.

The Department believes that its original purposes for the $750,000 threshold proposal were valid: establishing a clearly understandable standard for rebuttal of the presumption of disadvantage and preventing potential abuses that single out certain DBEs or classes of DBEs for unfavorable treatment. At the same time, the Department is persuaded that some of the flaws noted by comments that opposed the NPRM proposal—adverse effect on privacy, inconsistency with the statutory presumption, administrative difficulties, additional paperwork burden, etc.—should be considered.

For these reasons, the Department is proposing to adopt a modified version of its NPRM proposal. Recipients would be prohibited from requiring owners to prove their social and economic disadvantage as part of the application process. However, in order to have relevant information to enable them to make determinations about whether there should be inquiry into the disadvantage of applicants, the applicants would have to submit a signed certification that they are socially and economically disadvantaged and a brief summary statement of their personal net worth, which the recipient would have to keep confidential. The applicant would not be required to submit actual personal financial data (e.g., personal income tax returns or a detailed financial statement) documenting the information in the summary statement, however. These provisions are intended to balance applicants' interest in protecting the privacy of financial data and in avoiding unnecessary paperwork with recipients' interest in having sufficient information to determine when further investigation of disadvantage is needed.

Under the SNPRM, if a recipient has a reasonable basis to believe that an owner may not be disadvantaged (e.g., from summary statement of PNW, information provided by third parties, or other information available to the recipient), the recipient could commence a proceeding to determine whether the presumption of disadvantage should be removed from the individual. This proceeding would use the same due process procedures that the recipient uses in a decertification proceeding. The recipient would bear the burden of proving that the individual was not disadvantaged, by a preponderance of the evidence standard. In order to ensure that the statutory presumption is given proper effect, the recipient would not begin such a proceeding until it had

determined that the individual(s) in question owned and controlled the firm. However, to prevent contracts from being awarded to a firm that might not ultimately be owned and controlled by disadvantaged individuals, the recipient could hold the firm's certification in abeyance until the conclusion of the proceeding concerning the owner's disadvantage.

The SNPRM leaves open for further comment the issue of the amount of the threshold. There was considerable disagreement about the proper amount, and the Department asks commenters to provide, if possible, data or even anecdotal information about the potential effects of different thresholds. In doing so, commenters should be aware that this issue concerns the wealth of the owner, not the size of the business. How wealthy can an individual be before he or she ceases to be reasonably regarded as disadvantaged? This is not an abstract inquiry. The legitimacy of the DBE program rests, in part, on being perceived by the public and the courts as fair and as helping the people it is intended to help. Participation in the program by someone who is a strong candidate for air time on "Lifestyles of the Rich and Famous" can only undermine the program's credibility.

The Department seeks comment on whether it would be feasible to have recipients, unified certification process entities, or regional consortiums establish variations on the net worth of persons participating in the program. Doing so could increase flexibility in the program, but could also lead to a variety of inconsistent standards. The Department also seeks comment on whether there are other indices of individual social and/or economic disadvantage—other than personal net worth—that the rule should focus on to assist recipients in making disadvantage determinations.

The Department does not agree with those comments that favored using a PNW standard as an absolute cutoff for program eligibility, without the possibility of an individual being able to demonstrate eligibility on a case-by-case basis. Under the DBE program, all persons who are not entitled to the presumption of eligibility may make an individual demonstration of eligibility, and we believe that this should remain the case for persons who lose the presumption by virtue of a PNW over the applicable threshold as well as those who are not members of one of the designated groups.

Another issue concerned what standards recipients should use to make individual determinations of social and economic disadvantage. The December 1992 NPRM proposed using standards based on SBA 8(a) standards (13 CFR § 124.106(a)). Nine comments favored, and 10 opposed, this approach. The opponents pointed to differences between SBA programs and the DOT DBE program that could lead to confusion; proponents believed the standards were appropriate. The Department will retain SBA standards as the basis for guidance on making individual determinations of social and economic disadvantage, there being no other or better standards of which the Department is aware. However, as one comment pointed out, there are some inconsistencies between SBA standards and requirements of the DOT DBE program. Rather than simply incorporate or copy the SBA standards, therefore, Appendix F would modify the standards to ensure a good fit with the DOT program.

At times, firms certified under the SBA 8(a) program seek to participate in the DBE program. Under Part 23, the Department had said that, since these firms had been determined by another Federal agency to be owned and controlled by socially and economically disadvantaged individuals, recipients were required to accept their 8(a) certifications as valid for DBE program purposes. Recipients could not look behind the 8(a) certification to deny certification to such a firm based on the recipients' own evaluation of its ownership and control. Over the years, the Department had heard from recipients that this requirement resulted in their having to use 8(a) firms they believed to be ineligible under DBE program criteria. Therefore, the December 1992 NPRM proposed to allow recipients to look behind 8(a) certifications in some circumstances.

Nine commenters supported the NPRM provision, saying that too many questionable firms have 8(a) status, that size and other criteria differed between the programs, and that they had difficulty in securing assistance from SBA in reviewing the eligibility of 8(a) firms whose eligibility they questioned. Four commenters supported the existing rule's approach, one of them suggesting that there should a memorandum of understanding between DOT and SBA on the subject.

The Department believes, with the latter group of commenters, that deference to the eligibility determinations of SBA is warranted. At the same time, when a recipient has a reasonable belief that a firm is not eligible, we believe that it is contrary to the goals of the program to preclude inquiry. To balance both these concerns, the SNPRM would establish a presumption that an 8(a) firm is owned and controlled by socially and economically disadvantaged individuals. (The firm would have to demonstrate that it meets the DOT gross receipts cap and SBA size criteria for the type of work it was to perform as a DBE.) However, if the recipient had a reasonable basis to believe that the firm or its owner fails to meet Part 26 ownership, control, or disadvantaged status criteria, the recipient would request a response to these concerns from SBA. Taking into account SBA's response (or after 60 days, if SBA had not responded), the recipient could, on the basis of these concerns, initiate an eligibility removal proceeding under § 26.77.

*Section 26.59 What Rules Govern Determinations of Ownership?*

This section and the control section respond to the need to reinvent the certification standards in the existing Part 23. These sections have provided insufficient guidance to recipients and other participants, resulting in inconsistent and burdensome interpretations and decisions concerning certification. This situation has resulted in DBEs unfairly being denied certification and permitted the certification of firms who should not participate. To ensure that ineligible firms are screened out properly, and that applicants are not treated unfairly, the Department is proposing to provide clearer and more precise standards.

The December 1992 NPRM, like Part 23, said that contributions of capital or expertise can count toward ownership. The December 1992 NPRM proposed to clarify the circumstances under which expertise may be counted as the contribution to acquire ownership. The December 1992 NPRM said that the expertise must be in areas critical to the firm's operation, specific to the type of work the firm performs, and documented in the records of the firm. These records would have to show clearly the contributions of expertise and their value to the firm.

There were 23 comments on this issue, 19 of which supported the proposal. A few of these comments suggested minor modifications. One suggested that the rule should allow contributions of expertise in areas related to the firm's operations, another that under most circumstances business administration skills (e.g., bookkeeping, accounting, office supervision) should not be counted, a third that contributions of expertise should be limited (i.e., to 60 percent of the 51 percent of the firm needed to establish

ownership), and a fourth that the contribution should be entered into corporate documents at the time it arises.

The Department has decided to adopt the NPRM proposal unchanged. The SNPRM would therefore allow business owners who bring a special expertise, but relatively little capital, to a company to establish their ownership. At the same time, the provision provides standards to recipients on how to evaluate these situations. One requirement is that the expertise be specific to the type of work the firm performs. This would exclude, in most instances, general business administration experience from counting. The requirement that the expertise be in areas critical to the firm's operations has sufficient flexibility to allow for expertise in areas closely related to its operations. The Department does not see a rational basis for a specific percentage limitation on the amount of expertise that can be contributed, and it is probably asking too much of a firm to enter details about the contribution of expertise in its records at the time the issue arises, since the firm may not know at that time that it is planning to seek DBE participation.

Part 23 said that no assets held in trust could be counted toward DBE ownership. Early in the implementation of Part 23, the Department interpreted this provision liberally, to allow assets held in trust to be counted in some situations. The December 1992 NPRM proposed to codify this interpretation, allowing trusts to be counted where the trustee and the beneficial owner were disadvantaged individuals or the disadvantaged beneficial owner clearly controlled the company. Seven comments supported the NPRM provision and 11 opposed it. Two comments on each side of the issue raised the question of whether living trusts should be counted.

The SNPRM will adopt the NPRM provision, with the addition that assets held in a revocable living trust may not be counted toward ownership in any circumstances. Since such a trust can be revoked, there is continuing uncertainty about the beneficial owner's possession of the assets. Irrevocable living trusts can be counted if they meet other requirements of the section. Otherwise, the provision meets the original purpose of the "no trusts" provision, which was to ensure that titular ownership of assets did not count when the power to control the assets lay with a non-disadvantaged person or organization. If the disadvantaged beneficial owner is also the trustee, or the trustee is also a disadvantaged individual, then this problem does not arise. Also, if it is clear that the disadvantaged beneficial owner controls the firm, and the non-disadvantaged trustee does not, the problem does not arise.

Part 23 said nothing specific about assets acquired through such means as gifts, divorce settlements, and inheritances. Recipients have taken a variety of positions on whether assets acquired through these means constitute a "real and substantial" contribution of capital that can count toward ownership. The December 1992 NPRM provided that, while the recipient could take such circumstances into account, recipients could not disregard assets solely because they were acquired by these means.

Six comments favored the NPRM provision, though two of these requested greater specificity. Thirty-one comments opposed one or more provisions of the December 1992 NPRM. The general concern of these commenters is that allowing ownership based on assets acquired through these means would make it easier for fronts to get into the program. It was gifts—particularly interspousal gifts—that commenters were most concerned about. Several of these commenters thought transfers resulting from death or divorce were less troublesome, though others thought where the assets in these cases had been generated through efforts of non-disadvantaged persons, even the irrevocable turnover of the assets to disadvantaged persons in these cases should not result in the assets being counted.

The Department is responding to the comments by introducing more specificity into this portion of the rule. First, the Department believes that assets transferred as the result of death or divorce should always be counted toward ownership. Assets or ownership interests passed through inheritance become the property of the beneficiary, and the decedent, absent supernatural intervention beyond the Department's regulatory jurisdiction, will play no further role in the affairs of the company. Likewise, when assets pass from one spouse to another via a property settlement or other formal resolution of a divorce or legal separation, the assets or ownership interest becomes the property of the party in question, and the former spouse—unless there is some term or condition of the settlement or decree to the contrary—loses all control over the assets. It is very difficult to argue that assets so wholly belonging to an individual, with the former owner out of the picture, should not be counted toward ownership.

On the other hand, the Department is persuaded that many gifts (including transfers not based on adequate consideration) are problematical. The limitation we propose to place on gifts in the SNPRM relates to the identity of the donor and the donor's relationship to the firm seeking certification. If a non-disadvantaged individual who is involved in (1) the firm seeking certification, (2) any affiliate of the firm, (3) a firm in the same or a similar line of business, or (4) a firm having an ongoing business relationship with the firm seeking certification gives assets or an interest in the business to the applicant, then those assets are presumed not to count toward ownership. To overcome this presumption, the applicant must show clear and convincing evidence—a high standard—that the transfer was made for reasons other than DBE certification and that the applicant really does own and control the firm.

The Department believes these limitations will cover the great majority of situations in which gifts can be used to circumvent the intent of the ownership requirements. In other situations, such as a gift from one disadvantaged individual to another, while the recipient may review the situation, the recipient could not rule out counting the assets involved toward ownership just because they result from a gift.

One subject about which the Department has often received requests for clarification is the role of marital assets. This was also a topic on which Part 23 did not provide explicit guidance. The December 1992 NPRM proposed that when joint or community property assets are used to acquire the disadvantaged spouse's ownership interest in the applicant firm, the recipient would count these assets as belonging to the disadvantaged owner if the other spouse formally renounced all rights of ownership in the assets. The December 1992 NPRM proposed that spousal co-signature on documents involved with ownership of the firm would not constitute a ground for finding the firm ineligible on ownership grounds. The December 1992 NPRM also said that a higher level of scrutiny should be given to situations where one spouse's assets are transferred to the other.

There were relatively few comments on these subjects, which were fairly evenly divided. Five comments supported the marital assets provision, while four others supported simply relying on a 50/50 split in such assets

and one opposed counting marital assets that had not been segregated prior to the firm's application. Five comments supported the spousal co-signature provision, while six opposed it. Some comments on both sides of this issue said that co-signature should be a "red flag" for recipients. The Department would retain both provisions. Recipients could consider spousal co-signature, but could not determine that a firm is ineligible on this ground alone. The provision concerning interspousal transfers of assets (transfers for adequate consideration, since gifts are treated elsewhere) would be made more specific. The SNPRM would give recipients direction to give particularly close and careful scrutiny in this situation to make sure that the firm is owned and controlled by a disadvantaged individual.

The NPRM preamble asked whether there should be additional limitations on ownership by non-disadvantaged persons in DBE firms. That is, should non-disadvantaged participants be limited to less than the 49 percent stake in a firm possible under Part 23? Again, comments were divided. Twenty-five comments supported more stringent limits, ranging from 10–40 percent. These comments generally said that such a provision would make it less likely that fronts or marginal DBE firms could participate. Twenty-six comments opposed change, mostly on the ground that such a limit would limit the availability of needed capital to DBEs, especially to start-up companies. The Department has decided not to make a change, for the reason suggested by the commenters and because a change (especially a stringent limit like 10 percent) could have very disruptive effects on many currently-certified DBEs and on recipients' programs.

A few comments asked for more specificity on the meaning of the 51 percent stock ownership requirement for corporations. This issue has arisen in some cases where corporations are organized with two or more classes of stock. Should the 51 percent requirement apply to the total of all stock, to the voting stock, or to each class of stock independently? The Department believes the most reasonable answer to this question is that the disadvantaged owner(s) must own 51 percent of all stock (i.e., the combined total) in order to meet ownership requirements. (Of course, a disadvantaged owner who did not own 51 percent of voting stock could not control a firm.) The SNPRM would add a parallel requirement for businesses organized as partnerships, based on SBA regulatory provisions.

*Section 26.61 What Rules Govern Determinations Concerning Control?*

The December 1992 NPRM proposed that a DBE must be an independent firm, whose disadvantaged owners control its day-to-day operations as well as its overall management. It proposed clarifications of the details of making control determinations at a number of points, which often codified existing DOT interpretations of the rule.

One of these clarifications concerned the role of occupational or professional licenses. Some recipients had taken the position that a disadvantaged owner must personally possess such a license in order to control a firm. The December 1992 NPRM proposed that personal holding of the license be essential for certification only where state law mandated that the person controlling such a firm possess the license. Otherwise, holding a license would be only one of the various factors taken into account by the recipient. Seven comments supported and five opposed this proposal. Some of the latter said that the individual should be required to hold the license for certification purposes even if state law did not require it for other purposes. Comments on the other side of the issue said that it was unfair to require more of DBE firms than others, that it was common business practice in some places for a firm to hire the licensee as an employee, and that experience in the type of work could confer enough ability to control a firm even in the absence of a license.

We believe that the December 1992 proposal makes good sense. Except where expressly mandated by state law as a condition of controlling a firm, we believe it best, in a program intended to facilitate the entry of new businesses into the market, to de-emphasize formal barriers to entry. It is better to make control decisions on the basis of the individual reality of each firm than to rely on a surrogate for determining whether an individual in fact controls the firm.

The Department has interpreted its regulation, since the mid-1980s, as permitting the delegation of functions by disadvantaged business owners. A certification appeal and ensuing litigation in the 1980s established that disadvantaged owners can delegate authority and functions to non-disadvantaged participants, as long as they retain actual control over the firm. This interpretation also states that the disadvantaged owners are not required to have expertise or experience superior to that of other participants in the firm, but must have the ability to intelligently and critically evaluate information provided by others and make their own decisions based on that information. This interpretation provided the basis for the NPRM provision on the delegation/expertise issue.

Comments were evenly divided on this issue. The 18 comments that opposed or expressed serious concern about the proposal (some of which appeared not to be aware that it had been DOT's interpretation of Part 23 for several years) thought that this approach could make it too easy for fronts to enter the program. They stressed the importance of disadvantaged owners having personal expertise in their firms' field of work. Two of the comments thought the proposal was ill-advised because it would increase the market share of white female owned firms at the expense of minority-owned firms. One thought an owner should be able to perform all the tasks his or her company performs, even if not regularly performing them. Two commenters said that owners should be required to have experience or expertise in every critical area of the firm's operations. Others thought that owners should never have less expertise than employees. One suggested that general business administration experience should never, standing alone, be viewed as providing enough expertise to control a company.

An equal number of comments supported the NPRM provision, generally saying that it accurately reflected the reality of business practice. Some of these commenters also said that business administration experience should be counted for control experience. As one commenter noted, being able to keep the financial and administrative sides of a business afloat can be just as critical as experience in driving a truck or operating a grader.

The Department has decided to retain the NPRM provision with a few modifications. In our view, once a firm grows beyond the one-person shop stage, delegation is essential. The more successful or complex a firm becomes, the more inevitable delegation becomes. It is fanciful to imagine that one or a few owners can or should do, or be prepared to do, everything that a firm does. As long as the owners can take back authority they have delegated, retain hiring and firing authority, and continue to "run the show" for the company, they control it, notwithstanding delegation of some authority and functions.

With respect to expertise, the disadvantaged owners must, in our view, generally understand and be competent with respect to the substance of the firm's business. We agree with commenters who say that generally (aside, perhaps, from a firm whose

substantive business is providing business administration services) generic business administration experience is insufficient, by itself, to meet this standard. However, the disadvantaged owners need not have extensive experience or expertise in everything the company does, even in all critical areas, or have more experience or expertise than some employees or managers, so long as the owners are able to intelligently and critically evaluate information their subordinates provide and use the information to make independent decisions. We find it difficult to accept the proposition that an individual who exercises this ability is not controlling his or her firm or is acting as a front for some other party.

The December 1992 NPRM addressed the issue of the relative pay levels of owners and other participants. It proposed that the fact that the disadvantaged owner took a lower salary than a non-disadvantaged key employee did not necessarily mean that the owner did not control the firm, even though the recipient could consider this disparity as one factor in reviewing control. Nine comments supported this proposal, one cautioning that the firm should be able to show a good reason for the disparity. Five comments cautioned that recipients needed to continue to look at relative salary levels, since a lower salary for the owner could indicate a "front" situation. One of these suggested that no non-disadvantaged participant should have a higher salary than a disadvantaged owner.

The SNPRM follows the NPRM provision, affirming that it is appropriate for recipients to scrutinize relative salary levels in a firm. In doing so, recipients should take into account the duties of the persons involved, normal industry practices, the firm's policy concerning reinvestment of income, and other reasons provided. Because there are common circumstances in which an owner may choose to take a lower salary than he or she may have to pay to certain key employees, a difference of this kind does not necessarily mean that the owner does not control the firm. We are adding a sentence specifying that where a firm used to be owned by a non-disadvantaged person and is now owned by a disadvantaged person, a difference in remuneration between the former and present owner can be taken into account by recipients.

The December 1992 NPRM proposed that recipients treat non-disadvantaged family members the same as other non-disadvantaged participants in DBE firms. The participation of family members in a firm should not be viewed as meaning that a disadvantaged individual fails to control a firm, the December 1992 NPRM said. Seven comments supported the NPRM proposal, one mentioning concern that some recipients appeared to apply a per se rule against firms that employ family members. Fourteen other comments expressed various concerns about the proposal. One said that the NPRM statement was true but too obvious to include in the rule. Two expressed concern about businesses that appear to be run by an entire family as a unit. Two others expressed concern about firms that used to be run by a male relative or still do a lot of work with businesses run by male relatives. One wanted to make sure that family member involvement could be reviewed by recipients, while another favored banning participation by non-disadvantaged family members. The underlying concern of these comments appeared to be that family-run businesses were subject to being used to circumvent requirements of the rule.

The Department believes that its basic statement in the December 1992 NPRM is the most sensible way of looking at the participation of non-disadvantaged family members in a firm. The rule recognizes only two kinds of people in the world: socially and economically disadvantaged individuals and others. Generally, there seems little basis for treating "others" who are family members differently from "others" who are unrelated, and non-disadvantaged family members may participate in a DBE firm on the same basis as any other non-disadvantaged persons. Except as otherwise provided in the rule, the recipient could not apply a more stringent standard to situations in which family members participate.

However, in response to comments as well as the Department's experience in working with the DBE program, the SNPRM would provide that where the recipient cannot discern that the disadvantaged owners themselves, as distinct from the family unit as a whole, independently control the firm, the applicant has not demonstrated control. In addition, given concerns about firms owned and controlled by white males being transferred to their wives or female relatives and allegedly continuing to operate as before, the SNPRM would add a provision designed to deter this practice. Where the white male or other non-disadvantaged owner continues to be involved with the firm, the current disadvantaged owner would have to meet a higher burden of proof—clear and convincing evidence—concerning ownership and control. The owner must also demonstrate by this higher burden of proof that the transfer of ownership and control was made for reasons other than gaining certification in the DBE program. The Department believes that the combination of provisions on "family businesses" should avoid unfairness to businesses that legitimately employ family members while preventing abuses.

Two comments asked that the regulation specify that a firm could be controlled by disadvantaged persons even though it leased, rather than owned, equipment. The SNPRM responds by stating that the recipient could consider this factor, but could not find a firm to be not controlled by its disadvantaged owners solely because it leases or rents equipment, where doing so 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.

In the context of its discussion of the DBE directory, the December 1992 NPRM said that recipients should certify and reflect DBEs simply as DBEs, not as a particular sort of firm. Twenty-six comments, mostly from recipients, objected, their basic argument being that recipients should certify firms to perform only those types of work in which the expertise and experience of the owners allowed them to control. Many of these comments preferred certification by SIC code, while some went further and wished to prequalify DBE firms. Some other comments suggested that the Department should avoid authorizing recipients to take steps that could pigeonhole DBE firms in a particular type of work and inhibit their ability to diversify.

In response to these comments, the Department proposes adding a provision that tells recipients to grant certification to firms only for specific types of work in which the owners have the ability to control the firms. However, to become certified in an additional area, the firm need only demonstrate that its owners have the ability to control the firm in this type of work as well. A complete recertification or new application would not be needed.

Because the Department has received a number of questions about how partnerships and franchises should be handled under the rule, the SNPRM would add paragraphs on these subjects. The provision concerning franchises has been adopted from the Department's regulation concerning the DBE program for airport concessions (see Subpart G). The provision generally permits franchises to participate in the program,

notwithstanding the requirements that franchisers place on them with respect to some aspects of the business. As a policy matter, we do not wish to exclude all franchises, which may be an important route for disadvantaged individuals to enter the market. However, if the ties between franchiser and franchisee are so close as to constitute affiliation, then the franchisee could not participate as a DBE.

With respect to partnerships, the basic requirement would be that, in addition to other control criteria, the non-disadvantaged partners cannot have the power, without the concurrence of the disadvantaged partners, to commit the partnership in a contract or to take actions that subject the partnership to contract or tort liability. On another subject, a sentence would be added to this section to clarify that, for control purposes, the socially and economically disadvantaged owners must own and control 51 percent of the voting stock. Finally, in response to issues that have been raised in certification appeals and in questions to DOT staff, the SNPRM adds a paragraph saying that to be viewed as controlling a firm, a disadvantaged owner cannot engage in outside employment or business interests that prevent the individual from devoting enough time and attention to his duties with the firm. For example, it is unlikely that an individual could control a full-time firm while he spent only part of his or her time working with the business.

*Section 26.63 What Are Other Rules Affecting Certification?*

This section includes several miscellaneous provisions concerning certification. One of them concerns the role of not-for-profit organizations in the DBE program. The December 1992 NPRM proposed to maintain the Department's long-standing policy of excluding such organizations. Thirty-three commenters agreed, citing such reasons as that the program was designed for entrepreneurs and that the not-for-profit sector has a different, generally more favorable, tax status. Four commenters favored allowing not-for-profits to participate, because they often included useful community organizations, could help individuals with disabilities enter the program, and because some may specialize in technical assistance to DBEs. The Department will retain its existing policy. The basic purpose of this program is to assist firms in entering into and succeeding within the competitive business marketplace. Not-for-profit organizations are often very worthy and useful, but assisting them does not achieve this purpose. The different tax and legal status of not-for-profit organizations in most jurisdictions also weights against permitting them to be certified as DBEs in competition with for-profit businesses.

The December 1992 NPRM proposed to specify that certification decisions be made on the basis of the present, not the past, status of the firm. Eleven comments supported this proposal, while five said that recipients should be able to take the firm's history into account in making certification decisions. We agree with one of the former group that said that this provision should not be construed to preclude a recipient taking action against a DBE for previous fraudulent or deceptive conduct that has come to light. We disagree with a comment in the latter group that suggested that if a firm applies for certification in Year 1, is turned down for lack of expertise on the part of the disadvantaged owner, and reapplies in Year 3 after the owner has acquired the needed expertise, the recipient should have discretion to refuse certification again based on the owner's lack of expertise in Year 1. If the owner now has enough expertise to control the firm, it is illogical to say that he or she is ineligible today because of a three-year-old expertise deficit that has since been corrected. Certainly no one would argue that a firm that was eligible three years ago must be retained as a certified DBE when its circumstances change so that it presently fails to meet ownership and control criteria. The same rationale applies in both directions.

A few comments suggested that recipients should be able to use "commercially useful function" as a certification or recertification criterion. The Department disagrees. "Commercially useful function" is a concept that concerns solely how credit is counted toward goals for a DBE that has already been certified. It is a contract-specific concept: a DBE may perform a commercially useful function on one contract but not on another. It has nothing to do with determining group membership, disadvantage, size, ownership, or control, which are the factors involved in certification. We agree with those comments that said that a pattern of conduct designed to evade program requirements, which can include such things as repeated instances of operating as a "pass-through" for prime contractors, can be taken into account in certification decisions, however.

A few other commenters suggested that there should be, in effect, a prequalification standard for businesses seeking certification, so that only "viable" businesses entered the program. The Department believes that it is appropriate to require prequalification for DBEs only if prequalification is required for all contractors. To require more of DBEs than of other participants would, in our view, be discriminatory. Policy on prequalification is at the recipient's discretion, but the policy cannot single out DBEs. That is, it would be consistent with nondiscrimination requirements to require prequalification of DBE subcontractors only if all subcontractors are required to be prequalified. One suggestion that we received would, in fact, call for all subcontractors to be prequalified, DBEs as well as non-DBEs. The intent of the suggestion is to ensure, in advance, that all subcontractors are fully qualified, and to counter assertions that primes cannot find qualified DBEs. The Department seeks comment on this suggestion.

The SNPRM continues to include provisions of the December 1992 NPRM that are derived either from uncontroversial Part 23 language or long-standing DOT policy, concerning Indian tribal firms, cooperation with recipients' information requests, and the limited effect of legal or tax status of firms on determinations concerning independence. Except for one comment agreeing with the Indian tribal firms provision, there were no comments on these provisions. The SNPRM would change one NPRM provision, on which there was also no comment. The December 1992 NPRM proposed to allow certification of a subsidiary of a DBE firm. That is, if Company Q is a small business 51 percent owned and controlled by one or more certified DBE firms, then Company Q could be certified. On further reflection, we have decided that this proposal is inconsistent with the statutes underlying Part 26, which require DBEs to be owned and controlled by socially and economically disadvantaged *individuals*. If Company Q is owned by other business organizations, rather than by disadvantaged individuals, as such, then it would not be certified.

**Subpart E—Certification Procedures**

*Section 26.71 What Are the Requirements for Unified Certification Programs?*

By better than a 4–1 margin, commenters endorsed the December 1992 NPRM's proposal to establish unified certification programs (UCPs) in each state that would provide "one-stop shopping" to firms seeking DBE

certification. Eighty-two comments favored the proposal, 12 opposed it, and 9 either said UCPs should be optional or expressed concern that it would be difficult to obtain resources for this purpose.

Among the comments favoring the proposal, most agreed that the present system's administrative burden on small businesses seeking multiple certifications was unduly heavy and that it led to a waste of recipient resources. Many of these comments favored regional certification as well, most on a voluntary but some on a mandatory basis. Some of the comments said that more time was needed to establish UCPs than the three years proposed in the December 1992 NPRM, though equal numbers of comments approved the three-year phase-in period or advocated quicker implementation (e.g., one or two years). Some comments asked questions concerning whether individual recipients could "veto" UCP decisions with which they disagreed, whether there could be several regional mini-UCPs in a state as distinct from a single state agency, and whether the agencies would be required to follow DOT certification standards.

Comments opposing or expressing concern about the concept said that a UCP would be too difficult to administer, would lessen local autonomy in certification decisions, lead to a "lowest common denominator" approach to certification, or would require funding and agency resources that comments said was probably unavailable.

A related issue discussed by a substantial number of comments was mandatory reciprocity. Currently, and under the December 1992 NPRM, recipients have the discretion to accept certification decisions made by other recipients if they choose. Under mandatory reciprocity, a recipient would be required to accept other recipients' decisions. Twenty-six comments favored adopting mandatory reciprocity, at least within a state or region or particular industry, while 33 opposed the idea.

Proponents cited mandatory reciprocity as a way of reducing the impact of multiple certification requirements on applicants, while opponents were concerned that mandatory reciprocity would lead to "least common denominator" certification practices, where applicants would "forum shop" for recipients with less stringent certification processes, obtain certification, and then force these certifications on recipients who would otherwise not certify them.

The SNPRM would adopt the UCP proposal with certain modifications that respond to commenters' concerns. Restructuring government programs to provide better and more economical services to customers, while making more efficient use of scarce resources, is consistent with the purpose of the Clinton Administration's Regulatory Reform Initiative. Introducing the UCP in DOT Federally-assisted programs is a step similar to many reforms adopted for the Federal government itself as a result of the National Performance Review.

By providing one-stop shopping to small businesses seeking certification, this reform would reduce significant burdens on DBEs. Some comments estimated that going through the certification process one time can cost a business as much as $5000. Avoiding repetitions of this process within a state can save substantial money for these businesses. Moreover, if several recipients within a state have to review an application from the same firm, there is an obviously inefficient use of the recipients' collective resources. UCPs will avoid this costly duplication of effort. Given appropriate cooperation and sharing among the recipients in the state, operation of a UCP should save resources, not increase costs.

The proposed UCP requirement takes fully into account the needs of recipients for flexibility and adequate time for negotiation and implementation of UCP agreements. Recipients within each state would have three years to form an agreement creating a UCP, with the possibility of a one-year extension if granted by the Secretary. The UCPs will have an additional 18 months after DOT approval of the agreement to become fully operational. The Department seeks comment on whether it is desirable and feasible to shorten these time periods (e.g., to two years for forming an agreement and a year for implementation).

Moreover, the recipients in a state would have discretion to devise a type of UCP that best fits their needs. This SNPRM would not prescribe any particular administrative structure. Recipients could choose from among a number of types of UCPs listed in the regulation or construct a different structure of their choosing, which can be responsive to recipient concerns about resources, the role of local recipients, etc. Whatever structure is constructed would have to follow Part 26 certification standards and all other certification requirements applying to recipients, in whose shoes the UCP stands. It would also have to ensure genuine one-stop shopping, which means that individual recipients would have to accept UCP certification decisions.

While mandatory reciprocity within recipients in a state is one optional way to structure a UCP, the SNPRM does not propose mandatory reciprocity among recipients or among UCPs, primarily because of concern about the "least common denominator" problem. (Nevertheless, the Department is interested in commenters views on whether nationwide mandatory reciprocity would be, on balance, a good idea.) The SNPRM would authorize, and DOT encourages, multistate UCPs and other regional cooperation ventures. DOT will work with recipients both to assist in setting up UCPs and in fostering regional arrangements.

Commenters also addressed some implementation issues. Twenty-four comments favored, and seven opposed, a system that would require a firm to be certified in its "home state" before it could be certified in other states. Proponents believed this could reduce resource needs for out-of-state site visits and place basic certification responsibility on the recipients that are closest to the applicant and know the most about it. Opponents said this could lead to hardship for a firm who for some reason was on the wrong side of its local recipient, or which simply found it most expedient, for business reasons, to seek most of its work in a state other than the one in which it was domiciled. The SNPRM takes a middle ground on this issue, permitting UCPs (but not recipients prior to the establishment of UCPs) to decline to accept an application from a firm that had not first been certified by the UCP in the state in which it maintained its principal place of business. Home-state certification would be much harder to implement before UCPs are in place (i.e., would it mean certification by any transit authority, airport, or state highway agency in the state? What if some home state recipients certified the firm and others did not?). Giving UCPs flexibility with respect to accepting out-of-state applicants not having home-state UCP certifications also is preferable to requiring home-state certification in all cases.

The December 1992 NPRM had proposed that UCP certifications be "precertifications" (i.e., certifications decided in advance of the proposed use of a firm to meet DBE goals on a particular contract). Commenters' opinion was split on this issue, with seven comments favoring and six opposing the proposal. The SNPRM would adopt this proposal for two reasons. First, certification under

pressure of a procurement deadline is more likely than precertification to lead to hurried, less adequate, certification decisions. Second, UCPs' resources and priorities are likely to be more effectively allocated in the absence of pressures from recipients to give precedence to processing an application involved in a pending procurement.

Finally, it makes sense, once UCPs are in place, for the UCP, rather than individual recipients, to maintain the DBE directory. This directory would cover all firms certified by the UCP. Since so many agencies and businesses are now equipped with computer communications capability, this unified directory would be made available electronically as well as on paper.

*Section 26.73 What Procedures Do Recipients Follow in Making Certification Decisions?*

The December 1992 NPRM listed a series of actions that recipients would be required to perform in each certification. They are essentially the same as those in the existing regulation. The only one of these to inspire significant comment was the requirement for a site visit. Fourteen commenters opposed mandatory site visits, while six favored mandatory site visits by each recipient (i.e., they opposed a provision in the December 1992 NPRM that would allow one recipient to rely on another recipient's site visit report). The opponents of mandatory site visits generally cited the cost and burden of carrying out this requirement, particularly when the firm seeking certification was located elsewhere. The Department cannot eliminate the requirement for site visits, because it is statutory. A recipient that fails to make site visits is out of compliance with the rule. On the other hand, allowing a recipient to make use of a site visit report compiled recently by another recipient can be a useful way of conserving resources, and the SNPRM would permit it.

The December 1992 NPRM proposed to require recertification reviews of certified DBEs every two years; that a DBE would remain certified unless it were decertified through a decertification proceeding; and that a DBE had to notify the recipient of any changes in its circumstances that would affect its certification and submit a sworn statement at the time of the recertification review concerning any changes in the firm that could affect its eligibility. Eleven comments favored this general approach, three of which said that the process should be abbreviated (e.g., through the use of a short form or certification instead of a full-fledged review). Another comment said that recipients should not be permitted to force already-certified firms to reapply for certification on an annual or other periodic basis on the rationale that a certification had expired, allowing firms to be effectively decertified without due process. Most of these comments said that two years was an appropriate interval, though two said that annual recertification was preferable. Thirteen commenters supported the specific proposal that DBEs be required to report changes as they occur, a few of which asked for greater specificity in terms of what changes had to be reported and a few others of which suggested that the requirement would be difficult to enforce.

The Department has decided, in response to comments, to modify the NPRM proposal in the SNPRM. First, the Department would retain the requirement for DBEs to submit an affidavit when there is a change in their circumstances that can affect certification. The rule would specify that the recipient must report changes affecting size, disadvantaged status, ownership, control, or any material changes to the information presented on the certification form. Second, in response to comments about simplifying the recertification process, and in order to reduce administrative burdens on DBEs and workload requirements on recipients, the SNPRM would drop the proposed requirement for a recertification review to be conducted by the recipient. (Recipients would remain free to conduct reviews of the status of firms at their discretion, however.) The SNPRM does include the requirement that the DBE would submit an annual affidavit that nothing in its circumstances has changed beyond what it has told the recipient and that it continues to meet size criteria (with supporting documentation).

The December 1992 NPRM proposed that firms would remain certified unless the recipient decertifies them through a decertification proceeding. The proposal was based on the view that requiring frequent reapplications, besides imposing unnecessary paperwork burdens on DBEs that have already been through a certification process, tends to divert recipients' resources from new certifications and decertifications. These resources can better be used for reducing or avoiding certification backlogs. The Department continues to believe that this view has merit. However, we also believe that is inappropriate to require that DBEs remain certified indefinitely. As a means of accommodating both these concerns, the SNPRM would require that a recipient permit a firm to remain certified for three years without any "recertification" or "reapplication" process, absent cause for decertifying the firm. The Department seeks comment on whether this period should be longer (e.g., five years).

The December 1992 NPRM said that UCPs would have to make certification decisions within 60 days of receiving a complete application. Commenters were divided on this issue. Ten comments said a 60-day period was not enough, suggesting that 90 days or a period of the recipient's discretion was more reasonable. Nine comments supported the 60-day period, saying that it was useful in preventing recipients from unduly delaying responses to applications. One of these said there could be a DOT waiver of the deadline. Three comments supported a shorter period, such as 15 or 30 days, suggesting that such a period was useful in preventing bureaucratic stalling. Many of the commenters on all sides of this issue discussed the deadline in terms of certifications in general, not just those to be performed by UCPs.

The Department has decided, in response to these comments, to propose extending the deadline to 90 days, with a possibility of a 60-day extension of this period if the recipient sends a specific written explanation to the applicant. The Department is persuaded that a 60-day deadline is unrealistic in light of the certification workloads facing many recipients. However, a deadline remains necessary to give firms the assurance of reasonably timely handling of their applications. With the approval of the concerned operating administration, the recipient could alter the deadline involved, but the appropriate DOT office would be very careful to grant only what relief is necessary to recipients.

One issue that has arisen since the publication of the December 1992 NPRM is whether recipients should be able to impose user fees or other charges on applicants for certification. Recipients have taken different positions on this issue, and the Department's rule provides no guidance on the issue. The Department has decided to propose that recipients may impose a modest, reasonable application processing fee, not to exceed the actual cost of processing the application. Such a fee would have to be approved by the concerned operating administration as part of the DBE program approval process. The Department seeks comment on whether there should be a cap on such fees.

Under Part 23, the Department published a model certification form (Schedule A). Recipients had discretion to modify this form. This led to a proliferation of somewhat similar forms that often differed significantly in their details, leading to confusion and difficulty for those applicants who sought certification in more than one jurisdiction. Based in part on the Department's experience in our drug testing program, where a similar approach created similar problems for participants, the December 1992 NPRM proposed requiring the use of a standard, uniform, form by all recipients. Commenters were divided on this proposal. Twenty-four comments favored the idea of a single nationwide form. Two additional comments advocated allowing recipients to add material to the standard form. Twenty commenters preferred the approach of the existing rule, with a model form that recipients could modify. A number of commenters suggested specific modifications to the form published with the December 1992 NPRM.

The Department believes that requiring a single, uniform, nationwide form that all recipients must use without modification is the best approach to take. Many firms seek certification with more than one recipient. Having them have to fill out somewhat different forms providing the same basic substance to different recipients (as distinct from photocopying a standard form they have already filled out) is a waste of their time and money. The same Part 26 standards apply to all these certifications. Each recipient needs the same information to make determinations according to these standards. When UCPs become operational, each UCP (particularly those UCPs that rely on centralized or relatively centralized structures) will presumably need to have a standard form. Under these circumstances, we do not believe that allowing different recipient forms is productive. However, as a few comments suggested, we will allow recipients to supplement (not alter) the standard form to capture additional information that is consistent with Part 26 requirements and reasonably necessary for program administration. Such supplements will have to be approved by the concerned operating administration as part of the recipient's DBE program.

The SNPRM incorporates this policy decision. We are also requesting renewed comment on the content and format of the standard form, including examples of existing forms that commenters would recommend and suggestions about how to make the form both complete and user-friendly. We are also seeking comment on whether, at least when UCPs are operational, we should require that they have a capability of accepting application forms electronically. To assist commenters in formulating responses, we are publishing in Appendix C to the SNPRM a proposed form, but the Department is not committed to adopting the specifics of this form.

*Section 26.75 What Rules Govern Recipients' Denials of Initial Requests for Certification?*

The December 1992 NPRM proposed that, within 30 days of a recipient's denial of an application, the applicant could fix problems that had led to the denial, and resubmit a revised application to the recipient for consideration at that time. Two comments favored this proposal, while 18 opposed it, mostly out of concern that repeated resubmissions within a short period of time would waste agency resources. Some commenters were also concerned that it would lead to successful resubmissions based on little more than rearranging paperwork. The Department believes that the opponents of this proposal have the better of this argument, and we are not adopting this proposal. However, recipients should allow applicants to correct minor paperwork errors or non-material mistakes or omissions in applications before rejecting the application.

The December 1992 NPRM proposed that after an application was denied, the recipient could set a waiting period of 6–12 months before the firm could reapply. Eighteen comments supported a 12-month waiting period, 12 supported a shorter period (generally 3–6 months), two supported a longer period (12–18 months), five supported letting recipients have discretion in establishing a waiting period, and two advocated having no waiting period. The Department believes that 12 months is long enough to meet recipients' concerns about avoiding wasting their resources on rapidly repeating reapplications and is also consistent with the reported practices of most recipients who commented. A longer period would have too harsh an impact on potential reapplicants. Therefore, the SNPRM proposes a waiting period of no more than 12 months. If a recipient wants to establish a shorter waiting period (e.g., 3, 6 or 9 months), it can seek approval from the relevant DOT administration as part of its DBE program.

The December 1992 NPRM also proposed that the recipient must notify a firm of the denial of its application in writing, with a written explanation of the reasons for the denial. The explanation would have to specifically reference the evidence in the record supporting each reason for the denial. Six comments supported this proposal, while another five wanted additional due process protections (e.g., equivalent to those required in decertification proceedings). The Department has decided to retain the NPRM provision, which we believe provides sufficient protection to applicants in initial denial circumstances. We do not believe that the additional due process protections needed in decertifications (where a recipient is proposing to take away from a firm an existing status, which takes on some of the character of a property interest) are essential here.

*Section 26.77 What Procedures Does a Recipient Use To Remove a DBE's Eligibility?*

The December 1992 NPRM proposed a set of procedures to govern recipient's decertification proceedings. Comments focused on a relatively small number of the procedural points proposed in the December 1992 NPRM. The subject of the most comments was the proposal that decertification actions must provide administrative due process protections to DBEs, particularly that separation of functions be incorporated into the procedure.

By separation of functions, we mean the principle that, to preserve the fairness of a proceeding, the proponent of an action should not also be the decisionmaker. A prosecuting attorney, for example, is not permitted to serve as the judge or jury. Likewise, the December 1992 NPRM said, a recipient official who proposes that a firm be decertified should not be the same official who decides whether or not the proposal has merit. Fourteen comments supported the separation of functions proposal, a few of whom said that a requirement for administrative law judges (ALJs) or other officials completely separate from the recipient's DBE certification office would be even better. Eight commenters opposed the proposal, many in the apparent belief that it would require the use of ALJs, the hiring of extra personnel.

With respect to the more general issue of administrative due process (e.g., requirements for notice, the opportunity for a hearing, written statement of reasons for a decision, etc.), 21 comments supported the proposal to require these protections. Five comments opposed the proposal, generally saying that it was too burdensome.

The Department believes that it is essential to provide administrative due process to DBEs when recipients propose to decertify them. Basic requirements like notice, the opportunity for a hearing on the record, separation of functions, and a written statement of reasons for a decision are necessary to avoid the appearance, and sometimes the reality, of arbitrary decisions. Through the Department's certification appeals process, we have become aware of situations in which these protections have not been provided. For the sake of fairness to participants, and to uphold the legitimacy of the program, this must change. In addition, DBE certification may take on, to a degree, the character of a property interest. Taking away an interest in property without appropriate due process raises issues under the 5th and 14th Amendments to the Constitution.

Separation of functions is one of the most important features of administrative due process, since it avoids a major potential source of unfairness. Clearly, if a DBE owner walks into a proceeding and sees, in the role of the decisionmaker, the same official who proposed to decertify the firm, the owner may well have a justified perception that the deck is stacked against the company. We would emphasize that separation of functions can be provided in a number of ways, and it does not require hiring ALJs or other "outside" personnel. For these reasons, the SNPRM adopts, with minor modifications (e.g., a simplification of the notice procedure, a change requested by several comments), the administrative due process proposals of the December 1992 NPRM.

There were eight comments on the issue of the burden of proof in a decertification proceeding, equally divided between those who agreed with the December 1992 NPRM that the recipient should have the burden of proving the firm should not be certified (including one that said the recipient should have to carry its case by a "clear and convincing evidence" standard) and those who said that the firm should have the burden of proving it should remain certified. The SNPRM would continue to require the recipient to carry the burden of proof. In virtually all proceedings in the U.S. legal system, the proponent (e.g., the state in a criminal proceeding, the plaintiff in a civil suit, the agency in a regulatory enforcement proceeding) bears the burden of proof. We do not think that adopting a system contrary to this NPRM would be fair or appropriate. Moreover, the DBE, to become certified in the first place, has had to carry a burden of proof. It is reasonable to ask the recipient to carry the burden to remove the certification. We believe that it is appropriate to apply the preponderance of the evidence standard—the same standard that the DBE must meet to be certified—to attempts by the recipient to decertify the firm.

A few commenters said that recipients should be able to accept anonymous complaints, which the December 1992 NPRM proposed to prohibit. The SNPRM would change this provision so that recipients are not required to accept such complaints, though they may. The December 1992 NPRM also proposed that DOT could act to suspend a firm's certification and direct a recipient to start a decertification proceeding. Three comments objected to this proposal. The SNPRM would modify this provision. Concerned operating administrations would have the discretion to direct a recipient to initiate a proceeding when the Department reasonably believes that a certified DBE is ineligible. However, DOT would not assert the authority to suspend the firm's certification pending the outcome of the recipient's proceeding.

One of the grounds for decertification in the December 1992 NPRM was a documented finding that the recipient's previous decision to certify a firm was clearly erroneous. The intent of this provision was to prevent a recipient from decertifying a firm on the basis of nothing more substantial than a change of mind about an unchanged set of facts. Three commenters questioned this proposal, saying that a recipient should be able to reopen a certification, at least if there were an error. One suggested modifying the language to refer to a "substantial evidence" rather than "clearly erroneous" standard. Another supported the NPRM language. The standard applying to all decertifications is that the recipient demonstrate by a preponderance of the evidence that the firm does not meet eligibility standards. It would be confusing to introduce another standard here, so we are removing reference to the "clearly erroneous" standard. While we are not adopting the "substantial evidence" standard here (it is more appropriate as a standard in reviews of administrative proceedings, as distinct from *de novo* proceedings like this), we do think that the emphasis of this standard on factual backing for determinations is appropriate.

The point of this provision is to allow recipients to correct factual mistakes that resulted in certifications, not to reverse judgment calls. For this reason, this SNPRM refers to situations when a previous certification was factually erroneous.

The December 1992 NPRM proposed that if a firm was decertified in the midst of a contract, the remainder of its performance would not count toward contract or overall goals, since it was no longer a DBE. A few comments suggested allowing the remainder of the contract to count at least toward contract goals, assuming that the prime contractor had used the firm in good faith. We have decided to adopt this comment. The remainder of the contract would not count toward the recipient's overall goal, however.

As a general matter, it is not appropriate to remove a firm's eligibility until the recipient has determined that the firm is ineligible. However, there may be situations in which the case against a firm looks very strong, but the process will not conclude before the firm is awarded a contract. In this case, the SNPRM proposes that the recipient can suspend the firm's eligibility to receive new contracts, pending the outcome of the proceeding. This would be a sort of administrative preliminary injunction designed to protect the program from harm.

There was not significant comment on the remainder of the proposed section, and the SNPRM would adopt it with minor modifications (e.g., a cross-reference to SBA regulations has been dropped, given that Appendix F, which is adapted from SBA rules, provides guidance concerning social and economic disadvantage issues).

*Section 26.79 What is the Process for Certification Appeals to the Department of Transportation?*

Part 23 lacked specific procedures for certification appeals. The Department's procedures for handling appeals evolved as a matter of informal practice. The December 1992 NPRM proposed filling in this gap. Commenters focused on a few points of the proposed procedures.

The December 1992 NPRM proposed that DOT would decide appeals within 60 days of receiving a complete administrative record. Six comments suggested a shorter period (e.g., 30 days) or a longer period (e.g., 90 days); others favored no stated period at all, lest there be reversals or affirmances through inaction; and 12 comments favored the NPRM proposal, some of which supported affirmances or reversals when the time frame was not met. The SNPRM notes that, while we would administratively set a goal of 90 days for finishing appeal decisions once a complete administrative record is acquired, a regulatory time frame would

not be advisable, particularly given the often heavy workload of certification appeals. In short, we do not want to promise what we cannot ensure delivering. We think that affirmances or reversals resulting from failure to meet a self-imposed deadline, rather than on the merits of the appeals, would be inconsistent with the purposes of the appeals system.

Currently, firms have 180 days after a denial or decertification to make a certification appeal. The NPRM proposed reducing that number—which was based on the amount of time used for Title VI complaints—to 90 days, since firms always would have specific notice of the recipient's action on which to base an appeal. Four of the five comments on this issue supported the change, which the SNPRM incorporates for the reason stated above. This change would help the system run reasonably quickly, and provide closure for recipient decisions that are not appealed promptly.

The December 1992 NPRM proposed that, as under Part 23, the effects of a recipient's decision would remain in force pending the DOT appeal. For instance, a firm that the recipient had decertified would stay decertified unless and until DOT reversed the recipient's decision. Sixteen comments supported this position, while two said that DOT should grant stays of recipients' actions in appropriate cases. The SNPRM adopts the NPRM provision.

In the December 1992 NPRM, the Department proposed that we would reverse a recipient's decision if we found that it was unsupported by substantial evidence or inconsistent with this regulation. Nine comments supported the proposal, while six preferred a different standard, such as "arbitrary and capricious." Both the "substantial evidence" and "arbitrary and capricious" standards are used for the judicial review of administrative action, a function which is analogous to the role of the Department in the certification appeals process. The standards are closely linked, and there is no "bright line" between them in most administrative law cases. For example, courts will sometimes say that an agency decision is arbitrary and capricious because it is not supported by substantial evidence.

Generally, the "arbitrary and capricious" standard is viewed as slightly narrower, with courts considering whether the agency's decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment. If there was a rational basis for the agency's decision, court decisions say that courts should not substitute their judgment for that of the agency. The "substantial evidence" test is said to go to the reasonableness of what the agency did on the basis of the evidence before it. "Substantial evidence" must do more than create a suspicion of the fact to be established, requires objective evidence affording a rational basis for the agency's conclusions, and must be capable of convincing an unprejudiced "reasonable person" of the truth or validity of the agency's findings. It is less than a preponderance of the evidence, however. There can be "substantial evidence" supporting the agency's conclusion even though the record would also support a different conclusion. Use of the "substantial evidence" standard implies a somewhat more intensive inquiry into the facts of the case by the reviewing body than the "arbitrary and capricious." Under either standard, inconsistency with governing law is a ground for invalidating an agency's finding.

The SNPRM uses "substantial evidence" as the standard for review of agency certification decisions. The Administrative Procedure Act (APA) uses this standard for cases "reviewed on the record of an agency hearing provided by statute" (5 U.S.C. 706(2)(E)). In this process, DOT is acting in a role analogous to that of a court reviewing agency action. DOT is reviewing cases on the record of a recipient hearing provided by, in this case, Part 26. The same considerations that support using this standard in court review of agency action, such as the desirability of authorizing a reasonably limited inquiry into the factual basis of the agency's decision, apply in the case of certification appeals. Under the APA, the "arbitrary and capricious" standard applies not to adjudications by agencies but to their more purely administrative actions, such as issuing regulations and adopting environmental impact statements. We believe the APA model is an appropriate one for DOT to use in responding to certification appeals.

Two comments said that DOT should hold hearings in certification appeal cases. Such hearings are not appropriate to a review of an administrative record. Two other comments said that a firm should have to pay for a transcript when it appeals. To make possible the administrative review of the record, a recipient who does not already have a transcript of the hearing will have to prepare it to send to DOT. The only appropriate charge to the company, in our view, is for the cost of photocopying the transcript, not for its preparation. Twenty-five commenters supported the Department having an improved indexing/retrieval system for certification appeal decisions. The Department agrees that this is desirable, and we will work to establish such a system for decisions rendered under Part 26. We hope to utilize existing or planned computer bulletin boards in the Department to make certification appeal decisions, as well as guidance, interpretations, etc. of Part 26 available to the public electronically.

*Section 26.81 What Actions do Recipients Take Following DOT Certification Appeal Decisions?*

This section concerns what happens to recipients' certification actions concerning a firm—including those of recipients other than the one whose decision was appealed to DOT—following a DOT certification appeal decision. The December 1992 NPRM proposed that certification appeal decisions would be binding only on the recipient from whom the appeal was taken. Most of the comment on this section concerned the effects on other recipients.

Twenty-four comments said that other recipients should be able to adopt the Department's certification appeal decisions as their own, without the necessity of conducting further proceedings of their own. That is, if State A decertified Company X, and DOT upheld the decertification, then States B, C, etc. should be able to decertify Company X without being required to go through a § 26.77 decertification proceeding. Most of these comments did not discuss automatically certifying firms when DOT overturned a recipient's denial. Nine comments said that other recipients should have to go through their own due process procedure, rather than automatically taking action to follow a DOT decision.

As a legal matter, it would be inappropriate for recipients, other than the recipient directly involved in the appeal, to automatically take action to certify or decertify firms based on the outcome of a DOT certification appeal. This is because the nature of a DOT certification appeal proceeding. DOT is not, as such, determining whether a firm meets Part 26 eligibility criteria. All DOT is determining is whether a particular recipient's decision about a firm's eligibility is supported by substantial evidence and consistent with Part 26 standards. Under the substantial evidence standard, the Department can uphold a recipient's decision as supported by substantial evidence even though an alternative decision could also be supported by

substantial evidence. The Department could reverse a recipient's decision as unsupported by substantial evidence even though another recipient could have substantial evidence to come to the same result. The Department's decision is necessarily specific to the administrative record of the particular recipient involved and is not a legally definitive statement about the eligibility of the firm. The Department recognizes that it would be possible for the Department to uphold different decisions on the eligibility of a firm by different recipients, if both met the substantial evidence test.

Consequently, when a DOT certification appeal decision upholds or directs a denial of eligibility to a firm, this would provide a basis for other recipients to initiate a decertification proceeding, but they must go through such a proceeding to decertify the firm. Where DOT's action results in a firm being certified, this fact would be taken into account by other recipients to whom the firm is applying, but it would not result in automatic certifications elsewhere. The Department's decision, and its reasoning, would be taken into consideration by other recipients in their proceedings.

Other parts of the NPRM proposal for this section were not the subject of comment, and the SNPRM adopts them without substantive modification.

*Section 26.83 What Procedures Govern Direct Ineligibility Complaints to DOT?*

Under the existing Part 23, the Office of Civil Rights has accepted so-called "third party complaints," in which a party complains that a recipient has erroneously certified a firm. The NPRM did not include such a mechanism, on the basis that DOT's most useful role was the administrative review of the record of proceedings held at the recipient level. Nevertheless, there may be situations in which it is important for the Department to take a direct hand in responding to an ineligibility complaint.

To handle these situations, the SNPRM proposes that any person may file a direct ineligibility complaint. The Office of Civil Rights would have complete discretion concerning the disposal of the complaint. It could accept the complaint, decline to accept it, or refer it to the appropriate recipient for action. In no case would the Department be required to accept such a complaint; nor would it have to offer explanation for not accepting it.

If the Office of Civil Rights accepted the complaint, it would follow essentially the same procedure as a recipient would in a § 26.79 ineligibility complaint. As in the case of a recipient, the Department could invoke the "administrative preliminary injunction" procedure in an appropriate case.

**Subpart F—Compliance and Enforcement**

Sections 26.91–26.99 concern compliance and enforcement procedures under the rule. They were the subject of little comment. One comment favored leaving them as they were in the December 1992 NPRM. Five comments supported including additional measures, such as requirements for liquidated damages or making more use of the Program Fraud Civil Remedies Act of 1986 (PFCRA). Five comments supported the use of suspension and debarment remedies for program abuses, while six others said that this remedy should be limited to cases of indictment or conviction for criminal offenses (some of these said suspension should only be used where there has been a conviction).

The SNPRM retains the enforcement provisions of the December 1992 NPRM with little change. We are adding a specific reference to PFCRA. We are also deleting paragraphs discussing decertification in cases of criminal conduct, since we believe suspension and debarment remedies are adequate to deal with DBEs involved in criminal offenses. Recipients would retain discretion to begin decertification proceedings concerning DBEs involved in criminal activity, however. Under normal suspension and debarment practice relating to criminal offenses, a firm may be suspended when it is indicted but is only debarred following conviction. The Department will follow this practice in suspension and debarment actions related to criminal activity in the DBE program.

**Subpart G—DBE Participation in Airport Concessions**

On October 3, 1993, the Department published an NPRM in the **Federal Register**, proposing to revise its DBE program requirements applicable to airport concessions. (58 F.R. 52050) The NPRM proposed to implement statutory provisions which would allow airport sponsors to count new forms of DBE participation toward the overall goals of a DBE concession plan. These new forms include purchases from DBEs of goods and services used in the operation of a concession, as well as management contracts and subcontracts with DBEs. To make these and other changes, the Department proposed to amend Subpart F of 49 CFR Part 23, DOT's existing DBE rule.

The statutory provisions authorizing these changes were cited in the NPRM as Sections 511(a)(17) and 511(h) of the Airport and Airway Improvement Act (AAIA) of 1982, as amended by Section 117 of the Airport and Airway Safety, Capacity, Noise Improvement, and Intermodal Transportation Act of 1992 (Pub. L. 102–581). The AAIA and other transportation statutes were repealed effective July 5, 1994, by Public Law 103–272 and have been recodified in title 49 of the United States Code (U.S.C.). The recodification does not change substantively the legal authority of the DOT or the Federal Aviation Administration (FAA) or any prior interpretations of that authority, but is merely a restatement of the authority granted under prior statutes using different language and a reordering of provisions.

In accordance with this change, the Department will cite title 49 of the U.S.C., rather than the AAIA or any act which amended it, as authority for administering the DBE program. References to the Airport Improvement Program (AIP) will continue to be made, however.

49 U.S.C. 47107(e) (formerly Sections 511(a)(17) and (h) of the AAIA) provides as follows:

*(e) Written Assurances of Opportunities for Small Business Concerns.—*

*(1) The Secretary of Transportation may approve a project application under this subchapter for an airport development project only if the Secretary receives written assurances, satisfactory to the Secretary, that the airport owner or operator will take necessary action to ensure, to the maximum extent practicable, that at least 10 percent of all businesses at the airport selling consumer products or providing consumer services to the public are small business concerns (as defined by regulations of the Secretary) owned and controlled by a socially and economically disadvantaged individual (as defined in section 47113(a) of this title).*

*(2) An airport owner or operator may meet the percentage goal of paragraph (1) of this subsection by including any business operated through a management contract or subcontract. The dollar amount of a management contract or subcontract with a disadvantaged business enterprise shall be added to the total participation by disadvantaged business enterprises in airport concessions and to the base from which the airport's percentage goal is calculated. The dollar amount of a management contract or subcontract with a non-disadvantaged business enterprise and the gross receipts of business activities to which the management contract or subcontract pertains may not be added to this base.*

*(3) Except as provided in paragraph (4) of this section, an airport owner or operator may meet the percentage goal of paragraph (1) of this subsection by including the purchase from disadvantaged business enterprises of goods and services used in businesses conducted at the airport, but the*

*owner or operator and the businesses conducted at the airport shall make good faith efforts to explore all available options to achieve, to the maximum extent practicable, compliance with the goal through direct ownership arrangements, including joint ventures and franchises.*

*(4)(A) In complying with paragraph (1) of this subsection, an airport owner or operator shall include the revenues of car rental firms at the airport in the base from which the percentage goal in paragraph (1) is calculated.*

*(B) An airport owner or operator may require a car rental firm to meet a requirement under paragraph (1) of this subsection by purchasing or leasing goods or services from a disadvantaged business enterprise. If an owner or operator requires such a purchase or lease, a car rental firm shall be permitted to meet the requirement by including purchases or leases of vehicles from any vendor that qualifies as a small business concern owned and controlled by a socially and economically disadvantaged individual.*

*(C) This subsection does not require a car rental firm to change its corporate structure to provide for direct ownership arrangements to meet the requirements of this subsection.*

*(5) This subsection does not preempt—*

*(A) a State or local law, regulation, or policy enacted by the governing body of an airport owner or operator; or*

*(B) the authority or a State or local government or airport owner or operator to adopt or enforce a law, regulation, or policy related to disadvantaged business enterprises.*

*(6) An airport owner or operator may provide opportunities for a small business concern owned and controlled by a socially and economically disadvantaged individual to participate through direct contractual agreement with that concern.*

*(7) An air carrier that provides passenger or property-carrying services or another business that conducts aeronautical activities at an airport may not be included in the percentage goal of paragraph (1) of this subsection for participation of small business concerns at the airport.*

The NPRM was drafted based on the language in the AAIA, and redrafting the rule to reflect the recodification would be cumbersome. Thus, when appropriate, the SNPRM (as well as this preamble) uses the language in the AAIA. Final rule language will be modified, as needed, to conform to the recodified version of the statute.

Of the entities that submitted comments to the October 1993 NPRM, 16 are minority or female owners of car dealerships. Of these, 13 submitted comments in advance of publication of the NPRM. Five industry associations commented. These include the Airport Minority Advisory Council (AMAC); American Bar Association (ABA); American Car Rental Association (ACRA); Airports Council International—North American Region (ACI–NA); and National Automobile Dealers Association (NADA). Representatives of ten airport operators or owners (sponsors) commented individually. Representatives of 5 car rental agencies also commented individually, including Alamo Rent a Car, Inc.; Avis Rent a Car System, Inc.; Dollar Systems, Inc.; the Hertz Corporation; Thrifty Rent-a-Car System. Thrifty and Dollar submitted comments jointly, while Avis and Hertz each filed several comments. Hertz filed its major papers jointly with ACRA. The remaining comments (9) came from Congresswomen Eleanor Holmes Norton and Cardiss Collins; the Small Business Administration (SBA); two DBEs that are not car dealers; Host Marriott Corporation; Tie Rack, Plc; Smarte Carte, Inc., and one consulting firm.

Much of proposed Subpart G in this SNPRM reflects the Department's response to comments on the October 1993 NPRM. Subpart G also includes proposals for revising overall goals and contract goals based on *Adarand* and proposed implementing guidance issued by the Department of Justice. Generally, the Department intends to employ the same methodology in revising the concession program as the DOT-assisted contracting program. Following the close of the comment period, the Department expects to publish a final rule setting forth the concession provisions in Subpart G to 49 CFR Part 26. This subpart will respond to comments to this SNPRM and the comments to the October 1993 NPRM.

The following analysis includes a discussion of the Department's response to comments on the October 1993 NPRM. As with the other portions of this rule, we request that commenters focus on those matters responsive to *Adarand* and issues on which the Department specifically requests comment.

*Section 26.101 Definitions*

In one of several matters unrelated to the grant legislation or to *Adarand*, the October 1993 NPRM proposed to modify the definition of "affiliation." Subpart F of 49 CFR Part 23, as issued in 1992, incorporated the definition of the term from § 121.401 of the SBA's regulation, 13 CFR Part 121. The Department chose to adopt the SBA definition but was not required by the statute to do so. 49 U.S.C. § 47107(e) delegates authority to the Secretary to designate size standards for the concession program.

As set forth in 13 CFR § 121.401(l), affiliation may arise through a joint venture agreement, requiring the parties thereto to combine their gross receipts in making a determination of business size. The NPRM proposed to delete § 121.401(l) from the definition employed in the concession program.

Based on a review of the comments, the SNPRM retains this provision as proposed. Of five comments submitted to the docket which address the matter, four are generally supportive, while one is opposed. Two commenters are concerned that DBEs qualifying under the SBA's existing definition may have trouble competing against joint ventures involving a very large firm and a DBE. Another commenter, writing in support of the change, opposes any restrictions on a DBE owning an interest in another firm. This commenter points out that in the concession area, operations often are organized under separate businesses at individual airports, and separate partnerships often are established.

The Department does not believe that this provision would adversely affect a significant number of DBEs meeting SBA's definition of affiliation. The SNPRM does not require modification or abrogation of existing concession agreements during their term. Thus, if a DBE meeting SBA's affiliation standards currently operates a concession, its concession agreement could not be disturbed during the remainder of the term. Further, any DBE could compete for the award of future concession contracts by forming joint ventures or other eligible arrangements under the revised standard. The Department believes that joint ventures can offer DBEs a viable means of participating in a direct ownership arrangement when a lease, sublease, or other arrangement is not feasible.

The Department does not concur that all affiliation requirements should be suspended, and the NPRM did not propose this. Only Section 121.401(l) of 13 CFR Part 121, pertaining to joint ventures, has been deleted from the definition of "affiliation" used in the concession program. All other provisions of Section 121.401 would be retained. Under the remaining provisions, affiliation can arise through a variety of other arrangements, such as through an identity of interest, through stock ownership, or through common management. We also point out that the affiliation standards set forth in 13 CFR Part 121 apply regardless of the location of the businesses. To illustrate: if the same socially and economically disadvantaged individual owns 100 percent and clearly exercises management control over a retail concession at an airport and two other businesses located off-airport, the firms are affiliated. The gross receipts earned by all three would be summed in

determining the size of the airport concession.

The SNPRM also would amend the definition of "concession" to exclude long distance telephone service. The proposed change is intended to formalize 1993 administrative guidance issued by the FAA. The FAA concluded that facilities operated by long distance carriers generally are not "located at an airport" as provided in the definition of a concession and thus, should be excluded from the program. Local pay telephone service, by contrast, generally qualifies as a concession and hence, would be subject to the requirements of the rule.

In further regard to the term "concession," one commenter apparently advocates inclusion of car rentals in the definition if the firm holds a license or permit to pick up or deliver customers to airport terminals. Another organization comments to the contrary, stating that there is no evidence that Congress envisaged such an extension to the program. The Department concurs with the latter position and, to date, the rule has been administered using this latter approach. Since this matter has been the source of some confusion, the SNPRM proposes to clarify it.

As proposed, the SNPRM states that a car rental firm servicing the public from an on-airport facility is deemed "at the airport," while one that only picks up and/or delivers customers to the airport is not so regarded. The same principle would apply to taxicabs, limousines, hotels, and other businesses. In a related matter, an off-airport hotel that maintains a direct telephone in a terminal building would not be considered "at the airport," while a hotel doing business anywhere on airport property would be so regarded.

The SNPRM would further clarify that any firm meeting the definition of "concession" is covered by the program, regardless of the name given to its legal agreement with the sponsor or other organization.

The SNPRM proposes to add a definition of "direct ownership arrangement." The term appears in the legislation at 49 U.S.C. Sections 47107(e) (3) and (4). Section 47107(e)(3) names "joint ventures" and "franchises" as examples of direct ownership arrangements. Under the proposed definition in the SNPRM, such arrangement is one in which a firm owns and controls a concession. "Subleases" and "partnerships" are other examples of direct ownership arrangements that the SNPRM proposes to reference.

Four commenters favor expanding the definition of "management contract or subcontract" to include firms hired by concessionaires. The October 1993 NPRM limited the scope of the term to only those firms hired by sponsors. Although the statute does not define the term, 49 U.S.C. Section 47107(e)(2) explicitly provides for counting DBE management contracts and subcontracts toward a sponsor's overall goal. However, the legislation is devoid of any reference to counting such contracts toward a goal imposed on a concessionaire.

Furthermore, as set forth in Section 47107(e)(2), when a sponsor counts a management contract or subcontract with a DBE toward its overall goal, the gross receipts earned by the business activity to which the management contract applies must be excluded from the base. Section 47107(e)(2) also explicitly requires exclusion of the dollar value of management contracts or subcontracts with non-DBEs from the base.

Thus, if the definition of a management contract is expanded as these commenters request, the gross receipts accrued by a non-DBE concessionaire that hires a DBE management contractor or subcontractor would presumably be excluded from the base. In such case, the only expenditures from the concession added to the base would be the value of the DBE management contracts and/or subcontracts, as well as any goods or services purchased or leased from DBEs, if such provisions apply. DBE participation in the concession would necessarily equal 100 percent, even though the concessionaire is a non-DBE. To take another example, if a non-DBE concessionaire hires a non-DBE management contractor and purchases no goods or services from DBEs, no expenditures or gross receipts from the concession would be added to the base.

The Department concludes that expanding the scope of the term management contract could result in calculating overall DBE goals from a base which is not inclusive of all concession gross receipts. This, in our view, would conflict with 49 U.S.C. Section 47107(e)(1), which requires overall goals to be calculated as a percentage of the gross receipts from all concessions (in the case of a sponsor that uses gross receipts, rather than number of concession agreements, as the base.) Further, adopting an expanded definition of management contract could allow an airport to achieve a high percentage of DBE participation, while not reporting substantial gross receipts accrued by non-DBE concessions.

Since we have no indication that Congress intended such results, we do not propose to expand the scope of the term beyond those agreements with airport sponsors. However, under the SNPRM, managerial services procured by concessionaires, like other services used to operate a concession, can count toward the goals pursuant to the procedures of 49 U.S.C. Section 47107(e) (3) or (4).

In response to another comment, the wording in the definition of "management contract or subcontract" would be changed from "operates a business activity" to "operates or directs one or more business activities." As this comment points out, in some management contracts, the contractor directs the activities of other entities rather than conducting operations directly. In addition, the Department concurs with the comment that the words "the assets of which are owned by the sponsor" should be changed to "the assets of which are owned, leased or otherwise controlled by the sponsor." This makes clear that the sponsor's interest in the business activity is not limited strictly to an ownership interest. One other comment recommends a slight variation-inserting the words "or in which the airport sponsor has a significant interest or over which the airport sponsor exercises control" after "the assets of which are owned." However, this version makes no reference to "leased" assets and would require a further definition of "significant interest."

To further distinguish between a "concessionaire" and "management contractor," the SNPRM proposes to modify the former to mean a firm that owns and controls a concession, as opposed to one that simply operates one.

We propose to amend the definition of "small business concern" to specify that the appropriate size standard is the one which best describes the type of business a firm seeks to operate under the DBE concession program. The sole exception would be the size standard for car dealerships. This matter is discussed below under "Appendix G—Size Standards for the Airport Concession Program." The SNPRM would also clarify that a small business concern must be an "existing" firm.

Under provisions of the SNPRM for DOT-assisted contractors (including FAA-assisted contractors), the presumption of social and economic disadvantage is deemed to be rebutted when an individual's personal net worth exceeds $750,000. The October 1993 NPRM proposed to not apply the

$750,000 personal net worth limit to the concession program.

All five comments to the October 1993 NPRM that address this matter supported the Department's proposal to not apply the $750,000 standard to the concession program. The rationale for not applying this standard to airport concessions is that, given the larger businesses that may participate in the concessions DBE program, the $750,000 figure would be unreasonably low, excluding businesses that the Department intends to be able to participate.

Nevertheless, there are grounds for having some disadvantage threshold or other in this part of the rule. Even though larger businesses are intended to be eligible to participate in airport concessions, the concept of program eligibility based on economic disadvantage appears to call for a criterion to determine when someone is no longer disadvantaged. The Department is seeking comment on the appropriate dollar level for the economic disadvantage threshold in the financial assistance part of the SNPRM. We will ask the same question in the context of airport concessions. In this context, is it reasonable to have a higher threshold than in the case of the financial assistance program and, if so, what should it be?

*Section 26.103 Applicability*

As modified, this section would state that the subpart applies to any sponsor that received a grant for airport development after January 1988.

*Section 26.105 Requirements for Airport Sponsors*

In response to one comment, we propose to modify this section to require insertion of the nondiscrimination clause in management contracts. The NPRM required inclusion of the provisions only in concession agreements executed by the sponsor. The clause also would also be required as part of any subsequent contract or subcontract covered by the rule, including contracts for the provision of goods or services. The Department also concurs with a recommendation to include recordkeeping requirements in the rule that will enable sponsors to monitor contract awards and payments by concessionaires to DBEs which provide goods or services. A section would be added pertaining to all recordkeeping and reporting requirements; it would apply to both primary and non-primary airports.

We have not adopted a recommendation to allow small primary airports to submit their DBE concession plans to the FAA for review less frequently than annually, as currently required. We point out that, as administered by the FAA, the concession plan covers a three year period, which requires sponsors to do long-range planning. One purpose of an annual review and update is to include any information in the plan not previously available to the sponsor. Submission of an entirely new document is not required. Additionally, since the rule requires overall annual goals, accomplishments in meeting them must be reported yearly. Thus, the Department believes that the current requirements are appropriate.

Another comment opposes a quarterly reporting requirement, which the Department proposed for the DOT-assisted contracting program. Currently, the FAA requires an annual report of accomplishments in the concession program and does not propose to increase the frequency.

The SNPRM would retain a provision established in 1992 with the issuance of Subpart F of 49 CFR Part 23. Under the proposal, only primary airport sponsors would be required to implement a DBE concession plan. Other airports would not be subject to goal-setting and other components of a plan. Rather, these sponsors would be required to take appropriate outreach steps to encourage available DBEs to participate as concessionaires whenever there is a concession opportunity. This approach is consistent with the narrow tailoring principle of applying race-neutral mechanisms whenever possible to accomplish program objectives.

*Section 26.107 Elements of a DBE Concession Plan*

1. Overall Goals

This section has been modified for consistency with the Department's approach to overall goals in the DOT-assisted contracting portion of the SNPRM. A discussion of § 26.41 is found above. In it, we note that provisions of the SNPRM concerned with data collection and analysis could be burdensome to recipients. Realizing that the market for airport concessionaires is different from the market for many kinds of contractors for DOT-assisted contracting, we seek comment on how these concepts can best be adapted to the concessions industry and what data sources are available or should be developed to assist this process.

DBE program costs incurred in connection with an approved project are eligible for reimbursement with Federal funds. However, it should be noted that costs incurred in administering the airport concession program are not eligible for AIP funds. The Department therefore invites additional comments on resources available to sponsors to collect and analyze concession program data as required by the SNPRM.

A new requirement has been added to the SNPRM. It would require sponsors to provide for public participation in establishing overall annual goals. This provision is intended to assist sponsors in arriving at appropriate goals.

Several comments to the October 1993 NPRM concern calculation of overall goals. One favors the use of net payment to the airport in lieu of gross receipts as the base from which overall goals are calculated. This commenter opposes using a combination of net payment and gross receipts, as currently required when the gross receipts from a particular concession are not known to the sponsor. This matter was fully considered when Subpart F of Part 23 was published in 1992 and was not raised as an issue under the current rulemaking. (See discussion in preamble to Subpart F at 57 FR 18400, April 30, 1992.) We also do not propose to adopt a comment to allow DBEs that perform an aeronautical business to count toward concession goals. 49 U.S.C. § 47107(e)(7) provides that air carriers and other businesses conducting aeronautical activities are not included in the "overall percentage goal."

Another comment favors calculating goals based on "committed" dollar values derived from agreed-to contracts or contingent purchase orders, rather than estimated dollars. This commenter also disagrees with the proposal to exclude from the base from which the overall goal is calculated, the value of non-DBE management contracts and the gross revenues from the activity to which the management contract pertains. It advocates establishing a base annually to reflect all eligible DBE program activity.

Regarding the latter comment, as discussed above, the statute explicitly requires exclusion of these figures referenced from the base. Further, the goal of "at least 10 percent" is expressed in 49 U.S.C. § 47107(e)(1) as a percentage of "all businesses at the airport selling consumer products or services to the public," language that the Department interprets to mean "concessions." The statute permits a sponsor to count management contracts with DBEs or goods or services purchased or leased from DBEs toward meeting the goal. Thus, Section 47107(e)(2) provides that a sponsor "may meet the percentage goal of paragraph (1) of this subsection by

including any business operated through a management contract or subcontract." Section 47107(e)(3) provides that a sponsor "may meet the percentage goal of paragraph (1) of this subsection by including the purchase from [DBEs] of goods and services used in businesses conducted at the airport * * *" The Department believes that expanding the base to include all management contract fees or all purchases or leases of goods or services would be inconsistent with these statutory provisions.

Concerning the use of "estimated" versus "committed" dollars when setting overall goals, we note that overall annual goals are required as part of a three year plan. Some projections must be made a year or two in advance. Thus, sponsors would not ordinarily have sufficient information to base overall goals on committed dollars. To the extent that they do, however, such information should be reflected in the goals.

The SNPRM states that all overall goals must provide for participation by all certified DBEs and that goals may not be subdivided by specific groups. The Department's rationale for applying this provision to DOT-assisted contracting is discussed above in connection with 49 CFR § 26.41. Since the concession program authorized by 49 U.S.C. § 47107(e) incorporates the definition of "socially and economically disadvantaged individuals" from the contracting provisions of 49 U.S.C. § 47113, the Department's rationale applies equally to concessions.

In response to two comments, a provision has been added stating that in setting overall goals, a sponsor is permitted to include only those projected expenditures/gross receipts or number of agreements, as applicable, as the rule allows to be counted toward meeting such goals.

2. Counting DBE Participation Toward Meeting Goals

Several comments point out that the October 1993 NPRM does not clearly state whether the requirement to perform a commercially useful function applies to all expenditures that can be counted toward DBE goals. One commenter favors doing so, and we concur. The SNPRM clarifies this provision. In the preamble to the NPRM, the Department indicated that this was its intention from the outset. It states, "While the requirement to perform a commercially useful function would be made applicable to any DBE eligible under subpart F, it would be particularly useful in evaluating firms which provide services or supplies, and which subsequently enter into subcontracts." (58 FR 52050 at 52053)

Although the NPRM incorporated the provisions of § 23.47(d), it did not include guidance on other counting provisions, such as the definition of "regular dealer," "manufacturer," and others. One commenter believes that it would be useful to add a definition of "providers of goods or services," while another believes that the NPRM is too broad in allowing credit for procurement of goods and services which may be "pass-throughs", such as with distributors and brokers. Other comments, discussed below, express the same concerns.

The Department concurs that additional guidance is needed. The SNPRM proposes to adopt many of the counting provisions proposed for DOT-assisted contracting. Although "providers of goods or services" would not be defined as such, the SNPRM lists all types of transactions in which a DBE may participate, including as a regular dealer, manufacturer, or provider of a professional, technical, consultant or other service.

a. *Counting purchases or leases of vehicles by car rental firms.* The NPRM proposed to count the total dollar value of purchases or leases of vehicles toward DBE goals. Of 10 comments which address this proposal, 6 favor it, 3 oppose it, while one recommends additional review. Of those opposed, two suggest that the profit earned by the DBE is the appropriate amount to be counted.

The comments indicate that car rentals generally acquire their vehicles through fleet purchases. The Department was unaware of this practice at the time the NPRM was developed, and indeed, there is no reference to fleet purchases in the NPRM. According to the comments, most states have franchise laws requiring that fleet purchases be made through a car dealership. Commenters also state that the major automobile manufacturers have franchise agreements with their dealers, which require all car sales to be made through the dealers.

Fleet purchase transactions vary from one car rental firm to another and from one new car dealer to another. The dealer and car rental firm often agree to have the cars delivered directly from the manufacturer to the car rental firm, a practice known as "drop shipment," in which the dealer neither sees nor touches the cars. The profit margin in a fleet purchase is generally lower than a single car acquired in a retail sale. According to one comment, in a recent year, a minority dealer made a gross profit of approximately $8 per unit on fleet sales of 15,737 cars. The same dealer made $1,090 per unit on 770 cars through retail sales. This dealer comments that car dealers buy and resell these vehicles all in one transaction for which they generally receive a fee of between $10 and $20. Another comment refers to a dealer that made $44 per car or less.

Commenters point out that in a fleet purchase, car rental firms generally adhere to one of two scenarios in processing a new vehicle's ownership documents. In many cases, the new vehicle is delivered to the car rental company and its ownership documents are sent to the new car dealer. In these instances, the dealer handles the titling and registering of the vehicle. In other cases, a new vehicle's ownership documents are sent to the car rental company's regional office or its national headquarters. At these locations, employees of the car rental company, acting as agents for the dealer, perform the various procedures necessary to title and register these new vehicles.

Based on the comments, the Department has concluded that a fleet purchase is a separate function from retail sales of vehicles, and that car dealerships handle the transactions differently. Indeed, a dealer may use a separate account for its fleet purchases. In our view, the statute does not require that 100 percent of the cost of vehicles acquired in a fleet purchase count toward meeting DBE goals. Section 511(h)(3)(B) of the AAIA provided in part, "In the event that an airport owner or operator requires the purchase or lease of goods or services from DBEs, a car rental firm shall be permitted to meet such requirement by including purchases or leases of vehicles from any vendor that qualifies as a small business concern * * *"

Moreover, we do not interpret the statute to preclude application of "commercially useful function" principles to purchases or leases of vehicles. As referenced above, the additional counting provisions included in the SNPRM represent a logical outgrowth in response to comments to the NPRM. Hence, we do not concur with one comment which contends that the Department must issue a new NPRM and obtain additional comments on this matter. Also, we are unable to concur with the rationale provided by commenters who state that the total dollar value of vehicles acquired in fleet purchases must be counted so that a car rental can achieve the goals imposed by a sponsor. Under the SNPRM, a concessionaire that fails to meet a DBE contract goal would be permitted to

demonstrate that it made good faith efforts.

The Department believes that the car dealer's role in a fleet purchase best fits the description in 49 CFR Section 26.107(2)(iii)(E), which provides for counting the fee or commission charged by a DBE that is neither a manufacturer nor a regular dealer. Under paragraph (1) of this section, the entire amount of the fee or commission charged by a DBE for assistance in the procurement of goods would be counted toward the goals, provided that it is determined by the sponsor to be reasonable and not excessive as compared with fees customarily allowed for similar services. However, no portion of the goods themselves (in this case, vehicles) would be counted toward the goals.

While a car dealership may qualify as a "regular dealer" in other types of transactions, the Department does not believe that it functions as such in arranging a fleet purchase of vehicles. "Regular dealer" is defined in the SNPRM at Section 26.49(f)(2)(ii), applicable to DOT-assisted contracting, and is incorporated into the concession program. It reads in part as follows:"A firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question * * *"

Part 23 contained a similar definition at Section 23.47(e)(3). We point out that the vehicles acquired in a fleet purchase are not "bought, kept in stock, and regularly sold or leased to the public in the usual course of business." Rather, they are always acquired from a manufacturer and often shipped directly to the car rental agency.

The fee or commission earned by a car dealer in a fleet purchase generally will equal the gross profit-the difference between the amount charged by the manufacturer and the amount charged by the car dealer. To facilitate compliance with the rule, a definition of "fleet purchase" is proposed, as follows: "a purchase of vehicles in volume from a manufacturer at a discounted price, which is made through a car dealer. While the process may vary by manufacturer and by car dealer, the vehicles are frequently 'drop-shipped' directly to the car rental firm. A car dealer may handle fleet purchases through a separate account. The minimum number of vehicles in a fleet may vary, but as few as 10 have been used."

Under the SNPRM, a car dealer may qualify as a regular dealer in retail sales of vehicles (other than fleet sales) or when it leases vehicles or sells supplies or new parts. As proposed, 100 percent of the cost of goods purchased or leased from a DBE regular dealer would be counted toward DBE goals.

b. *Other counting issues pertaining to car rentals.* Two commenters make reference to car repair services performed under a manufacturer's warranty. In some instances, the car rental that purchased the vehicle can select the company to perform the warranty work. The manufacturer, rather than the car rental, pays for the service. One commenter requests that the cost of such warranty services performed by a DBE be counted toward the goals.

Reference is made to 49 U.S.C. 47107(e)(4)(B), which provides that a sponsor "may require a car rental firm to meet a requirement under paragraph (1) of this subsection by purchasing or leasing goods or services from a [DBE] * * *" Since the manufacturer, not the car rental, pays for the work performed under a warranty agreement, we conclude that such purchases do not meet the standard in the legislation. As such, they would not count toward DBE goals.

The SNPRM proposes to incorporate a recommendation by a sponsor to credit toward the goals, the amount paid by a car rental franchise to a DBE hired to manage its leased facilities. This provision relates to the discussion of "management contracts and subcontracts" set forth above.

3. Counting Purchases of Goods and Services by Concessionaires (Other Than Car Rentals)

Seven comments address the proposal in the NPRM to count the total dollar value of purchases of goods and services by non-DBE concessionaires. As proposed, counting such expenditures would be subject to a requirement that the sponsor and non-DBE make good faith efforts to explore all available options to attain, to the maximum extent practical, a direct ownership arrangement with a DBE. This good faith efforts "test" would apply to concessionaires other than car rentals. Three commenters favor the proposal, while four are opposed.

Of those opposed, three prefer use of a "discount factor" similar to DOT-assisted contracting procedures, in which 60 percent of supplies obtained from a DBE regular dealer can be counted. Another comment wishes to minimize "pass-throughs" such as with distributors and brokers, while one other believes that all concessionaires should be given the same latitude as car rentals, by being exempted from the good faith efforts test.

The SNPRM proposes to apply the same principles of commercially useful function to these transactions as to the ones involving car rentals. Thus, 100 percent of the cost of goods purchased from a DBE acting as a regular dealer or manufacturer would count toward the goals.

If a concessionaire purchases goods from a DBE which is acting neither as a regular dealer nor a manufacturer, only the fee or the commission charged for assistance in the transaction or the cost of the transportation provided would count toward goals, provided that it is determined by the sponsor to be reasonable and not excessive as compared with fees customarily allowed for similar services. However, no portion of the cost of the goods themselves would be counted. Further, the entire amount of fees or commissions charged by a DBE firm that provides a bona fide service to a non-DBE concessionaire would be counted toward goals. Counting any of these expenditures would be predicated on a good-faith efforts test, a condition that is not imposed on car rentals.

The SNPRM makes clear that such purchases of goods and/or services would count even if a non-DBE concessionaire meets a goal for a direct ownership arrangement with a DBE. In response to one comment, we point out that any qualifying DBE participation could count toward goals. The commenter notes that only a limited number of manufacturers of equipment used in baggage cart concessions exist throughout the country. While the rule does not impose restrictions on the geographical location of firms, 49 CFR Section 26.123 does allow a sponsor to employ a geographical preference under the conditions stated in that section.

One comment inquires about warehousing and distribution systems, which have acquired their inventories from DBEs. The commenter proposes that concessionaires be given credit for purchases from such warehousing and distribution systems in proportion to the DBE product mix as a part of the total inventory. Based on a review of the legislation, we do not propose to adopt this comment. 49 U.S.C. Section 47107(e)(3) authorizes sponsors to count purchases from DBEs of goods and services used in "businesses conducted at the airport," words which we

interpret to mean "concessions." Thus, only those goods actually purchased by a concessionaire from a DBE and used in operating a concession would be counted toward meeting DBE goals under this SNPRM.

In response to several comments, the SNPRM incorporates a provision stating that packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers.

4. Other Counting Provisions

One commenter recommends that a DBE should not be required to perform at least 30 percent of the work of a contract with its own forces in order to be considered to perform a commercially useful function. The commenter notes that for management contacts, the 30 percent requirement, which appeared in the December 1992 NPRM, may impose an unrealistically high standard, particularly if it is applied to any work of a concession or activities associated with a management contract. The Department concurs. Thus, while the 30 percent standard and other provisions of 49 CFR Section 26.49(e)(3) would be incorporated into the concession program, management contracts and subcontracts would be exempt. Concession agreements would also be exempt based on our observation that DBEs frequently make up less than 30 percent of a joint venture or sublease less than 30 percent from a prime concessionaire. Other participants in the DBE concession program would be covered by Section 26.49(e)(3), however, in order to be consistent with DOT-assisted contracting provisions.

In response to another comment, the Department could not find a basis in the statute to count purchases of goods or services from DBEs made by non-DBE management contractors. 49 U.S.C. 47107(e)(2) makes no reference to such a procedure, while we interpret Section 47107(e)(3) to apply only to concessions. Under the SNPRM, however, a sponsor may impose a contract goal on a management contractor to attain DBE participation through a management subcontract. (See 49 CFR 26.115(d).)

*Section 26.107(g) Certification Procedures*

The SNPRM gives sponsors the discretion of participating in the Unified Certification Process (UCP) with regard to certifying DBEs under the concession program. (All sponsors would be required to participate in the UCP with regard to certifying DOT-assisted contractors.) A sponsor that elects not to participate in the UCP would need to independently certify firms that will count toward overall and contract goals set under the concession program. These sponsors could choose to adopt precertification or certify only firms to be counted toward DBE goals.

*Section 26.107(h) Certification Process*

A sponsor that does not participate in the UCP would not be subject to the timeframes set forth in 49 CFR 26.73(i) in which to make an eligibility determination. These sponsors would be required to determine that a firm is eligible before it could count toward the overall goal or to a firm's contract goal.

Nine comments responded to the Department's proposal for considering the feasibility of adopting a self-certification procedure in limited circumstances, such as for providers of goods and services holding contracts of less than a designated dollar value. Six favor such a procedure, while three are opposed. One proponent recommends using procedures similar to SBA's under which a contracting officer may accept a self-certification in the absence of a written protest by competitors or other credible information. A second proponent suggests imposing penalties for fraud or willful misrepresentation, such as fines or debarment, and also recommends that the Department conduct random samplings of self-certified firms. Those opposed are concerned that self-certification will allow ineligible firms to participate in the program to the detriment of legitimate DBEs.

Significantly, a state department of transportation estimates that 25 percent of applications for DBE certification it receives do not meet eligibility standards and are denied. We concur with the comment that since these applicants believe their firms to be eligible, there may be an inherent problem with a self-certification process. Self-certification may also offer greater opportunity for fraud and abuse. We believe that these potential difficulties would offset any advantages gained by streamlining the process.

Concerning the proposal to allow sponsors to give "full faith and credit" to certifications of other DOT recipients, all 10 comments on the subject favor it. Two organizations recommend that both the certifying and accepting agency be held harmless if a defect is discovered in the certification, while another recommends that the certifying agency be held harmless. While the SNPRM would allow UCPs to form reciprocal agreements, it does not propose giving "full faith and credit" to certifications of DOT-assisted contractors made by other UCPs or recipients. In view of this, allowing such a practice in the concession program could cause confusion. The Department also believes that the sponsor that counts a firm toward its goals should be the entity responsible for the validity of the certification. If full faith and credit is allowed, a sponsor could knowingly and with impunity accept a defective certification.

Two comments address the feasibility of accepting certifications by local or state agencies that are not DOT recipients, but which use the same eligibility criteria as DOT. Both commenters support such a provision. The Department believes, however, that such agencies would not be proficient in applying the new eligibility standards proposed in this SNPRM, even if their local procedures incorporate them. Also, these agencies would not have the same interest as a recipient in ensuring that their certifications are valid.

For the reasons cited, the SNPRM does not include provisions for self-certification, giving "full faith and credit," or accepting certifications of agencies that are not DOT recipients. We have attempted, however, to minimize administrative requirements associated with certification, whenever feasible. For example, the SNPRM retains the provision in Subpart F of Part 23 that on-site visits are not mandatory in all instances. The establishment of the UCPs and other provisions pertaining to DOT-assisted contracting would also result in a reduction of administrative costs. The following proposed provisions address many concerns raised by commenters.

A UCP would make all certification decisions on behalf of all DOT recipients in the state, except for sponsors that elect not to participate in regard to their concession programs. If a sponsor does elect to participate, the certification decisions made by the UCP would be binding on it. Subject to the Department's approval, recipients in two or more states could form a regional UCP. UCPs could also enter into reciprocity agreements with other UCPs. A UCP would be permitted but not required to accept the certifications of another UCP. A UCP would not be required to process an application for certification from a firm having its principal place of business outside the state if the firm is not certified by the UCP in the state in which it maintains its principal place of business.

Concerning a comment that sponsors be permitted to contract out certification, the FAA issued guidance to sponsors in 1993 on the eligibility of such costs under the AIP. In response to comments recommending that the

Federal government or other agencies be responsible for certification, the Department is proposing recipients retain that responsibility. Regarding certification schedules, Subpart G would incorporate provisions of section 26.73(c), which requires potential DBEs to complete and submit an appropriate application form. Sponsors would be required to use the form provided in Appendix C without change or revision, except that subject to approval by FAA, additional information not inconsistent with the rule could be requested.

*Section 26.107(j) Certification Standards*

We received 7 comments concerning automobile dealer development programs operated and financed by major car manufacturers. All 7 commenters would support a provision to allow these firms to participate as DBEs. They suggest that the Department grant a limited exception to the ownership requirements in the rule. The comments explain that firms seeking to become car dealerships do not have access to the $700,000 to $1 million in start-up costs necessary to place a new car dealership in business. The commenters state that since commercial banks have not been interested in lending money to these unestablished dealers, the automobile manufacturers have provided start-up financing as a component of their dealer development programs.

Comments indicate that under the program, a candidate must provide a minimum of 15 percent of the start-up capital for the dealership, in return for which the candidate receives 100 percent of the common stock of the new dealership. The manufacturer loans the candidate the remainder of the start-up capital, taking back what is in effect a security interest in the new dealership. This security interest takes the form of a controlling interest in the preferred stock of the corporation. The dealership contract is structured so that as long as the preferred stock is outstanding, the common stockholders in the corporation will not have voting control over the corporation.

This dealership contract is often for a period of ten years, after which the contract will lapse if certain performance and profit conditions have not been met. The intent of the arrangement is that the candidate/dealer will redeem, on an annual basis, a portion of the preferred stock held by the manufacturer out of the profits of the dealership. The dealer gradually redeems all of the preferred stock and gains full control of the dealership within ten years of inception. During the early years of their contracts, dealers in development will not be able to participate in the DBE concession program because they do not own 51 percent of the their dealerships. These commenters do not advocate waiving any other eligibility criteria. They state that the industry recognizes the importance of assuring that disadvantaged owners are actively involved in the daily management of the dealership and meet appropriate size standards.

In considering this matter, we make reference to the definition of a "DBE" as follows: "a for-profit small business concern—(a) which is at least 51 percent owned by one or more socially and economically disadvantaged individuals 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." (49 CFR Sections 26.5 and 26.101)

The comments request that we waive the requirements in paragraph (a) concerning ownership. As paragraph (b) makes clear, to qualify as a DBE, the management and daily operations of the firm must be controlled by one or more disadvantaged individuals who are the 51 percent owners. In the case of some dealers in development, however, disadvantaged individuals own less than 51 percent of the business. Thus, control of such a firm cannot rest with disadvantaged individuals, as specified in paragraph (b), if the manufacturer is a non-DBE. Additionally, the comments indicate that the manufacturer and developing firm are in a franchisor/franchisee relationship. If this is the case, and the franchisor controls the franchisee, the firms would be affiliated. Under 49 CFR Section 26.107(j)(4), a business operating under a franchise agreement is eligible for certification only if it qualifies as a DBE and the franchise is not affiliated with the franchisee. Firms are affiliated if one firm controls or has the power to control the other or they meet other criteria stated in the definition of "affiliation" found in 49 CFR Section 26.101.

Inasmuch as both ownership and control criteria would need to be waived, the SNPRM would not grant an exemption for dealers in development. However, in the event that the Department adopts a developmental program or a mentor-protégé program for concessions at a future date, we would reexamine our position to determine if dealers in development could qualify.

A commenter notes that while the Department's program encourages the formation and growth of new firms, it may be difficult to make an eligibility determination of a newly formed firm that intends to perform a concession. A provision has been added which would address such situations. The SNPRM states that while a new firm applying for certification as a concessionaire must meet all eligibility standards, a sponsor cannot deny certification solely because it is new, without applying the eligibility standards.

The rule would also clarify that a limited partnership is not eligible for DBE certification if a non-DBE or a non-disadvantaged individual is the general partner.

*Section 26.107(k) Good Faith Efforts*

This section would require sponsors to use race neutral means, such as outreach and technical assistance, in an effort to meet overall goals, prior to applying the race-conscious technique of contract goals. In many cases, we anticipate that sponsors will need to apply race-conscious means in order to overcome the effects of past discrimination.

This section includes a list of good faith efforts, which is not exhaustive, that a sponsor would consider making to meet its overall annual goals. The efforts would also apply, as appropriate, to firms subject to a DBE contract goal, as well as to a sponsor and firm required to make good faith efforts to attain a direct ownership arrangement with a DBE. To assist sponsors and businesses, a definition of "good faith efforts" has been added.

One commenter to the October 1993 NPRM requests that a method be developed for obtaining nationwide information about the availability of certified DBE providers of goods and services. The FAA will provide such information or sources of information that it has. Another commenter requests additional guidance to clarify the meaning of suggested good faith efforts for attaining a direct ownership arrangement with a DBE. The Department suggests, as one example, that the firm conduct a pre-bid meeting concerned with the DBE portion of the contract to explain the solicitation and proposal process.

Another comment observes that the statute requires concessionaires to enter into joint venture agreements with DBEs only if "practical" and urges the Department to clarify that concessionaires cannot be required to offer DBEs financial assistance, management training, or other support as a means of making a joint venture

arrangement practical. The Department concurs, and an appropriate provision would be added at 49 CFR Section 26.115(g).

The Department believes, however, that it is within the authority of the legislation to require sponsors and concessionaires to provide technical assistance to DBEs in overcoming limitations, such as the inability to obtain bonding or financing. This assistance may include providing DBEs with information on lending institutions. A provision to this effect now appears in the SNPRM. A sponsor and/or concessionaire may also work with banks in their community in an effort to encourage loans to DBE program participants. A regulation of the Board of Governors of the Federal Reserve System, implementing the Community Reinvestment Act, imposes a continuing and affirmative obligation on financial institutions to help meet the credit needs of their local communities. (See 12 CFR Part 228.)

*Section 26.107(l) Monitoring and Compliance Procedures*

One commenter recommends establishing a requirement to ensure that non-DBE concessionaires actually fulfill their promised levels of DBE participation. We concur. A new provision would direct sponsors to implement appropriate mechanisms to ensure that all program participants comply with the requirements established pursuant to this subpart. The sponsor would utilize its own local authority to enforce these contractual conditions.

*Section 26.115 Obligations of Concessionaires, Contractors, and Competitors*

The Department concurs with a comment to the NPRM stating that a sponsor is authorized to impose a DBE contract goal on competitors for concession agreements. This provision is included in the SNPRM. It would also permit a sponsor to impose a contract goal on a management contractor to attain DBE participation through a management subcontract.

Like the current rule, the SNPRM does not require a DBE contract on each concession; rather, the sponsor has discretion to select agreements to be covered by this requirement.

Three commenters to the NPRM support the provision that requires sponsors to seek DBE participation in all types of concessions to the extent practical. They believe that the overall percentage of DBE participation should be distributed equitably among concessionaires. Another commenter requests that the rule expressly prohibit sponsors from levying disproportionate requirements on small concessions. It believes such a provision is a corollary to the statement in the current rule that sponsors "not concentrate participation in one category or a few categories to the exclusion of others."

The SNPRM retains the provision in the existing rule requiring sponsors, to the maximum extent practical, to seek DBE participation in all types of concession activities and not concentrate participation in any one or few categories to the exclusion of others. However, we do not propose to adopt a recommendation to require all contract goals to be set at the same percentage level. The SNPRM proposes that a contract goal may be higher or lower than the overall goal, depending on such factors as the type of work involved, its location, and the availability of DBEs for the work of the contract or concession. Unreasonably high contract goals, unrelated to the availability of DBEs, would not be authorized.

The SNPRM proposes that when a contract goal is set, the sponsor would be required to notify competitors that as a condition of receiving the award, the firm must submit information indicating that it will meet the goal by using named DBEs or that it made good faith efforts. Sponsors would be prohibited from using more stringent mechanisms than good faith efforts, such as a set-aside or conclusive presumption, except under specific conditions. A similar approach is proposed under 26.45 for DOT-assisted contracting.

Like overall goals, all contract goals would provide for participation by all certified DBEs and could not be divided into group-specific goals. We concur with one comment that opposes demands by sponsors to give preferential treatment to one group of DBEs over another.

Under the SNPRM, a sponsor may impose either of two requirements on a non-DBE concessionaire or firm competing for the award of a concession agreement, other than a car rental. A contract goal may be set to attain DBE participation solely through a direct ownership arrangement. Alternatively, a contract goal may be set for the purchase of goods or services. In the latter case, the sponsor would be subject to the procedures in 49 CFR 26.117, pertaining to making good faith efforts to attain a direct ownership arrangement.

The Department concurs with a comment that sponsors should not be required to allow car rental firms to meet DBE goals through purchase or lease of goods and services. Accordingly, the SNPRM proposes that a sponsor may levy one or both of the following requirements on such firms. First, it may set a contract goal for purchases or leases of goods or services, in which case, the car rental would be permitted to meet the goal by including costs associated with purchases or leases of vehicles from any firm that qualifies as a DBE.

A sponsor could also require a car rental to state in writing whether a change to its corporate structure is needed in order to form a direct ownership arrangement with a DBE; and to identify any such arrangements. If the car rental can provide for a direct ownership arrangement with a DBE without altering its corporate structure, the sponsor could require it to make good faith efforts to achieve a contract goal through such arrangement. If, however, the car rental cannot form a direct ownership arrangement with a DBE without altering its corporate structure, the sponsor must deem the firm to be responsive to any requirement pertaining to direct ownership arrangements.

The SNPRM proposes that DBEs may participate as prime concessionaires or management contractors through direct contractual agreements with the sponsor. Although the NPRM made reference only to DBEs as prime concessionaires, the legislation does not limit the provision in this way.

Since several comments address the matter of calculating DBE contract goals, we have included a new section on this matter. If a goal applies to a direct ownership arrangement, it would be calculated as a percentage of the total estimated annual gross receipts from the concession. If the goal applies to purchases and/or leases of goods and services, it would be calculated by dividing the estimated dollar value of such purchases/leases from DBEs by the sum of that amount and the estimated annual gross receipts from the concession. The latter is expressed in the following formula, which is designed to parallel the statutory direction for calculating overall goals:

$$\text{DBE Contract Goal} = \frac{\text{Estimated purchases/leases from DBEs (\$)}}{\text{Estimated purchases/leases from DBEs (\$)} + \text{Estimated gross receipts from concession (\$)}}$$

To illustrate: A concession is expected to generate $1 million in gross receipts, and the sponsor wishes to set a DBE contract goal of 10 percent. To meet the goal, the concessionaire must purchase/lease $111,111 in goods or services from DBEs.

$$\text{10\% DBE Goal} = \frac{\$111{,}111}{\$111{,}111 + \$1{,}000{,}000}$$

While the rule would not include a formula for calculating a DBE contract goal imposed on a management contractor, it may be calculated as a percentage of the amount of the prime contract. The Department seeks comment on whether this approach is a sensible one for contract goals, or whether there are other approaches the Department should consider.

Several comments address the proposal under which car rentals are not required to make good faith efforts to form a direct ownership arrangement with a DBE as a condition of counting the purchase or lease of goods and services from DBEs. All representatives of the car rental industry agree with the proposal. Another comment states that the statute does not relieve sponsors or any business operating at airports from making good faith efforts to achieve direct DBE participation. This commenter states that alternative methods of compliance through purchase of goods and services from DBEs is permitted only when direct participation is not practical. Yet another comment states that the statute does not preclude car rental firms from entering into a joint venture, partnership, sublease, or other direct ownership arrangement with a DBE, where such an arrangement is practical or desirable. This comment states that the statute does not relieve car rental firms of the "good faith" requirement applicable to every other non-DBE business operating at the airport.

Still another commenter, contending that the good faith efforts test should be applied to car rentals, strongly disagrees with the NPRM. It points out that much of the intent of Congress was stated between the time of the 1987 amendments to the AAIA and the subsequent 1992 Act. This commenter notes that several members of Congress made very key and explicit statements in their remarks on the good faith efforts issue.

Based on its review, the Department has concluded that the Congressional statements cited by this last commenter either do not support its position or are largely irrelevant because they refer to an early version of Section 117 of the 1992 Act which is substantially different than the language of Section 117 that was enacted into law. The position advocated by the commenter was thoroughly considered by Congress during its early deliberations on the 1992 Act but was discarded by Congress in drafting the final statutory language.

Moreover, the Department believes that the plain language of the statute does not impose a good faith efforts test on car rental firms before they are permitted to engage in vendor purchases. 49 U.S.C. Section 47107(e)(3) of 49 U.S.C. (formerly Section 511(h)(2) of the AAIA), which covers all concessionaires except car rental companies, contains the good faith efforts test. Section 47104(e)(4)(B) (formerly Section 511(h)(3)(B) of the AAIA), which covers car rental concessionaires only, contains no such language. Standard rules of statutory construction require that the words of a statute must be given their plain meaning, and the absence of the good faith efforts test from the provision covering car rental concessionaires shows that the test is not mandated for these concessionaires. In *Russello* v. *United States, 464 U.S. 16.23 (1983)*, the U.S. Supreme Court held that where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

The Department concurs with other comments on this matter to the extent that a sponsor may, within the constraints imposed by the statute, levy certain requirements on car rentals pertaining to direct ownership arrangements. These requirements are discussed above.

The NPRM proposed that a car rental firm would not be required to change its corporate structure in order to provide for a direct ownership arrangement with a DBE. A change in corporate structure was defined to include a "transfer of corporate assets, or execution of a joint venture, partnership, or sublease agreement." One commenter disagrees with the proposal, while several others agree. The one opposed comments that it does not see a "coming-together" of two businesses such as in a joint venture, partnership, or a specific sublease as a change in corporate structure, and the rule should not define it as such. The Department believes, however, that a firm that does not generally conduct its operations through such arrangements may need to alter its corporate structure to provide for doing so. Although the statute does not define "change to corporate structure," Senator Wendell Ford addressed this point as follows:

*Section 511(h)(3) of the AAIA, as amended provides that nothing in the law on DBE assurance 'shall require a car rental firm to change its corporate structure to provide for direct ownership arrangements.' For example, a car rental firm is not required, but is permitted, by the DBE assurance sections 511(a)(17) and 511(h) of the AAIA, as amended, to transfer corporate assets or engage in joint ventures, partnerships, or subleases. I would like to repeat that this language has been agreed to by both the car rental industry and the airports. 138 Cong. Rec. S17843 (October 8, 1992) (statement of Sen. Ford).*

In an extension of his remarks on the floor of the House of Representatives on October 2, 1992, Representative James L. Oberstar submitted a similar statement for the Congressional Record on October 8, 1992 (138 Cong. Rec. E 3501). Representative William F. Clinger submitted the same statement to the Congressional Record, as an extension of his remarks. (138 Cong. Rec. D 3257.) The SNPRM retains the definition of "change to corporate structure" consistent with the sense of Congress described above.

One commenter requests clarification of whether an airport can express a preference for a car rental that can

achieve a DBE goal through a direct ownership arrangement without changing its corporate structure, for instance, a firm that traditionally franchises. The SNPRM would prohibit sponsors from granting such a preference. The Department believes that if adopted, the practice could have the effect of imposing a de facto requirement on some firms to change their corporate structure in order to enter direct ownership arrangements. The prohibition in the rule applies to the selection by sponsors of car rental concessionaires and to the terms and conditions of concession agreements.

*Section 26.117 Conditions Precedent to Counting Purchases of Goods and Services by Concessionaires (Other Than Car Rentals) Toward DBE Goals*

The rule would include this separate section on the good faith efforts test, which lists the conditions precedent to counting purchases of goods and services toward DBE goals by concessionaires (other than car rentals). For each covered concession, the sponsor would be obligated to either (1) set a DBE contract goal for a direct ownership arrangement and require the non-DBE firm to make good faith efforts; or (2) submit information to the FAA demonstrating that the sponsor and firm made appropriate good faith efforts to attain DBE participation through a direct ownership arrangement.

In the latter case, the sponsor would be permitted, if appropriate, to submit an explanation as to why the nature of a particular concession makes a direct ownership arrangement not economically feasible or otherwise impractical. Any contract goals established under this section would be subject to FAA approval. The Department interprets 49 U.S.C. 47107(e)(3) as authority to require a contract goal for a direct ownership arrangement, whenever practicable. The statute requires the sponsor and concessionaire to "make good faith efforts to explore all available options to achieve, to the maximum extent through practicable, compliance with the [overall DBE] goal through direct ownership arrangements, including joint ventures and franchises."

Purchases of goods and services covered by this section would be counted toward DBE goals throughout the duration of the concession agreement, as long as the requirements of this section and subpart are met. For example, if a concessionaire meets a contract goal for a direct ownership arrangement, the purchases of goods and services can also count toward the goals.

*Section 26.121 Prohibition on Long-Term, Exclusive Concession Agreements*

Under the SNPRM, a sponsor would be permitted to enter into a long-term, exclusive agreement only if one or more DBEs participate throughout the term of the agreement. These DBEs must account for a percentage of the gross receipts equal to a level set in accordance with the goaling process of § 26.107. The SNPRM would specify that such DBE involvement must be in the form of a concession.

However, purchases of goods and services from DBEs would also count toward the goals, as provided in § 26.117. The SNPRM also proposes that if a DBE concessionaire cannot perform successfully, the non-DBE concessionaire must replace the firm with another DBE, if the remaining term of the agreement makes this feasible. Under a newly proposed provision, if such a replacement would not be feasible, the non-DBE would be required to make good faith efforts during the remaining term of the agreement to encourage DBEs to compete for the purchase and/or leases of goods and services that it procures.

*Section 26.123 Compliance Procedures*

One commenter recommends that the final rule include relatively short deadlines for completing the various stages of investigating a complaint, and that in any case, the FAA be required to resolve a complaint within six months. Two commenters believe that unless the areas relating to car rental concessions are more specific in terms of what a sponsor is permitted to require, many complaints will be generated. One of these commenters recommends that this section be modified accordingly.

The FAA considered matters pertaining to complaint processing in connection with the development of 14 CFR Part 16 (61 FR 53998; October 16, 1996). In the NPRM leading to this rule (59 FR 29889; June 9, 1994), the Department invited comments on specific procedures that would apply to complaints filed under the DBE program. Prior to issuance of Part 16, the procedures in 14 CFR Part 13 governed.

The obligations that would be imposed on concessionaires, including car rentals, are set forth in other sections of the rule, including 49 CFR Section 26.115. 49 CFR Section 26.123 would provide for processing complaints and taking enforcement actions in the event of noncompliance. Complaints would be processed in accordance with the procedures of FAA regulation 14 CFR Part 16, while Title 49 of the United States Code (U.S.C.), including Sections 47106(d), 47111(d), and 47122, would govern the enforcement actions the Administrator is empowered to take in the event of noncompliance. We would like to point out that these procedures would apply to any noncompliance matter, regardless of whether it involves a car rental or other covered organization. We note that other procedures (e.g., DOT Title VI procedures) may apply concurrently in some cases.

*Section 26.125 Effect of Subpart*

The SNPRM retains the provision in the NPRM concerning nonpreemption of State or local requirements. A new paragraph is proposed concerning local geographical preference, which formalizes FAA guidance on the matter. This section would also incorporate certain miscellaneous requirements from 49 CFR Section 26.99, concerning the availability of records, confidentiality of information on complainants, cooperation, and the prohibition on intimidation and retaliation. These provisions would apply equally to the concession program.

**Appendix G—Size Standards for the Airport Concession Program**

The NPRM focused on two issues relating to size standards. It solicited comments on an appropriate size standard for car dealerships, and proposed use of SBA size standards for other off-airport firms and for management contractors.

Regarding car dealerships, the NPRM incorrectly stated that the SBA size standard was $11.5 million. The actual standard at the time was $18 million. The standard has since been raised to $21 million, due to an inflationary adjustment to the receipts-based size standards in 13 CFR Part 121, not otherwise prohibited by statute from change. SBA announced this change April 7, 1994. (See 59 F.R. 16513.)

All car rental agencies that commented and four other commenters strongly support basing the size standard for car dealers on number of employees. The number recommended by these organizations ranges from 100 (unaggregated where a DBE owns more than one dealership) to 500 (if aggregated). The SBA believes that its size standard is reasonable for car dealerships, although it comments that a moderately higher standard would also be acceptable. Two commenters suggest basing the standard on annual net profits, while five commenters recommend that the Department conduct additional research prior to

setting a standard. Two of these latter propose that no size limit be imposed during the initial implementation of the rule, while one favors use of an interim standard. Those recommending additional research believe that a number of factors should be studied, including average annual gross receipts earned by dealerships; impact of fleet purchases on gross receipts; number and location of minority dealerships; recognition that not all dealers are given the same line of credit, and that a small dealer may be unable to obtain the credit needed for a fleet inventory.

One sponsor observes that in processing applications for certification, DBE car dealers who own less than 51 percent of a dealership are more likely to meet SBA's size standard, while DBEs who own more that 51 percent of a dealership often exceed this cap. Of the comments favoring the use of gross receipts, one recommends a standard of $58 million, another in excess of $200 million, while another recommends setting the standard based on non-fleet sales, together with other revenues earned from service, parts, and body shop work. Ten car dealerships comment that fleet sales result in very low profits even though dollar volume is high. All car dealers that commented voice the concern that a low gross receipts cap such as $17 million would make them ineligible immediately.

Most dealers provided information on their own gross receipts and number of employees. Only one dealer reports yearly revenues of less than $5 million; five range between $17 and $29 million; three between $45 and $62 million; and three between $100 and $150 million. Two have multiple dealerships (four and five), with aggregated revenues of approximately $424 million and approximately $250 million respectively. The number of employees ranged from 38 to 150 per dealership. Most employment levels range from 38 to 70, with only one dealer reporting more than 600 at four dealerships.

As suggested by one commenter, we obtained the SBA's study, "Review of Auto Dealer Size Standard March 1991," prepared by Robert N. Ray. The study, which has been included in the docket, was undertaken to determine what assistance the SBA could provide to new and used automobile dealers. The industry was in distress at the time of the study due to a downturn in the business cycle. The study recommended an increase in the size limit to $13.5 million or $14.5 million.

The Department concurs with commenters who believe that a size standard based on gross receipts is inappropriate to the extent that revenues from fleet purchases are included, as only a small profit is made by the dealer in these transactions.

The Department has concluded that car dealers meeting the SBA's size standard, in general, are not large enough to handle fleet purchases or are participating in a dealer development program and may own less than 51 percent of the dealership. As noted above, such dealers in development cannot qualify as DBEs. Thus, adopting the current SBA standard of $21 million may leave only a small pool of DBEs to perform the type of work eligible to be counted toward DBE goals. This approach could also eliminate many firms soon after "graduating" from a dealer development program and which could benefit significantly from the DOT's DBE program. Selection of a size standard must also consider the substantial capital investment that a new car dealer makes. Setting the standard too low may not provide sufficient time for the firm to develop and grow.

Extensive research may be required in order for the Department to determine an appropriate receipts-based standard that excludes revenues from fleet purchases. A commenter observes that SBA regulations include an employee-based size standard of 500 employees for Division G, "Retail Trade," non-manufacturers engaged in government procurement, and 100 employees for wholesale dealers for Division F, "Automobiles and Other Motor Vehicles." The Department is proposing to use a maximum of 500 employees as the standard. It would apply to any firm that meets the definition of SIC 5511, "Motor Vehicle Dealers (New and Used)," found in 49 CFR Section 26.101 under "small business concern." Given the nature of the comments, we do not believe that this standard would result in a very few DBEs dominating the market, to the detriment of smaller DBEs.

If the proposal is adopted, the FAA would notify sponsors in the event of a change to the definition of SIC 5511. The size standard of 500 employees would apply to any firm meeting this definition, regardless of the type of goods and/or services it seeks to provide under the concession program. Thus, if a DBE dealer arranges for a fleet purchase and provides vehicle repair services to a concessionaire, a maximum of 500 employees would be used as the standard for both transactions (whereas, the SBA standard for many types of automobile repair and services is $5.0 million, as in Major Group 75). We believe that this approach would simplify administration of the program and is proposed based on many of the same factors as discussed above.

One comment addresses the matter of the size standard for management contractors. This commenter believes that SBA's size standard of $3.5 million for parking lot contractors may be low, given the experience necessary to manage a parking lot. It suggests a survey of DBE firms currently in this business and of the minimum qualification criteria set by airports.

In proposing to use SBA's size standards, the Department commented that management contractors, unlike concessionaires, generally are not required to make a substantial capital investment in a leasehold facility. Thus, they would not encounter the hardships associated with "graduating" from the DBE program after exceeding the size standard, that ordinarily would befall concessionaires. Indeed, the turnover of DBEs would allow more firms to enter and benefit from the program.

The SBA's April 7, 1994, final rule increased the size standard for parking lot operators to a maximum of $5.0 million. (See SIC 7521, "Automobile Parking.") The Department points out that rulemaking procedures do not require a survey of organizations having an interest in the matter. Further, at least some of the information that would be obtained in a survey could have been addressed by commenters. Significantly, no firms and only one sponsor commented. In view of this and the recent increase in the standard, the Department proposes to use $5.0 million as the size standard for parking lot operators.

The rule would also incorporate the SBA's size standards for all other providers of goods or services. With regard to leasing of vehicles, if a firm does not fall under SIC 5511, "Motor Vehicle Dealers (New and Used)," the appropriate size standard would generally be SIC 7515, "Passenger Car Leasing," which is set at $18.5 million.

The SNPRM would make an inflationary adjustment to the size standards for concessionaires, pursuant to the Secretary's authority under 49 CFR Section 26.101. The Department of Commerce, Bureau of Economic Analysis, prepares estimates of personal consumption expenditures using suitable price indices. These indices include purchases of goods and services, many of which are sold to the public by airport concessionaires. The implicit price deflator for personal consumption expenditures was 10.9 from June 1992 to March 1996. Since size standards for concessionaires were originally established and became effective June 1, 1992, the second

quarter of 1992 is used as the base period. 10.9 percent represents the rate of increase since that time. By multiplying the appropriate size standard by 1.109 we are able to adjust dollar figures for inflation.

Thus, $40,000,000 multiplied by 1.109 yields $44,360,000 as the proposed new size standard for auto rental concessionaires. $30,000,000, when multiplied by 1.109, yields $33,270,000 as the proposed new size standard for many other categories of concessionaires. These standards would apply to concessions as listed in Appendix G, until such time as they are amended. The standards will be further adjusted upon issuance of a final rule.

**Miscellaneous Comments to the NPRM**

The SNPRM does not incorporate a recommendation by one commenter to require prompt payment to DBE contractors. The Department has no experience in administering a concession program involving providers of goods or services and does not know whether prompt payment to DBEs is an issue under such contracts. This matter can be reconsidered at a later point if problems are brought to our attention.

Two commenters believe that the proposed revisions are not in the best interest of minorities. One is concerned that the resources required to monitor purchases of goods and services and management contractors will make it more difficult to facilitate DBE involvement in direct ownership arrangements. The Department does not concur that such monitoring will impose an unreasonable burden. Additionally, the Department is required by statute to issue a regulation implementing the provisions relating to goods and services.

Another commenter supports the idea of implementing a "managed growth" program in which DBEs move from threshold to threshold in terms of development. Upon attaining the level of progress that enables the firm to compete in the free marketplace, the DBE program will have accomplished its goal. The comment does not indicate whether such "thresholds" are size standards or other types of developmental stages. Another commenter believes that the proposed development program presents major problems and should not be included without research and testing. We point out that the October 3, 1993, NPRM did not propose a developmental program for DBEs. Such a program was proposed for DOT-assisted contractors and is addressed in that section of the SNPRM.

**Other Matters Pertaining to Adarand**

The SNPRM does not include a proposal for diversifying DBEs in concessions similar to the one proposed under § 26.33 for DOT-assisted contractors. There are several reasons for this. First, available data does not indicate that DBEs are concentrated in particular types of concessions. Further, when all primary airports are included, DBEs have accounted for less than 10 percent of total gross receipts earned during each of the past three years. Many individual airports are also below this level. Additionally, in contrast to highway construction, very few non-DBEs have complained to the Department of being excluded from particular types of concessions due to a concentration of DBEs.

Like the current rule, the SNPRM would require a DBE to leave the program once it exceeds a specified size standard. As in the other portions of the SNPRM, Subpart G does not propose additional "graduation" provisions. However, the Department seeks comment on whether additional provisions affecting the duration element of narrow tailoring should be added to this portion of the rule.

**Regulatory Analyses and Notices**

*Executive Order 12866*

This is a significant NPRM under Executive Order 12866. We view it as significant because it has substantial policy and public interest and affects a broad variety of parties across three DOT modes. As noted earlier in the preamble, this SNPRM is one part of the Clinton Administration's overall reform of affirmative action programs. For the same reasons, it is also significant under the Department's Regulatory Policies and Procedures.

We do not believe that the SNPRM would have significant economic impacts, however. In evaluating the potential economic impact of this SNPRM, we begin by noting that this proposal would not create a new program. It would revise the rule governing an existing program. The economic impacts of the DBE program are created by the existing regulation and the statutes that mandate it. The changes that we propose in this program are likely to have some positive economic impacts. For example, "one-stop shopping" and clearer standards in certification are likely to reduce costs for small businesses applying for DBE certification, as well as reducing administrative burdens on recipients.

"Narrow tailoring" changes are likely to be neutral in terms of their overall economic impact. These could have some distributive impacts (e.g., if the proposed goal-setting mechanism results in changes in DBE goals, a different mix of firms may work on DBE contracts), but there would probably not be net gains or losses to the economy. There could be some short-term costs to recipients owing to changes in program administration resulting from "narrow tailoring," however.

In any event, the economic impacts are quite speculative and appear nearly impossible to quantify. We do not now have any data that would allow us to quantify these impacts. The Department is working with other agencies to see if data on DBE participation and potential effects of the proposal can be obtained. We also seek comments and information on the issue of economic impacts or costs to participants. We will conduct further analysis if information or comments we receive make it possible.

*Regulatory Flexibility Act Analysis*

The DBE program is aimed at improving contracting opportunities for small businesses owned and controlled by socially and economically disadvantaged individuals. Virtually all the businesses it affects are small entities. There is no doubt that a DBE rule always affects a substantial number of small entities.

The SNPRM, while improving program administration and facilitating DBE participation (e.g., by making the certification process clearer) and responding to legal developments, appears essentially cost-neutral with respect to small entities in general (as noted above, the one-stop shopping feature is intended to benefit small entities seeking to participate). It does not impose new burdens or costs on small entities, compared to the existing rule. It does not affect the total funds or business opportunities available to small businesses who seek to work in DOT financial assistance programs. To the extent that the proposals in this SNPRM (e.g., with respect to changes in the methods used to set overall goals) lead to a different goals than the existing rule, some small firms may gain, and others lose, business.

There is no data of which the Department is aware that would permit us, at this time, to measure the distributive effects of the proposed revisions on various types of small entities. It is likely that any attempt to gauge these effects would be highly speculative. For this reason, we are not able to make a quantitative, or even a precise qualitative, estimate of these effects.

Nevertheless, the Department seeks any information that commenters may

have on potential small entity impacts of the SNPRM, particularly the provisions concerning goal-setting and DBE diversification. In addition to reviewing information we receive in comments, DOT anticipates working with other agencies involved in the Administration's affirmative action reform effort to benefit from research and analysis they have performed. Based on the information we have obtained (or program data after a final rule is implemented), the Department may be in a position to do a more detailed analysis of small entity impacts in the future.

*Paperwork Reduction Act*

At the present time, under 49 CFR Part 23, the Department has one information collection item approved under the Paperwork Reduction Act. This is for a quarterly DBE data report from recipients to DOT (OMB No. 2105–0510). This approval expires July 31, 1997. Under the SNPRM, the frequency of reporting would change from four times a year to twice a year, which would reduce the burden involved.

Under Part 23, there are other regulatory requirements that may have Paperwork Reduction Act implications. These include the requirement for applicants for DBE participation to submit eligibility information to recipients (Appendix C of the SNPRM contains a proposed certification form that applicants would use) and for recipients to submit DBE programs and overall goals to DOT for approval. Similar requirements apply in the airport concessions portion of the rule. These provisions, for the most part, originated before the current version of the Paperwork Reduction Act, and the Department did not, at the time, submit Paperwork Reduction Act approval requests concerning them. These activities would continue under the SNPRM, which would also add a one-time requirement for the submission of a unified certification program plan to the Department for approval.

The Department intends to analyze information collection requirements in the DBE program in greater detail before the issuance of a final rule, and we seek comments on information collection issues. The Department intends, based on its own analysis and information we receive in comments, to submit a formal information collection approval request to OMB in connection with paperwork contained in Part 26.

Organizations and individuals wishing to submit comments on these proposed requirements should direct comments to OMB's Office of Information and Regulatory Affairs, Room 10235, New Executive Office Building, Washington, DC 20503: Attention: Desk Officer for U.S. Department of Transportation. OMB is required to make a decision concerning the collection of information proposed in this SNPRM between 30 and 60 days after its publication. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the Department's comment closing date.

*Regulatory Reform Initiative*

This proposal is intended to help the Department achieve the goals of the Clinton Administration's Regulatory Reform Initiative. It does so in several ways. It proposes to reduce the frequency of reports. It proposes to reduce the burden on small businesses by creating a one-stop shopping certification system in each state and by ensuring that recipient certification processes treat all applicants fairly and consistently.

One of the most burdensome aspects of the current administration of the program is the vagueness of certification standards and the multiplicity of interpretations and varying guidance and policies that have implemented these standards at the Federal, state, and local levels. To address this problem, the SNPRM reinvents the certification standards and provides clear, specific, uniform, nationwide standards for certification. This will provide greater certainty to all participants and reduce the time, difficulty, and cost involved in the certification process. It will also substantially improve the fairness of the process to applicants.

One aspect of regulatory reinvention is enhancing partnership with state and local governments, providing greater opportunities for state and local innovation and responsibility in carrying out programs. The SNPRM seeks to do so in a number of ways, such as the program waiver provision and the flexibility provided to establish the unified certification process in each state. The Department seeks comment on additional ways the DBE program can accomplish this objective.

The Department also seeks comment on additional ways in which the Department's regulation can be reinvented, simplified, clarified, or made easier for participants to work with, consistent with the goals of the Administration's Regulatory Reform Initiative.

*Federalism*

The SNPRM does not have sufficient Federalism impacts to warrant the preparation of a Federalism assessment. While the rule concerns the activities of state and local governments in DOT financial assistance programs, the proposal would not significantly alter the role of state and local governments vis-a-vis DOT from the present Part 23. The proposal to permit program waivers could allow greater flexibility for state and local participants, however.

Issued this 21st day of May, 1997, at Washington, DC.

**Rodney E. Slater,**

*Secretary of Transportation.*

For the reasons set forth in the preamble, and under the authority of 49 U.S.C. 322, the Department proposes to amend Title 49, Subtitle A, by removing Part 23 and adding Part 26, to read as follows:

## PART 26—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS

### Subpart A—General

Sec.

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### Subpart B—Administrative Requirements for DBE Programs for Federally-Assisted Contracting

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26.103 Applicability.
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26.109 Rationale for basing overall goals on the number of concession agreements.
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26.113 Conditions precedent to counting purchases of goods and services (other than car rentals) toward DBE goals.
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**Appendix A—Explanation and Construction of Provisions of 49 CFR Part 26**
**Appendix B—Good Faith Efforts**
**Appendix C—DBE Certification Form**
**Appendix D—DBE Developmental Program Guidelines**
**Appendix E—Mentor-Protégé Program Guidelines**
**Appendix F—Guidance for Making Individual Determinations of Social and Economic Disadvantage**
**Appendix G—Size Standards for Airport Concessionaires**

**Authority:** Section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991; 49 U.S.C. 47113, 47107, 47123; 49 U.S.C. 1615; 23 U.S.C. 324; and 42 U.S.C. 2000d, et seq.

## Subpart A—General

### § 26.1 What are the purposes of this part?

In this part, the Department seeks to achieve several objectives:

(a) To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs;

(b) To result in programs that, consistent with Federal law, create significant opportunities for DBEs to participate, on a nondiscriminatory basis, in the DOT-assisted contracts

(c) To carry out the statutory requirement concerning DBE participation in concessions at airports receiving Federal grant funds;

(d) To assist the development of firms that can compete successfully in the marketplace outside the DBE program;

(e) To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs; and

(f) To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

### § 26.3 To whom does this part apply?

(a) If you are a recipient of any of the following types of funds, this part applies to you:

(1) Federal-aid highway funds authorized Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102–240.

(2) Federal transit funds authorized by Titles I, III, V and VI of Pub. L. 102–240 or by Federal transit laws in Title 49, U.S. Code.

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

(b) If you are an airport sponsor that has received a grant for airport development after January 1988 authorized by the AAIA, as amended, Subpart G of this part applies to you.

(c) If you are letting a contract, and that contract is to be performed entirely outside the United States, its possessions, Puerto Rico, Guam, or the Northern Marianas Islands, this part does not apply to the contract.

(d) If you are letting a contract in which DOT financial assistance does not participate, this part does not apply to the contract.

### § 26.5 What do the terms used in this part mean?

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

(1) Except as otherwise provided in 13 CFR part 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, you must consider all appropriate factors, including common ownership, common management, and contractual relationships. You must consider affiliates together when you determine if a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

*Compliance* means that you have correctly implemented the requirements of this part.

*Contract* means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them.

*Contractor* means one who participates, through a contract or subcontract (at any tier), in a DOT-assisted highway, transit, or airport program.

*Department* or *DOT* means the U.S. Department of Transportation, including the Office of the Secretary and FHWA, FTA, and FAA.

*DOT-assisted contract* means any contract between a you and a contractor 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.

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

(1) Which is at least 51 percent owned by one or more socially and economically disadvantaged individuals or, in the case of a corporation, in which

51 percent of the stock is owned by one or more such individuals; and

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

*Good faith efforts* means efforts to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

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

*Noncompliance* means that you have not correctly implemented the requirements of this rule.

*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.

*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

(1) The individual's ownership interest in an applicant or participating DBE firm or

(2) 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.

You are a *Primary recipient* if you receive DOT financial assistance and pass some or all of it on to another recipient.

*Program* means any undertaking on your part to use DOT financial assistance.

You are a *Recipient* if you are any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or if you have applied for such assistance.

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

*Set-aside* means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

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

*Small business concern* means, with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR part 121) that also does not exceed the cap on average annual gross receipts specified in § 26.55(b).

*Socially and economically disadvantaged individuals* means individuals who are citizens (or lawfully admitted permanent residents) of the United States and who are:

(1) Individuals in the following groups, who are rebuttably presumed to be socially and economically disadvantaged:

(i) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;

(ii) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(iii) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;

(iv) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong.

(v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka.

(vi) Women.

(vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

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

*You* refers to recipients, unless the context requires otherwise.

**§ 26.7 What discriminatory actions are forbidden?**

(a) You must never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by this rule on the basis of race, color, sex, or national origin.

(b) In administering your DBE program, you must not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex, or national origin (see the Department's rules implementing Title VI of the Civil Rights Act of 1964, 49 CFR part 21).

**§ 26.9 How does the Department issue guidance, interpretations, exemptions and program waivers under this part?**

(a) This part supersedes the former 49 CFR part 23 contained in the 49 CFR, parts 1 to 99, edition revised as of October 1, [19—]. Only guidance and interpretations (including interpretations set forth in certification appeal decisions) consistent with and issued after [the effective date of the final rule] have definitive, binding, or precedential effect in implementing the provisions of this part.

(b) The Office of the Secretary of Transportation and FHWA, FTA, and FAA may issue written interpretations of or written guidance concerning this part. Interpretations are valid and binding only if they contain the following statement:

This interpretation of 49 CFR Part 26 has been reviewed and approved through the Department of Transportation DBE Coordination Mechanism for consistency with the language and intent of Part 26.

(c) If you want an exemption from any provision of this part, you must request it in writing from the Office of the Secretary of Transportation, FHWA, FTA, or FAA. We will grant the request only if it meets these criteria:

(1) The request documents special or exceptional circumstances, not likely to be generally applicable, and not contemplated in connection with the rulemaking that established this part effective [effective date of final rule], that make your compliance with a specific provision of this part impracticable. You must agree to take steps we specify to comply with the intent of the provision from which an exemption is granted.

(2) We will issue written responses to all exemption requests. Grants or

denials of exemption requests are valid and binding only if they contain the following statement:

This response to a request for an exemption from 49 CFR Part 26 has been reviewed and approved through the Department of Transportation DBE Coordination Mechanism for consistency with the language and intent of Part 26.

(d) If you want a program waiver authorizing you to operate a DBE program that achieves the objectives of this part by means that differ from one or more of the requirements of subparts B, C or G of this part, you must follow these procedures:

(1) You must apply through the concerned operating administration. The application must include a specific program proposal and address how you will meet the criteria of paragraph (d)(2) of this section. Before submitting its application, you must have had public participation in developing your proposal, including consultation with the DBE community and at least one public hearing. Your application must include a summary of the public participation process and the information gathered through it.

(2) Your application must show that—

(i) There is a reasonable basis to conclude that you could achieve a level of DBE participation consistent with the objectives of this rule using different, innovative, or less prescriptive means than are provided in subparts B , C or G.

(ii) Conditions in your jurisdiction are appropriate for implementing the proposal.

(iii) Your proposal would prevent discrimination against any individual or group in access to contracting opportunities or other benefits of the program; and

(iv) Your proposal is consistent with legal and program requirements of the concerned operating administration's financial assistance program.

(3) The Secretary decides whether to grant your application. If the Secretary grants your application, you may administer your DBE program as provided in your proposal, subject to the following conditions:

(i) DBE eligibility is determined as provided in subparts D and E of this part, and DBE participation is counted as provided in § 26.49 of this part or Subpart G, as applicable;

(ii) Your level of DBE participation continues to be consistent with the objectives of this part;

(iii) There is a reasonable limitation on the duration of the modified program: and

(iv) Any other conditions the Secretary makes on the grant of the waiver.

(4) The Secretary may end a program waiver at any time and require you to comply with this part's provisions. The Secretary may also extend the waiver, if he or she determines that all requirements of paragraphs (d) (2) and (3) of this section continue to be met. Any such extension shall be for no longer than the period originally set for the duration of the program.

(5) The Secretary and Administrators of the concerned operating administrations may establish a limit on the number of recipients' programs operating under a waiver provided under this paragraph.

**§ 26.11 What records do recipients keep and report?**

(a) You must retain sufficient basic information about its program implementation, its certification of DBEs, and the award and performance of contracts and subcontracts to enable the concerned operating administration to monitor your compliance with this part. Keep this data for at least three years after the completion of the contract or project.

(b) You must report data to the concerned operating administration concerning DBE participation in DOT-assisted contracts twice a year, in a format and on dates determined by the appropriate DOT office.

(c) You must follow the requirements in this section whether or not you have to have a DBE program under § 26.21 of this part.

**§ 26.13 What assurances must recipients and contractors make?**

(a) Except as provided in paragraph (b) of this section, each financial assistance agreement you sign with a DOT operating administration (or a primary recipient) must include the following assurance:

*The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements of this Part. The recipient shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, if required by 49 CFR Part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).*

(b) An operating administration may, in place of the assurance in paragraph (a) of this section, prescribe other language you must agree to in grant agreements or certifications of compliance.

(c) Each contract you sign with a contractor (and each subcontract the prime contract signs with a subcontractor) must include the assurance in this paragraph.

*The contractor, subrecipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The requirements of 49 CFR Part 26 and the recipient's DOT-approved DBE program (where required) are incorporated in this contract by reference. The contractor shall take all necessary and reasonable steps in accordance with Part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.*

## Subpart B—Administrative Requirements for DBE Programs for Federally-Assisted Contracting

**§ 26.21 Who must have a DBE program?**

(a) If you are in one of these categories and let DOT-assisted contracts, you must have a DBE program meeting the requirements of subparts B, C, D, and E of this part:

(1) All FHWA recipients;

(2) FTA recipients that receive $250,000 or more in FTA planning, capital, and/or operating assistance in a Federal fiscal year.

(3) FAA recipients that receive a grant of $250,000 or more for airport planning or development.

(b) (1) You must submit your program for approval to the concerned operating administration. You must submit revised programs conforming to this part by [a date 180 days from the effective date of the final rule]. Once we approve your program, the approval counts for all DOT programs.

(2) You don't have to submit regular updates of your DBE programs, as long as you remain in compliance. However, you must submit significant changes in the program for approval.

(c) You are not eligible to receive DOT financial assistance unless DOT has approved your DBE program and you are in compliance with it and this part. You must continue to carry out your program until all funds from DOT financial assistance have been expended.

**§ 26.23 What is the requirement for a policy statement?**

You must issue a signed and dated policy statement which expresses your commitment to your DBE program, states its objectives, and outlines responsibilities for its implementation. You must circulate the statement throughout your organization and to the DBE and non-DBE business communities that perform work on your DOT-assisted contracts.

**§ 26.25 What is the requirement for a liaison officer?**

You must have a DBE liaison officer, who shall have direct, independent access to your Chief Executive Officer concerning DBE program matters. The liaison officer shall be responsible for implementing all aspects of your DBE program. You must also have adequate staff to administer the program in compliance with this part.

**§ 26.27 What efforts must recipients make concerning DBE financial institutions?**

You must thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in its community and make reasonable efforts to use these institutions. You must also encourage prime contractors to use such institutions.

**§ 26.29 What prompt payment mechanisms may recipients have?**

You may establish, as part of your DBE program, one or more mechanisms to ensure that DBE subcontractors are promptly and fully paid.

(a) You may include a contract clause to require prime contractors to pay DBE subcontractors for satisfactory performance of their contracts no later than a specific number of days (e.g., 10 days) from receipt of each payment you make to the prime contractor. This prompt payment clause may also provide for appropriate penalties for failure to comply, the terms and conditions of which you set.

(b) Prompt payment clauses may also provide that any delay or postponement of payment among the parties may take place only for good cause, with your prior written approval.

(c) You may also use a contract clause that requires prime contractors to include in their DBE subcontracts language providing that prime contractors and DBE subcontractors will use appropriate alternative dispute resolution mechanisms to resolve payment disputes. You may specify the nature of such mechanisms.

(d) You may include a contract clause providing that the prime contractor will not be reimbursed for work performed by DBE subcontractors unless and until the prime contractor ensures that the DBE subcontractors are promptly paid for the work they have performed.

(e) You may establish other mechanisms, consistent with this part and applicable state and local law, to ensure that DBEs are fully and promptly paid, including the prompt return of retainage payments following the satisfactory completion of the DBE's portion of the work.

**§ 26.31 What requirements pertain to the DBE directory?**

You must maintain and make available to interested persons a directory identifying all eligible DBEs. In the listing for each firm, you must include its address, phone number, and the types of work the firm has been certified to perform as a DBE. The listing may include additional relevant information. You must revise your directory at least annually and make updated information available to contractors and the public on request.

**§ 26.33 What steps must a recipient take to foster DBE diversification?**

(a) You must include in your DBE program a diversification mechanism to discourage the concentration of DBEs in certain fields. The mechanism shall provide that—

**Alternative 1**

If DBE firms receive [50, 75] percent or more of the contracts in a particular field in a given year, you will count toward overall and contract goals in the next year 50 percent of the DBE participation in that field that is normally countable under § 26.49.

**Alternative 2**

If the cumulative DBE participation in a particular field during any year exceeds four times your overall goal percentage as applied to the work projected to be available in that field over the entire year, you will not count any DBE credit for participation in that field for contracts awarded during the remainder of the year.

**Alternative 3**

If all DBEs receive [50, 75] percent or more of the contracts in a particular field in a given year, you will not, in the following year, count toward overall and contract goals any participation in that field of a particular DBE firm (or its affiliate) that has received four or more contracts in that field over the preceding four years.

**Alternative 4**

If DBEs receive [50, 75] percent or more of the contracts in a particular field in a given year, you will, in the following year, tailors its contract goals to specify participation in other fields.

(b) In operating outreach and technical assistance programs under § 26.45(a), you must give priority to assisting firms to enter fields in which DBEs receive [10, 25, 50] percent or fewer of the contracts.

(c) You may, or, if an operating administration directs you to, must establish a DBE business development program (BDP) to assist selected DBE firms in becoming able to compete in fields in which DBEs receive [10, 25, 50] percent or fewer of the contracts awarded. You may include in this program only firms that meet these criteria:

(1) A DBE firm must have been certified by you for at least two years and must have participated in at least one of your DOT-assisted contracts during that time.

(2) You must have made the following determinations about the firm:

(i) It has as its primary area of operation a field in which DBEs have received at least [50, 75] percent of your DOT-assisted contracts in at least one of the previous three years, and

(ii) It is capable, with business development assistance, of competing successfully in one or more fields in which DBEs have received [10, 25, 50] percent or fewer of your DOT-assisted contracts in at least one of the previous three years.

(3) In providing business development assistance to DBE firms, you must be guided by the provisions of appendix D of this part.

(d) As part of a BDP established under paragraph (c) of this section, you may establish a "mentor-protégé" program, in which another DBE or non-DBE firm is a principal source of business development assistance. To participate in such a program, a DBE firm must meet these criteria:

(1) It must meet the criteria of paragraphs (c) (1) and (2) of this section.

(2) It must have participated, during the preceding two years, in at least one contract you let in which the mentor firm did not participate.

(e) In operating a mentor-protégé program, you must follow these additional requirements:

(1) During the course of the mentor-protégé relationship, you must not award DBE credit to the mentor firm for using the protégé firm for more than one half of its goal on any contract let by the recipient.

(2) For purposes of making determinations of business size under this part, you must not treat protégé firms as affiliates of mentor firms, when both firms are participating under an approved mentor-protégé program.

(3) You must operate your mentor-protégé program consistent with the guidelines of appendix E to this part.

(f) For purposes of this section, a "field" means an industry as defined by a four-digit SIC code in 13 CFR part 121 or a readily identifiable category of work in your DOT-assisted contracting, as designated in your DBE program with the approval of the concerned operating administration.

**§ 26.35 What are a recipient's responsibilities for monitoring the performance of other program participants?**

You must implement appropriate mechanisms to ensure compliance with this part's requirements by all program participants. You must include in your DBE program the contract provisions, enforcement mechanisms, or other means you use to ensure compliance. These must include a monitoring and enforcement mechanism to verify that the work committed to DBEs at contract award is actually performed by the DBEs.

**§§ 26.37–39 [Reserved]**

## Subpart C—Goals, Good Faith Efforts, and Counting

**§ 26.41 How do Recipients Set Overall Goals?**

(a) You must have an overall goal and calculate it as follows:

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

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

(b) Except as provided in paragraphs (c) through (e) of this section, you must calculate its overall goal in the following way:

Alternative 1

(1) Calculate the number of DBE firms available to work on your DOT-assisted contracts. This is the number of certified DBE firms in your DBE directory.

(2) Calculate the total number of firms available to work on your DOT-assisted contracts. This number includes both the DBE firms in your DBE directory and non-DBE firms available to work on your DOT-assisted contracts.

(3) Calculate the percentage of DBEs among the total number of firms available to work on the recipient's DBE contracts. The result represents DBE capacity and becomes your overall goal.

**Example to paragraph (b):** You have 10 DBE firms in your Directory. There are 100 firms, including the 10 DBEs and 90 non-DBEs, available to work on your DOT-assisted contracts. Your overall goal is 10 percent.

**Alternative 2**

(1) Calculate the number of minority and women-owned firms in your jurisdiction, using 2-digit SIC codes covering the principal types of work in your DOT-assisted contracts.

(2) Calculate the total number of firms in your jurisdiction in the same SIC codes.

(3) Calculate the percentage that minority- and women-owned firms make up of all firms. This percentage becomes your DBE goal.

**Example to paragraph (b):** You determine that there are 10 minority-and women-owned firms (not just DBE firms) in your jurisdiction in the three two-digit SIC codes in which you do the bulk of your DOT-assisted contracting. In these same SIC codes, there are a total of 100 firms in your jurisdiction. Your overall goal is 10 percent.

**Alternative 3**

(1) Calculate the average number of DBE firms that have worked on your DOT-assisted contracts in any capacity (e.g., as prime contractors, subcontractors, suppliers) in the preceding five years.

(2) Calculate the average number of all firms that have worked on your DOT-assisted contracts in any capacity in the preceding five years.

(3) Using the average numbers calculated in paragraphs (b) (1) and (2), determine the percentage that DBE firms make up of all firms that have worked for you in the preceding five years. This percentage becomes your overall goal.

**Example to paragraph (b):** Over the five years preceding this year, the following numbers of firms have worked for you:

| | DBEs | All firms |
|---|---|---|
| Year 1 | 4 | 45 |
| Year 2 | 5 | 49 |
| Year 3 | 6 | 42 |
| Year 4 | 4 | 38 |
| Year 5 | 6 | 41 |
| Total | 25 | 215 |
| Average | 5 | 43 |

Percentage—11.6%—becomes the overall goal.

(c) Under the following circumstances, you may use an overall goal developed by another agency:

(1) You may use a "benchmark" developed by the U.S. Department of Commerce (DOC) for purposes of Federal procurement if—

(i) The geographic scope of your market with respect to the type of business involved is generally similar to the geographic scope of the market studied by DOC; and

(ii) You make an appropriate adjustment to the "benchmark" to account for the participation of women-owned DBEs (which are not included in the DOC numbers).

(2) You may use an overall goal developed under paragraph (b) of this section by another DOT recipient if the other recipient's goal pertains to an area generally similar to the area from which you obtain contractors for DOT-assisted contracts.

**Example to paragraph (c)(2):** City X is located within State Y. The city transit authority could use the State DOT's overall goal, assuming that it procures from the same general area. It could also use the local airport's overall goal, assuming that the airport and transit authority typically obtained contractors for DOT-assisted projects from the same general area.

(3) When you use the overall goal of another agency, you may adjust that goal upward or downward based on information about differences between your market and that of the other agency.

**Example to paragraph (c)(3):** City X uses the overall goal developed by State Y's DOT. However, there is a heavier concentration of minority-owned businesses in City X than there is statewide. City X could adjust its goal upward to take this demographic difference into account.

(d) With the approval of the concerned operating administration, you could use another means (e.g., a disparity study) of calculating your overall goal, provided that this means is narrowly tailored to redress the effects of discrimination.

(e) On the basis of evidence that discrimination has suppressed business development by DBEs, you must increase the overall goal by a percentage representing the degree to which DBE capacity has been suppressed.

**Example to paragraph (e):** You determine that discrimination has suppressed DBE business development by 20 percent. DBE capacity is 10 percent. The overall goal

becomes 12 percent (i.e., the 10 percent capacity number plus 20 percent of that number).

(f)(1) If you set overall goals on a fiscal year basis, you must submit them to the applicable DOT operating administration for review 60 days before the beginning of the Federal fiscal year to which the goal applies, or at another time determined by the Administrator of the concerned operating administration.

(2) If you are an FTA or FAA recipient and set your overall goal on a project or grant basis, you must submit the goal for review at a time determined by the FTA or FAA Administrator.

(3) You must include with your overall goal submission a description of the methodology you used to establish the goal and the basis for selecting the particular goal submitted.

(4) You are not required to obtain prior operating administration concurrence with your overall goal. However, if the operating administration's review suggests that your overall goal has not been correctly calculated, or that its justification is inadequate, the operating administration may, after consulting with you, adjust your overall goal. The adjusted overall goal is binding on you.

(g) In establishing an overall goal, you must provide for public participation. This public participation must include:

(1) Consultation with minority, women's and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and your efforts to increase the participation of DBEs.

(2) A published notice announcing your proposed overall goal, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at your principal office for 30 days following the date of the notice, and informing the public that you and the Department will accept comments on the goals for 45 days from the date of the notice. The notice must include addresses to which comments may be sent, and you must publish it in general circulation media and available minority-focus media and trade association publications.

(h) If you don't establish and implement an overall goal as provided in this section, you are in noncompliance with this part and you are not eligible to receive FHWA, FTA, or FAA financial assistance.

(i) If you don't meet your overall goal, you will have an opportunity to explain to the concerned operating administration why you could not do so and why meeting the goal was beyond your control. If you do not make such an explanation, or the explanation is inadequate, the operating administration may direct you to take remedial action. If you don't take this remedial action, you are in noncompliance with this part.

(j) Your overall goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

**§ 26.43 How are overall goals established for transit vehicle manufacturers?**

(a) If you are an FTA recipient, you must require in your DBE program that each transit vehicle manufacturer, as a condition of being authorized to bid on FTA-assisted transit vehicle procurements, certify that it has complied with the requirements of this section. You do not include FTA assistance used in transit vehicle procurements in the base amount from which your overall goal is calculated.

(b) If you are a transit vehicle manufacturer, you must use an overall goal determined by FTA on a national basis for the industry. The base from which the goal shall be calculated is the amount of FTA financial assistance participating in transit vehicle contracts you will perform during the fiscal year in question. FTA will not include funds attributable to work performed outside the United States and its territories, possessions, and commonwealths in this base.

(c) If you are an FTA recipient, you may, with FTA approval, establish project-specific goals under § 26.41 for DBE participation in the procurement of transit vehicles in place of complying with this section.

(d) If you are an FHWA or FAA recipient, you may, with FHWA or FAA approval, in a case where FHWA or FAA has established a national goal, use the procedures of this section with respect to procurements of vehicles or specialized equipment.

**§ 26.45 What means do recipients use to meet overall goals?**

(a) You must meet as much of your overall goal as you can by using outreach, technical assistance, and other methods to facilitate DBE participation, including but not limited to the following:

(1) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways to facilitate DBE participation (e.g., unbundling large contracts to make them more accessible to DBEs);

(2) Providing assistance to DBEs in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs obtain bonding and financing);

(3) Providing technical assistance and other services;

(4) Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential DBE subcontractors; provision of information in languages other than English, where appropriate);

(5) Implementing a supportive services program to develop and improve immediate and long-term business management, recordkeeping, and financial and accounting capability for DBEs;

(6) Providing services to help DBEs improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;

(7) Establishing a race/gender-neutral program to assist new, start-up firms, particularly in fields in which DBE participation has not been traditionally significant;

(8) Ensuring distribution of its DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors.

(b) To meet any portion of your overall goal you cannot meet using the means provided in paragraph (a) of this section, you must use the means provided in paragraphs (c) and/or (d) of this section.

(c) The following provisions apply to the use of contract goals:

(1) You may use contract goals only on those DOT-assisted contracts that have subcontracting possibilities.

(2) You must calculate contract goals on the basis of the entire amount of the prime contract (i.e., both the state/local and Federal share of the contract).

(3) You are not required to set each contract goal at the same percentage level as the overall goal. The goal for a specific contract may be higher or lower than that percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. However, over the period covered by its overall goal, you must set contract goals so that they will cumulatively result in the meeting any portion of your overall

goal not met through use of the mechanisms in paragraph (a) of this section.

(4) Operating administration approval of each contract goal is not necessarily required. However, operating administrations may review and approve or disapprove any contract goal you establish.

(5) Your overall goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

(d) The following provisions apply to the use of evaluation credits:

(1) You may use evaluation credits only to the award of prime contracts.

(2) You may provide that a responsible and responsive DBE firm competing for the prime contract will receive the contract if the price it offers is a stated percentage, between one and 10 percent, higher than the lowest price offered by any responsible and responsive non-DBE firm.

(3) You may also provide that a responsible and responsive non-DBE firm competing for the prime contract that provides a stated level of DBE participation will receive the contract if the price it offers is a stated percentage, between one and 10 percent of the amount that is subcontracted, higher than the lowest price offered by any responsible and responsive non-DBE firm that does not provide this level of DBE participation.

(4) In establishing the level of DBE participation used in this mechanism, you must use the factors set forth in paragraphs (c) (2) through (5) of this section. You must require competitors for the prime contract to submit DBE participation information as provided in § 26.47(b)(2) (i) through (v) and (b)(3) of this part.

(5) Your evaluation credit procedures must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

(e) You must not use more stringent mechanisms (including, but not limited to, set-asides or a conclusive presumption) on DOT-assisted contracts unless—

(1) You have legal authority independent of this part to use such mechanisms; and

(2) You have a continuing, substantial inability to meet your overall goal using the mechanisms provided for in this section. In such a case, you must document in its file for the contract the basis for the determination that other available methods have proven unable to meet DBE goals.

(f) You must review, at appropriate intervals, the methods and procedures used to comply with this section to ensure that they continue to be needed to overcome the effects of discrimination, modifying them as needed for this purpose.

(1) If your actual DBE participation significantly exceeds your overall goals over a substantial period of time, you must consider appropriate reductions in your use of race/gender-conscious means of meeting overall goals.

(2)(i) You must calculate—

(A) The percentage that minority- and women-owned businesses in your state (not just DBEs) in types of work relevant to DOT-assisted contracting make up of all such businesses; and

(B) The percentage of all business receipts in these types of work attributable to minority- and/or women-owned businesses.

**Example to paragraph (b)(2):** In State Z, minority- and women-owned firms account for 20 percent of all businesses. These same firms account for 10 percent of business volume (i.e., as measured by receipts).

(ii) Where the percentage calculated in paragraph (b)(2)(i)(B) is greater than that calculated in paragraph (b)(2)(i)(A), you must consider appropriate reductions in its use of race/gender-conscious means of meeting overall goals.

**Example to paragraph (b)(2)(ii):** In State Z, minority- and women-owned firms continue to account for 20 percent of all businesses, but now account for 27 percent of business volume. Particularly where this pattern persists over a significant period of time, you would rely more on race/gender-neutral methods of achieving goals in construction contracts and less on race/gender-conscious means.

**§ 26.47 What are the good faith efforts procedures recipients follow in situations where there are contract goals?**

(a) When you have established a DBE contract goal, you must award the contract only to a contractor who either meets the contract goal requirement or demonstrates that it has made adequate good faith efforts to do so. If the contractor does document adequate good faith efforts, you must not deny award of the contract on the basis that the contractor failed to meet the goal.

(b) In your solicitations for DOT-assisted contracts for which a contract goal has been established, you must require the following of competitors:

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

(2) All bidders/offerors will be required to submit the following information to the recipient, at the time provided in paragraph (b)(3) of this section:

(i) The names and addresses of DBE firms that will participate in the contract;

(ii) A description of the work that each DBE will perform;

(iii) The dollar amount of the participation of each DBE firm participating;

(iv) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;

(v) Written confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment; and

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

(3) At your discretion, the bidder/offeror must present the information required by paragraph (b)(2) of this section—

(i) Under sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contract negotiation procedures; or

(ii) At any time before you commit yourself to the performance of the contract by the bidder/offeror, as a matter of responsibility.

(c) If the DBE participation submitted by the bidder/offeror does not meet the contract goal, you must determine whether the bidder/offeror's good faith efforts are adequate. In making this determination, use the guidance provided in appendix B to this part. If the bidder/offeror makes a showing of adequate good faith efforts, you must award the contract to the bidder/offeror, even if the bidder/offeror did not meet the contract goal.

(d) You must make sure all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts committing yourself to the performance of the contract by the bidder/offeror.

(e) When the apparent successful bidder/offeror for a contract fails to meet the DBE contract goal, and you determine that the bidder/offeror has failed to make adequate good faith efforts, you must, before awarding the contract, provide the bidder/offeror an opportunity for administrative reconsideration.

(1) As part of this reconsideration, the bidder/offeror must have the opportunity to provide written documentation or argument concerning the issue of whether it made adequate good faith efforts to meet the contract goal.

(2) The bidder/offeror must also have the opportunity to meet in person with your officials to discuss the issue of whether it made adequate good faith efforts to meet the contract goal.

(3) Your decision on reconsideration must be made by an official who did not take part in the original determination that the bidder/offeror failed to make adequate good faith efforts.

(4) Your must send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not make adequate good faith efforts.

(5) The result of the reconsideration process is not administratively appealable to the Department of Transportation.

(f) A DBE prime contractor—

**Alternative 1**—is required to meet DBE contract goals on the same basis as other prime contractors.

**Alternative 2**—is not required to meet DBE contract goals.

**Alternative 3**—that will perform, with its own forces, a sufficient percentage of the work on the contract to meet the contract goal is not required to obtain other DBE participation to meet the goal. If a DBE prime contractor will not perform such a percentage of the work with its own forces, it must obtain other DBE participation sufficient to meet the remainder of the goal, or demonstrate that it made adequate good faith efforts to do so.

(g)(1) You must require that a prime contractor not terminate for convenience a DBE subcontractor listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm) and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without your prior written consent.

(2) When a DBE subcontractor is terminated, or fails to complete its work on the contract, for any reason, you must require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform 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.

(3) You must include in each prime contract a provision for appropriate administrative remedies that you will invoke if the prime contractor fails to comply with the requirements of this section.

**§ 26.49 How is DBE participation counted toward goals?**

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

(b)(1) Count the entire amount of a construction contract toward DBE goals, including the cost of supplies and materials obtained by the DBE for the work of the contract.

(2) Count the entire amount of fees or commissions charged by a DBE firm for providing a *bona fide* service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, toward DBE goals, provided you determine the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(c) When a DBE performs as a participant in a joint venture, count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs toward DBE goals.

(d) Do not count any portion of the value of a contract that a DBE subcontractor subcontracts to any non-DBE firm (including a non-DBE prime contractor or its affiliate) toward DBE goals. Provided, however, that you may count value of supplies purchased or equipment leased by a DBE subcontractor from a non-DBE firm (other than the prime contractor or its affiliate) and used by the DBE in the performance of the subcontract toward DBE goals.

(e) Count expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.

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

(2) A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, you must examine similar transactions, particularly those in which DBEs do not participate.

(3) If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, you must presume that it is not performing a commercially useful function.

(4) You must presume that a DBE engaged in transporting materials is not performing a commercially useful function if the DBE does not own at least 50 percent of the vehicles used for the contract.

(5) When a DBE is presumed not to be performing a commercially useful function as provided in paragraph (e) (3) or (4) of this section, the DBE may present evidence to rebut this presumption. You may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.

(6) Your decisions on commercially useful function matters are subject to review by the concerned operating administration.

(f) Count expenditures with DBEs for materials or supplies toward DBE goals as provided in this paragraph:

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

(ii) For purposes of this paragraph, a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

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

(ii) For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.

(A) To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.

(B) A regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt may be a person who owns and operates distribution equipment for the products and/or owns, operates, or maintains a store, warehouse, or other place of business in which products of the general character described by the specifications and required under the contract are bought for the account of such person and sold to the public in the usual course of business. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an *ad hoc* or contract-by-contract basis.

(C) Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this paragraph.

(3) With respect to materials or supplies are purchased from a DBE which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, provided you determine the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the materials and supplies themselves toward DBE goals, however.

(g) If a firm is not currently certified as a DBE in accordance with standards of subpart D of this part at the time of the execution of the contract, do not count the firm's participation toward DBE goals.

(h) Do not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward the your overall goal.

(i) Do not count the participation of a DBE subcontractor toward the prime contractor's goal attainment until the amount being counted toward the goal has been paid to the DBE.

## Subpart D—Certification Standards

### § 26.51 How are burdens of proof allocated in the certification process?

(a) In determining whether to certify a firm as eligible to participate as a DBE, you must apply the standards of this subpart.

(b) The firm seeking certification has the burden of demonstrating to you, by a preponderance of the evidence, that it meets the requirements of this subpart concerning group membership, business size, ownership, and control.

(c) You must rebuttably presume that members of the designated groups identified in § 26.57(a) are socially and economically disadvantaged. This means that they do not have the burden of proving to you that they are socially and economically disadvantaged.

(d) 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 to you, by a preponderance of the evidence, that they are socially and economically disadvantaged.

(e) You must make determinations concerning whether individuals and firms have met their burden of demonstrating group membership, ownership, control, and social and economic disadvantage (where disadvantage must be demonstrated on an individual basis) by considering all the facts in the record, viewed as a whole.

### § 26.53 What rules govern group membership determinations?

(a) If you have reason to question whether an individual is a member of a group that is presumed to be socially and economically disadvantaged, you must require the individual to demonstrate, by a preponderance of the evidence, that he is a member of the group.

(b) In making such a determination, you must consider whether the person has held himself out to be a member of the group over a long period of time prior to application for certification and whether the person is regarded as a member of the group by the relevant minority community. You may require the applicant to produce appropriate documentation of group membership.

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

(2) Your decisions concerning membership in a designated group are subject to the certification appeals procedure of § 26.79.

### § 26.55 What rules govern business size determinations?

(a) To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. You must apply current SBA business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts.

(b) Even if it meets the requirements of paragraph (a) of this section, 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 fiscal years, in excess of $17.77 million. The Secretary adjusts this amount for inflation from time to time.

### § 26.57 What rules determine social and economic disadvantage?

(a) *Presumption of disadvantage.* (1) You must rebuttably presume that 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 socially and economically disadvantaged individuals. You must not require an individual who are members of a designated group to demonstrate, in connection with his or her firm's application for certification, that he or she is , in fact, socially and economically disadvantaged.

(2) Except as provided in paragraph (a)(3) of this section, you must not collect information related to the social and economic disadvantage of individuals who are members of the designated groups (including, but not limited to, information concerning personal net worth, personal income tax returns, or other personal financial data) as part of the certification process, except information essential to ascertain the individuals' ownership and control of a business that is unavailable from any other source. When you require an applicant to submit personal financial information, you must provide a written statement to the applicant stating with specificity what information is required, why the information is essential to a determination of ownership and control, and why the information is unavailable from any other source.

(3) You must require applicants for certification to submit a signed, notarized certification that each socially and disadvantaged owner is, in fact, a socially and economically disadvantaged individual, as provided in this part. You must also require applicants for certification to submit a brief summary statement of the personal net worth of each socially and economically disadvantaged owner.

(b) *Rebuttal of presumption of disadvantage.* (1) If you have a reasonable basis to believe that an individual who is a member of one of the designated groups is, in fact, not socially and/or economically disadvantaged, you may start a

proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual.

(2) In the case of a firm that is applying for initial certification, do not start such a proceeding unless and until you have determined that the individual owns and controls the firm and that the firm meets business size criteria. In this case, you may hold the issuance of a certification in abeyance pending the outcome of the proceeding.

(3) Your proceeding must follow the procedures of § 26.77.

(4) In such a proceeding, you have the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged.

(5) If you demonstrate that the personal net worth of the individual exceeds [an amount to be inserted in the final rule], you have met this burden, and the presumption of social and economic disadvantage is rebutted for that individual. In this case, the individual must, in order for his or her firm to be certified, demonstrate on an individual basis that he or she is socially and economically disadvantaged.

(6) For purposes of such a proceeding, you may require the individual whose disadvantage is being questioned to provide information about his or her personal net worth. You may require only such information as is necessary to establish whether the individual's personal worth exceeds [the amount inserted in the final rule].

(c) *8(a) firms.* (1) If a firm applying for certification has a current, valid certification from the SBA under the 8(a) program, you must presume it to be eligible for the DBE program, subject to demonstrating that it meets the average annual gross receipts limit referenced in § 26.55(b) and that it meets SBA business size criteria for the type(s) of work it seeks to perform in your DBE program. If the firm does not meet these requirements, it is not an eligible DBE, even though it has a valid 8(a) certification from SBA.

(2) Consistent with this presumption, you must not, in connection with the firm's application for certification, require an 8(a) firm to provide information related to ownership, control, or social and economic disadvantage. You may require the firm to provide information to demonstrate that it meets the average annual gross receipts limit and that it meets SBA small business size criteria for any type of contracting it expects to perform in your DBE program. You may also require the firm to provide information that will appear in your DBE directory.

(3) If you have a reasonable basis to believe that the ownership, control, or disadvantaged status of an 8(a) firm is not consistent with its participation in the DBE program, bring your concerns to the attention of, and request a response from, the SBA. Following the receipt of the response from SBA, or after 60 days if no response from SBA has been received, you may initiate a proceeding under § 26.77 of this part, including in the record and taking into account any response received from SBA. If the 8(a) firm is making its initial application for certification, you may hold the firm's certification in abeyance pending the outcome of this proceeding.

(d) *Individual determinations of social and economic disadvantage.* Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. You must make a case-by-case determination of whether such an individual is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to you, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. In making these determinations, use the guidance in appendix F to this part.

**§ 26.59 What rules govern determinations of ownership?**

(a) In determining whether the socially and economically disadvantaged participants in a firm own the firm, you 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. In the case of a corporation, such individuals must own unconditionally at least 51% of the stock. In the case of an applicant firm which is a partnership, 51% of the partnership interest must be unconditionally owned by socially and economically disadvantaged individuals. Such unconditional ownership must be reflected in the firm's partnership agreement.

(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, 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 (other than in a revocable living trust) are 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 is a disadvantaged individual who, rather than the trustee, exercises effective control over the management, policy-making, and daily operational activities of the firm.

(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 which lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

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

(g) You must 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—

(1) As the result of a property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce decree is inconsistent with this section; or

(2) Through inheritance, or otherwise because of the death of the former owner.

(h)(1) You must presume as not being 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 as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm that is—

(i) Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;

(ii) Involved in the same or a similar line of business; or

(iii) Engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.

(2) To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual firm must demonstrate to you, by clear and convincing evidence, that—

(i) The gift or transfer 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 provided the gift or transfer.

(i) You must apply the following rules in situations in which marital assets form a basis for ownership of a firm:

(1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled.

(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) You may consider the following factors in determining the ownership of a firm. However, you must 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, you must 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.

**§ 26.61 What rules govern determinations concerning control?**

(a) In determining whether socially and economically disadvantaged owners control a firm, you must consider all the facts in the record, viewed as a whole.

(b) Only an independent business may 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, you must scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.

(2) You must 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) You must 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, you 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. In the case of a corporation, the socially and economically disadvantaged owners must own and control at least 51 percent of voting stock. 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) 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 § 26.59(i)(2) of this part.

(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.

(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 must 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 must be revocable, and the socially and economically disadvantaged owners must 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 must be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.

(g) The socially and economically disadvantaged owners must have an overall understanding of, and managerial or 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 must 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 a potential DBE firm of that type must 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, the you must not deny certification solely on the ground that the person lacks the license or credential. However, you 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) You 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. You may determine that a firm is controlled by its socially and economically disadvantaged owner although that owner's remuneration is lower than that of some other participants in the firm. In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, you may consider a difference between 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.

(k) A socially and economically disadvantaged individual may control a firm even though one or more members of the individual's family participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, you must make a judgment about the control the socially and economically disadvantaged owner exercises vis-a-vis other persons involved in the business as it does in other situations, without regard to whether or not the other persons are family members.

(l) If you 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.

(2) Where a firm was formerly owned and/or controlled by a non-disadvantaged individual, 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 must demonstrate to you, 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.

(l) In determining whether a firm is controlled by its socially and economically disadvantaged owners, you may consider whether the firm owns equipment necessary to perform its work. However, you must 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.

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

(n) A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licenser is not affiliated with the franchisee or licensee. In determining whether affiliation exists, you 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.

(o) In order for a partnership to be controlled by socially and economically disadvantaged individuals, any non-disadvantaged partners shall not have the power, without the specific written concurrence of the socially and economically disadvantaged partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.

**§ 26.63 What are other rules affecting certification?**

(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 DBEs. Except as provided in paragraph (a)(2) of this section, you must not consider commercially useful function issues in any way in making decisions about whether to certify a firm as a DBE.

(2) You 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) You must evaluate the eligibility of a firm on the basis of present circumstances. You must 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. Nor must you refuse to certify a firm solely on the basis that it is a newly formed firm.

(c) DBE firms and firms seeking DBE certification shall cooperate fully with your 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 may be eligible DBEs. Not-for-profit organizations, even though controlled by socially and economically disadvantaged individuals, are not eligible to be certified as DBEs.

(e) Except as provided in paragraph (f) of this section, an eligible DBE firm shall be owned by individuals who are socially and economically disadvantaged. A firm that is owned not by such individuals, but by another firm, is not an eligible DBE, even if the other firm is itself an eligible DBE.

(f) A firm owned by an Indian tribe recognized by the Department of the Interior or an Alaskan Native Corporation may be regarded as owned by socially and economically disadvantaged individuals, notwithstanding the fact that ownership may formally reside in the tribe or corporation as an entity, rather than in individual members of the tribe. Such a firm must meet the control and business size criteria of this section in order to be an eligible DBE. In determining business size, recipients shall apply the affiliation standards of 13 CFR part 121.

(g) 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.

(h) You must not require a DBE firm to be prequalified as a condition for certification unless the recipient requires all firms that participate in its contracts and subcontracts to be prequalified.

**§§ 26.65—26.69 [Reserved]**

## Subpart E—Certification Procedures

### § 26.71 What are the requirements for Unified Certification Programs?

(a) Except as provided in paragraph (b) of this section, you and all other DOT recipients in your state must participate in a Unified Certification Program (UCP).

(1) Within three years of [the effective date of the final rule], you and the other recipients in your state must sign an agreement establishing the UCP for that state and submit the agreement to the Secretary for approval. The Secretary may, on the basis of extenuating circumstances shown by the recipients in the state, extend this deadline for no more than one additional year.

(2) The agreement must provide the establishment of a UCP meeting all the requirements of this section. The agreement must specify that the UCP will follow all certification procedures and standards of this part, on the same basis as recipients; that the UCP shall cooperate fully with oversight, review, and monitoring activities of DOT and its operating administrations; and that the UCP shall implement DOT directives and guidance concerning certification matters. The agreement shall also commit recipients to ensuring that the UCP has sufficient resources and expertise to carry out the requirements of this part. The agreement shall include an implementation schedule ensuring that the UCP is fully operational no later than 18 months following the approval of the agreement by the Secretary.

(3) Subject to approval by the Secretary, the UCP in each state may take any form acceptable to the recipients in that state.

(4) The Secretary shall review the UCP and approve it, disapprove it, or remand it to the recipients in the state for revisions. A complete agreement which is not disapproved or remanded within 180 days of its receipt is deemed to be accepted.

(5) If the you and the other recipients in your state fail to meet the deadlines set forth in this paragraph, you shall have the opportunity to make an explanation to the Secretary why a deadline could not be met and why meeting the deadline was beyond your control. If you fail to make such an explanation, or the explanation does not justify the failure to meet the deadline, the Secretary shall direct you to complete the required action within a time certain. If you and the other recipients fail to carry out this direction in a timely manner, you are collectively in noncompliance with this part.

(b) If you are an airport sponsor, you may, but are not required to, participate in the UCP for your state with respect to firms seeking certification as airport concessionaires. If you choose not to participate in the UCP with respect to the concession program, you must certify concessionaires and other concession program participants independently. You must participate in the UCP for your state with respect to contractors on FAA-assisted contracts.

(c) The UCP shall make all certification decisions on behalf of all DOT recipients in the state with respect to participation in the DOT DBE Program. Certification decisions by the UCP shall be binding on all DOT recipients within the state. The UCP shall provide "one-stop shopping" to applicants for certification, such that an applicant is required to apply only once for a DBE certification that will be honored by all recipients in the state.

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

(e) A UCP is not required to process an application for certification from a firm having its principal place of business outside the state if the firm is not certified by the UCP in the state in which it maintains its principal place of business.

(f) Subject to DOT approval as provided in this section, the recipients in two or more states may form a regional UCP. UCPs may also enter into written reciprocity agreements with other UCPs. Such an agreement shall outline the specific responsibilities of each participant. A UCP may accept the certification of any other UCP or DOT recipient.

(g) Pending the establishment of UCPs meeting the requirements of this section, you may enter into agreements with other recipients, on a regional or inter-jurisdictional basis, to perform certification functions required by this part. You may also grant reciprocity to other recipient's certification decisions.

(h) Each UCP shall maintain a unified DBE directory containing, for all firms certified by the UCP, the information required by § 26.31 of this part. The UCP shall make the directory available to the public electronically as well as in print.

(i) Except as otherwise specified in this section, all provisions of this subpart and subpart D pertaining to recipients also apply to UCPs.

### § 26.73 What procedures do recipients follow in making certification decisions?

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

(b) You must determine the eligibility of firms as DBEs consistent with the standards of subpart D of this part.

(c) You must take all the following steps in determining whether a DBE firm meets the standards of subpart D:

(1) Perform an on-site visit to the offices of the firm. You must interview the principal officers of the firm and review their resumes and/or work histories. You must also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in your jurisdiction or local area. You may rely upon the site visit report of any other recipient with respect to a firm applying for certification. If you have made a site visit to a firm, you must promptly make available the report of that visit to any other recipient that makes a written request for it.

(2) If the firm is a corporation, analyze the ownership of stock in the firm;

(3) Analyze the bonding and financial capacity of the firm;

(4) Determine the work history of the firm, including contracts it has received and work it has completed;

(5) Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program and its preferred locations for performing the work, if any;

(6) Obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the DBE program;

(7) Require potential DBEs to complete and submit an appropriate application form.

(i) You must use the application form provided in Appendix B to this part without change or revision. However, you may provide in your DBE program, with the approval of the concerned operating administration, for supplementing the form by requesting additional information not inconsistent with this part.

(ii) You must 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 law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States.

(iii) You must review all information on the form prior to making a decision about the eligibility of the firm.

(d) Subject to the approval of the concerned operating administration as part of your DBE program, you may impose a reasonable fee for processing a firm's application for certification, which in no case shall exceed the actual cost of the administrative processing of the application. Fee waivers shall be made in appropriate cases.

(e) You must 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, and local law.

(f) Once you have certified a DBE, it shall remain certified for a period of at least three years unless and until its certification has been removed through the procedures of § 26.77. You must not require DBEs to reapply for certification as a condition of continuing to participate in the program during this three-year period.

(g) If you are a DBE, you must inform the recipient or UCP in writing of any change in its circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material change in the information provided in its application form. You must attach supporting documentation describing in detail the nature of such changes. The notice must take 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. You must provide the written notification within 21 days of the occurrence of the change. If you fail to make timely notification of such a change, you will be deemed to have failed to cooperate under § 26.99(c) of this part.

(h) If you are a DBE, you must provide to the recipient, every year on the anniversary of the date of its certification, 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. 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 this part or any material changes in the information provided in its application form, except for changes about which you have notified the recipient under paragraph (g) of this section. The affidavit shall specifically affirm that your firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of your firm's size and gross receipts. If you fail to provide this affidavit in a timely manner, you will be deemed to have failed to cooperate under § 26.99(c) of this part.

(i) If you are a recipient, you must shall make decisions on applications for certification within 90 days of receiving from the applicant firm all information required under this part. You 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. You may establish a different time frame in its DBE program, upon a showing that this time frame is not feasible, and subject to the approval of the concerned operating administration. Your failure to make a decision by the applicable deadline under this paragraph is deemed a constructive denial of the application, on the basis of which the firm may appeal to DOT under § 26.79.

**§ 26.75 What rules govern recipients' denials of initial requests for certification?**

(a) When you deny a request by a firm, which is not currently certified with you, to be certified as a DBE, you must 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 must be made available to the applicant, on request.

(b) When a firm is denied certification, you must establish a time period of no more than twelve months that must elapse before the firm may reapply to the recipient for certification. You may provide, in its DBE program, and subject to approval by the concerned operating administration, a shorter waiting period for reapplication. 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 you make an administratively final denial of certification concerning a firm, the firm may appeal the denial to the Department under § 26.79.

**§ 26.77 What procedures does a recipient use to remove a DBE's Eligibility?**

(a) *Ineligibility complaints.* (1) Any person may file with you a written complaint alleging that a currently-certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. You are not required to accept a general allegation that a firm is ineligible or an anonymous complaint. The complaint may include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not continue to be certified. Confidentiality of complainants' identities may be

protected as provided in § 26.99(b) of this part.

(2) You must review your records concerning the firm, any material provided by the firm and the complainant, and other available information. You may request additional information from the firm or conduct any other investigation that you deem necessary.

(3) If you determine, based on this review, that there is reasonable cause to believe that the firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. If you determine that such reasonable cause does not exist, you must 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 must specifically reference the evidence in the record on which each reason is based.

(b) *Recipient-initiated proceedings.* If, based on notification by the firm of a change in its circumstances or other information that comes to your attention, you determine that there is reasonable cause to believe that a currently-certified firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(c) *DOT directive to initiate proceeding.* (1) If the concerned operating administration determines that information in your certification records, or other information available to the concerned operating administration, provides reasonable cause to believe that a firm you certified does not meet the eligibility criteria of this part, the concerned operating administration may direct you to initiate a proceeding to remove the firm's certification.

(2) The concerned operating administration concerned must provide you and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.

(3) You must immediately commence and prosecute a proceeding to remove eligibility as provided by paragraph (b) of this section.

(d) *Hearing.* When you notify a firm that there is reasonable cause to remove its eligibility, under paragraph, (a), (b) or (c) of this section, you must 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) In such a proceeding, you bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part.

(2) You must maintain a complete record of the hearing, by any means acceptable under state law for the retention of a verbatim record of an administrative hearing. If there is an appeal to DOT under § 26.79, you must provide a transcript of the hearing to DOT and, on request, to the firm. You must retain the original record of the hearing. You may charge the firm only for the cost of making a photocopy for the firm.

(3) The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, a decision you make to remove the firm's eligibility must be based on a preponderance of the evidence that the firm does not meet the eligibility standards of this part.

(e) *Separation of functions.* You 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.

(f) *Grounds for decision.* You must not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to the recipient at the time of its certification of the firm. You may 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 the recipient that render the firm unable to meet the eligibility standards of this part;

(2) Information or evidence not available to you at the time of its certification of the firm;

(3) Information that was concealed or misrepresented by the firm in previous certification actions by a recipient;

(4) A change in the certification standards or requirements of the Department since you certified the firm; or

(5) A documented finding that your determination to certify the firm was factually erroneous.

(g) *Notice of decision.* Following your decision, you must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department of Transportation under § 26.79. You must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed the recipient to initiate the proceeding.

(h) *Status of firm during proceeding.* (1) Except as provided in paragraph (h)(3) of this section, a firm remains an eligible DBE during the pendancy of your 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.

(3) If you determine that there is a strong likelihood that the firm will be determined to be ineligible, and it appears that the firm will be awarded a contract or subcontract before the conclusion of the proceeding, you may suspend the eligibility of the firm to receive any new contracts or subcontracts as a DBE, pending the conclusion of the proceeding.

(i) *Effects of removal of eligibility.* When you remove a firm's eligibility, you must take the following action:

(1) When a prime contractor has made a commitment to using the ineligible firm, or you have made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before you issue the decertification notice provided for in paragraph (g) of this section, the ineligible firm does not count toward the contract goal or overall goal. You must direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate good faith efforts to the recipient.

(2) If a prime contractor has executed a subcontract with the firm before you have 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 you have let a prime contract to the firm, the portion of ineligible firm's performance of the contract remaining after you issued the notice of its ineligibility shall not count toward the overall goal.

(3) When a firm is found to be ineligible, the effects of its ineligibilty (*e.g.*, its participation not counting toward overall goals) are retroactive to the date you received the complaint of

ineligibility or other event initiating the ineligibility proceeding.

(j) *Availability of appeal.* When you make an administratively final removal of a firm's eligibility under this section, the firm may appeal the removal to the Department under § 26.79.

**§ 26.79 What is the process for certification appeals to the Department of Transportation?**

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

(2) If you are a complainant in an ineligibility complaint to a recipient (including the concerned operating administration in the circumstances provided in § 26.77(c)), you may appeal to the Department if the recipient does not find reasonable cause to propose removing the firm's eligibility or, following a removal of eligibility proceeding, determines that the firm is eligible.

(3) Send appeals to the following address:

Department of Transportation Office of Civil Rights 400 7th Street, SW., Room 2401 Washington, DC 20590

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

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

(1) If you are an appellant who is a firm which has been denied certification, whose certification has been removed, whose owner is determined not to be a member of a designated disadvantaged group, or concerning whose owner the presumption of disadvantage has been rebutted, your letter must state the name and address of any other recipient which currently certifies the firm, which has rejected an application for certification from the firm or removed the firm's eligibility within one year prior to the date of the appeal, or before which an application for certification or a removal of eligibility is pending. Failure to provide this information may be deemed a failure to cooperate under § 26.99(c).

(2) If you are an appellant other than one described in paragraph (c)(1), the Department will request, and the firm whose certification has been questioned shall promptly provide, the information called for in paragraph (c)(1). Failure to provide this information may be deemed a failure to cooperate under § 26.99(c).

(d) When it receives an appeal, the Department requests a copy of the recipient's complete administrative record in the matter. If you are the recipient, you must provide the administrative record, including a hearing transcript, within 20 days of the Department's request. To facilitate the Department's review of a recipient's decision, you must ensure that such administrative records are well organized, indexed, and paginated. Records that do not comport with these requirements are not acceptable and will be returned to you to be corrected immediately.

(e) The Department makes its decision based solely on the entire administrative record. The Department does not make a *de novo* review of the matter and does not conduct a hearing. The Department may supplement the administrative record by adding relevant information made available by the DOT Office of Inspector General; Federal, state, or local law enforcement authorities; officials of a DOT operating administration or other appropriate DOT office; a recipient; or a firm or other private party.

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

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

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

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

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

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

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

(7) The Department provides written notice of its decision to you, the firm, and the complainant in an ineligibility complaint. The notice includes the reasons for the Department's decision, including specific references to the evidence in the record that supports each reason for the decision.

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

**§ 26.81 What actions do recipients take following DOT certification appeal decisions?**

(a) If you are the recipient from whose action an appeal under § 26.79 is taken, the decision is binding. It is not binding on other recipients.

(b) If you are a recipient to which a DOT determination under § 26.79 is applicable, you must take the following action:

(1) If the Department determines that you erroneously certified a firm, you must remove the firm's eligibility on receipt of the determination, without further proceedings on your part. Effective on the date of your receipt of the Department's determination, the consequences of a removal of eligibility set forth in § 26.77(i) take effect.

(2) If the Department determines that you erroneously failed to find reasonable cause to propose removing the firm's eligibility, you must

expeditiously commence a proceeding to determine whether the firm's eligibility should be removed, as provided in § 26.77.

(3) If the Department determines that you erroneously declined to certify or removed the eligibility of the firm, you must certify the firm, effective on the date of your receipt of the written notice of Department's determination.

(4) If the Department determines that you erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, you must take appropriate corrective action as determined by the Department.

(5) If the Department affirms your determination, no further action is necessary.

(c) Where DOT has upheld your denial of certification to or removal of eligibility from a firm, or directed the removal of a firm's eligibility, other recipients with whom the firm is certified may commence a proceeding to remove the firm's eligibility under § 26.77. Such recipients must not remove the firm's eligibility absent such a proceeding. Where DOT has reversed your denial of certification to or removal of eligibility from a firm, other recipients must take the DOT action into account in any certification action involving the firm. However, other recipients are not required to certify the firm based on the DOT decision.

**§ 26.83 What procedures govern direct ineligibility complaints to DOT?**

(a) Any person who believes that a recipient has erroneously certified a firm as a DBE may file a written complaint with the DOT Office of Civil Rights. The complaint should be sent to the address in § 26.79(a)(3).

(b) The Office of Civil Rights may, at its discretion, accept the complaint, decline the complaint, or refer the complaint for action by a recipient under § 26.77.

(c) If the Office of Civil Rights accepts the complaint, it investigates the facts of the matter and determines if there is reasonable cause to believe that the firm is ineligible. The Office of Civil Rights notifies the firm of its determination, in the same way as provided in § 26.77(a)(3).

(d) If the Office of Civil Rights determines there is reasonable cause to believe that the firm is ineligible, it provides an opportunity for a hearing and makes a decision in the same way as provided in § 26.77 (d) through (g) (except that there is no further administrative appeal to the Department under § 26.79). The effects of a Departmental decision to remove a firm's eligibility is the same as provided in § 26.77(i).

(e) Except as provided in this paragraph, a firm remains eligible during the pendancy of a proceeding under this section. However, if the Office of Civil Rights determines that there is a strong likelihood that the firm will be determined to be ineligible, and it appears that the firm will be awarded a contract or subcontract before the conclusion of the proceeding, the Office of Civil Rights may direct the recipient to suspend, pending the conclusion of the proceeding, the eligibility of the firm to receive any new contracts or subcontracts as a DBE.

**§§ 26.85–26.89 [Reserved]**

## Subpart F—Compliance and Enforcement

**§ 26.91 What compliance procedures apply to recipients?**

If you fail to comply with any requirement of this part, you may be subject to formal enforcement action under § 26.93 or § 26.95 of this subpart or appropriate program sanctions by the concerned operating administration, such as the suspension or termination of Federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied. Program sanctions may include, in the case of the FHWA program, actions provided for under 23 CFR 1.36; in the case of the FAA program, actions consistent with section 519 of the Airport and Airway Improvement Act of 1982, as amended; and in the case of the FTA program, any actions permitted under the Federal Transit Act of 1964, as amended, or applicable FTA program requirements.

**§ 26.93 What enforcement actions apply in FHWA and FTA programs?**

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

(a) *Noncompliance complaints.* Any person who believes that a recipient has failed to comply with its obligations under this part may file a written complaint with 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. 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 § 26.99(b) of this part. 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.

(c) *Reasonable cause notice.* If it appears, from the investigation of a complaint or the results of a compliance review, that you, 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 you to reply within 30 days concerning whether you wish to begin conciliation.

(d) *Conciliation.* (1) If you request conciliation, the appropriate DOT office shall pursue conciliation for at least 30, but not more than 120, days from the date of your request. The appropriate DOT office may extend the conciliation period for up to 30 days for good cause, consistent with applicable statutes.

(2) If you 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 its compliance. While a conciliation agreement is in effect, you remain eligible for FHWA or FTA financial assistance.

(3) The concerned operating administration shall monitor your implementation of the conciliation agreement and ensure that its terms are complied with. If you fail to carry out the terms of a conciliation agreement, you are in noncompliance.

(4) If you do 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.

**§ 26.95 What enforcement actions apply in FAA Programs?**

(a) Compliance with all requirements of this part by airport sponsors and other recipients of FAA financial assistance is enforced through procedures of Title 49 of the United States Code, including 49 U.S.C. 47106(d), 47111(d), and 47122, and regulations implementing them.

(b) The provisions of § 26.93(b) and § 26.97 apply to enforcement actions in FAA programs.

(c) Any person who knows of a violation of this part by a recipient of FAA funds may file a complaint under 14 CFR part 16 with the Federal Aviation Administration Office of Chief Counsel.

**§ 26.97 What enforcement actions apply to firms participating in the DBE program?**

(a) If you are a firm that does not meet the eligibility criteria of subpart D of this part and which attempts to participate in a DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the Department may initiate suspension or debarment proceedings against you under 49 CFR part 29.

(b) If you are a firm which, in order to meet DBE contract goals or other DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of subpart D, the Department may initiate suspension or debarment proceedings against you under 49 CFR part 29.

(c) In a suspension or debarment proceeding brought under paragraph (a) or (b) of this section, the concerned operating administration may consider the fact that a purported DBE has been certified by a recipient. Such certification does not preclude the Department from determining that the purported DBE, or another firm that has used or attempted to use it to meet DBE goals, should be suspended or debarred.

(d) The Department may take enforcement action under 49 CFR part 31, implementing the Program Fraud Civil Remedies Act of 1986, against any participant in the DBE program whose conduct is subject to such action under part 31.

(e) The Department may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program or otherwise violates applicable Federal statutes.

**§ 26.99 What are the rules governing information, confidentiality, cooperation, and intimidation or retaliation?**

(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. The Department may make available to the public any information concerning the DBE program release of which is not prohibited by Federal law.

(2) If you are a recipient, you shall safeguard from disclosure to unauthorized persons information that may reasonably be considered as confidential business information, consistent with Federal, state, and local law.

(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 must 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. FAA follows the procedures of 14 CFR part 13 with respect to confidentiality of information in complaints.

(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; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts or suspension and debarment).

(d) *Intimidation and retaliation.* If you are a recipient, contractor, or any other participant in the program, you must 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 you violate this prohibition, you are in noncompliance with this part.

## Subpart G—DBE Participation in Airport Concessions

**§ 26.101 Definitions.**

*Affiliation* has the same meaning the term has in regulations of the Small Business Administration, 13 CFR part 121, except that the provisions of § 121.401(l), "Affiliation under joint venture agreements," shall not apply to the definition used in this subpart. Except as otherwise provided in 13 CFR part 121 and in this section, 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. In determining whether affiliation exists, consideration shall be given to all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates are considered together for purposes of determining whether either concern meets the applicable small business size standard.

*Concession* means a for-profit business enterprise, located on an airport subject to this subpart, that is engaged in the sale of consumer goods or services to the public under an agreement with the sponsor, another concessionaire, or the owner of a terminal, if other than the sponsor. Businesses which conduct an aeronautical activity are not considered concessionaires for purposes of this subpart. Aeronautical activities include scheduled and non-scheduled air carriers, air taxis, air charters, and air couriers, in their normal passenger or freightcarrying capacities; fixed base operators; flight schools; and sky-diving, parachute-jumping, flying guide services, and helicopter or other air tours.

(1) Appendix G to this part contains a listing of the types of businesses that are frequently operated as concessions.

(2) Examples of entities that do not meet the definition of a concession include flight kitchens and inflight caterers servicing air carriers, government agencies, industrial plants, farm leases, individuals leasing hangar space, custodial and security contracts, telephone and electric utilities, long distance telephone service, and skycap services under contract with an air carrier.

(3) For purposes of this subpart, a business is not considered to be "located on the airport" solely because it picks up and/or delivers customers under a permit, license, or other

agreement. This provision applies to, but is not limited to, taxicabs, limousines, hotels, and car rentals. A business is considered to be "located on the airport," however, if it has an on-airport facility which services the public. On-airport facilities include in the case of a taxi-cab, a dispatcher; in the case of a limousine, a booth selling tickets to the public; in the case of a car rental, a counter at which its services are sold to the public; and in the case of a hotel operator, a hotel located anywhere on airport property.

(4) Any business meeting the definition of concession is covered by this subpart, regardless of the name given to the agreement with the sponsor, concessionaire, or airport terminal owner. A concession may be operated under various types of agreements, including:

(i) Leases.

(ii) Subleases.

(iii) Permits.

(iv) Contracts.

(v) Other instruments or arrangements.

*Concessionaire* means a firm that owns and controls a concession.

*Direct ownership arrangement* means a joint venture, partnership, sublease, franchise, or other arrangement in which a firm owns and controls a concession.

*Disadvantaged business enterprise* or *DBE* has the same meaning the term has in § 26.5 of this part, except that for purposes of this subpart—

(1) The firm must qualify as a small business concern, as defined in this subpart; and

(2) The definition of "socially and economically disadvantaged individuals" set forth in this subpart shall apply.

*Management contract or subcontract* means an agreement with a sponsor or a derivative subagreement under which a firm directs or operates one or more business activities, the assets of which are owned, leased, or otherwise controlled by the sponsor.

(1) The managing agent generally receives, as compensation, a flat fee or a percentage of the gross receipts or profit from the business activity. For purposes of this subpart, the business activity operated or directed by the managing agent must be other than an aeronautical activity, be located at an airport subject to this subpart, and be engaged in the sale of consumer goods or services to the public.

(2) As used in this subpart, the term management contract or subcontract shall not include an agreement between a concessionaire and a managing agent. (In the event such managing agent qualifies as a DBE and meets other appropriate criteria in this subpart, it can be counted toward DBE goals as provided in paragraph (c)(2)(iii) or (c)(2)(iv) of § 26.107.)

*Material amendment* means a substantial change to the basic rights or obligations of the parties to a concession agreement. Examples of material amendments include an extension to the term not provided for in the original agreement or a substantial increase in the scope of the concession privilege. Examples of nonmaterial amendments include a change in the name of the concessionaire or a change to the payment due dates.

*Primary airport* means a commercial service airport which is determined by the Secretary to have more than 10,000 passengers enplaned annually.

*Small business concern* means an existing firm, including all its domestic and foreign affiliates, that qualifies under the appropriate size standard referenced in Appendix G to this part. Except as provided in paragraph (4) of this definition, the appropriate standard is the one which best describes the type of concession the firm seeks to operate, or type of goods or services the firm seeks to provide under the DBE concession program.

(1) A concessionaire qualifying under this definition that exceeds the size standard after entering a concession agreement, but which otherwise remains eligible, may continue to be counted as DBE participation toward the overall goals and any contract goals set under this subpart, until the current agreement, including the exercise of options, expires.

(2) The Secretary may periodically adjust the size standards in Appendix G to this part for inflation.

(3) If a concessionaire was certified as a minority/woman/or disadvantaged business enterprise (MBE/WBE/DBE) prior to [the effective date of the final rule], pursuant to a requirement in § 23.43(d) or subpart F of 49 CFR part 23, and the firm has exceeded the size standard, it may be counted as DBE participation until the current agreement, including the exercise of options, expires, provided that the firm remains otherwise eligible.

(4) Any firm falling under "Standard Industrial Classification (SIC)" code 5511 shall be considered a small business concern for purposes of this subpart, if it has no more than 500 employees, regardless of the nature of the goods and/or services it seeks to provide under the DBE concession program. SIC 5511, "Motor Vehicle Dealers (New and Used)," hereinafter "car dealerships," means:

Establishments primarily engaged in the retail sale of new automobiles or new and used automobiles. These establishments frequently maintain repair departments and carry stocks of replacement parts, tires, batteries, and automotive accessories. Such establishments also frequently sell pickups and vans at retail.

*Socially and economically disadvantaged individuals* has the same meaning the term has in § 26.5 and as further defined in § 26.57 and Appendix F to this part.

*Sponsor* means the recipient of an FAA grant.

**§ 26.103 Applicability.**

This subpart applies to any sponsor that received a grant for airport development after January 1988 which was authorized under Title 49 of the United States Code.

**§ 26.105 Requirements for airport sponsors.**

(a) *General requirements.* (1) Each sponsor shall abide by the non-discrimination requirements of § 26.7 with respect to the award and performance of any concession agreement, management contract or subcontract, purchase or lease agreement, or other agreement covered by this subpart.

(2) Each sponsor shall take all necessary and reasonable steps to ensure nondiscrimination in the award and administration of contracts and agreements covered by this subpart.

(3) The following statements shall be included in all concession agreements and management contracts executed between the sponsor and any firm after [the effective date of the final rule].

(i) "This agreement is subject to the requirements of the U.S. Department of Transportation's regulations, 49 CFR Part 26, subpart G. The concessionaire or contractor agrees that it will not discriminate against any business owner because of the owner's race, color, national origin, or sex in connection with the award or performance of any concession agreement, management contract, or subcontract, purchase or lease agreement, or other agreement covered by 49 CFR Part 26, subpart G."

(ii) "The concessionaire or contractor agrees to include the above statements in any subsequent concession agreement or contract covered by 49 CFR Part 26, subpart G, that it enters and cause those businesses to similarly include the statements in further agreements."

(4)(i) Each sponsor shall retain sufficient basic information about its program implementation, its certification of DBEs, and the award and

performance of agreements and contracts to enable the FAA to monitor the sponsor's compliance with this subpart. Data shall be retained for a minimum of three years following the completion of the concession agreement or other covered contract.

(ii) Sponsors shall report data to the appropriate FAA Regional Office concerning DBE participation in concession activities. The reports shall be made in a format, and with a frequency, as determined by the FAA Administrator.

(iii) The requirements of this paragraph apply to all obligated sponsors, whether or not it is required to establish a DBE concession plan under paragraph (b) of this section.

(b) *Additional requirements for primary airports.* (1) Sponsors of primary airports shall implement a disadvantaged business enterprise (DBE) concession plan containing the elements listed in § 26.107. Sponsors of more than one primary airport shall implement a separate plan for each location that has received assistance for airport development. The plan shall be submitted to the appropriate FAA Regional Office for approval.

(2) The sponsor shall review and update the plan at least annually. The updated plan shall include any information required under § 26.107 that was not available to the sponsor when the previous submission was made. Updated plans shall be submitted to the appropriate FAA Regional Office for approval.

(c) *Additional requirements for nonprimary airports.* Sponsors of commercial service airports (except primary), general aviation and reliever airports are not required to implement a DBE concession plan but shall take appropriate outreach steps to encourage available DBEs to participate as concessionaires whenever there is a concession opportunity.

**§ 26.107 Elements of a Disadvantaged Business Enterprise (DBE) concession plan.**

(a) *Overall annual DBE goals.*

(1) The sponsor shall establish an overall goal for the participation of DBEs in concession activities for each 12-month period covered by the plan.

(2) Sponsors shall calculate the overall DBE goal as a percentage of one of the following bases:

(i) The estimated gross receipts that will be earned by all concessions operating at the airport during the goal period.

(ii) The total number of concession agreements operating at the airport during the goal period.

(3) The plan shall indicate which base the sponsor proposes to use for calculating the overall goals.

(4) Sponsors that employ the procedures of paragraph (a)(2)(i) of this section may add the following amounts to the total DBE participation and to the base from which the overall percentage goal is calculated:

(i) The estimated dollar value of a management contract or subcontract with a DBE. (The dollar value of management contracts and subcontracts with non-DBE firms are not added to the base from which the overall percentage goal is calculated.)

(ii) Subject to the conditions set forth in §26.117 of this subpart, the estimated dollar value of goods and services that a non-DBE concessionaire (except a car rental) will purchase from DBEs and use in operating the concession.

(iii) The estimated dollar value of goods and services that a non-DBE car rental firm will purchase or lease from DBEs and use in operating the concession.

(5) Sponsors that employ the procedures of paragraph (a)(2)(i) of this section shall also:

(i) Use the net payment to the airport for banks and banking services, including automated teller machines (ATM) and foreign currency exchanges, in calculating the overall goals.

(ii) Exclude from the overall goal calculation any portion of a firm's estimated gross receipts that will not be generated from a concession activity.

*Example to paragraph (a)(5).* A firm operates a restaurant in the airport terminal which services the traveling public and under the same lease agreement, provides in-flight catering service to the air carriers. The projected gross receipts from the restaurant are included in the overall goal calculation, while the gross receipts to be earned by the in-flight catering services are excluded.

(iii) State in the plan which concession agreements, if any, do not provide for the sponsor to know the value of the gross receipts earned. For such agreements, the sponsor shall use the net payment to the airport and combine these figures with the estimated gross receipts from other agreements, for purposes of calculating overall goals.

(6)(i) Sponsors that will employ the procedures of paragraph (a)(2)(ii) of this section shall submit a rationale as required by § 26.111.

(ii) In calculating overall goals, these sponsors may add the number of management contracts and subcontracts with DBEs to the total of DBE participation and to the base from which the overall percentage goal is calculated. Management contracts and subcontracts with non-DBEs shall not be included in this base.

(7) All overall goals established under this subpart shall provide for participation by all certified DBEs and may not be subdivided into group specific goals.

(8) In setting overall goals, sponsors shall include only those projected expenditures/gross receipts or number of agreements, as applicable, as § 26.107(c) allows to be counted toward meeting such goals.

(9) In establishing the overall annual goals of the concession plan, the sponsor shall provide for public participation by taking at least the steps listed in paragraphs (a)(9)(i) and (ii) of this section. If the FAA approves the overall annual goals of the concession plan, the sponsor is not required to repeat the steps in subsequent years covered by the plan.

(i) Consult with minority, women's and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and the sponsor's efforts to increase participation of DBEs.

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

(10) Failure to establish and implement overall annual goals as provided in this section constitutes noncompliance with this subpart. A sponsor that fails to comply with this requirement is not eligible to receive Federal financial assistance from the FAA.

(11) In setting overall DBE goals, the sponsor shall follow the procedures set forth in § 26.41 (b) through (e), as applied to contractors who are available for airport concession leases or contracts.

(12) To the extent practicable, sponsors shall seek to obtain DBE participation in all types of concession

activities and not concentrate participation in one category or a few categories to the exclusion of others.

(13) Approval by the appropriate FAA Regional Office of the sponsor's overall annual goals is required prior to implementation. If the FAA determines that the overall goals have not been correctly calculated or the justification is inadequate, the FAA may, after consulting with the sponsor, establish one or more adjusted overall annual goals. The adjusted overall goal(s) represents the FAA's determination of an appropriate overall goal for DBE participation in the sponsor's concession program, based on relevant data and analysis. The adjusted overall goal(s) shall be binding on the sponsor.

(b) *Goal methodology.* (1) The plan shall contain a description of the methodology used to calculate each overall DBE goal. The methodology shall include information on the concessions that will operate at the airport during the period covered by the plan. For each concession agreement, the sponsor shall provide the following information, together with any additional information requested by the Regional Civil Rights Officer:

(i) Name of firm (if known).

(ii) Type of business (e.g. bookstore, car rental, baggage carts).

(iii) Beginning and expiration dates of agreement, including options to renew.

(iv) For new agreements, method of solicitation proposed by sponsor (e.g. request for proposals, invitation for bids).

(v) Dates that material amendments will be made to the agreement (if known).

(vi) Except for sponsors covered by paragraph (a)(2)(ii) of this section, the estimated gross receipts for each goal period established in the plan.

(vii) Identification of those concessionaires that have been certified under this subpart as DBEs.

(viii) An indication of those concessions having potential for participation by DBEs.

(2) The plan shall provide information on other projected expenditures with DBE firms that the sponsor proposes to count toward meeting overall goals, including

(i) Name of each DBE firm (if known).

(ii) Type of business arrangement (e.g. management contract, vehicle leasing, building cleaning and maintenance service).

(iii) Estimated value of funds to be counted toward meeting the overall goals.

(iv) Identification of entity purchasing or leasing the goods or services from the DBE (e.g., the sponsor or name of non-DBE concessionaire).

(3) Sponsors that will levy a DBE contact goal or other requirements on competitors or concessionaires in accordance with § 26.115 of this subpart shall state those requirements in the plan.

(4) The plan shall include a narrative description of the types of efforts the sponsor intends to make in good faith to achieve the overall annual goals, in accordance with paragraph (k) of this section.

(c) *Counting DBE participation toward meeting the goals.* (1) A sponsor or concessionaire may count toward DBE goals expenditures with DBEs as referenced in this section, provided that the DBE performs a commercially useful function in the work of the contract. For purposes of this subpart, the term commercially useful function has the same meaning as in § 26.49(e) of this part, except that the requirements of § 26.49(e)(3) shall not apply to a concession agreement or management contract or subcontract.

(2) If a sponsor is covered by paragraph (a)(2)(i) of this section, DBE participation is counted toward meeting goals as follows.

(i) The total dollar value of a management contract or subcontract with a DBE is counted toward the goals (but the value of the gross receipts of the business activity to which the management contract or subcontract pertains is not counted toward the goals.)

(ii)(A) The total dollar value of gross receipts a DBE earns under a concession agreement is counted toward the goals, provided, however, that if the DBE enters into a subconcession agreement with a non-DBE, no portion of the gross receipts earned by the non-DBE is counted.

(B) When a DBE performs as a subconcessionaire to a non-DBE, only the portion of the gross receipts earned by the DBE under its subagreement is counted toward the goals.

(C) When a concession is performed by a joint venture involving a DBE, a portion of the gross receipts equal to the percentage of the ownership and control by the DBE partner in the joint venture is counted toward the goals.

(iii) A non-DBE car rental firm may count toward a contract goal set under § 26.115, the expenditures with DBEs for goods and services listed in paragraphs (c)(2)(iii) (A) through (C), (D)(1), and (E) of this section, which are used in operation of the concession. A sponsor may count these same expenditures toward its overall goal. Counting such expenditures toward DBE goals is subject to the additional condition stated in § 26.49(d) of this part.

(A) Costs incurred in connection with the renovation, repair, or construction of a concession facility (sometimes referred to as the "build-out") are counted toward DBE goals in accordance with § 26.49 of this part, except that 100 percent of the cost of any materials or supplies purchased from a DBE regular dealer and used in the project are counted toward the goals. For purposes of this subpart, the term regular dealer has the same meaning as in § 26.49(f)(2)(iii).

(B) The entire amount of fees or commissions charged by a DBE firm for a *bona fide* service is counted toward DBE goals, provided that it is determined by the sponsor to be reasonable and not excessive as compared with fees customarily allowed for similar services. Such services may include, but are not limited to, professional, technical, consultant, legal, security systems, advertising, building cleaning and maintenance, computer programming, or managerial.

(C) 100 percent of the cost of goods obtained from a DBE manufacturer is counted toward the goal. For purposes of this subpart, the term manufacturer has the same meaning as in § 26.49(f)(1)(ii) of this part.

(D)(*1*) 100 percent of the cost of goods purchased or leased from a DBE regular dealer is counted toward the goals.

(*2*) 100 percent of the goods purchased from a DBE regular dealer is counted toward goals.

(E) If goods are purchased from a DBE which is neither a manufacturer nor a regular dealer, credit toward DBE goals may be counted as follows:

(*1*) The entire amount of fees or commissions charged for assistance in the procurement of the goods is counted toward the goals, provided that it is determined by the sponsor to be reasonable and not excessive as compared with fees customarily allowed for similar services. No portion of the cost of the goods themselves may be counted toward DBE goals, however.

(*2*) The entire amount of fees or transportation charges for the delivery of goods required in a concession is counted toward DBE goals, provided that it is determined by the sponsor to be reasonable and not excessive as compared with fees customarily allowed for similar services. No portion of the cost of goods themselves may be counted toward the goals, however.

(iv) A non-DBE concessionaire (other than a car rental) may count toward a contract goal set under § 26.115, the expenditures listed in paragraphs

(c)(2)(iii)(A) through (C), (D)(2) and (E) of this section that are used in the operation of a concession. A sponsor may count these same expenditures towards its overall goal. Counting such expenditures toward DBE goals is subject to meeting the additional conditions set forth in § 26.117 of this subpart and § 26.49(d) of this part.

(3) The following guidelines apply the counting provisions of paragraph (c)(2) of this section to various transactions involving car rental firms.

(i) For purposes of this subpart, a fleet purchase means a purchase of vehicles in volume from a manufacturer at a discounted price, which is made through a car dealer. While the process used varies by manufacturer and by car dealer, the vehicles in a fleet purchase are frequently "dropped-shipped" directly to the car rental firm. A car dealer may use a separate account to handle fleet purchases. The minimum number of vehicles in a fleet purchase may vary, but as few as 10 have been used.

(ii) A car dealership shall not be regarded as a regular dealer in a transaction in which it assists a car rental firm to make a fleet purchase from a manufacturer. The entire amount of the fee or commission charged by a DBE car dealership for arranging a fleet purchase is counted toward DBE goals, provided that it is determined by the sponsor to be reasonable and not excessive as compared to fees customarily allowed for similar services. No portion of the cost of the vehicles themselves is counted toward DBE goals, however.

(iii) A DBE car dealership may be regarded as a regular dealer with respect to other transactions, including but not limited to, retail sales or leasing of vehicles other than through a fleet purchase and selling motor vehicle supplies or new parts, provided that the operation meets appropriate criteria in this section. In these instances, 100 percent of the cost charged by the DBE car dealer for such goods is counted toward DBE goals.

(iv) The entire amount of the cost charged by a DBE for repairing vehicles is counted toward DBE goals, provided that it is determined by the sponsor to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(v) The entire amount of the fee or commission charged by a DBE to manage a car rental concession under an agreement with the concessionaire is counted toward DBE goals, provided that it is determined by the sponsor to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(vi) No portion of a fee paid by a manufacturer to a car dealership for reimbursement of work performed under the manufacturer's warranty shall be counted toward DBE goals.

(4) If the sponsor is covered by paragraph (a)(2)(ii) of this section, DBE participation is counted toward meeting overall goals and any contract goals set under this subpart as follows:

(i) A sponsor or concessionaire shall count each concession agreement with a DBE toward its goal.

(ii) A sponsor shall count each management contract or subcontract with a DBE toward its goal.

(5) If a firm has not been certified as a DBE in accordance with the standards in this part, the firm's participation may not count toward DBE goals.

(6) Except in the case of a concessionaire that exceeds the small business size standard, as referenced under the definition of a "small business concern," the work performed or gross receipts earned by a firm after its eligibility has been removed may not be counted toward DBE goals.

(d) [Reserved]

(e) *Accomplishments in achieving DBE goals.* The plan shall contain an annual analysis of the accomplishments made by the sponsor toward achieving the previous year's goals. The plan shall show the effect of those results on the overall level of DBE participation in the sponsor's concession program.

(f) *Explanation for not achieving a goal.* (1) If the analysis required under paragraph (e) of this section indicates that the sponsor failed to meet the previous year's overall goal, the plan shall include a statement of the reasons demonstrating why failure to meet the goal was beyond the sponsor's control.

(2) If the FAA determines that the reasons given by the sponsor are not sufficient justification, or if the sponsor fails to state any reasons, the FAA may require the sponsor to implement appropriate remedial measures. Such measures may include an adjustment to the overall goals of the concession plan.

(g) *Certification procedures.* (1) The procedures in § 26.71 apply to this subpart. The DBE concession plan shall state whether the sponsor participates in the unified certification program (UCP) for its state.

(i) A sponsor that participates in a UCP shall be subject to all certification procedures applicable to the UCP.

(ii) A sponsor that elects not to participate in the UCP shall independently certify concessionaires and other program participants counted toward DBE contract goals and overall goals under this subpart. Such a sponsor:

(A) Is not authorized to accept the certifications made by another sponsor or by a UCP;

(B) May, at its own discretion, use the pre-certification procedures in § 26.71(d).

(2) Pending the establishment of a UCP meeting the requirements of this part, any sponsor is authorized to take the actions set forth in § 26.71(g). A sponsor that does not participate in the UCP in its state is not authorized to take such actions, however, after the UCP has become operational.

(h) *Certification process.* (1) Except for paragraphs (c) (1) through (6) of this section, the requirements of § 26.73 of this part apply to all certifications made under this subpart.

(2) In determining whether a firm is an eligible DBE, a sponsor or UCP shall take all steps listed in paragraphs (h)(2)(i) through (vi) of this section.

(i) Obtain the resumes or work histories of the principal owners of the firm and personally interview these individuals;

(ii) Analyze the ownership of stock of the firm, if it is a corporation;

(iii) Analyze the bonding and financial capacity of the firm;

(iv) Determine the work history of the firm, including any concession contracts or other contracts it may have received;

(v) Obtain or compile a list of the licenses of the firm and its key personnel to perform the concession contracts or other contracts it wishes to receive;

(vi) Obtain a statement from the firm of the type(s) of concession(s) it prefers to operate or the type(s) of other contract(s) it prefers to perform.

(3) When determined by the sponsor or UCP to be necessary to validate the certification information submitted by the firm, the sponsor or UCP shall perform an on-site visit to the offices of the firm and to any facilities within the sponsor's jurisdiction or local area prior to making an eligibility determination.

(4) Each certified DBE shall provide the affidavit required by § 26.73(h) of this part, except that, for certifications made under this subpart, the affidavit shall affirm that the firm meets the appropriate size standard in Appendix G to this part.

(5) A sponsor described in paragraph (g)(1)(ii) of this section that does not adopt pre-certification procedures, is required to certify only those firms which will count toward DBE contract goals and overall goals set under this subpart. The provisions of § 26.73(i) shall not apply to such a sponsor if the application for certification is submitted

by a firm that will not count toward such goals.

(i) *Other certification procedures.* (1) Except as provided in paragraph (i)(2) of this section, the procedures in §§ 26.75, 26.77, 26.79, and 26.81 apply to this subpart. For purposes of this subpart, the term "prime contractor" in § 26.77(i) shall include:

(i) A firm holding a prime contract with an airport concessionaire to provide goods or services to the concessionaire; and

(ii) A firm holding a prime concession agreement with a sponsor.

(2) The procedures of § 26.77(i)(2) shall apply to this subpart, except when a sponsor removes a concessionaire's eligibility because the firm exceeded the size standard after entering a concession agreement. In such instances, the procedures set forth under the definition of a "small business concern" in § 26.101 shall apply.

(j) *Certification standards.* (1) Except as provided in paragraphs (j)(1) (i) and (ii) of this section, sponsors shall use the same standards as contained in §§ 26.51, 26.53, 26.57, 26.59, 26.61, and 26.63 of this part to determine whether a firm may be certified as a DBE under this subpart.

(i) The personal net worth threshold used in rebutting the presumption of disadvantage, referenced in §§ 26.57(b)(5) and (b)(6) and in appendix F of this part, shall be [a number to be inserted in the final rule] under this subpart;

(ii) The provisions of § 26.61(n) of this part shall not apply to this subpart.

(2) A newly formed firm applying for DBE certification as a concessionaire must meet all applicable eligibility standards in this part. A sponsor shall not deny certification solely because such firm was newly formed, without applying the standards in this part.

(3) Businesses operating under the following structures may be eligible for certification as DBEs under this subpart:

(i) Sole proprietorships meeting the standards in this part.

(ii) Corporations described in § 26.59(b).

(iii) Partnerships described in § 26.59(b).

(iv) Other structures that provide for ownership and control by the socially and economically disadvantaged owners.

(4) A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licenser is not affiliated with the franchisee or licensee. In determining whether affiliation as defined in § 26.101 exists, the restraints relating to standardizing quality, advertising, accounting format, and other provisions imposed on a franchisee or licensee by its franchise or license agreement generally shall not be considered, 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 the franchiser or licenser by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions upon the sale or transfer of the franchise interest or license.

(5) An association of a DBE firm and one or more other firms meeting the definition of a joint venture in § 26.5 of this part is eligible for certification under this subpart.

(6) Businesses operating under the following arrangements are not eligible for certification as DBEs under this subpart:

(i) A limited partnership, in which a non-DBE firm or a non-disadvantaged individual is the general partner.

(ii) Other arrangements that do not provide for ownership and control by the socially and economically disadvantaged owners.

(k) *Good faith efforts.* (1)(i) A sponsor shall make good faith efforts in accordance with this section to achieve the overall goals of an approved concession plan.

(ii) For purposes of this subpart, good faith efforts means efforts which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to achieve a DBE goal or fulfill another program requirement.

(2) To the maximum extent feasible, sponsors shall meet overall goals by using outreach, technical assistance, and other methods to facilitate DBE participation, including, but not limited to the steps listed in paragraphs (k)(4) (i) through (iv) of this section.

(3)(i) To the extent that a sponsor has determined that it cannot meet its overall goals by using the means referenced in paragraph (k)(2) of this section, the sponsor shall use the additional steps listed in paragraphs (k)(4) (v) and (vi) of this section and the procedures in § 26.115.

(ii) Sponsors shall review at appropriate intervals the methods and procedures used to comply with this section to ensure that they continue to be needed to meet overall goals, modifying them as needed for this purpose. If the sponsor's actual DBE participation significantly exceeds its overall goals over a substantial period of time, the sponsor shall appropriately reduce the use of DBE contract goals as a means of meeting overall goals.

(4) Good faith efforts include the following:

(i) Locating and identifying DBEs who may be interested in participating as concessionaires or contractors under this subpart;

(ii) Notifying DBEs and other organizations of concession/contracting opportunities and encouraging them to compete, when appropriate;

(iii) When practical, structuring contracting activities so as to encourage and facilitate the participation of DBEs; and

(iv) Providing technical assistance to DBEs in overcoming limitations, such as inability to obtain bonding or financing.

(v) Informing competitors for concession/contracting opportunities of any DBE requirements during pre-solicitation meetings;

(vi) Providing information concerning the availability of DBE firms to competitors to assist them in meeting DBE requirements;

(5) A firm subject to a DBE contract goal set under § 26.115 of this subpart shall make good faith efforts to meet the goal. The firm shall consider implementing at least the steps listed in paragraph (k)(4) of this section.

(6) A sponsor and firm covered by § 26.117(b)(2) of this subpart shall make good faith efforts to meet the requirements of that section. The sponsor and firm shall consider implementing at least the steps listed in paragraph (k)(4) of this section.

(l) *Monitoring and compliance procedures.* The sponsor shall implement appropriate mechanisms to ensure compliance with the requirements of this subpart by all participants in the program. The sponsor shall include in its DBE concession plan the specific provisions to be inserted into concession agreements and management contracts, the enforcement mechanisms, and other means it uses to ensure compliance. These provisions shall include a monitoring and enforcement mechanism to verify that the work committed to DBEs as a condition of receiving the award of a covered contract is actually performed by the DBEs.

**§ 26.109 [Reserved]**

**§ 26.111 Rationale for basing overall goals on the number of concession agreements.**

(a) A sponsor that proposes to calculate the overall DBE goals as a percentage of the number of concession agreements shall submit information with the DBE plan to demonstrate that

one of the following applies to the airport:

(1) In order to achieve the overall DBE goals of the plan on the basis of gross receipts, the airport would need to award a disproportionate percentage of concession agreements to DBEs. This rationale may address a time period that extends beyond that covered by the current plan; or

(2) Other circumstances at the airport exist that do not make it feasible to use gross receipts as the basis for calculating the goals.

(b) If the FAA approves the request, the sponsor shall not be required to provide further justification during subsequent years of the plan, unless requested by the FAA to do so.

(c) If the FAA determines that the information submitted by the sponsor fails to justify the requested goal-setting procedure, the sponsor shall resubmit the plan. The goals in the revised plan shall be calculated as a percentage of gross receipts, as outlined in § 26.107(a)(2)(i) of this subpart.

**§ 26.113 [Reserved]**

**§ 26.115 Obligations of concessionaires, contractors, and competitors.**

(a)(1) Nothing in this subpart shall require any sponsor to modify or abrogate an existing concession agreement (one executed prior to the date the sponsor became subject to this subpart G) during its term. When an option to renew such an agreement is exercised or when a material amendment is made, the sponsor shall assess potential for DBE participation and may, if permitted by the agreement, set a DBE contract goal in accordance with this section.

(2) Sponsors may impose DBE contract goals on competitors for concession agreements or management contracts. If a contract goal is established, the solicitation shall notify competitors that as a condition of receiving the award of the agreement/contract, the competitor shall be required to submit information indicating that the competitor—

(i) Will meet the contract goal through utilization of one or more named DBEs; or

(ii) Made good faith efforts in accordance with § 26.107(k) of this subpart.

(3) The sponsor shall award an agreement or contract for which a contract goal has been established only to a firm that is responsive to the requirements of this section.

(4) All DBE contract goals established under this subpart shall provide for participation by all certified DBEs and may not be subdivided into group-specific goals.

(5) Sponsors are not required to set each contract goal at the same percentage level as the overall goal. The goal for a specific contract may be higher or lower than the percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract or concession.

(6) DBE contract goals shall be calculated as follows:

(i) If the goal is to attain a direct ownership arrangement with a DBE, the goal is calculated as a percentage of the total estimated annual gross receipts from the concession.

(ii) If the goal applies to purchases and/or leases of goods and services, the goal is calculated by dividing the estimated dollar value of such purchases and/or leases from DBEs by the sum of this amount and the estimated annual gross receipts to be earned by the concession.

(b) A sponsor may impose the requirements of paragraphs (b)(1) and/or (b)(2) of this section on a non-DBE car rental firm.

(1) The sponsor may set a DBE contract goal for the purchase or lease of goods or services, provided, that a car rental firm shall be permitted to meet such goal by including costs associated with purchases or leases of vehicles from any firm that qualifies as a DBE, as defined in this subpart.

(2)(i) The sponsor may require a car rental firm to state in writing—

(A) Whether a change in its corporate structure is needed in order to provide for a direct ownership arrangement with a DBE; and

(B) To identify the particular arrangements it can utilize for such purpose, if any.

(ii) For purposes of this subpart, a change in corporate structure shall include a transfer of corporate assets or execution of a joint venture, partnership, or sublease agreement.

(iii) If a car rental firm identifies one or more direct ownership arrangements pursuant to paragraph (b)(2)(i)(B) of this section, the sponsor may require the firm to make good faith efforts to achieve a DBE contract goal through such arrangement.

(iv) If a car rental firm cannot provide for a direct ownership arrangement with a DBE without changing its corporate structure, the firm shall be considered responsive to any requirement established by the sponsor under this paragraph (b)(2).

(3)(i) Nothing in this subpart shall require a car rental firm to change its corporate structure to provide for a direct ownership arrangement with a DBE in order to meet the requirements of this subpart.

(ii) In evaluating bids or proposals for a car rental concession, a sponsor shall not give preference or more favorable consideration solely because a firm can provide for a direct ownership arrangement with a DBE without changing its corporate structure.

(iii) A sponsor shall not grant more favorable terms or conditions in a car rental concession agreement solely because a firm can provide for a direct ownership arrangement with a DBE without changing its corporate structure.

(c) A sponsor may impose the requirements of paragraphs (b)(1) and/or (b)(2) of this section on a non-DBE concessionaire or competitor (except a car rental firm):

(1) Subject to complying with the conditions in § 26.117, the sponsor may set a DBE contract goal for the purchase of goods or services.

(2) The sponsor may set a contract goal to attain DBE participation solely through a direct ownership arrangement.

(d) A sponsor may impose a contract goal on a management contractor to attain DBE participation through a management subcontract.

(e) A sponsor is permitted to afford DBE firms opportunities to participate as prime concessionaires or management contractors through direct contractual agreements with the sponsor.

(f) When a contract goal has been established in accordance with this section, sponsors are prohibited from using more stringent mechanisms than good faith efforts (including, but not limited to, set-asides and a conclusive presumption) unless—

(1) The sponsor has legal authority independent of this part to use such mechanisms; and

(2) Where the sponsor has a continuing, substantial inability to meet its overall goal using the mechanisms provided for in this section. In such a case, the sponsor shall document in its file for the contract the basis for the determination that other available methods have proven unable to meet DBE goals.

(g) The concession plan shall include a description, together with a citation of state or local law, regulation, or policy, to support any requirement that a sponsor will levy on a firm which is in addition to the requirements of this subpart, such as a requirement to provide financial assistance to a DBE.

This subpart does not provide authority to establish such a requirement.

**§ 26.117 Conditions precedent to counting purchases of goods and services by concessionaires (other than car rentals) toward DBE goals.**

(a) A sponsor that proposes to count expenditures referenced in § 26.107(c)(1)(iv) of this subpart toward a DBE goal, shall include information in the concession plan on how it will comply with the requirements set forth in this section.

(b)(1) Except as provided in paragraph (d) of this section, the sponsor shall, with respect to each concession agreement covered by this section, implement the procedures of paragraph (b)(1) (i) or (ii) as follows:

(i) Set a DBE contract goal for a direct ownership arrangement and require the non-DBE firm to make good faith efforts as provided in § 26.115 of this subpart.

(ii) Submit information demonstrating that the sponsor and non-DBE firm made good faith efforts, in accordance with § 26.107(k) of this subpart, to explore all available options to attain, to the maximum extent practical, DBE participation through a direct ownership arrangement. If appropriate, the submission may include an explanation why the nature of a particular concession makes DBE participation through a direct ownership arrangement not economically feasible or otherwise impractical.

(2) [Reserved]

(c)(1) The FAA shall approve or disapprove a DBE contract goal submitted by the sponsor pursuant to paragraph (b)(2)(1) of this section.

(2)(i) If a sponsor submits information meeting the standards in paragraph (b)(1)(ii) of this section, the FAA Regional Office shall approve the submission, and if appropriate, require the sponsor to reassess the feasibility of setting a DBE contract goal prior to exercising each option to renew the concession agreement, when a material amendment is made to the agreement, or at another appropriate time.

(ii) If a sponsor submits information that does not meet the standards in paragraph (b)(1)(ii) of this section, the FAA Regional Office may;

(A) Require that additional efforts be made by the sponsor and concessionaire;

(B) Direct the sponsor to set a DBE contract goal for a direct ownership arrangement; or

(C) Take other appropriate action in accordance with this subpart.

(d) If the FAA approved a plan referenced in § 26.121(b)(2) of this subpart, the sponsor is not required to submit additional information pursuant to this section unless requested by the FAA to do so.

(e)(1) Purchases of goods and services covered by this section may be counted toward DBE goals throughout the duration of a concession agreement, provided, that all requirements of this section and subpart are being met.

(2) In the event the FAA determines that the sponsor and non-DBE firm did not comply with all requirements of this subpart, the FAA may direct that the purchases of goods and services affected by such determination shall not be counted toward DBE goals.

**§ 26.119 Privately-owned terminal buildings.**

(a) The requirements of this subpart apply to concession activities conducted by a private owner of an airport terminal building. The sponsor shall levy the applicable requirements on the terminal owner through the agreement with the owner or by other means, except that certification shall, in the case of a primary airport, remain the responsibility of the sponsor. The sponsor shall ensure that the terminal owner complies with the requirements imposed pursuant to this subpart.

(b) If a terminal building is at a primary airport, the sponsor shall obtain from the terminal owner the overall goals and other elements of the DBE concession plan required under § 26.107. This information shall be incorporated into the concession plan and goals established by the sponsor and submitted to the FAA in accordance with this subpart.

(c) If the terminal building is at a commercial service airport (except primary), general aviation, or reliever airport, the sponsor shall ensure that the owner complies with the requirements in § 26.105(c).

**§ 26.121 Prohibition on long-term, exclusive concession agreements.**

(a) Except as provided in paragraph (b) of this section, sponsors shall not enter into long-term, exclusive agreements for the operation of concessions. For purposes of this section, a long-term agreement is one having a term in excess of five years. Guidelines for determining whether an agreement is exclusive, as used in this section, shall be issued by the FAA and be made available through any FAA Regional Civil Rights Officer or from the FAA Office of Civil Rights, 800 Independence Avenue, SW., Washington, DC 20591, Attention, ACR–4.

(b) A long-term, exclusive agreement is permitted under this subpart, provided that:

(1) Special local circumstances exist that make it important to enter such agreement, and

(2) The responsible FAA regional civil rights officer approves of a plan for ensuring adequate DBE participation throughout the term of the agreement.

(c) Sponsors shall submit the following information with the plan referenced in paragraph (b)(2) of this section:

(1) A description of the special local circumstances that warrant a long-term, exclusive agreement, e.g., a requirement to make certain capital improvements to a leasehold facility.

(2) A copy of the draft and final leasing and subleasing or other agreements. The long-term, exclusive agreement shall provide that:

(i) One or more DBEs will participate as concessionaires throughout the term of the agreement and account for at a percentage of the estimated annual gross receipts equivalent to a level set in accordance with § 26.107(a)(11) of this subpart.

(ii) The extent of DBE participation will be reviewed prior to the exercise of each renewal option to consider whether an increase is warranted. (In some instances, a decrease may be warranted.)

(iii) A DBE concessionaire that is unable to perform successfully will be replaced by another DBE concessionaire, if the remaining term of the agreement makes this feasible. In the event that such action is not feasible, the sponsor shall require the concessionaire to make good faith efforts during the remaining term of the agreement encourage DBEs to compete for the purchase and/or lease of goods and services that it procures.

(3) Assurances that a DBE concessionaire will be in an acceptable form, such as a sublease, joint venture, or partnership.

(4) Documents used by the sponsor in certifying the DBEs.

(5) A description of the type of business or businesses to be operated, location, storage and delivery space, "back-of-the-house facilities" such as kitchens, window display space, advertising space, and other amenities that will increase the DBE's chance to succeed.

(6) Information on the investment required on the part of the DBE and any unusual management or financial arrangements between the prime concessionaire and DBE.

(7) Information on the estimated gross receipts and net profit to be earned by the DBE.

**§ 26.123 Compliance procedures.**

(a) *Complaints.* Any person who believes that there has been a violation of this subpart may personally, or through a representative, file a written complaint in accordance with FAA regulations (14 CFR part 16). The complaint must be submitted to the Federal Aviation Administration, Office of the Chief Counsel, Attention: FAA Part 16 Airport Proceedings Docket (AGC–610), 800 Independence Avenue, SW., Washington, DC 20591. Complaints which meet the requirements of 14 CFR part 16 shall be docketed and processed as formal complaints.

(b) *Compliance procedures.* In the event of noncompliance with this subpart by a sponsor, the FAA Administrator may take such action as provided in Title 49 of the United States Code (U.S.C.), including sections 47106(d), 47111(d), and 47122.

**§ 26.125 Effect of subpart.**

(a) *Local requirements not preempted.* Nothing in this subpart shall preempt any State or local law, regulation, or policy enacted by the governing body of a sponsor, or the authority of any State or local government or sponsor to adopt or enforce any law, regulation, or policy relating to DBEs. In the event that a State or local law, regulation, or policy conflicts with the requirements of this subpart, the sponsor shall, as a condition of remaining eligible to receive Federal financial assistance from the DOT, take such steps as may be necessary to comply with the requirements of this subpart.

(b) *Local geographical preference.* Nothing in this subpart shall prohibit a sponsor from employing a local geographical preference in evaluating bids or proposals for a concession agreement or other contract covered by this subpart, provided that the procedure does not conflict with any provision in this part or have the effect of defeating or substantially impairing accomplishment of the objectives of the program. An example of a prohibited practice is a local geographical preference that has the effect of discriminating against a business owner on the grounds of race, color, sex, or national origin, in violation of § 26.7 of this part.

(c) The miscellaneous provisions set forth in § 26.99 of this part apply to this subpart.

## Appendix A to Part 26—Explanation of Provisions

The text of this appendix is not included in this SNPRM, since it is intended to reflect the Department's understanding of the meaning and proper interpretation of the provisions of the final version of Part 26. The Department, as an alternative or addition to publishing this Appendix in the final rule, may publish this material as part of a compliance guide responding to the requirements of the Small Business Regulatory Enforcement Fairness Act of 1996.

## Appendix B to Part 26—Guidance Concerning Good Faith Efforts

When, as a recipient, you establish a contract goal on a DOT-assisted contract, any bidder which does not meet this goal must show you that it made good faith efforts to do so. This means that the bidder must show that it took all necessary and reasonable steps 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.

It is important for you to look at not only the different kinds of efforts that the contractor has made, but also the quantity and intensity of these efforts. The efforts employed by the bidder should be those 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. The extent to which other bidders obtained DBE participation, and the kind and quality of steps they took in attempting to do so, can be considered by the recipient in the course of evaluating a bidder's good faith efforts.

The following is a list of types of actions which you should consider as part of the bidder's good faith efforts to obtain DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

A. Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The bidder must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

B. Selecting 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.

C. Providing 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.

D. Negotiating in good faith with interested DBEs. It is the bidder'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. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.

A bidder 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 extra cost involved in finding and utilizing DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. As a recipient, you may establish, as part of the solicitation, a reasonable range of additional cost that you will consider in making a good faith efforts determination. The range set forth in solicitation documents, or your finding of reasonableness in the absence of a predetermined range should be determined on a case-by-case basis appropriate to the circumstances of the contract involved.

We also note that the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to either meet the contract goal or demonstrate that it made adequate, but unsuccessful, good faith efforts.

E. Noting whether other bidders have met the contract goal. 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.

F. Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within the highway construction 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 contractor's efforts to meet the project goal.

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

H. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

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

In any situation in which you have established a contract goal, Part 26 requires you to use the good faith efforts mechanism

of this part in determining whether bidders/offerors have met program requirements. You must make a fair and reasonable judgment concerning the good faith efforts made by competitors for contracts, and must not accept a showing of efforts that are inadequate or merely *pro forma*.

You are also cautioned against requiring that a bidder meet a contract goal in order to be awarded a contract, even though the bidder makes an adequate good faith efforts showing. If you impose such a requirement, or reject reasonable showings of good faith efforts by bidders, you may create a *de facto* quota system. Except in the limited circumstances noted in § 26.45(e), you are prohibited from using quotas, a conclusive presumption, or set-asides in the award of DOT-assisted contracts. Such actions may also expose you to lawsuits from contractors.

## Appendix C—DBE Certification Application Form

Application is hereby made by the Individual (organization) identified below for certification as a disadvantaged business enterprise (DBE) under the U.S. Department of Transportation DBE program pursuant to 49 CFR part 26. Socially and Economically Disadvantaged (SED) Individuals are presumed to be members of the following groups: Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Subcontinent Americans, Women and any groups so designated by the Small Business Administration (SBA). Applicants who are not one of the presumed groups must prove social and economic disadvantage in accordance with the standards in 49 CFR Part 26, Appendix F.

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

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

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

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

1. Name and Address of Company

2. Mailing Address (if Different)

3. Contact Person and Title

4. Telephone No.

5. Federal Identification Number

6. Other Identification Number Used

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

8. NATURE OF THE FIRM'S BUSINESS:

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

SIC _____
Size _____
SIC _____
Size _____
SIC _____
Size _____
SIC _____
Size _____

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

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

A. For each license/permit attached, indicate:

| Name of licensee | Name of qualifying individual | Type of licenses | DBE code | Exp. date |
|---|---|---|---|---|
| | | | | |
| | | | | |
| | | | | |

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

12. OWNERSHIP INFORMATION:

____Sole Proprietor ____Partnership ____Corporation ____Joint Venture ____Other

Date established/incorporated _____ State _____

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

| Name | DBE code | Gender M/F | Date of ownership | No. of shares | Voting % | U.S. citizen or permanent resident? |
|---|---|---|---|---|---|---|
| | | | | | | |
| | | | | | | |
| | | | | | | |

Check here ____, if more space is needed and continue listing in Item 29.

14. List on an attachment to this form, any other companies in which any of their individuals are employed, have been employed within the past year, and also have more than a 5% ownership interest.

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

| Name | Title | DBE code | M/F | Expiration of |
|---|---|---|---|---|
| | | | | |
| | | | | |
| | | | | |

Check here ____, if more space is needed and continue listing in Item 29.

16. List the contributions of money, equipment, real estate, or expertise of each of the owners/investor. Attach proof of the initial investment in the firm (dollars, real estate, equipment, etc.) on behalf of each of the owners. If more space is required continue in Item 29.

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

| Duties | Individual responsible | Reports to: | DBE code |
|---|---|---|---|
| Preparation and presentation of estimates and bids: | | | |
| Hiring and firing management personnel: | | | |
| Final Determination of what jobs the company will undertake: | | | |
| Day to Day Operations | | | |
| Negotiations and approval of contracts: | | | |
| Administration of company contracts: | | | |
| Marketing and sales activities: | | | |
| Negotiating and signing for surety bonds: | | | |
| Supervision of field operations: | | | |

18. Identify any owner or management official of the firm who is, or has been, an employee of another firm that has an ownership interest in or a present business relationship with the named firm. Provide details of the arrangement and relationship. Present business relationships include shared space, equipment, financing or employees, as well as both firms having the same owners. Be sure to list those persons who are currently working for any other business which has a relationship with this firm, whether on a full-time or part-time basis as an owner, partner, shareholder, advisor, consultant, or employee.

19. Company's experience: List the three largest projects performed by the company in the last 3 years. If performed as a subcontractor, indicate the name of the prime contractor and a contact person for these projects.

| Project | Dollar amount | Date completed | Prime contractor/contact person |
|---|---|---|---|
| | | | |
| | | | |
| | | | |
| | | | |

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

| | | | |
|---|---|---|---|
| YEAR ENDING | | | |
| GROSS RECEIPTS | $ | $ | $ |

21. Name of Surety Company _____ Bonding limit _____
Agent _____ Telephone Number _____

22. Who signs for insurance and payroll? _____. Provide copy of the signed Corporate Bank Resolution(s) and bank account(s) signature card(s)

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

| Source | Amount | Date | Terms |
|---|---|---|---|
| | | | |
| | | | |
| | | | |

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

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

26. WORKFORCE INFORMATION:
Past calendar year: Highest Total _____ Lowest Total _____ Average _____
A. Permanent Personnel Currently on Payroll

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

| | Administrative | Clerical | Supervisory | Skilled | Unskilled |
|---|---|---|---|---|---|
| TOTAL | | | | | |

B. Are any of the employees on another firm's payroll? Yes ____ No ____. If yes, please identify firm(s) and number of employees _____

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

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

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

**Affidavit**

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

Note: If additional information is required to determine certification, the conditions stated in the affidavit are applicable. If there are any significant changes in the information provided above that would alter your status as a DBE inform the certifying agency (See 49 CFR 26.73(g)).

_____
Name of Firm

_____
Name

_____
Title

_____
Signature

_____
Date

On this _____ day of _____, 19____, before me appeared

_____
who, being duly sworn, did execute the foregoing affidavit, and did state that he or she was properly authorized by (Name of Firm)

_____
to execute the affidavit and did so as his or her free act and deed.

Notary Public _____

Commission expires _____

(Seal)

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

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

S—Sole Proprietorship P—Partnership C—Corporation.

## Appendix D to Part 26—DBE Business Development Program Guidelines

(A) Each firm that participates in the developmental program is subject to a program term determined by the recipient. The term will consist of two stages; a developmental stage and a transitional stage.

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

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

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

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

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

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

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

5. Such other information as the recipient may require.

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

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

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

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

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

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

(G) Program participation is divided into two stages; (1) A developmental stage and (2) a transitional stage. The developmental stage is designed to assist participants to overcome their social and economic disadvantage by providing such assistance as may be necessary and appropriate to enable them to access relevant markets and strengthen their financial and managerial skills. The transitional stage of program participation follows the developmental stage and is designed to assist participants to overcome, insofar as practical, their social and economic disadvantage and to prepare the participant for leaving the program.

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

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

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

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

(1) Profitability;

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

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

(4) Ability to obtain bonding;

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

(6) Good management capacity and capability.

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

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

## Appendix E to Part 26—Mentor-Protégé Program Guidelines

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

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

amount stipulated in the original mentor/protégé agreement.

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

## Appendix F to Part 26—Individual Determinations of Social and Economic Disadvantage

This appendix contains guidance for recipients as they make individual determinations of social and economic disadvantage for individuals who are not entitled to the statutory presumption of social and economic disadvantage. Applicants not entitled to the presumption must establish both social and economic disadvantage by a preponderance of the evidence.

*Social Disadvantage*

Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control. Social disadvantage must include the following elements:

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

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

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

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

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

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

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

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

*Economic Disadvantage*

Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged, and such diminished opportunities have precluded or are likely to preclude such individuals from successfully competing in the open market (i.e., the individuals are not in a position to compete on a "level playing field" with non-disadvantaged businesses or business owners). The DBE program is not intended to assist concerns owned and controlled by socially disadvantaged individuals who have accumulated substantial wealth, who have unlimited growth potential or who have not experienced or have overcome impediments to obtaining access to financing, markets and resources.

In determining the degree of diminished credit and capital opportunities of a socially disadvantaged individual, the recipient must consider factors relating both to the applicant and to the individual(s) claiming disadvantaged status, including that individual's access to credit and capital; the financial condition of the applicant; and the applicant's access to credit, capital, and markets. That is, the recipient must look at the situation of the business as well as that of the owner personally. The recipient must compare the applicant's business and financial profile with profiles of businesses in the same or similar line of business which are not owned and controlled by socially and economically disadvantaged individuals.

The recipient must consider the following factors:

(a) *Personal financial condition of the individuals claiming disadvantaged status.* This criterion is designed to assess the relative degree of economic disadvantage of the individual, as well as the individual's potential to capitalize or otherwise provide financial support for the business. The specific factors to be considered include, but are not limited to, the individual's personal net worth, the individual's personal income for at least the past two years, and the total fair market value of all assets. Generally, an individual whose personal net worth exceeds [an amount to be inserted in the final rule] is viewed as not being economically disadvantaged, absent a showing by the individual that other factors in his or her economic situation, the nature of the markets in which his or her firm is competing, the business financial condition of the firm, or its access to capital or credit, make that individual and his or her business relatively disadvantaged (i.e., not on a level playing field), compared to competing firms.

(b) *Business financial condition.* This criterion will be used to provide a financial picture of a firm at a specific point in time in comparison to other concerns in the same or similar line of business which are not owned and controlled by socially and economically disadvantage individuals. In evaluating a concern's financial condition, the recipient's consideration must include, but not be limited to, the following factors: business assets, revenues, pre-tax profits, working capital and net worth of the concern, including the value of the investments in the concern held by the individual claiming disadvantaged status.

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

**Claims of Disadvantage Based on Alleged Effects of DBE Program**

Individuals cannot establish they are socially and economically disadvantaged by relying on competitive disadvantages they allegedly suffer because of the operation of the DBE program itself, or of similar state and local programs. Over the years, there have been allegations from some white male-owned firms that they have difficulty getting contracts in certain fields or certain jurisdictions *because* the DBE program results in a significant portion of contracts going to DBEs. The Department is aware of arguments having been made that this situation may make a given white male-owned firm eligible for an individual finding of social and economic disadvantage. The Department does not accept this argument, which would have the effect of benefiting firms the DBE program is not intending to assist because the program has been successful in assisting the firms for which it is intended. Nothing in this appendix provides that the effect of government-sponsored affirmative action programs can be used as a basis for a finding of disadvantage. Recipients are instructed not to make findings of disadvantage on such a basis.

## Appendix G to Part 26—Size Standards for the Airport Concession Program

MAXIMUM AVERAGE ANNUAL GROSS RECEIPTS IN PRECEDING 3 YEARS

[In millions of dollars]

| Concession | Amount |
|---|---|
| Food and beverage | 33.270 |
| Book stores | 33.270 |
| Auto rental | 44.360 |
| Banks | [1] 100.00 |
| Hotels and motels | 33.270 |
| Insurance machines and counters | 33.270 |
| Gift, novelty, and souvenir shops | 33.270 |
| Newsstands | 33.270 |
| Shoe shine stands | 33.270 |
| Barber shops | 33.270 |
| Automobile parking | 33.270 |
| Jewelry stores | 33.270 |
| Liquor stores | 33.270 |
| Travel agencies | 33.270 |
| Drug stores | 33.270 |
| Pastries and baked goods | 33.270 |
| Luggage cart rental | 33.270 |

MAXIMUM AVERAGE ANNUAL GROSS RECEIPTS IN PRECEDING 3 YEARS—Continued

[In millions of dollars]

| Concession | Amount |
|---|---|
| Coin-operated T.V.'s | 32.040 |
| Game rooms | 33.270 |
| Luggage and leather goods stores | 33.270 |
| Candy, nut, and confectionery stores | 33.270 |
| Toy stores | 33.270 |
| Beauty shops | 33.270 |
| Vending machines | 33.270 |
| Coin-operated lockers | 33.270 |
| Florists | 33.270 |
| Advertising | 33.270 |
| Taxicabs | 33.270 |
| Limousines | 33.270 |
| Duty free shops | 33.270 |
| Local pay telephone service | [2] 1500 |
| Gambling machines | 33.270 |
| Other concessions not shown above | 33.270 |

[1] As measured by total assets.

[2] As measured by number of employees.

OTHER PARTICIPANTS

| | |
|---|---|
| Management contractors: | |
| Parking lots | 5.0. |
| Other | As defined in 13 CFR Part 121. |
| Motor vehicle dealers (new and used). | 500 employees.[3] |
| Other providers of goods or services. | As defined in 13 CFR Part 121. |

[3] See definition of "small business concern" in § 26.101 for additional information regarding firms classified within this industry.

[FR Doc. 97–13961 Filed 5–29–97; 8:45 am]

BILLING CODE 4910–62–P

4910-62P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 26

[~~OST~~ Docket OST-97-2550 ; Notice 97-5]

RIN: 2105-AB92

**Participation by Disadvantaged Business Enterprise in Department of Transportation Programs**

**AGENCY:** ~~Department of Transportation,~~ Office of the Secretary, DOT

**ACTION:** Supplemental notice of proposed rulemaking.

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**SUMMARY:** This notice proposes revisions of the Department of Transportation's regulations for its disadvantaged business enterprise (DBE) program. The notice responds to comments on notices of proposed rulemaking issued December 1992 and October 1993 and also proposes responses to the Supreme Court's decision in *Adarand* v. *Peña*. It would replace the current DBE rule (49 CFR Part 23) with a new rule (49 CFR Part 26).The proposed changes in the latter category would modify the overall goal, contract goal, and good-faith efforts provisions of the rule, as well as add provisions concerning diversification in the DBE program and provide greater flexibility to recipients. A final rule based on this SNPRM would replace the existing DBE rule in its entirety.

**DATE:** Comments should be received no later than [60 days from date of publication]. Late-filed comments will be considered to the extent practicable.

**ADDRESS:** Interested persons should send comments to Docket Clerk, Docket No. OST-97-2550, Department of Transportation, 400 7th Street, S.W., Room 4107, Washington, D.C. 20590. We request that, in order to minimize burdens on the docket clerk's staff, commenters send three copies of their comments to the docket. Commenters wishing to have their submissions acknowledged should include a stamped, self-addressed postcard with their comments. The docket clerk will date stamp the postcard and return it to the commenter. Comments will be available for inspection at the above address from 10 a.m. to 5:30 p.m., Monday through Friday.

**FOR FURTHER INFORMATION CONTACT:** For questions concerning Subpart G (airport concessions), David Micklin , FAA Office of Civil Rights, 800 Independence Avenue, SW., 20591, Room 1030, (202) 267-3270; or Kathleen Connon, FAA Office of Chief Counsel, same street address, Room 922-C, (202) 267-3473. For questions on other portions of the SNPRM, Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 400 7th Street, S.W., Room 10424, Washington, D.C., 20590. Phone numbers (202) 366-9306 (voice); (202) 366-9313 (fax); 202-755-7687 (TDD).

**SUPPLEMENTARY INFORMATION:**

**Background**

The Department first published 49 CFR Part 23 in 1980. The regulation required goals to be set for businesses owned or controlled by members of minority groups and women (MBEs/WBEs). This regulation has been amended several times. Many of these amendments responded to statutory changes. In 1983, Congress enacted the first statutory disadvantaged business

enterprise (DBE) provision. This provision required the Department to ensure, except as the Secretary determined otherwise, that not less than 10% of the funds authorized for the highway and transit financial assistance programs be expended with DBEs. Under the 1983 statute, members of several minority groups were presumed to be socially and economically disadvantaged; women were not.

In 1987, Congress re authorized and amended the statutory DBE program. In this legislation, Congress added women to the groups presumed to be disadvantaged. In separate legislation, Congress added an identical provision applying to the FAA's airport grant program. The Department's 1987 amendments to Part 23 added FAA programs to the DBE portion of the rule and established a single DBE goal for firms owned by women and minority group members. In 1992, the Department added Subpart F, which implements a statutory requirement for DBE programs in airport concessions.

As a result of these changes, Part 23 became something of a patchwork. To clarify the rule, reflect program changes since 1980, incorporate updated interpretations of rule provisions, correct problems in implementation, and reduce burdens on state and local governments and small businesses, the Department issued a notice of proposed rulemaking (NØRM) on December 9, 1992 (57 FR. 58288). The December 1992 NØRM was intended to create a clearer regulation that deals explicitly with known implementation problems in the program. The Department received 601 comments in response. The Department has thoroughly considered these comments, and much of this SNPRM consists of the Department's responses to these comments. In October 1993, the Department issued a separate NØRM to amend Subpart F. This SNPRM's provisions concerning airport concessions are based on the October 1993 NØRM and the comments received in response to it.

In June 1995, the Supreme Court issued its decision in *Adarand v. Peña* (115 S. Ct. 2097). In this case, the Court determined that race-conscious affirmative action programs are subject to strict judicial scrutiny. To meet this heightened level of scrutiny, such a program must be based on a compelling government interest (e.g., remedying the effects of discrimination) and must be narrowly tailored to meeting its objective. In response to this decision, the Department has included in this SNPRM a wide range of ideas for revising the rule, particularly in the areas of overall and contract goals, good faith efforts, and other means of "narrowly tailoring" the provisions of the rule.

Following its review of the comments received in response to this SNPRM, the Department intends to publish a final rule that will constitute a comprehensive revision of the entire DBE rule. The SNPRM and the final rule will refer to 49 CFR Part 26, for clarity and to emphasize that Part 23 and guidance and interpretations pertaining to it are being replaced in their entirety by Part 26.

**Summary of *Adarand*-related proposals**

In commenting on the Administration's review of affirmative action programs, President Clinton said his objective was to "mend it, not end it." This is the approach the Department is taking concerning the DBE program. We have submitted to Congress, as part of our highway/transit program reauthorization bill ("NEXTEA"), a proposal to reauthorize, without change, the statute underlying the DBE program. We believe that this statute is Constitutional and that it is based on the continuing compelling need for the government to remedy the effects of discrimination in DOT-assisted contracting. The material gathered by the Department of Justice (DOJ) in

connection with review of Federal procurement affirmative action programs also supports our view that this compelling need exists.

The Department of Transportation's SNPRM is one part of the Administration's overall effort to revise affirmative action programs in light of *Adarand*. On May 9, 1996, the Department of Justice (DOJ) published proposed regulations concerning the use of race-conscious remedies for the effects of discrimination in direct Federal contracting programs. Other agencies with significant Federal procurement responsibilities (the Department of Defense, General Services Administration, and National Aeronautics and Space Administration) expect soon to propose changes to the Federal Acquisition Regulation (FAR) conncerning small disadvantaged businesses. These proposed changes would amend the FAR to be consistent with the proposed rules. The Small Business Administration is planning to issue a proposal to change the rules for its 8(a) and 8(d) programs, which are intended to foster the participation of small disadvantaged businesseses in Federal agency procurement. These proposals will affect direct procurements by the Department of Transportation.

This SNPRM affects only the airport, transit and highway financial assistance programs of the Department. While the thinking behind this SNPRM is intended to be consistent with the proposals other agencies are making, the specific proposals are different because this SNPRM concerns state and local, rather than Federal, procurement actions.

This SNPRM is the Department's primary vehicle for "mending" the details of the DBE program, tailoring program implementation more precisely to the objective of remedying the effects of discrimination. Here is a summary of the most important proposals we are making toward this end. The section-by-section analysis discusses these provisions in greater detail.

1. Overall Goals

We propose to change the method for calculating overall goals. Under the existing rule, recipients determine the maximum amount of work they can obtain from DBEs available to them. They must also take into account their past performance in meeting their overall goals. This system is well-understood and accepted in the recipient and DBE communities. However, we believe the system can be tuned more precisely to obtain the amount of DBE participation needed to remedy the effects of discrimination.

In a world in which discrimination did not affect business opportunities for DBEs -- a world, in other words, in which market forces operated on a level playing field -- how much would DBEs participate in DOT-assisted contracts? The answer to this question would lead us to the level of DBE participation that recipients should expect for DBEs. This level is the appropriate DBE goal to remedy the effects of discrimination.

The SNPRM asks for comment on three alternative ways of estimating a goal consistent with this concept. Each of the proposed methods has strengths and weaknesses, and each raises question about the kind of data that is available to help recipients set goals. We ask commenters to participate fully in helping us determine how best to establish what the "level playing field" result for DBE participation would be, including whether recipients should be able to choose from a variety of methods.

The approach we propose is conceptually consistent with that developed by the Department of Justice (DOJ) in its Federal procurement affirmative action reform effort (see May 23, 1996 DOJ Federal Register notice). However, we are not proposing to require recipients to follow the "benchmarks" established by the Department of Commerce (DOC) as part of

the procurement reform initiative. The proposal describes, however, some circumstances under which recipients may be able to use DOC benchmarks, goals established by other recipients, or other information (e.g., local disparity studies) in place of the goal-setting mechanism in this rule.

2. Means of Meeting Overall Goals

The SNPRM emphasizes that race/gender-neutral mechanisms (e.g., outreach, technical assistance) are the means of first resort for recipients to use in seeking to meet overall goals. Only to the extent that these means are insufficient to meet overall goals would recipients use race/gender-conscious mechanisms, such as contract goals or evaluation credits. Unlike the existing rule, contract goals would not be required on every DOT-assisted contract, regardless of whether they were needed to meet overall goals. More intrusive mechanisms (e.g., set-asides, quotas) could be used only if the recipient had legal authority independent of the Department's DBE rule and made a finding that other methods to reach overall goals had not worked. When it became apparent that the effects of discrimination were being addressed successfully (e.g., when the recipient had exceeded its overall goals over a significant period of time), the recipient would reassess its use of race/gender-conscious measures and would rely more on race/gender-neutral measures and less on race/gender-conscious measures to meet its overall goals.

3. Good Faith Efforts

The SNPRM emphasizes that when they use contract goals, recipients must take seriously their obligation to award a contract to a bidder who makes good faith efforts, even if the bidder does not meet the goal. To do otherwise would result in a *de facto* quota. Recipients must provide a reconsideration

mechanism to a bidder who is denied a contract on the basis of a failure to make good faith efforts.

4. DBE Diversification

The SNPRM asks for comment on alternatives to reduce concentration of DBE firms in certain types of work in which, at least in highway construction, they are said to cluster. The aim is to diversify the types of work in which DBEs participate, as well as to reduce what is perceived as unfair competitive pressure on non-DBE firms attempting to work in certain fields.

5. Added Flexibility for Recipients

The SNPRM proposes that, with the Secretary's concurrence, recipients could obtain a waiver of provisions of DBE program requirements if they devised an alternative that would effectively redress the effects of discrimination in their DOT-assisted contracting. This added flexibility could allow states and localities to deal creatively with their specific circumstances. The SNPRM also would give recipients flexibility in choosing the mix of measures (race-neutral and race-conscious) they use to meet overall goals.

**Section-by-Section Analysis**

This portion of the preamble describes the Department's responses to comments on the December 1992 and October 1993 NPRMs and the rationales for the proposals in this SNPRM. Because the Department has already extensively considered comments on many of the provisions of this SNPRM, we request that commenters focus their comments on the *Adarand*-related

provisions highlighted above and issues about which the preamble specifically asks for additional comment.

**A Style Note**

We are making one general stylistic change to the regulatory text. The text (except for Subpart G) is being organized in a question/answer format in the interest of greater clarity. This format directly addresses recipients (and other parties identified in the text), saying, for example, "You must....." in place of "The recipient shall....." We believe that this approach will make the regulation easier to read and use.

**§26.1 - What are the purposes of this rule?**

Seventeen comments to the December 1992 NORM addressed the purpose section. Ten of these comments favored retention of the purpose language in the existing rule, particularly its reference to providing the "fullest possible participation" to DBEs. Other comments included a suggested reference to the desirability of DBEs being able to compete on their own, outside the DBE program and a request to include language on the "equitable distribution" of DBE awards among various groups.

The SNPRM makes a few additions to the NORM language. One addition states that a purpose of the program is to ensure, consistent with Federal law, significant opportunities for DBEs to participate in DOT-assisted contracts. In addition, we have added a paragraph emphasizing the importance to the program of keeping "fronts" and other ineligible firms out of the program. We also added a sentence stating the aim of the program as developing businesses that can compete independently.

We did not adopt the suggestion of including "equitable distribution" language, which appears to refer to a concept of ensuring that various groups (e.g., blacks, Hispanics, Asians, women) receive what is viewed, under a given concept of equity, as a fair market share of DBE contact awards. This concept would be difficult to implement, and mechanisms to carry it out appear to exceed the Department's discretion under the statutes authorizing the DBE program. The Department has adequate authority, under Title VI of the Civil Rights of 1964, to address any alleged discriminatory effects of its DBE program.

**§26.3 To whom does this rule apply?**

There was only one comment on this section of the December 1992 NORM, from a DBE firm that objected to deleting the Federal Railroad Administration (FRA) from this rule. The Department continues to believe that it makes sense to drop FRA from the rule, since FRA -- unlike FTA, FHWA, and FAA -- does not have a statute establishing a DBE program. We have added a paragraph clarifying that Part 26 requirements would not apply to the non-Federally-assisted contracts of recipients of DOT funds.

It should be pointed out that Part 26 would be authorized not only by the specific DBE statutes Congress has enacted, but also by long-standing nondiscrimination statutes such as Title VI of the Civil Rights Act of 1964 and nondiscrimination provisions in the FHWA, FTA, and FAA program statutes. The original 1980 49 CFR Part 23 was based on these statutes, and the courts upheld that regulation even though specific DBE legislation had not yet been enacted.

**§26.5 What do the terms used in this rule mean?**

Many of the comments to this section of the December 1992 NORM recommended adding definitions to the Department's proposed list. Twelve comments, all from recipients and DBEs, suggested a definition of "affirmative action." Eight comments, mostly from recipients, asked for a definition of "commercially useful function." Other comments sought definitions of a variety of terms, including applicant, good faith efforts, graduation, real and substantial contribution, expertise, good cause, subsidiary, broker, complainant, precertification, business opportunity, normal industry practices, pro forma ownership, equitable distribution, regulated party, exemptions, exceptions, discrimination, dollar value, debarment, origin, and social and economic disadvantage, to name a few.

Several comments sought amplification of certain terms, such as joint venture and affiliate. Twenty-one comments, mostly from DBEs and recipients, concerned the key term "disadvantaged business enterprise." Most of these comments were not about the content of the definition but rather about the words of the term itself. A few preferred MBE/WBE terminology to DBE terminology. Others suggested terms having what they viewed as having more positive connotations, such as "emerging business enterprises" (EBEs) or "historically underutilized businesses" (HUBs).

Four comments recommended deleting persons of European Spanish or Portuguese origin from the definition of "Hispanic Americans," saying that the regulation should focus on persons whose origins were from Latin America (one of these comments preferred the term "Latino"). Four other comments suggested that Asian-Americans (e.g., persons of Japanese or Chinese descent) should be deleted from the definition and the program, because the comments perceived these persons as not being disadvantaged. Other comments requested clarification of the stock ownership requirement

(i.e., does the regulation mean 51 percent of all stock combined, 51 percent of each class of stock, or both?).

In response to the comments, the SNPRM is not adding a definition of "affirmative action." The main point of a definitions section in a rule is to describe the meaning of terms of art that are used in the regulation. The rest of the regulation does not use the term "affirmative action." Nor does the SNPRM add a definition of "commercially useful function." This is an important term, which is given its operational meaning in the context of the counting section of the rule. In our view, an abstract definition of the term outside of that context would add little to users' understanding of the rule.

"Disadvantaged business enterprise" is a term that derives directly from the statutes authorizing this program, which by now is well known and understood among recipients and contractors. It is difficult to imagine a more apt term to use for businesses that, by statute, must be owned and controlled by socially and economically disadvantaged individuals. The suggested alternatives are not as suitable. Minority and women's business enterprise terminology suggests a program in which status as a minority group member or woman, standing alone, makes one an eligible business owner. EBE and HUB do not relate conceptually to the operation of the program. Part 26 would remain a DBE regulation. The stock ownership requirement -- that 51 percent all stock be owned by disadvantaged individuals -- would remain as part of the ownership criteria, and is discussed in more detail in the SNPRM.

The DBE statutes direct DOT to use the definitions of the "presumptive groups" found in SBA's rules implementing section 8(d) of the Small Business Act. The definitions of Hispanic Americans and Asian

Americans in the December 1992 NØRM are taken directly from SBA materials. We recognize that the inclusion of persons of European Spanish and Portuguese origin is controversial, but, absent legislative direction to the contrary, we believe it is necessary to leave the definition unchanged. Congress has determined that Asian-Americans are presumptively disadvantaged (a judgment that can be supported by a substantial history of discrimination against many Asian groups in this country), and the Department could not exclude them even if it wanted to.

It is not good regulatory drafting practice to place a great deal of the substance of the rule into the definitions section. Abstract descriptions of a word or term are often of little help in making decisions about how to apply a regulation to real-world situations. Regulatory concepts are best understood in the context of the rule's operational provisions. For this reason, the SNPRM does not add definitions of the many terms suggested by various comments. However, the SNPRM does incorporate the text of SBA's definition of "affiliate" rather than merely cross-referencing SBA regulations, as some comments requested. The counting section in the SNPRM includes additional guidance concerning counting the participation of joint ventures.

**§26.7 What discriminatory actions are forbidden?**

There were few comments on this section of the December 1992 NØRM. One comment suggested that age, disability, and religion be added as prohibited grounds for discrimination. These grounds are not mentioned in the authorizing statutes for the program. To the extent that other statutes apply nondiscrimination requirements to actions of DOT recipients (e.g., the ADA re disability), these statutes can stand on their own.

One comment said that the rule should clarify that someone need not discriminate in order to violate the rule. This is true: noncompliance can arise from a violations of a variety of provisions, but this does not need to be reiterated in regulatory text.

The provision would be left as proposed, with the exception of adding a paragraph clarifying that discrimination in the administration of a DBE program is prohibited. This clarification is proposed in order to avoid a potential loophole concerning actions by recipients (e.g., in the administration of their certification programs) that allegedly have the effect of discriminating against persons on one of the forbidden grounds, even if the award and performance of a contract is not directly involved.

This paragraph prohibits not only intentional discrimination but also actions that have the effect of discriminating against individuals on one of the forbidden grounds (e.g., that have a disparate adverse impact on members of a particular group). The language of paragraph (b) is similar to that in the Department's long-standing Title VI regulation (49 CFR §21.5(b)(2)) and is consistent with court interpretations of nondiscrimination statutes in other contexts. See, e.g., Alexander v. Choate, 469 U.S. 287 (1985); Elston v. Talladega Board of Education, 997 F.2d 1394 (11th Cir., 1993).

**§26.9 How does the Department issue guidance, interpretations, exemptions and program waivers under this rule?**

The SNPRM would add paragraph (a) of this section to avoid confusion over the status of guidance and interpretations issued by DOT in the past concerning the current version of this DBE regulation (49 CFR Part 23). Language in this paragraph is intended to emphasize that it is

interpretations of Part 26, not interpretations of Part 23, that definitively would set forth the meaning of the Department's DBE requirements.

As noted in the preamble to the December 1992 NORM, a General Accounting Office (GAO) study criticized the Department's administration of the DBE program because guidance was uncoordinated, inconsistent and confusing. As part of our response to this problem, the December 1992 NORM proposed creating a DBE Program Council to coordinate guidance and interpretations. Thirty-eight comments favored this idea, as a means of dealing with inconsistency, though some expressed reservations about potential bureaucratic delays. A number of the comments that supported the Council suggested that it be expanded into an Advisory Committee, with participation from outside the Department. Five comments opposed the Council, mostly on the grounds of potentially adding to bureaucratic delay.

The SNPRM references a DBE Coordination Mechanism, which is intended to be established within the Department by the time the rule becomes final. It would include representatives of all the DOT organizations -- FHWA, FTA, FAA, the Office of General Counsel, the Office of Civil Rights, and the Office of Small and Disadvantaged Business Utilization -- that are regular players in the DBE program. Because these offices are very familiar with the regulation, we do not anticipate that the review of guidance and interpretations through this mechanism would create undue delay. On the other hand, the presence of the mechanism would make it much more likely that guidance will be consistent and correct, which will result in much more reliable and useful customer service.

Because the kind of work we intend the mechanism to do is intrinsically a government task, it would not be appropriate to include non-DOT parties in its deliberations. However, the Department does believe that receiving input from interested parties on a regular basis is very useful, and we are exploring the creation of an advisory committee that would provide continuing input to the Department on the implementation of this program.

The Department proposes to maintain its existing exemptions mechanism, which is consistent with the way that all exemptions are handled in Office of the Secretary rules. The Department seeks comment on how participants view this process as working, and on any improvements commenters might want to suggest.

In addition, paragraph (d) proposes a new provision, not included in previous NPRMs. It permits recipients to apply for a program waiver, allowing them to construct a DBE program different from that called for in Subparts B, C or G (airport concessions), of the SNPRM (the general provisions of Subpart A and the certification standards and procedures of Subparts D and E would not be subject to waiver). Public participation would be required, and the Secretary could impose conditions on the grant of a waiver. The Department seeks comment on this concept, which is designed to provide recipients greater flexibility, as well as on the details of the proposed provision.

**§26.11 What records do recipients keep and report?**

The December 1992 NORM proposed that recipients report DBE program data to the concerned operating administration (OA) quarterly, unless that OA determined a different frequency for the data. The preamble

to the December 1992 NORM included a draft Office of Small and Disadvantaged Business Utilization reporting form and asked whether this form, or a modification of it, should be required Department-wide.

Twenty-four comments generally favored the idea of a single, Department-wide reporting form, though some of these suggested allowing recipients to modify the form. Two comments favored annual, rather than quarterly, reporting. When it came to what the form should include, there was a wide divergence of views. Several comments each supported detailed breakouts of awards (i.e., by awards to DBEs owned by various minority groups and women) and tracking actual payouts to DBEs as well as commitments to DBE participation. Other comments suggested detailed changes in the data elements (e.g., distinguishing between awards to prime and subcontractors, counting of overhead, tracking areas of work), and two favored electronic reporting of data.

The Department believes, in view of these comments, that it needs to consider further the best way of obtaining program evaluation data for the DBE program. Specifically, the Department asks whether there modifications the Department should make in order to adequately capture DBE participation through race/gender neutral means and mechanisms other than contract goals. Meanwhile, the SNPRM would maintain the *status quo* for reporting. We ask, however, for comment specifically on whether the frequency of reporting should be reduced (e.g., to twice a year) and, if so, whether this would continue to allow sufficient program oversight and evaluation. The SNPRM would add, as an aid to DOT oversight of recipients' programs, a three-year record retention requirement for basic program data. Again, recipients should rely on DOT guidance concerning the content of this material. As a general matter, the

Department intends that recipients retain only basic data needed to allow DOT personnel to review and evaluate recipients' program compliance.

**§26.13 Assurances.**

As under the old version of the rule, recipients and contractors have to subscribe to assurances of compliance with Part 26 requirements. There were few comments on the December 1992 NORM assurances section. One comment preferred the lengthier language of the old rule's assurances section, another suggested adding more enforcement language, a third asked that contractors who fail to promptly pay DBEs should be told in the assurance that this will be in breach of contract, and a fourth asked how states will enforce the requirement for assurances in contracts.

In the assurance for recipients, the SNPRM would add references to additional remedies available to the Department, namely the Federal false statements statute (18 U.S.C. 1001) and the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.). We believe that the issue of prompt payment is better handled under the provision of the SNPRM dealing with that subject. Consistent with the language added to §26.7, the SNPRM would add a statement to the assurance concerning nondiscrimination in the administration of DBE programs.

States can enforce the requirement for assurances in contracts by the same means that they enforce other requirements for the inclusion of contract clauses: a prospective contractor who fails to include Federally-required contract clauses in a Federally-assisted contract is not, presumably, a responsive bidder. We believe the shorter, more compact language of the new version of the assurances is clearer, less verbose, and more easily understood than the old version. In addition, an operating administration is

permitted to prescribe a briefer assurance or certification of compliance in its grant agreements.

## SUBPART B - ADMINISTRATIVE REQUIREMENTS FOR DBE PROGRAMS FOR FEDERALLY-ASSISTED CONTRACTS

### §26.13 What assurances must recipients and contractors make?

This section details which recipients have to establish DBE programs. There were several comments to the December 1992 NORM about it. One comment said that FRA and port authorities should have to have DBE programs. The issue about including FRA under Part 26 was discussed above. With respect to port authorities, if a port authority receives FHWA, FTA, or FAA funds, it would be subject to the requirements of Part 26 like any other recipient. One comment asked whether the thresholds apply to prime recipients or subrecipients, while another disliked the change from the two-tier threshold system of the old regulation to the proposed one-tier system, saying it would involve duplicate work by prime recipients and subrecipients. If any recipient -- prime or sub -- receives the requisite amount of DOT financial assistance and lets DOT-assisted contracts, it must have a program. If the prime recipient is a pure pass-through agency that does not let any DOT-assisted contracts, it would not have to have a program.

A comment asked that the threshold level for airports be raised to $1 million, which would have the effect of exempting some airports (smaller ones, in most cases) from the DBE program requirement. The Department believes that airports, and other recipients that receive the proposed $200,000 in financial assistance, are likely to have adequate resources for establishing a DBE program and may let contracts of sufficient size to make DBE

participation a realistic possibility. For this reason, we are leaving this portion of the proposal unchanged.

One comment asked that annual program updates not be required, and two others asked for updates at three-year rather than one-year intervals. Recipients would have to revise their programs to conform to Part 26, submit overall goals each year, and request the consent of the applicable DOT office for any significant program change. For these reasons, we do not believe it is necessary to require a formal update at any particular interval, so this proposed requirement is not included in the SNPRM. This would have the effect of reducing paperwork burdens.

The Department seeks comment on whether additional public participation mechanisms are desirable for recipients as they prepare DBE programs for submission to DOT. For example, do their need to be more explicit requirements for input from DBEs, non-DBEs, the public etc.?

**§§ 26.23 - 26.27 and 26.37 - Other DBE Program Provisions**

This subpart contains a number of provisions incorporated from Part 23, concerning a DBE policy statement, a DBE liaison officer with direct access to the CEO of the organization, use of DBE financial institutions, and monitoring, compliance and enforcement mechanisms. There were few comments on these items, and we are incorporating them in the SNPRM with only minor changes. All these items are components of a recipient's DBE program that would have to be approved by the concerned operating administration.

**§26.29 Prompt payment mechanism.**

The December 1992 NORM proposed that recipients would establish a prompt payment mechanism, containing one or more of five options listed in the proposed provision. This provision, and its components, drew substantial interest from commenters.

Sixty-nine comments favored requiring a prompt payment clause in contracts, saying that it addressed a serious problem that had adverse consequences on subcontractors. Among ideas suggested by these comments were that contract goal attainment should not be counted until DBEs are paid and that subcontractors should be paid within a given period of time (e.g., 10 days) of the time the prime is paid by the recipient. Some of these comments suggested that sanctions be imposed for failure to comply with prompt payment clauses. On the other hand, 29 comments opposed prompt payment clauses and mechanisms in general, saying that they involved too great intrusion into the contract process and added cost to the system. All the suggested options were impractical, many of these comments said.

One of the five options listed was direct payment of DBE subcontractors by the recipient, who could ensure that the DBE was paid on time. Fifteen comments, mostly DBEs, supported this idea, while 44 comments, mostly prime contractors and some recipients, opposed it. Proponents said that this approach would end the waiting game that they perceive prime contractors as playing, while subcontractors go dry awaiting payment. Opponents complained that prime contractors would lose control over subcontractors' performance and that delays in paying subcontractors are as often caused by delays in state payments to prime contractors as anything else.

Nine comments supported, and five opposed, mandatory alternative dispute resolution between prime and subcontractors as a way of addressing payment delay disagreements. There were smaller numbers of comments on other proposals, with scattered support for and opposition to them.

The Department, having reviewed the extensive comment on this issue, remains convinced that delays in payment to DBE subcontractors are a significant problem in the DBE program, which we should take steps to correct. The SNPRM would specifically authorize two such steps. Given the concerns expressed, particularly by recipients, about the problems that could arise in some cases from mandating prompt payment mechanisms, the Department is seeking further comment on whether these steps should be mandatory. (Under the SNPRM, recipients who use prompt payment mechanisms would do so under the legal authority of this rule, but using them would be optional.)

The first specifically authorized step would be a prompt payment clause that would be inserted in all contracts between recipients and prime contracts, obligating the prime contractor to pay DBE subs for work satisfactorily completed within a specific number of days (e.g., 10 days) of each payment by the recipient to the prime contractor. The contract would include appropriate penalties, chosen by the recipient, for failure to comply. In addition, the recipient could require prime contractors to get the written consent of the recipient, based on good cause, for any delay.

The second specifically authorized step would be a clause in both prime and DBE subcontracts committing the parties to participate in alternative dispute resolution (ADR) to resolve payment disputes. Recipients could specify the nature of these mechanisms in contract documents. In addition, recipients could take additional steps, such as

withholding payments from primes until subcontractors are paid, or other steps devised by the recipient, to ensure prompt payment of DBE subcontractors. All prompt payment mechanisms would be incorporated in the recipient's DBE program, and would be subject to DOT approval.

Because they frequently lack working capital, access to credit, and a strong cash flow, DBEs are particularly vulnerable to delays in payment. However, we recognize that prompt payment is an issue for all subcontractors, and we therefore recommend that recipients apply prompt payment provisions to all subcontractors, not just DBEs.

One prompt payment-related issue of which we are aware concerns retainage payments. DBEs have complained that prime contractors often do not return retainage payments to DBE subcontractors until the recipient returns the prime contractor's retainage payment at the end of the entire project. This is true, DBEs have said, even in a large project in which a subcontractor's work has been inspected and approved long before the overall project has been completed. This can result in a lengthy delay in the subcontractor getting its money back. The Department seeks comment on whether prompt payment provisions should address this issue.

**§26.31 What requirements pertain to the DBE directory?**

The statutes mandate that recipients have a DBE directory. Sixteen comments explicitly favored the December 1992 NORM proposal on this subject. There was a good deal of debate among commenters on the issue of whether, as the December 1992 NORM proposed, the directory should list the types of work DBEs preferred to do or whether recipients should limit (and reflect in the directory) DBEs' types of work to those in which the firm was qualified.

Twenty-six comments favored the latter approach, taking two different basic rationales. Some said that recipients should prequalify DBEs, certifying only those, and only in those types of work, that the recipient viewed as being qualified to perform the work. Others said that the "qualifications" of DBE firms were relevant only insofar as they affected control. The comments that favored the NORM approach argued against both rationales, saying that prequalification overstepped the bounds of appropriate recipient discretion in the certification process and that certifying firms only in certain fields (as opposed to simply certifying them as DBEs) would "pigeon-hole" firms into a few areas and thwart their efforts at diversification.

The Department believes that a good case can be made that a firm should be certified only in those areas of work in which its disadvantaged owners are able to control its management and operations. It is reasonable, then, to reflect the recipient's determinations on this point in the directory, and we have modified this provision accordingly. The Department believes, however, that a firm wishing to move into a new area of work should not have to go through an entire new certification process. Also, the Department does not believe that "prequalification," as such, is an appropriate part of the certification process. In fact, the Department believes that requiring prequalification for DBE firms would be a discriminatory practice under Part 26, unless the recipient also requires prequalification of all other firms.

The directory would have to be republished at least annually. Updated information (e.g., who's in and who's out) would have to be made available, on request, in the meantime. This would ensure that, for example, prime contractors would be able to find information on new DBEs that had been certified between publications of the directory.

**§26.33 What steps must a recipient take to foster DBE diversification?**

This is a substantially new section proposed as part of the Department's efforts to narrowly tailor the DBE program. Paragraph (a) of this section proposes for comment four alternatives designed to foster diversification in the kinds of work DBEs perform in DOT-assisted contracts. Taking steps to reduce adverse impacts on non-disadvantaged parties is one of the ways in which it is appropriate to narrowly tailor an affirmative action program.

Over many years, the Department has received anecdotal information suggesting that DBE subcontractors in highway construction have been concentrated in a few specialty areas that require relatively modest capitalization (e.g., guardrail, landscaping, traffic control). Non-DBE contractors in these areas have complained that they are denied contracting opportunities because of the number of DBE firms obtaining subcontracts, a point also addressed in a 1994 GAO report. At the same time, some DBE firms have expressed the concern that it is difficult for them to expand and diversify.

The December 1992 NPRM asked for comment on a variety of ideas related to this issue, ranging from ceilings on DBE participation in certain areas to "extra credit" for the use of DBEs in "non-traditional" fields to financial or other incentives for prime contractors to involve DBEs in such fields. Generally, commenters had a negative reaction to these suggestions. For example, only seven comments favored caps or ceilings on DBE participation in areas in which DBEs were heavily represented, while 49 comments opposed this idea. Opponents said that the problem may be over-hyped and that implementing a cap would be an administrative

nightmare. One commenter preferred that recipients be encouraged to come up with their own innovative approaches.

Concerning incentive programs, 17 comments favored the idea and 28 opposed it. Among the opponents, one noted that it didn't make sense to pay people to obey the law, while another said that it had tried the idea for six years and it hadn't worked. Supporters mentioned a state incentive program that had worked, and others said that the incentives should be permitted, though not required.

The suggestion that comments received most favorably was for "extra credit." For example, if a contractor used a DBE outside certain traditional fields, it could receive $1.15 or $1.25 worth of credit toward its contract goal for every dollar it expended with the DBE. Twenty-one comments favored this approach, while four opposed it. Commenters pointed out that DOT or recipients would have to determine what constituted a "traditional" field to make this idea work.

This SNPRM asks for comment on a series of ideas for addressing the concentration issue. The first alternative focuses on types of work in which DBE firms receive a given percentage (e.g., 50%, 75%) or more of the contracts in Year 1. If this is the case, prime contractors and recipients in Year 2 could count only half the actual DBE participation in that field toward goals. The intent of the provision is that this shift in the incentives would reduce the concentration.

> EXAMPLE: Recipient X's highway construction contracts give rise to 100 subcontracts for landscaping in Year 1. Of these, 80 go to DBEs. In Year 2, any DBE firm's landscaping subcontract leads only to 50 percent credit toward the prime contractor's contract goal and the recipient's overall goal (e.g., a $50,000 subcontract counts for $25,000 toward these goals).

The Department seeks comment both on the concept and on what the percentage standard should be. We ask the same question about the level of DBE participation that would be allowed in the second year. In addition, we ask whether it would make more sense to tie the criterion to an average over a number of years rather than to a particular year. We also ask whether a provision of this type could have the unintended consequence of increasing concentration in these fields (e.g., because recipients might use more DBE contractors to meet a goal if credit for using a DBE is reduced).

The second alternative looks at the issue in terms of proportionality between the recipient's overall goal for all work and the DBE participation in a particular field of work. If DBE participation in a particular field far exceeds the overall DBE goal percentage, then the recipient would not credit toward DBE goals further work in that field during the year.

> Example: Recipient X's overall goal for the year is 10 percent. The recipient estimates that it will spend $10 million for widget wrangling in all its contracts that year. By September 15, DBE widget wranglers have received contracts worth $4.1 million (i.e., more than four times 10 percent of the recipient's projection for widget wrangling expenses for the year). For contracts let after that date, the recipient would not count DBE participation for this worthy activity toward goals.

In addition to the concept itself, the Department asks commenters whether the multiple (four times the overall goal) is a reasonable one, whether the consequence should be no credit after the threshold is reached (as distinct from some other percentage), and whether it makes more sense to implement such a provision on a year-to-year basis than on a part-year basis.

The third alternative would focus on fields in which there is a concentration of DBEs, again defined as one in which DBEs in general get a given percentage of the contracts. Unlike the first alternative, however, the limitation on receiving credit for contracts would fall not on all DBEs in a

field but only those that had received several recent contracts. The intention is to address situations in which the same DBE firms repeatedly receive contracts, to the exclusion of others.

> EXAMPLE: Recipient X's highway construction contracts give rise to 100 subcontracts for guardrail in Year 1. Of these, 80 go to DBEs. DBE Q has received four guardrail subcontracts during Year 1 and the preceding three years. In Year 2, no credit toward goals can be counted for a guardrail subcontract awarded to DBE Q.

The questions asked about the appropriate percentage level for determining concentration under Alternative 1 apply here as well. In this alternative, in a field in which there is a DBE concentration, in Year 2 the recipient would not count toward goals participation from any particular DBE firm that had received four or more contracts in that field over the previous four years. The Department seeks comment on the concept and on the number of contracts over the number of years that would be most appropriate.

The fourth alternative would again focus on fields in which there was DBE concentration at a given percentage level (the same questions apply). This alternative would direct the recipient to establish contract goals that gave special emphasis to DBE participation in other fields.

> EXAMPLE: Recipient X's highway construction contracts give rise to 100 subcontracts for fencing in Year 1. Of these, 80 go to DBEs. In Year 2, Recipient X sets contract goals to emphasize steel erection, widget wrangling, barrier placement etc. (i.e., fields in which there is not a concentration of DBEs).

The Department seeks comment on whether this concept would be practical to administer (e.g., it would require setting somewhat more complex contract goals than is now the case).

These alternatives are not necessarily mutually exclusive, and it might be possible to combine some of them. It might also be possible to offer recipients a menu of such alternatives from which they could choose. The

Department also seeks comment on any other ideas for encouraging DBE participation in particular fields, including those mentioned in the December 1992 NPRM and the comments on it. We note that these alternatives focus on situations in which contract goals are used, and we seek other ideas that may work in situations where contract goals are not used.

Paragraphs (b) and (c) focus on the other side of the coin, fields in which DBEs are poorly represented. The proposed definition of such a field is one in which DBEs receive 25 percent or fewer of the contracts. The Department seeks comment on whether 25 percent is an appropriate level for this purpose and whether the standard ought to refer to a specific period of time, such as the previous year or an average over a number of previous years.

Paragraph (b) would direct recipients to give priority to "underrepresented" fields in operating their outreach and technical assistance programs. The recipients' focus would be on assisting firms to enter such fields. The Department seeks comment on whether any greater degree of specificity in terms of what recipients are to do in this respect is advisable.

Paragraph (c) is based on a proposal for business development programs (BDPs) in the December 1992 NPRM. Thirty-two comments, mostly from recipients, thought this was a bad idea, primarily because it would result in costly, administratively burdensome, new requirements for them. Some also said it would be burdensome for firms and would duplicate other government programs. The 21 comments supporting the idea, including recipients and some DBE and non-DBE contractors, thought that providing additional training for DBEs would be beneficial. They differed on whether the program should be voluntary or mandatory for

DBEs and on other details, and several mentioned that additional funding would be needed to make the idea work.

The SNPRM continues to propose the BDP concept, which gains added importance as a means of helping to meet the narrow tailoring requirements of current law. Having a BDP would be mandatory for a recipient, however, only if an operating administration decided it must have such a program. Recipients would also have the option to create such a program on their own, subject to DOT program approval.

The Department recognizes that BDPs can be costly and burdensome. Consequently, the size and scope of a recipient's BDP could vary with the recipient's resources. The SNPRM does not propose a given level of resources or activity for a BDP, even where an operating administration mandates the creation of BDPs. The Department also intends that recipients would have considerable flexibility in the creation of BDPs, which can be adapted, within the regulatory framework, to each recipient's circumstances. The NPRM's safeguards for the integrity of the BDP process, on which there was little comment, have also been retained in the SNPRM.

Like the December 1992 NØRM, the SNPRM permits recipients, as part of their BDPs, to create a mentor-protégé program. Sixteen comments favored this NØRM proposal, which was a modification of an existing non-regulatory FHWA initiative. These comments generally favored the limitations on the use of protégé firms incorporated in the proposal, which were designed to avoid the abuse of mentor programs. A few thought that the restrictions would make it too hard to attract participants, however. Three comments opposed the proposal, out of concern that such programs make it too easy for fronts to participate. As a discretionary, limited program, the Department believes that a mentor-protégé program can be

useful as part of a strategy to help DBEs diversify, and so we are retaining this provision in the SNPRM. It should be noted that this is the only context in which a mentor-protégé program would be authorized.

The SNPRM includes appendices setting out guidelines for the operation of BDPs and mentor-protégé programs. The Department seeks comments on this guidance material.

One suggestion that has been made would tie together the idea of quality inspections of DBEs' work and mentor-protégé programs. Under this suggestion, recipients would inspect the work performed by DBE firms. Those that were not performing at an appropriate level would be referred to a mentor-protégé program for additional training, with incentives provided to the mentor firms. The Department seeks comment on the merits of this suggestion.

One of the key issues affecting virtually all parts of this section is how to define a "field" in which DBEs may be either over- or underrepresented. The SNPRM proposes a two-pronged approach. First, a field could be viewed as an industry defined by a SIC code in the SBA small business regulations. (Should this be a four-digit SIC code in all cases, or are there circumstances in which other levels of SIC codes would work?) Second, a "field" could mean a readily identifiable field of work designated by the recipient (e.g., landscaping or guardrail in highway construction). The Department seeks comment on whether it would be desirable and feasible for the Department to devise at least a partial list of "fields" in the second sense and, if so, what should be included on such a list.

**Duration**

One of the elements the courts have identified as part of narrow tailoring is that affirmative action programs should not be established in perpetuity. The duration of DBE program, as currently structured by statute, is narrowly tailored in this respect. That is, Congress reauthorizes the program from time to time. If Congress determines that the effects of discrimination have been eliminated, Congress would have a justification for ending the program.

The issue of duration is also sometimes discussed in terms of limits on the participation of individual firms in the program. In the December 1992 NORM, the Department raised this issue under the heading of "graduation." There were 110 comments opposed to the idea of graduation. The point of many of these comments, particularly those from DBEs, was that it takes more than several years for a firm to be able to overcome disadvantage and survive in the open market. Being thrown into the open market could prove fatal to many DBE firms, comments said, given that discrimination has not disappeared from the marketplace.

Some prime contractors said that it was hard enough to find qualified DBEs as it is, without adding to the problem by graduating firms. Other comments pointed out that there are significant differences between the DBE program and the 8(a) program, which ties a very complex graduation formula to the success of the 8(a) program's systematic business development efforts.

On the other hand, 61 comments favored a graduation requirement or suggested an approach to graduation. Some of these comments favored "term limits" for firms (e.g., 5-10 years) in order to clear the way for other, newer firms in the DBE program. Others suggested approaches based on such factors as success in business development, gross receipts, number of projects or contracts in which a firm participated, a sunset provision for unsuccessful

firms, etc. Graduation, comments suggested, could provide an incentive to DBE firms to become more competitive.

In one sense, the structure of the DBE program already provides for a limit on the participation of individual DBE firms. If a DBE firm grows to the point where it no longer meets SBA small business size standards or the statutory DBE size cap, it becomes ineligible. But as long as a firm remains a small business, and as long as there is a compelling need to remedy the effects of discrimination on small businesses owned and controlled by socially and economically disadvantaged individuals, it is difficult to find a sound rationale for excluding an otherwise eligible DBE from the program just because it has participated for a certain number of years or has had a degree of success in the program.

Arguments by opponents of graduation programs have considerable force. Unlike the 8(a) program, the DBE program does not provide for an encompassing business development program, with substantial agency assistance. The DBE program does not provide a comparable program for DBEs to graduate from. Experience has shown that, when firms leave the 8(a) program, or when state or local MBE/WBE programs are eliminated (e.g., in response to the Supreme Court's decision in *Croson*), the firm's success or the state or local government's MBE/WBE participation is imperiled. To force otherwise eligible DBEs out of the program would, given a marketplace in which the effects of discrimination persist, set up those firms to fail.

Therefore, while the Department will consider comments concerning how best to address the duration element of narrow tailoring, we are not proposing any "graduation" mechanisms in the SNPRM.

## SUBPART C - GOALS, GOOD FAITH EFFORTS, AND COUNTING

**26.41 Overall Goals**

The statutes underlying this program direct the Department to ensure, unless the Secretary determines otherwise, that 10 percent of the funds authorized by the statutes be expended with DBEs. This statutory formulation is important for two reasons. First, it constitutes a determination by Congress (in the context of the highway, transit, airport, and airport concessions programs) that discrimination in contracting opportunities has existed, that the problem is nationwide in scope, and that remedial efforts are needed to address this problem. Second, it constitutes a determination by Congress that, unless the Secretary determines otherwise, expending 10 percent of authorized funds with DBEs is a reasonable nationwide level of effort to achieve the remedial objective of the statutes.

These actions by Congress form an important part of the Department's basis for concluding that there is a compelling government interest in maintaining the DBE program, meeting the first part of the strict scrutiny test articulated in *Adarand*. We note that Department of Justice proposals for modifying affirmative action programs in Federal procurement are backed by an appendix citing substantial evidence of the compelling need for programs of this kind. The Department also relies on this appendix and similar evidence.

Strict scrutiny also requires that the program be narrowly tailored to address the compelling government interest. In our view, some aspects of narrow tailoring are best addressed at the recipient level. Under Part 23, recipients set overall goals, and we believe that recipients should continue to perform this function. The SNPRM proposes to modify how recipients set overall goals, with the aim of improving and strengthening the process from a narrow tailoring point of view. These proposals are, in the Department's

view, consistent with Congressional action establishing the nationwide ten percent level of effort, which the Department anticipates continuing to use as a guide for evaluating the overall success of the DBE program.

Under the current overall goal requirements (49 CFR §23.45(g)(5)), recipients set overall goals based on two factors: (1) a projection of the number and types of contracts the recipient will award and a projection of the number of DBEs likely to be available to compete for the contracts; and (2) past results of the recipient's DBE efforts. These factors are used to implement the DBE program goal of supporting "the fullest possible participation of [DBE firms]" (§23.1). Recipients must make a special showing to obtain DOT approval for an overall goal of less than 10 percent (this showing has been made on a few occasions). As a practical matter, recipients have often implemented these provisions by looking at their potential contracting opportunities, estimating how much DBE participation could be obtained from existing DBEs, and setting a goal to maximize this potential participation. The recipient's past performance often has operated as an informal "maintenance of effort" provision with respect to the level of overall goals.

In the context of narrow tailoring, a recipient's goal would remedy the effects of discrimination if it led to the results we could expect if the playing field for all businesses were level. The Department seeks comment on three conceptually similar, but mechanically different, means of setting a goal to approximate the results of a level playing field.

The first alternative would compare DBEs with all businesses. If we know the percentage that DBEs make up of all businesses that are available to work for the recipient, then the results of a level playing field will be DBE participation in the same proportion. The calculation looks like this:

$$\frac{\text{DBEs}}{\text{All businesses (large and small, DBEs and non-DBEs)}} = \text{DBE capacity}$$

By all businesses in this context, we mean all businesses in types of work relevant to the recipient's DOT-assisted contracting. We seek comment on the use of SIC codes or other information to identify the relevant business types. Also, would it make better sense to compare DBEs to only small businesses?

This option parallels the way we calculate DBE achievements, which looks like this:

$$\frac{\text{Contracting dollars to DBEs}}{\text{Contracting dollars to all businesses}} = \text{DBE participation}$$

Under the second alternative, the recipient would estimate the number of minority- and women-owned businesses in the state or locality in which it operates. This estimate could be made on the basis of U.S. Department of Commerce data. The data are broken down by 2-digit SIC codes. The recipient would make the estimate using only those SIC codes that represent a major portion of its DOT-assisted contracting work (e.g., for a state highway agency, those SIC codes encompassing construction, architects and engineers, etc.) The Department seeks comments on whether the Department should standardize the SIC codes used for this purpose by various categories of DOT recipients, and, if so, what those SIC codes should be (e.g., for state highway agencies, airports, transit authorities).

Second, the recipient would determine the total number of all businesses in these SIC codes within the state or locality. There is U.S. Census data available that provides this number. The recipient would then

determine what percentage minority- and women-owned businesses were of the total. This percentage, absent adjustments (see discussion below), would be come the recipient's overall goal. The goal would be expressed in terms of a percentage of the recipient's DOT-assisted contracting dollars. This is the result we would expect from a level playing field. The calculation would look like this:

$$\frac{\text{Minority/Women-Owned Businesses in Relevant SIC Codes in the State/locality}}{\text{All Businesses in Relevant SIC Codes in the State/locality}} = \text{DBE capacity}$$

It may be possible for the Department to calculate these goals, saving recipients the time and effort required. The Department will consider doing so, and we invite comment on whether this would be a good idea.

We note that there are limitations to the data currently available. The 2-digit SIC code data on which the numerator of this equation would be based could have significant error rates for some states, leading to a degree of statistical uncertainty. At the present time, however, this appears to be the best state-by-state data available on a nationwide basis.

Data are available by single-digit SIC codes for construction. However, this code tends to aggregate data for a greater number of businesses than those usually found in highway or transit construction. On the other hand, the state-by-state one-digit SIC data is likely to have a lower error rate than two-digit state-by-state data. We invite comment on whether this alternative should use one-digit rather than two-digit SIC data.

We also recognize that there may be differences between localities and states concerning the relative availability of minority- and women-owned businesses. Federal data is not currently available, however, in a useful form

to make the calculation needed for the numerator for localities. Where there is not better local data, however, we may have to rely on statewide data, for lack of a practicable alternative.

The third alternative differs from the others in that it focuses on actual participation by both DBEs and other firms. The approach would determine the percentage that DBEs make up of all firms that actually work for the recipient, in any capacity, on DOT-assisted contracts. To avoid having short-term trends skewing the calculation, we propose to use a five-year average as the basis for the calculation. (We seek comment on whether this is an appropriate time period for this purpose.) The calculation looks like this:

$$\frac{\text{Average number of DBE firms actually working on DOT-assisted contracts for the recipient, over five years}}{\text{Average number of all firms actually working on DOT-assisted contracts for the recipient, over five years}} = \text{DBE capacity}$$

This approach uses data that are readily available to the recipient. Since it is based on actual experience, it does not rely on projections about potential participation.

Each of these alternatives describes the shape of a level playing field in a somewhat different way. Each may have its advantages and disadvantages. We seek comment on the relative merits and problems of each approach, or other approaches that commenters may suggest.

In considering how to analyze capacity for Federal procurement, the Departments of Justice and Commerce are considering whether it is possible to include information on whether firms are ready, willing, and able to work on Federal contracts. Is this a relevant consideration for calculating DBE capacity in this program, and is data available that would make it possible?

As a means of reducing potential burdens on recipients, §26.41(c) would permit recipients to use a DBE capacity figure calculated by another agency in certain circumstances. First, as part of the Federal government's proposed direct procurement rules, the DOC will calculate "benchmarks" for various industries. These benchmarks, which are likely to be established on a national or regional basis (e.g., a regional basis for construction), could form a basis for a recipient's DBE capacity calculation.

To use the benchmark for this purpose, however, the recipient would have to determine that the area from which it obtained contractors was generally similar to the area for which DOC prepared the benchmark. That is, if DOC calculates a benchmark for construction in a particular region, a recipient could use the benchmark (and not calculate its own DBE capacity figure) if it obtained construction contractors from the same general region. (Since DOT does not permit its grantees to use geographic preferences in contracting, such comparisons may be readily demonstrable.) In some fields, of course, there might be a national market that everyone uses (e.g., transit vehicle purchases). One of the issues in using DOC figures is that DOC benchmarks, because of differences between Federal procurement and the DBE program, will not include women-owned firms. Consequently, recipients would have to adjust DOC benchmarks to account for women-owned DBEs. We seek comment on whether data are available for this purpose.

Closer to home, recipients may find that other recipients have established overall goals. For example, all state DOTs will establish such goals. A transit authority in a particular state could use the state DOT's goal, assuming the transit authority did its procurement in the same general area. Likewise, recipients (e.g., airports and transit authorities) in a metropolitan

area might use one another's goals, or work together on a combined goal, again assuming that their procurement areas are generally similar. The objective is for recipients to use the best possible data to arrive at DBE capacity, while not unnecessarily duplicating the relevant work that others may have done.

As noted in proposed §26.41(d), recipients may also use other means to establish goals (e.g., a local disparity study). In the interest of promoting flexibility in the program, these could include methods a recipient has devised that are not mentioned anywhere in Part 26. Under §26.41(d), the recipient would need the operating administration's approval to use alternative goal-setting methods, to ensure that its tailoring was appropriately narrow to meet *Adarand* standards.

The SNPRM (§26.41(e))asks for comment on one additional consideration in goal setting. The goal-setting analysis is based primarily on present DBE capacity. But it is very possible that the effects of discrimination have suppressed the formation of DBE firms (e.g., by having made capital more difficult to obtain over a long period, by having deterred potential DBE owners from entering businesses relevant to DOT-assisted contracting). To account for this suppression of DBE business formation, the proposed rule would require the recipient to increase the goal, if the recipient had evidence to support a finding that DBE business formation had been suppressed. DOJ has proposed a similar mechanism in its NPRM on Federal procurement affirmative action issues.

We seek comment on what data sources would be relevant and available, or would need to be created, to complete this so-called "but for" analysis. Other relevant information might include evidence of discrimination in the public and private sectors in such areas as obtaining

credit, bonding, and licenses. It could include evidence of discrimination in pricing and contract awards. If, through analysis of such information, the recipient could make a quantitative estimate of DBE suppression, the recipient would increase its overall goal proportionately.

The SNPRM would require recipients to seek information relevant to DBE suppression as part of their public participation process, but it would not require recipients to calculate a suppression factor where data was unavailable. At the same time, where recipients have some information (e.g., anecdotal information that cannot readily be quantified) that the capacity analysis understates the appropriate goal, recipients could take appropriate action in administering their programs to attempt to account for this factor. The Department seeks comment on the issue of how recipients would best obtain data and how they would best proceed in the absence of quantifiable data.

The Department is also aware that, under *Adarand,* programs for women-owned firms may be subject to different legal standards than minority-owned firms. Nonetheless, because the Department's statutes call for operating a unified DBE program, including both minority- and women-owned firms, this SNPRM proposes to use the same administrative mechanisms for all DBEs. We invite comments on alternative ways of viewing the overall goal process, in the post-*Adarand* legal climate, as well as alternative mechanisms. We would also be interested in seeing data that might illustrate the effects on DBE goals of making the calculation this way, as well as through alternative means commenters might suggest.

The Department wants very much to work with recipients and other commenters to flesh out the mechanics of the new goal-setting process. (The costs of making changes in the goal-setting process are eligible for

reimbursement from Federal funds on the same basis as the funds are available for other program administration costs.) Since this proposal is intended, in large part, to conform to the legal requirements enunciated in *Adarand*, the Department also seeks comment on the extent to which it succeeds in doing so. The Department also seeks any other suggestions commenters may have on ways of adjusting the overall goal provisions of the rule in light of *Adarand*.

Comments to the December 1992 NPRM raised only a few issues concerning overall goals. Sixteen commenters, mostly recipients, favored dropping the current rule's requirement for a public notice and comment procedure prior to the adoption of each annual overall goal. They said it was an administrative requirement that did not result in the receipt of useful comments. Some of these comments said the requirement should be retained in cases where a goal of less than 10 percent was requested. Three commenters, also recipients, favored its retention. As noted above, we believe that there are values in public participation, and the SNPRM includes such a requirement.

A few comments requested the deletion of the existing requirement that the Governor or other politically responsible official at the head of a governmental jurisdiction sign a request for a goal of less than 10 percent. We believe that this change would be beneficial, in that it would remove an administrative step that can delay goal submissions, so the SNPRM does not include it. We believe that, by this time, the process of goal-setting is likely to be well institutionalized in most recipients' organizations, making a political official's sign-off less important than when we began the program in 1980.

One issue related to goal-setting that was the subject of considerable comment to the December 1992 NORM is that of group-specific goals. The Department received 32 comments to the December 1992 NORM, principally from minority-owned DBE firms and their organizations, as well as some recipients, urging the adoption of either separate goals for minority-owned and women-owned DBEs or of multiple goals for different designated groups. Twelve comments, principally from recipients and women-owned DBEs, opposed changing the program to permit separate DBE goals.

The reason most often advanced for adopting separate "MBE/WBE" or group-specific goals was a concern on the part of minority firms that they were losing market share to firms owned by white women. Since Congress included women in the DBE program in 1987, comments said, the proportion of contracts going to women-owned DBEs has increased while the proportion of contracts going to minority-owned DBEs has decreased (FHWA statistics appear to support this observation in a number of states). Many of these comments suggested that firms owned by white women are, in effect, less disadvantaged than those owned by minorities. They perceive women-owned firms as having better access to capital, credit, and business opportunities than minority-owned firms. Many women-owned firms are simply fronts, in the view of some of these comments. Even if they are not fronts, strictly speaking, they still can ride on the coat-tails of spouses, relatives, or established businesses.

Women-owned firms countered by asserting that bias against their firms by recipients in the certification process made it more difficult for them to get certified. The main reason these comments suggested for the perceived bias was a desire by some certifying officials to ensure that

minority-owned firms retained the lion's share of contracting opportunities under the program.

The Department understands the views of commenters favoring group-specific goals, recognizing that many minority participants in the program have a genuine concern with the market share of DBE work that is available to them. We also note that some of the comments (particularly one from the Mexican-American Legal Defense and Education Fund) made interesting arguments that such goals are constitutionally permissible. However, the use of group-specific goals could raise a variety of policy and administrative problems, and we believe for legal reasons that we cannot propose making group-specific goals part of the Department's program.

The problem that we believe precludes the Department from permitting group-specific goals in the DBE program is a statutory one. The Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA) added women as a "presumptive group" within the definition of disadvantaged business enterprises. The legislative history of STURAA was quite explicit about the intent of this change. The Senate report on the bill said the following:

> *This provision extends the [DBE] program through 1990 and adds women (WBEs) to the rebuttable presumption of being disadvantaged....It is the intention of this language that prime contractors performing Federal-aid highway construction contracts and State transportation departments will now be able to use WBEs to meet their DBE contract goals. It is not intended that the overall DBE requirement set by this section be increased as a result of the inclusion of WBEs as a presumptive group.* (S. Rept. 100-4 (1987) at 11-13).

The STURAA Conference Report directly addressed the issue of separate goals. It said the following:

> *It is the intention of the conferees that firms owned and controlled by women (WBEs) be included, as a presumptive group, within the definition of Disadvantaged Business Enterprise (DBE). The conferees intend that contractors bidding on Federal-aid highway projects will now be able to make best efforts to meet DBE contract goals using DBEs (as they were defined prior to this Act),WBEs, or combinations thereof. Additionally, the conferees intend that the Department of Transportation and the States no longer should require contractors...to meet separate goals for DBEs (as defined prior to this Act) and WBEs.* (H. Rept. 100-27 (1987) at 148, emphasis added).

In the 1987 amendment to Part 23, the Department's contemporaneous construction of this statutory change was that Congress mandates a single goal encompassing both minority and women-owned DBEs.

Congress extended the DBE program in section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA). Congress made clear that "[t]his section provides for an ongoing Disadvantaged Business Enterprise (DBE) program. This section is a continuation of section 106(c) of the STURAA of 1987...." (H. Rept. 102-404 (1991) at 307). Twice, during the House Public Works and Transportation Committee's consideration of ISTEA and in a subsequent floor vote, the House rejected amendments that would have authorized or required separate MBE/WBE goals.

The present DBE program statute, then, is a continuation of section 106(c) of STURAA, concerning which Congress expressed its explicit intent that contractors should not have to meet separate goals for minority-owned and women-owned businesses. Congress had opportunities to change that direction in 1991 and did not do so. In these circumstances, it is difficult to see how the Department could, consistent with the language and legislative history of the statute, require or authorize separate, let alone group-specific, goals. (This same point applies to DBE airport concessions under Subpart G,

since the airport program DBE legislation - 49 U.S.C. 47102 and 47113 -- incorporates the same DBE definition).

**§26.43 How are overall goals established for transit vehicle manufacturers?**

There were few comments on the December 1992 NORM section on transit vehicle manufacturers (TVMs), which proposed to continue the existing Part 23 TVM section. Two comments supported the section, one asked for greater clarity, and another said it would be useful if acquisition of specialized equipment obtained by non-transit recipients (e.g., airport fire trucks) could benefit from the same approach. Another comment said that recipients, rather than TVMs themselves, should be responsible for certifying DBEs who work for TVMs.

The Department has adopted one of these comments, and the SNPRM would permit an FAA or FHWA recipient to use the procedures of this section with respect to meeting DBE requirements in the acquisition of specialized equipment, subject to the approval of the concerned operating administration. The Department would make one additional change, intended to provide greater flexibility to recipients, particularly when dealing with a large vehicle procurement. In such a case, the recipient may, with the approval of the concerned operating administration, establish a project-specific goal instead of relying on this section.

Transit vehicle production is clearly a national market, in which it does not make sense for individual transit authorities to set goals for DBE participation individually. Consequently, under the SNPRM, FTA would set a goal for manufacturers. The goal would be set by a means similar to the means the Department chooses for establishing overall goals under §26.41.

**§26.45 What means do recipients use to meet overall goals?**

In narrowly tailoring a nondiscrimination regulation, one of the important steps the Department can take is to place greater emphasis on race-neutral approaches such as outreach and technical assistance to meet program objectives. Consequently, the Department is proposing that recipients' first resort in meeting overall goals be to use these means. The proposed, non-exclusive, list of steps that recipients can take include several measures mentioned in the existing Part 23 and the December 1992 NORM.

The recipient would use means like those listed in paragraph (a) to meet its overall goal to the extent it was able to do so. In many cases, however, it will probably be necessary to use race-conscious means to overcome the effects of discrimination. The Department does not intend, in this section, to say that race-neutral means must be used "before" race-conscious measures in any crude chronological sense. We anticipate that a variety of measures will be used in combination to provide appropriate flexibility to recipients.

The basic means to be used when a recipient cannot meet its overall goal wholly through race-neutral methods is contract goals. Because the recipient may meet at least a portion of overall goals using other means, this proposed rule differs from the existing rule and the December 1992 NORM by not necessarily requiring a contract goal on every contract that has subcontracting possibilities. It would be up to the recipient to determine when use of contract goals is needed to meet the overall goal. For example, if a recipient had met its overall goal for a given year by the end of September, it might use paragraph (a) techniques rather than contract goals the rest of the year.

The proposed regulatory text does not change the existing rule's provision that contract goals are calculated on the basis of the entire amount of the contract (i.e., Federal plus non-Federal shares). We solicit comments, however, on whether there should be any change in this provision, particularly in situations where there is only a small percentage of Federal funds in the contract.

The SNPRM also seeks comment on including an "evaluation credit" approach. Under this approach, if a DBE's bid or offer on a prime contract falls within a price differential designated by the recipient (from one to ten percent of the lowest non-DBE offer), the DBE would get the contract. Alternatively, as among non-DBE bidders on prime contracts, a bidder who had a designated level of DBE participation (set by the recipient in a way equivalent to the way contract goals are set) would receive the contract if its bid fell within a given percentage differential of the lowest bid by a bidder who did not achieve that level of DBE participation.

We emphasize that, as proposed, this mechanism would apply only to bidding on prime contracts (though we seek comment on whether there is any feasible way of using it or a similar mechanism on subcontracts). For example, suppose a recipient established a price credit of 7 percent for bidders who had at least 10 percent DBE participation. Bidder A bids $105,000 on a contract, and has 10 percent DBE participation. Bidder B bids $100,000 for the same contract, but has only 5 percent DBE participation. Bidder A would receive the contract, since it achieved the targeted DBE participation and was within the 7 percent evaluation credit range established by the recipient.

If race-neutral means are the first resort under this proposed section, then set-asides and other more intrusive means, such as a "conclusive presumption," are the last resort. By a set-aside, we mean a procurement

practice that permits no one but DBEs to compete for a given contract. Only if the recipient documents that there are no other, less intrusive, ways to meet DBE goals, and only if the recipient has state or local authority independent of Part 26, should the recipient use means of this kind on a DOT-assisted contract.

When a recipient uses race-conscious measures, and these measures appear to have significant success in combating the effects of discrimination, what happens next? Given that, under *Adarand,* measures must be narrowly tailored to achieve nondiscrimination, we believe that recipients must consider changing their use of race-conscious measures when it appears that DBEs are closer to competing on a level playing field.

For example, suppose a recipient significantly exceeds its overall goals over a number of years. This suggests to us that the recipient should rethink its use of race-conscious measures to achieve overall goals (e.g., to rely more on race-neutral measures). Note that we are not suggesting shutting down the program or getting rid of overall goals in this situation, just changing the mix of measures used to achieve overall goals.

Another way of looking at the slope of the playing field shifts the focus to the broader economy. It is likely that, in many places, DBE participation is better in DOT-assisted contracting than in many other sectors of the economy, simply because of the existence of this program over the last 17 years. Were it not for the DBE program, it is likely that the picture of DBE participation in DOT-assisted contracting would resemble that in similar sectors of the broader economy.

Suppose that, in a given state, minority- and women-owned contractors account for 20 percent of the contractors, but only 10 percent of the business volume. Whatever DBE participation achievements may be in DOT

recipient contracting, this suggests that the playing field is not altogether level in the state. If we took away the use of race-conscious measures in the DOT program, its achievements would probably fall to a level approximating that of the broader economy. This is a rationale for maintaining the use of race-conscious measures. If this rationale disappears in the broader economy, then the recipient should rethink its use of race-conscious measures to achieve overall goals (e.g., rely more on race-neutral measures). The Department asks for comments on the data that would be needed to make this approach work.

One concern that disadvantaged businesses have expressed is that recipient sometimes do not apply measures to obtain DBE participation evenly through their various contracting opportunities. For example, DBEs have said that some recipients meet their goals entirely through construction contracting, largely ignoring other types of businesses (e.g., suppliers, architects and engineers, other professional services). The Department's intention is that recipients explore all opportunities for DBE participation, in all fields in which DOT-assisted contracting occurs. We seek comment on whether any regulatory provisions are needed on this subject and, if so, what they should say.

**§26.47 What are the good faith efforts procedures recipients follow in situations where there are contract goals?**

The concept of good-faith efforts is a very broad one, applicable in some senses in a variety of contexts under the rule. Section 23.47, however, applies only in the case where a recipient uses contract goals, one of the intermediate level of mechanisms available to meet overall goals. When the recipient has set a contract goal, the recipient would award the contract to the apparent successful bidder if either of two things happen: the bidder meets

the contract goal by providing sufficient DBE participation or the contractor documents adequate good faith efforts (GFE) , despite not meeting the contract goal with DBE participation. This section emphasizes that either showing is acceptable. It would not be consistent with the rule for the recipient to insist on a bidder meeting the goal, disregarding its showing of GFE. To do so would establish a *de facto* quota system. At the same time, it is not consistent with the rule for a recipient to award a contract based on merely pro forma or perfunctory efforts by a bidder. This is equally inconsistent with the rule.

In order to reinforce the point that the good faith efforts provision is meant to be taken seriously, the SNPRM proposes that recipients would implement an administrative reconsideration process when the apparent successful bidder had been denied the contract for failing to make adequate good faith efforts. This process is intended to be informal and minimally burdensome, but it is also intended to cause recipients to make sure that their decisions on GFE are well-founded.

One suggestion made by DBEs was that, rather than the recipient itself, a committee made up of recipient, DBE, prime contractor, etc. representatives should make GFE decisions. Is this a good idea, either at the initial decision or review level? Should the Department include such a provision in the final rule?

One issue related to GFE that was the subject of a good deal of comment on the December 1992 NØRM was whether DBE prime contractors should have to meet contract goals. It is clear that the existing Part 23 does not permit recipients to require DBE prime contractors to do so, as pointed out in the preamble to the December 1992 NØRM. (Any recipient programs to the contrary are inconsistent with the Department's rule; FHWA has provided guidance to its recipients emphasizing that any programs containing

inconsistent provisions on this point need to be changed.) Under the existing rule, a DBE prime contractor meets a contract goal by virtue of being a DBE. Since the entire amount of a contract to a DBE is counted toward the contract goal, a DBE prime contractor's goal attainment is 100 percent.

Thirty-six comments to the December 1992 NPRM favored changing this provision, so that a DBE prime contractor would have to meet subcontracting goals just like any other prime contractor. Commenters taking this position said that requiring DBE primes to meet goals would help to maximize DBE participation and that it was fair to impose the same requirements on all prime contractors. In some cases, these comments said that DBE primes should only meet goals when they would otherwise subcontract work, or should only have goals applying to that part of the work of a contract they did not plan to perform with their own forces.

Twenty-four comments opposed adding a regulatory requirement for DBE prime goals. Some of these agreed with the rationale of the existing rule, saying that there was already, in effect, 100 percent participation. Others said that requiring DBE primes to meet goals would hinder their growth and productivity, or that recipients should have discretion on this matter. Some comments said that DBE primes should have to meet goals only if they subcontracted work.

The Department seeks additional comment on this issue. We note that there are two competing notions of equity involved in the debate. On one hand, requiring DBE primes to meet subcontracting goals imposes the same requirements on all prime contractors. On the other hand, since DBE primes are implicitly viewed as not enjoying a level playing field with non-DBE primes, requiring both to meet the same subcontracting requirement can be viewed as simply maintaining the inequity.

With respect to subcontracting, the SNPRM, with certain exceptions, would not count toward DBE goals work performed by non-DBE second tier subcontractors. This approach for subcontractors is more consistent conceptually with a requirement for DBE primes to meet subcontracting goals. On the other hand, it can be argued that to make a DBE prime meet subcontracting goals in effect requires over 100 percent DBE participation on DBEs' prime contracts.

The SNPRM proposes the two approaches in the alternative. We also seek comment on a third alternative, specifying that a DBE prime has to use its own forces for a sufficient percentage of the contract to meet the contract goal. If the DBE prime were subcontracting out so much of its work that it would not cover the goal amount with work performed by its own forces, then the DBE would have to make up the difference with other DBE participation.

The most commented-upon issue in the December 1992 NPRM section on GFE concerned whether compliance with the requirement to supply information about goal attainment or GFE should be a matter of responsiveness or responsibility. If a matter of responsiveness, the bidder must submit all the required information with its bid. Failure to do so results in the bid being non-responsive. If a matter of responsibility, the apparent successful bidder is given a certain amount of time to submit the information following the opening of bids. Under Part 23, recipients had the option of whether to use the responsiveness or the responsibility approach. The December 1992 NPRM proposed that the responsiveness approach be used in all cases, in order to mitigate the problem of "bid-shopping," in which the apparent successful bidder uses the compliance

time after bid opening to conduct a sort of reverse auction among prices of DBEs interested in the job.

Thirty-eight comments, mostly recipients and DBEs, supported the NORM proposal. Many of these comments said that it would be an effective means of limiting prime contractors' opportunity to bid-shop. Others pointed to specific recipients' programs that successfully used the responsiveness approach. A few comments suggested modifications to this approach, such as allowing 5-7 days for contractors who did not meet the goal to show GFE. We have also received a suggestion that, given what some DBEs perceive as abuses of the "letter of intent" or "commitment" process by prime contractors, that the Department should establish a firm policy of requiring the use of the DBEs that a prime contractor originally names.

Sixty-five comments, mostly prime contractors but including a few recipients, opposed the December 1992 NORM proposal. These comments said that bid shopping was not that big a problem, or that some degree of bid shopping was appropriate. Their main objection was that the proposal was too burdensome for prime contractors. They painted a picture of contractors submitting multiple bids after a hectic whirl of last-minute negotiations involving quotes from a variety of subcontractors. The time frame for finalizing bids is too short to make the responsiveness approach practical, they said. Some recipients said that they had tried this approach and found it didn't work. Other comments suggested variations on the responsibility approach, such as limiting the time after bid opening in which a contractor could submit the required information or considering as evidence of GFE only those actions a contractor had taken prior to bid opening.

Both sides of this debate make some valid points. Based on DOT's experience with the contracting process, bid shopping appears to be a significant problem that negatively affects the ability of DBE subcontractors to succeed in performing contracts for a profit. Requiring information to be submitted as a matter of responsiveness, in our view and that of a number of comments, appears to be a reasonable means of mitigating that problem. On the other hand, the responsiveness approach would probably be more difficult administratively for prime contractors, though it is being used successfully in some places.

Given that there are valid points to be made in favor of both responsibility and responsiveness, and that the circumstances of different recipients may well differ concerning the desirability of one approach or the other, the significance of a bid-shopping problem in a particular jurisdiction, etc., the SNPRM would continue the existing practice of allowing recipients to choose which approach to follow. The Department seeks additional comment on this issue. In particular, the Department would be interested in receiving examples of how one system works, or fails to work, in current practice.

Sixteen comments to the December 1992 NORM asked for clarification or greater guidance concerning what constitutes GFE. Some of these comments asked for more "objective" GFE criteria, though they did not suggest what the objective criteria should be. Others suggested tightening up informational requirements. For example, some agreed with a proposal in the December 1992 NORM that the prime should actually have a contract with the DBE in hand to present to the recipient.

The Department is responding to these comments in two ways. First, the Department has rewritten and expanded the rule's GFE guidance (see

Appendix B) to provide greater assistance to recipients and contractors. There would also be a new definition in §26.5 which says that GFE are "efforts to achieve a DBE goal or other requirement of this Part which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement." Second, while it may not be necessary to have a written contract between the DBE and the prime contractor presented to the recipient, the SNPRM would require that the prime contractor present a letter from each DBE submitted to meet the goal confirming that the DBE is going to perform the contract as represented in the prime contractor's submission.

One of the features of the existing guidance concerning GFE is that a contractor is not viewed as making GFE if it rejects a quote from a DBE in favor of a quote from a non-DBE when the former is higher than the latter, but the DBE has still offered a "reasonable" price. Seventeen comments asked for clarification of what a reasonable price is, four supported the existing guidance, while 14 opposed the concept. Opponents said the requirement makes the system more expensive, since it does not allow prime contractors to get the lowest price they can for subcontracts. Some of these comments also said they did not want to have specific "reasonable price" requirements (e.g., a percentage) in their bid documents.

The Department believes it would be difficult to mandate a "reasonable price" differential that would make sense across the board for DOT-assisted contracts. However, the Department does believe that recipients should have the discretion to do so. Appendix B would specifically provide this discretion to recipients. The Department notes that in Federal procurement, a range of 1-10 percent is suggested. The Department seeks comment on whether this is a reasonable range, and

whether Appendix B should include a specific numerical range of this kind. The Department seeks comment on whether it would be desirable and feasible to establish a national standard concerning award of a subcontract to a DBE which quoted a higher price than another subcontractor, consistent with the narrow tailoring standard of Adarand.

The GFE guidance would provide that in determining whether a bidder has made good faith efforts, a recipient may take into account the success of other bidders in meeting goals. That is, if Bidder A has met the goal, but lower Bidder B has not, it is fair for a recipient to inquire if Bidder B's efforts were sufficient. We also seek comment on whether additional provisions would be useful. For example, should there be additional language concerning good faith efforts in subcontracting initiated by a prime contractor after award of the initial prime contract, particularly when the prime contractor may not have met its original commitments to DBE participation?

The December 1992 NPRM proposed that a prime contractor could terminate a DBE only for breach of contract. This proposal would have prohibited terminations for convenience of DBEs. Sixteen comments, primarily from recipients and some DBEs, favored the NORM proposal, while 19 comments, mostly from prime contractors, opposed it. The opponents said that terminations for convenience were an often-necessary part of doing business and that prohibiting them would add to expense, delay, and litigation. The Department takes a middle ground in the SNPRM. As a general matter, the rule would not prohibit terminations for convenience. However, a contractor could not terminate a DBE for convenience and then turn around and perform the work with its own forces or subcontract to a non-DBE subcontractor, absent the prior written

consent of the recipient. We believe that this approach will stop a potential source of abusive conduct by primes while not denying primes needed flexibility.

The December 1992 NPRM also proposed that when a DBE was dropped from a contract, the prime contractor would have to make GFE to find a substitute DBE, even if the prime was meeting its goal by using other DBEs. Twenty comments, principally prime contractors, opposed this proposal. They did not think that requiring substitution even when a prime contractor was already meeting its goal from other sources was a good idea. It would, they said, be a disincentive to prime contractors oversubscribing their goals. Four comments supported the proposal.

The Department has decided not to adopt this proposal in its entirety. As under the existing rule, recipients would still have to make good faith efforts to find a DBE substitute for a DBE that has been unable to complete its planned participation. However, a requirement to replace DBE participation, even when doing so is not needed to meet a contract goal, departs too far from the objective of race-conscious remedies, which is to remedy the effects of discrimination. Consequently, the SNPRM would propose requiring substitution only as needed to meet a contract goal. The Department seeks comments, however, on whether there is a supportable rationale for requiring substitution of DBEs simply on the basis of contract law (i.e., meeting the original commitment to the recipient).

The December 1992 NPRM proposed that recipients have a liquidated damages or penalty provision in their contracts to sanction noncompliance by recipients with the termination and substitution provisions of this section. Two comments favored this idea, while 20 opposed it, saying that liquidated damages or penalty clauses were contrary to state procurement

laws in many cases. The SNPRM adopts the suggestion made by one of these comments that recipients be required to have appropriate administrative remedies available to deal with noncompliance, without prescribing what they should be.

**§26.49 How is DBE participation counted toward goals?**

One of the issues most commented upon in response to the December 1992 was that of whether the cost of materials obtained from non-DBE sources, but used by DBE contractors, should be counted toward goals. The December 1992 NØRM solicited comment on this issue because the present regulation (49 CFR §23.47(a)) results in an inconsistency in the way credit is counted for materials, providing that the entire value of a contract with a DBE is counted toward goals. This has been interpreted, since the beginning of Part 23 in 1980, to include the cost of materials the DBE contractor obtains, from whatever source, for performance of the contract.

For example, suppose a DBE steel erection firm buys structural steel from a major steel company, which is not a DBE. The steel accounts for 75 percent of the cost of the contract, the rest being accounted for by labor, overhead, profit, etc. Under the present rules, the entire cost of the contract, including 100 percent of the cost of the steel, would be counted toward DBE goals.

The inconsistency arises because of the way that supplies and materials are counted in other situations. If a non-DBE steel erection company bought the same steel from the same steel manufacturer at the same price, none of the value of the steel would count toward DBE goals. If the non-DBE steel erection company bought the steel through a DBE regular dealer, 60 percent of the cost of the steel would count toward DBE goals. The inconsistency could

be removed if all materials and supplies were counted the same way: that is, if only materials and supplies produced by a DBE manufacturer or purchased through a DBE regular dealer could count toward DBE goals, regardless of whether the contractor was a DBE or not. This approach would result in the DBE steel erection company, in the example above, being able to count only 25 percent of the value of its contract toward DBE goals.

The great majority of comments on this point (83) opposed resolving the inconsistency in this way, saying that the entire amount of DBE contracts -- including materials obtained from non-DBE sources -- should continue to count toward DBE goals. Recipients, DBEs, and non-DBE contractors were all represented in this group. They said that materials are always included in the cost of any contract, and so it was meaningless to talk about counting the value of a contract and yet not counting the cost of materials. DBEs, like other contractors, take a financial risk in obtaining materials, and this should be taken into account. Also, since materials often make up a significant portion of the value of a contract, not counting materials would mean a significant reduction in goal attainment, and goals would have to be lowered accordingly. Some comments said that DBE supplies or manufacturers were not available in their areas, making reliance on other sources inevitable.

Fourteen comments, including some recipients and DBEs, favored limiting the counting of materials from non-DBE sources. Some of these suggested treating DBE and non-DBE contractors alike with respect to the counting of materials. In this scenario, only the work actually performed by the DBE would count toward goals. Others suggested limiting to 60 percent the amount of credit for non-DBE source supplies that could be counted toward goals (placing a DBE contractor in an analogous position to that of a DBE regular dealer).

The Department has decided not to propose changing this provision. There are advantages, from the point of view of consistency and logic, in counting supplies and materials the same way in all cases. These advantages are outweighed, in our view, by the potential disruption that would be caused to the program by changing this basic counting policy. Making the change would have significant effects on goal attainment and would cause recipients and contractors to reorient the way that they do business. We also believe that comments have a good point when they say that since a DBE contractor takes a risk in acquiring materials, and must manage their acquisition and use, it should receive credit for using them in the context of the contract. We do agree with a comment saying that credit should be allowed only for materials that the DBE contractor actually obtains and uses for the contract, and we have added language to this effect.

Another issue of interest to commenters was an NPRM proposal that, for the value of a DBE contract to be counted toward goals, at least 30 percent of the work of the contract must be performed with its own forces. The idea behind this proposal was that such a requirement would limit the possibility of "pass-throughs." Twenty-six comments favored a requirement of this type set at a level of at least 30 percent (a number of these comments favored higher levels, such as 60-75 percent, or supported recipient discretion to establish such a limit). Seventeen comments opposed such a provision, most saying that it would hurt contractors whose work is material-intensive.

The Department believes that a mechanism of this kind would be useful in preventing pass-throughs and in making sure that DBEs really have a sufficient role in performing contracts for which they obtain credit. The SNPRM therefore would provide that a DBE contractor that does not perform at least 30 percent of the contract is rebuttably presumed not to be performing

a commercially useful function. The comments opposing this proposal may have misunderstood its implications for material-intensive contracts. This provision (and the existing FHWA practice for prime contractors on which it is based) does not interfere with such contracts: if the contractor is responsible for the materials (i.e., as the comment referred to above suggested, if the DBE negotiates price, determines quantities, orders the material, and installs and pays for the material itself), the portion of the contract represented by the materials is viewed as being performed by the contractor. Language referring to this concept has been included in the SNPRM.

Another issue raised by the December 1992 NPRM is so-called "back-subbing." A non-DBE prime contractor subcontracts a portion of the work of the contract to a DBE. The DBE, in turn, subcontracts a portion of its work back to the prime contractor. Forty-eight comments agreed that work subcontracted back to the prime contractor by a DBE subcontractor should not be counted toward the goals, since it is work performed by the prime contractor, not by the DBE. A number of these comments suggested that the prohibition on counting work subcontracted out by DBEs should apply to work subcontracted to any non-DBE, not just a prime contractor. Some of these comments would make exceptions for what they viewed as customary practices such as equipment rental in certain industries. Ten comments opposed this proposal, saying that such practices as backcharging from the prime to the subcontractor or equipment rental from non-DBEs are normal, constructive industry practices.

Work performed by non-DBE contractors (primes or others) on the basis of subcontracts from DBE subcontractors may well be legitimate in various contexts, as distinct from an attempt to circumvent the DBE program. Whatever else it is, however, it is not work performed by a DBE. The

Department believes it makes sense to count toward DBE goals only work that is actually performed by DBEs, and the SNPRM proposes that work performed by a non-DBE subcontractor on the basis of a subcontract from a DBE subcontractor would not count toward DBE goals.

In response to the comments concerned about equipment rentals, the SNPRM provision includes an exception for such rentals, as long as the equipment is rented from someone other than the prime contractor or its affiliate. Supplies would be treated in the same way. This approach recognizes the legitimacy of the DBE's need to acquire equipment and supplies from outside sources in some instances, while guarding against attempts by prime contractors to claim DBE credit for the use of their own materials and equipment.

One issue that comments addressed here, as well as under other provisions of the rule, concerns what happens to DBE credit from a firm that a recipient decertifies while a contract is underway. Six comments favored continuing DBE credit for a contract begun in good faith with a then-certified DBE. One recipient suggested that the credit could continue to be counted toward the prime contractor's goal, but not toward the recipient's overall goal. The SNPRM adopts the recipient's suggestion, which seems a good balance between fairness to contractors and the point that credit to non-DBE firms should not be reflected as DBE goal achievements.

There were a variety of comments on other matters. Eight comments favored, and eight opposed, not crediting DBE participation to prime contractors until the DBE is paid. For purposes of awarding contracts, of course, recipients must operate on the basis of commitments to DBE participation. However, it is administratively feasible not to credit DBE

participation to a contractor's goal attainment until the DBE has been paid for the work in question, and the SNPRM proposes such a provision.

Other comments asked for clarification of the commercially useful function, regular dealer, and normal industry practices concepts. A few comments asked for clarification on awarding DBE credit for DBE trucking companies, a particular concern being companies that lease all or most of their trucks from non-DBEs. The SNPRM would presume that a DBE trucking company that does not own at least 50 percent of the trucks it uses for a particular contract does not perform a commercially useful function on that contract. This presumption could be overcome by a determination by the recipient that the firm is performing a commercially useful function in light of normal industry practices.

Finally, a few comments supported the notion of the "carry-forward" of DBE credit. That is, if a prime contractor gets 15 percent DBE participation on a contract with a 10 percent goal, then the "extra" 5 percent credit could be applied to meeting its goal on its next prime contract with the recipient, allowing it to obtain only five percent "new" DBE participation on the second contract. The Department has not adopted this idea, because we believe it would lead to an inappropriate focus on merely meeting minimum requirements.

Only the work of DBEs, of course, may be counted toward DBE goals. If a formerly certified firm does not have a certification that is current at the time a contract is executed (e.g., it has been decertified, it has allowed its certification to lapse), then it cannot satisfy DBE requirements. For example, suppose a DBE prime contractor is identified as the apparent successful bidder for a contract in July. The contract is to be executed in September. In August, however, the firm loses its certification. The recipient cannot use the contract

to meet DBE goals, and the firm would have to meet a DBE contract goal (assuming there was one on the contract) the same way any other non-DBE prime contractor would.

## SUBPART D - CERTIFICATION STANDARDS

The clarification of certification standards is one of the most important purposes of this SNPRM. Recipients and contractors should be aware that the certification standards in this subpart, while not yet formally in effect, represent the Department's interpretations of current Part 23 standards. Recipients should use this material as guidance in applying existing standards to the facts of certification cases.

The SBA is proposing new certification standards and procedures for the 8(a) and 8(d) program, which concern Federal procurement. These standards and procedures are similar in some ways, and differ in other ways, from the proposed Part 26 standards and procedures. The Department seeks comment on whether, in various specific respects, DOT should alter any of its proposed standards to more closely resemble the proposed SBA standards. During and after the comment period, DOT anticipates working with SBA to explore areas where greater convergence between the standards and procedures of the two agencies may be useful.

### §26.51 How are burdens of proof allocated in the certification process?

The purpose of this section is to state clearly who must prove what in certification matters. The December 1992 NPRM proposed that the applicant must bear the burden of proof that it meets eligibility criteria. Forty two comments agreed with this proposal, 36 of them supporting the "preponderance of the evidence" standard, which the SNPRM proposes to

adopt. This standard means, in essence, that on balance, the recipient must be able to determine that the applicant more likely than not meets each of the basic certification standards: group membership, business size, ownership, and control. The applicant is responsible for demonstrating to the recipient that it meets each of these standards by a preponderance of the evidence. If the applicant fails to carry this burden, then the recipient would not certify it. Six comments favored the higher "clear and convincing evidence" standard, which the Department believes is too stringent for this purpose.

There is a major exception to the general rule that the applicant bears the burden of proof on the elements of certification. Because the statutes authorizing this program provide that members of the designated groups are presumed to be socially and economically disadvantaged, applicants who are members of these groups do not have the burden of proving to the recipient that they are disadvantaged. (As noted above, these individuals do have a burden of proof with respect to group membership, however.) Other individuals, as well as designated group members whose presumption of disadvantage has been rebutted, would have the burden of proving, by a preponderance of the evidence, that they are disadvantaged. How the presumption is rebutted is discussed below in the section on social and economic disadvantage.

The December 1992 NPRM said that recipients should avoid "single factor" determinations about certification and should make determinations based on all the facts. Eleven comments supported this position, while 13 others opposed it or asked for clarification. Most of the latter noted that there could be a single large factor (e.g., the disadvantaged individual didn't own the company) that outweighed everything else. To avoid the confusion that some commenters noted, we have not incorporated the "single factor"

language in the SNPRM, but it clearly states that the recipient would have to consider all the facts in the record, viewed as a whole, in deciding whether an applicant has met its burden of proof. A single fact or problem would prevent certification only where it prevented the applicant from making its case by a preponderance of the evidence.

**§26.53 What rules govern group membership determinations?**

Group membership is important in making certification decisions because only members of the designated groups enjoy the presumption of disadvantage. Individuals outside these groups must make individual showings of disadvantage in order to be eligible. In many cases, membership in a designated group will be obvious (e.g., women, many Black Americans). The SNPRM does not require recipients to make any special inquiry in these cases. Rather, the recipient would simply accept the obvious. In other cases (e.g., some American Indians, Hispanics, or Asian-Americans) there may be individuals whose membership in a designated group is not obvious to the recipient. When the recipient has reason to question the claimed group membership of an individual, the recipient would require the individual to demonstrate, by a preponderance of the evidence, that he is a member of the group.

There were few comments on this section. Most of them concerned American Indians, a category which a number of comments thought was subject to abuse by persons with little Indian ancestry and little connection with Indian communities. These comments proposed that guidance concerning group membership of Indians be clarified and that recipients be authorized to require documentation of group membership. The Department agrees, and we intend to provide additional guidance concerning group

membership when the final rule is issued,. The SNPRM would specifically authorize recipients to require applicants to produce appropriate documentation of group membership.

**§26.55 What rules govern business size determinations?**

The Department's business size criteria are established by statute. There are two criteria, both of which a firm must meet in order to be eligible. First, a firm must meet SBA small business size criteria, which are found in 13 CFR Part 121. Second, a firm must not exceed an average annual receipts cap required by statute. The proposed section reflects the Department's contemplated adjustment of the current cap ($16.6 million) to $17.77 million. The Department anticipates publishing a Federal Register notice in the near future making this adjustment.

Many of the comments on size standards asked for changes that could be accomplished only by legislative amendments. Eight comments thought the gross receipts cap was too high (e.g., one comment said that even non-DBE prime contractors in its jurisdiction fell under the cap) while four (e.g., a petroleum products distributor) thought it was too low. Commenters in both camps, plus a few additional comments, thought that recipients should have discretion to adjust the cap to fit local conditions better. Four commenters thought that we should use only the cap, without involving the SBA size standards. Six other comments thought that DOT should develop its own size standards to replace reliance on SBA standards.

Six comments said that the SBA size standard for architectural and engineering (A & E) firms was too low and had not changed in many years. We suggest that, if members of a particular industry believe that their SBA size standard is inappropriate, they work with SBA to see if SBA will alter

the standard. Such firms are in a better position than DOT to advocate the merits of such a change to SBA.

One comment said that there needed to be different size standards for airport concessionaires. Subpart G contains FAA-developed size standards for airport concessionaires that differ from the size standards of this section, and which control for airport concession purposes. Finally, three comments asked for guidance on how to deal with situations in which a firm may work in more than one area. The size standard for each area may differ. The Department plans to issue guidance on this subject when the final rule is issued.

**§26.57 What rule determine determinations of social and economic disadvantage?**

The presumption of social and economic disadvantage for members of the designated groups has always been rebuttable in the Department's DBE program. The problem has been how to determine when the presumption has been rebutted. There has been substantial uncertainty on recipients' parts on what is necessary to rebut the presumption, with the result that there have been few proceedings under current §23.69 to remove the presumption from members of the designated groups.

The December 1992 NPRM proposed to address this problem by directing each presumptively disadvantaged owner of an applicant firm to submit a statement of personal net worth (PNW) with the application. If the statement showed that the individual's net worth was over $750,000, then the presumption of that individual's social and economic disadvantage would be rebutted, and the individual would have to demonstrate his or her disadvantage on a case-by-case basis. (The $750,000

number was suggested by SBA's PNW standard for owners of 8(d) program firms. See 13 CFR §124.106(b)). This relatively simple, bright line, across-the-board approach was also intended to prevent the possibility of abuses in which recipients might target a particular firm or class of firms for inquiry into social and economic disadvantage.

This proposal was the subject of extensive comment. Forty comments supported the NPRM approach, or something like it, basically for the reasons stated in the December 1992 NPRM. A few of these comments supported a more draconian approach, in which an applicant with a PNW of over $750,000 would be barred from participating in the program, with no possibility of an individual showing of disadvantage. Another 24 comments disagreed with the $750,000 number. Exactly half of this group thought the number should be lower (e.g., $250,000 - $500,000) while the other half thought it should be higher (e.g., $1 - $2.75 million). Those who wanted it lower generally thought that the program should not include persons who were affluent enough to have PNW in the mid-six figures range, while those who wanted it higher said that a low figure would limit the borrowing power and ability to expand of DBE firms. A few comments also supported recipients having discretion to set their own threshold.

Fifty-six comments opposed using a PNW threshold at all. They said that the bias that creates disadvantage for minority and women owners has little to do with personal net worth, and that until that bias is eradicated, a PNW threshold was inappropriate. They said it penalizes success. Some of these comments said that PNW was based on a paper accounting of assets, including many that had little to do with the ability of someone to succeed in business. It would be difficult to administer, particularly where firms

have multiple owners. It would limit the ability of businesses to expand (i.e., banks and bonding companies often demand that the personal assets of a small business owner guarantee the loan or bond, and if personal assets are limited by this rule, then financing or bonding becomes more difficult). Many comments expressed strong concern about the adverse impact on personal financial privacy of being required to submit personal financial statements to the recipient with all applications. Requiring this information with the application is inconsistent with the statutory presumption, other comments asserted, as well as being a substantial additional paperwork burden on applicants. Many also disagreed with using a number derived from SBA programs, which they saw as very different from the DBE program.

Among other miscellaneous comments were suggestions that spouse's assets, the owner's house, and/or business assets be counted in calculating PNW. Some comments suggested that owners should certify that their PNW was within the threshold or only send PNW information to the recipient as part of a due process proceeding that was challenging the firm's disadvantage.

The Department believes that its original purposes for the $750,000 threshold proposal were valid: establishing a clearly understandable standard for rebuttal of the presumption of disadvantage and preventing potential abuses that single out certain DBEs or classes of DBEs for unfavorable treatment. At the same time, the Department is persuaded that some of the flaws noted by comments that opposed the NPRM proposal -- adverse effect on privacy, inconsistency with the statutory presumption, administrative difficulties, additional paperwork burden, etc. -- should be considered.

For these reasons, the Department is proposing to adopt a modified version of its NPRM proposal. Recipients would be prohibited from requiring owners to prove their social and economic disadvantage as part of the application process. However, in order to have relevant information to enable them to make determinations about whether there should be inquiry into the disadvantage of applicants, the applicants would have to submit a signed certification that they are socially and economically disadvantaged and a brief summary statement of their personal net worth, which the recipient would have to keep confidential. The applicant would not be required to submit actual personal financial data (e.g., personal income tax returns or a detailed financial statement) documenting the information in the summary statement, however. These provisions are intended to balance applicants' interest in protecting the privacy of financial data and in avoiding unnecessary paperwork with recipients' interest in having sufficient information to determine when further investigation of disadvantage is needed.

Under the SNPRM, if a recipient has a reasonable basis to believe that an owner may not be disadvantaged (e.g., from summary statement of PNW, information provided by third parties, or other information available to the recipient), the recipient could commence a proceeding to determine whether the presumption of disadvantage should be removed from the individual. This proceeding would use the same due process procedures that the recipient uses in a decertification proceeding. The recipient would bear the burden of proving that the individual was not disadvantaged, by a preponderance of the evidence standard. In order to ensure that the statutory presumption is given proper effect, the recipient would not begin such a proceeding until it had determined that the individual(s) in question

owned and controlled the firm. However, to prevent contracts from being awarded to a firm that might not ultimately be owned and controlled by disadvantaged individuals, the recipient could hold the firm's certification in abeyance until the conclusion of the proceeding concerning the owner's disadvantage.

The SNPRM leaves open for further comment the issue of the amount of the threshold. There was considerable disagreement about the proper amount, and the Department asks commenters to provide, if possible, data or even anecdotal information about the potential effects of different thresholds. In doing so, commenters should be aware that this issue concerns the wealth of the owner, not the size of the business. How wealthy can an individual be before he or she ceases to be reasonably regarded as disadvantaged? This is not an abstract inquiry. The legitimacy of the DBE program rests, in part, on being perceived by the public and the courts as fair and as helping the people it is intended to help. Participation in the program by someone who is a strong candidate for air time on "Lifestyles of the Rich and Famous" can only undermine the program's credibility.

The Department seeks comment on whether it would be feasible to have recipients, unified certification process entities, or regional consortiums establish variations on the net worth of persons participating in the program. Doing so could increase flexibility in the program, but could also lead to a variety of inconsistent standards. The Department also seeks comment on whether there are other indices of individual social and/or economic disadvantage -- other than personal net worth -- that the rule should focus on to assist recipients in making disadvantage determinations.

The Department does not agree with those comments that favored using a PNW standard as an absolute cutoff for program eligibility, without the possibility of an individual being able to demonstrate eligibility on a case-by-case basis. Under the DBE program, all persons who are not entitled to the presumption of eligibility may make an individual demonstration of eligibility, and we believe that this should remain the case for persons who lose the presumption by virtue of a PNW over the applicable threshold as well as those who are not members of one of the designated groups.

Another issue concerned what standards recipients should use to make individual determinations of social and economic disadvantage. The December 1992 NORM proposed using standards based on SBA 8(a) standards (13 CFR §124.106(a)). Nine comments favored, and 10 opposed, this approach. The opponents pointed to differences between SBA programs and the DOT DBE program that could lead to confusion; proponents believed the standards were appropriate. The Department will retain SBA standards as the basis for guidance on making individual determinations of social and economic disadvantage, there being no other or better standards of which the Department is aware. However, as one comment pointed out, there are some inconsistencies between SBA standards and requirements of the DOT DBE program. Rather than simply incorporate or copy the SBA standards, therefore, Appendix F would modify the standards to ensure a good fit with the DOT program.

At times, firms certified under the SBA 8(a) program seek to participate in the DBE program. Under Part 23, the Department had said that, since these firms had been determined by another Federal agency to be owned and controlled by socially and economically disadvantaged individuals, recipients were required to accept their 8(a) certifications as

valid for DBE program purposes. Recipients could not look behind the 8(a) certification to deny certification to such a firm based on the recipients' own evaluation of its ownership and control. Over the years, the Department had heard from recipients that this requirement resulted in their having to use 8(a) firms they believed to be ineligible under DBE program criteria. Therefore, the December 1992 NØRM proposed to allow recipients to look behind 8(a) certifications in some circumstances.

Nine commenters supported the NØRM provision, saying that too many questionable firms have 8(a) status, that size and other criteria differed between the programs, and that they had difficulty in securing assistance from SBA in reviewing the eligibility of 8(a) firms whose eligibility they questioned. Four commenters supported the existing rule's approach, one of them suggesting that there should a memorandum of understanding between DOT and SBA on the subject.

The Department believes, with the latter group of commenters, that deference to the eligibility determinations of SBA is warranted. At the same time, when a recipient has a reasonable belief that a firm is not eligible, we believe that it is contrary to the goals of the program to preclude inquiry. To balance both these concerns, the SNPRM would establish a presumption that an 8(a) firm is owned and controlled by socially and economically disadvantaged individuals. (The firm would have to demonstrate that it meets the DOT gross receipts cap and SBA size criteria for the type of work it was to perform as a DBE.) However, if the recipient had a reasonable basis to believe that the firm or its owner fails to meet Part 26 ownership, control, or disadvantaged status criteria, the recipient would request a response to these concerns from SBA. Taking into account SBA's response (or after 60

days, if SBA had not responded), the recipient could, on the basis of these concerns, initiate an eligibility removal proceeding under §26.77.

**§26.59 What rules govern determinations of ownership?**

This section and the control section respond to the need to reinvent the certification standards in the existing Part 23. These sections have provided insufficient guidance to recipients and other participants, resulting in inconsistent and burdensome interpretations and decisions concerning certification. This situation has resulted in DBEs unfairly being denied certification and permitted the certification of firms who should not participate. To ensure that ineligible firms are screened out properly, and that applicants are not treated unfairly, the Department is proposing to provide clearer and more precise standards.

The December 1992 NORM, like Part 23, said that contributions of capital <u>or</u> expertise can count toward ownership. The December 1992 NORM proposed to clarify the circumstances under which expertise may be counted as the contribution to acquire ownership. The December 1992 NORM said that the expertise must be in areas critical to the firm's operation, specific to the type of work the firm performs, and documented in the records of the firm. These records would have to show clearly the contributions of expertise and their value to the firm.

There were 23 comments on this issue, 19 of which supported the proposal. A few of these comments suggested minor modifications. One suggested that the rule should allow contributions of expertise in areas related to the firm's operations, another that under most circumstances business administration skills (e.g., bookkeeping, accounting, office supervision) should not be counted, a third that contributions of expertise

should be limited (i.e., to 60 percent of the 51 percent of the firm needed to establish ownership), and a fourth that the contribution should be entered in to corporate documents at the time it arises.

The Department has decided to adopt the NØRM proposal unchanged. The SNPRM would therefore allow business owners who bring a special expertise, but relatively little capital, to a company to establish their ownership. At the same time, the provision provides standards to recipients on how to evaluate these situations. One requirement is that the expertise be specific to the type of work the firm performs. This would exclude, in most instances, general business administration experience from counting. The requirement that the expertise be in areas critical to the firm's operations has sufficient flexibility to allow for expertise in areas closely related to its operations. The Department does not see a rational basis for a specific percentage limitation on the amount of expertise that can be contributed, and it is probably asking too much of a firm to enter details about the contribution of expertise in its records at the time the issue arises, since the firm may not know at that time that it is planning to seek DBE participation.

Part 23 said that no assets held in trust could be counted toward DBE ownership. Early in the implementation of Part 23, the Department interpreted this provision liberally, to allow assets held in trust to be counted in some situations. The December 1992 NØRM proposed to codify this interpretation, allowing trusts to be counted where the trustee and the beneficial owner were disadvantaged individuals or the disadvantaged beneficial owner clearly controlled the company. Seven comments supported the NØRM provision and 11 opposed it. Two comments on each

side of the issue raised the question of whether living trusts should be counted.

The SNPRM will adopt the NØRM provision, with the addition that assets held in a revocable living trust may not be counted toward ownership in any circumstances. Since such a trust can be revoked, there is continuing uncertainty about the beneficial owner's possession of the assets. Irrevocable living trusts can be counted if they meet other requirements of the section. Otherwise, the provision meets the original purpose of the "no trusts" provision, which was to ensure that titular ownership of assets did not count when the power to control the assets lay with a non-disadvantaged person or organization. If the disadvantaged beneficial owner is also the trustee, or the trustee is also a disadvantaged individual, then this problem does not arise. Also, if it is clear that the disadvantaged beneficial owner controls the firm, and the non-disadvantaged trustee does not, the problem does not arise.

Part 23 said nothing specific about assets acquired through such means as gifts, divorce settlements, and inheritances. Recipients have taken a variety of positions on whether assets acquired through these means constitute a "real and substantial" contribution of capital that can count toward ownership. The December 1992 NØRM provided that, while the recipient could take such circumstances into account, recipients could not disregard assets solely because they were acquired by these means.

Six comments favored the NØRM provision, though two of these requested greater specificity. Thirty-one comments opposed one or more provisions of the December 1992 NØRM. The general concern of these commenters is that allowing ownership based on assets acquired through these means would make it easier for fronts to get into the program. It was

gifts -- particularly interspousal gifts -- that commenters were most concerned about. Several of these commenters thought transfers resulting from death or divorce were less troublesome, though others thought where the assets in these cases had been generated through efforts of non-disadvantaged persons, even the irrevocable turnover of the assets to disadvantaged persons in these cases should not result in the assets being counted.

The Department is responding to the comments by introducing more specificity into this portion of the rule. First, the Department believes that assets transferred as the result of death or divorce should always be counted toward ownership. Assets or ownership interests passed through inheritance become the property of the beneficiary, and the decedent, absent supernatural intervention beyond the Department's regulatory jurisdiction, will play no further role in the affairs of the company. Likewise, when assets pass from one spouse to another via a property settlement or other formal resolution of a divorce or legal separation, the assets or ownership interest becomes the property of the party in question, and the former spouse -- unless there is some term or condition of the settlement or decree to the contrary -- loses all control over the assets. It is very difficult to argue that assets so wholly belonging to an individual, with the former owner out of the picture, should not be counted toward ownership.

On the other hand, the Department is persuaded that many gifts (including transfers not based on adequate consideration) are problematical. The limitation we propose to place on gifts in the SNPRM relates to the identity of the donor and the donor's relationship to the firm seeking certification. If a non-disadvantaged individual who is involved in (1) the firm seeking certification, (2) any affiliate of the firm, (3) a firm in the same

or a similar line of business, or (4) a firm having an ongoing business relationship with the firm seeking certification gives assets or an interest in the business to the applicant, then those assets are presumed not to count toward ownership. To overcome this presumption, the applicant must show clear and convincing evidence -- a high standard -- that the transfer was made for reasons other than DBE certification and that the applicant really does own and control the firm.

The Department believes these limitations will cover the great majority of situations in which gifts can be used to circumvent the intent of the ownership requirements. In other situations, such as a gift from one disadvantaged individual to another, while the recipient may review the situation, the recipient could not rule out counting the assets involved toward ownership just because they result from a gift.

One subject about which the Department has often received requests for clarification is the role of marital assets. This was also a topic on which Part 23 did not provide explicit guidance. The December 1992 NORM proposed that when joint or community property assets are used to acquire the disadvantaged spouse's ownership interest in the applicant firm, the recipient would count these assets as belonging to the disadvantaged owner if the other spouse formally renounced all rights of ownership in the assets. The December 1992 NORM proposed that spousal co-signature on documents involved with ownership of the firm would not constitute a ground for finding the firm ineligible on ownership grounds. The December 1992 NORM also said that a higher level of scrutiny should be given to situations where one spouse's assets are transferred to the other.

There were relatively few comments on these subjects, which were fairly evenly divided. Five comments supported the marital assets

provision, while four others supported simply relying on a 50/50 split in such assets and one opposed counting marital assets that had not been segregated prior to the firm's application. Five comments supported the spousal co-signature provision, while six opposed it. Some comments on both sides of this issue said that co-signature should be a "red flag" for recipients. The Department would retain both provisions. Recipients could consider spousal co-signature, but could not determine that a firm is ineligible on this ground alone. The provision concerning interspousal transfers of assets (transfers for adequate consideration, since gifts are treated elsewhere) would be made more specific. The SNPRM would give recipients direction to give particularly close and careful scrutiny in this situation to make sure that the firm is owned and controlled by a disadvantaged individual.

The NPRM preamble asked whether there should be additional limitations on ownership by non-disadvantaged persons in DBE firms. That is, should non-disadvantaged participants be limited to less than the 49 percent stake in a firm possible under Part 23? Again, comments were divided. Twenty-five comments supported more stringent limits, ranging from 10-40 percent. These comments generally said that such a provision would make it less likely that fronts or marginal DBE firms could participate. Twenty-six comments opposed change, mostly on the ground that such a limit would limit the availability of needed capital to DBEs, especially to start-up companies. The Department has decided not to make a change, for the reason suggested by the commenters and because a change (especially a stringent limit like 10 percent) could have very disruptive effects on many currently-certified DBEs and on recipients' programs.

A few comments asked for more specificity on the meaning of the 51 percent stock ownership requirement for corporations. This issue has arisen in some cases where corporations are organized with two or more classes of stock. Should the 51 percent requirement apply to the total of all stock, to the voting stock, or to each class of stock independently? The Department believes the most reasonable answer to this question is that the disadvantaged owner(s) must own 51 percent of all stock (i.e., the combined total) in order to meet ownership requirements. (Of course, a disadvantaged owner who did not own 51 percent of voting stock could not control a firm.) The SNPRM would add a parallel requirement for businesses organized as partnerships, based on SBA regulatory provisions.

**§26.61 What rules govern determinations concerning control?**

The December 1992 NPRM proposed that a DBE must be an independent firm, whose disadvantaged owners control its day-to-day operations as well as its overall management. It proposed clarifications of the details of making control determinations at a number of points, which often codified existing DOT interpretations of the rule.

One of these clarifications concerned the role of occupational or professional licenses. Some recipients had taken the position that a disadvantaged owner must personally possess such a license in order to control a firm. The December 1992 NPRM proposed that personal holding of the license be essential for certification only where state law mandated that the person controlling such a firm possess the license. Otherwise, holding a license would be only one of the various factors taken into account by the recipient. Seven comments supported and five opposed this proposal. Some of the latter said that the individual should be required to

hold the license for certification purposes even if state law did not require it for other purposes. Comments on the other side of the issue said that it was unfair to require more of DBE firms than others, that it was common business practice in some places for a firm to hire the licensee as an employee, and that experience in the type of work could confer enough ability to control a firm even in the absence of a license.

We believe that the December 1992 proposal makes good sense. Except where expressly mandated by state law as a condition of controlling a firm, we believe it best, in a program intended to facilitate the entry of new businesses into the market, to de-emphasize formal barriers to entry. It is better to make control decisions on the basis of the individual reality of each firm than to rely on a surrogate for determining whether an individual in fact controls the firm.

The Department has interpreted its regulation, since the mid-1980s, as permitting the delegation of functions by disadvantaged business owners. A certification appeal and ensuing litigation in the 1980s established that disadvantaged owners can delegate authority and functions to non-disadvantaged participants, as long as they retain actual control over the firm. This interpretation also states that the disadvantaged owners are not required to have expertise or experience superior to that of other participants in the firm, but must have the ability to intelligently and critically evaluate information provided by others and make their own decisions based on that information. This interpretation provided the basis for the NPRM provision on the delegation/expertise issue.

Comments were evenly divided on this issue. The 18 comments that opposed or expressed serious concern about the proposal (some of which appeared not to be aware that it had been DOT's interpretation of Part 23 for

several years) thought that this approach could make it too easy for fronts to enter the program. They stressed the importance of disadvantaged owners having personal expertise in their firms' field of work. Two of the comments thought the proposal was ill-advised because it would increase the market share of white female owned firms at the expense of minority-owned firms. One thought an owner should be able to perform all the tasks his or her company performs, even if not regularly performing them. Two commenters said that owners should be required to have experience or expertise in every critical area of the firm's operations. Others thought that owners should never have less expertise than employees. One suggested that general business administration experience should never, standing alone, be viewed as providing enough expertise to control a company.

An equal number of comments supported the NØRM provision, generally saying that it accurately reflected the reality of business practice. Some of these commenters also said that business administration experience should be counted for control experience. As one commenter noted, being able to keep the financial and administrative sides of a business afloat can be just as critical as experience in driving a truck or operating a grader.

The Department has decided to retain the NØRM provision with a few modifications. In our view, once a firm grows beyond the one-person shop stage, delegation is essential. The more successful or complex a firm becomes, the more inevitable delegation becomes. It is fanciful to imagine that one or a few owners can or should do, or be prepared to do, everything that a firm does. As long as the owners can take back authority they have delegated, retain hiring and firing authority, and continue to "run the

show" for the company, they control it, notwithstanding delegation of some authority and functions.

With respect to expertise, the disadvantaged owners must, in our view, generally understand and be competent with respect to the substance of the firm's business. We agree with commenters who say that generally (aside, perhaps, from a firm whose substantive business is providing business administration services) generic business administration experience is insufficient, by itself, to meet this standard. However, the disadvantaged owners need not have extensive experience or expertise in everything the company does, even in all critical areas, or have more experience or expertise than some employees or managers, so long as the owners are able to intelligently and critically evaluate information their subordinates provide and use the information to make independent decisions. We find it difficult to accept the proposition that an individual who exercises this ability is not controlling his or her firm or is acting as a front for some other party.

The December 1992 NPRM addressed the issue of the relative pay levels of owners and other participants. It proposed that the fact that the disadvantaged owner took a lower salary than a non-disadvantaged key employee did not necessarily mean that the owner did not control the firm, even though the recipient could consider this disparity as one factor in reviewing control. Nine comments supported this proposal, one cautioning that the firm should be able to show a good reason for the disparity. Five comments cautioned that recipients needed to continue to look at relative salary levels, since a lower salary for the owner could indicate a "front" situation. One of these suggested that no non-

disadvantaged participant should have a higher salary than a disadvantaged owner.

The SNPRM follows the NPRM provision, affirming that it is appropriate for recipients to scrutinize relative salary levels in a firm. In doing so, recipients should take into account the duties of the persons involved, normal industry practices, the firm's policy concerning reinvestment of income, and other reasons provided. Because there are common circumstances in which an owner may choose to take a lower salary than he or she may have to pay to certain key employees, a difference of this kind does not necessarily mean that the owner does not control the firm. We are adding a sentence specifying that where a firm used to be owned by a non-disadvantaged person and is now owned by a disadvantaged person, a difference in remuneration between the former and present owner can be taken into account by recipients.

The December 1992 NPRM proposed that recipients treat non-disadvantaged family members the same as other non-disadvantaged participants in DBE firms. The participation of family members in a firm should not be viewed as meaning that a disadvantaged individual fails to control a firm, the December 1992 NPRM said. Seven comments supported the NPRM proposal, one mentioning concern that some recipients appeared to apply a *per se* rule against firms that employ family members. Fourteen other comments expressed various concerns about the proposal. One said that the NPRM statement was true but too obvious to include in the rule. Two expressed concern about businesses that appear to be run by an entire family as a unit. Two others expressed concern about firms that used to be run by a male relative or still do a lot of work with businesses run by male relatives. One wanted to make sure that family member

involvement could be reviewed by recipients, while another favored banning participation by non-disadvantaged family members. The underlying concern of these comments appeared to be that family-run businesses were subject to being used to circumvent requirements of the rule.

The Department believes that its basic statement in the December 1992 NPRM is the most sensible way of looking at the participation of non-disadvantaged family members in a firm. The rule recognizes only two kinds of people in the world: socially and economically disadvantaged individuals and others. Generally, there seems little basis for treating "others" who are family members differently from "others" who are unrelated, and non-disadvantaged family members may participate in a DBE firm on the same basis as any other non-disadvantaged persons. Except as otherwise provided in the rule, the recipient could not apply a more stringent standard to situations in which family members participate.

However, in response to comments as well as the Department's experience in working with the DBE program, the SNPRM would provide that where the recipient cannot discern that the disadvantaged owners themselves, as distinct from the family unit as a whole, independently control the firm, the applicant has not demonstrated control. In addition, given concerns about firms owned and controlled by white males being transferred to their wives or female relatives and allegedly continuing to operate as before, the SNPRM would add a provision designed to deter this practice. Where the white male or other non-disadvantaged owner continues to be involved with the firm, the current disadvantaged owner would have to meet a higher burden of proof -- clear and convincing evidence -- concerning ownership and control. The owner must also

demonstrate by this higher burden of proof that the transfer of ownership and control was made for reasons other than gaining certification in the DBE program. The Department believes that the combination of provisions on "family businesses" should avoid unfairness to businesses that legitimately employ family members while preventing abuses.

Two comments asked that the regulation specify that a firm could be controlled by disadvantaged persons even though it leased, rather than owned, equipment. The SNPRM responds by stating that the recipient could consider this factor, but could not find a firm to be not controlled by its disadvantaged owners solely because it leases or rents equipment, where doing so 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.

In the context of its discussion of the DBE directory, the December 1992 NORM said that recipients should certify and reflect DBEs simply as DBEs, not as a particular sort of firm. Twenty-six comments, mostly from recipients, objected, their basic argument being that recipients should certify firms to perform only those types of work in which the expertise and experience of the owners allowed them to control. Many of these comments preferred certification by SIC code, while some went further and wished to prequalify DBE firms. Some other comments suggested that the Department should avoid authorizing recipients to take steps that could pigeonhole DBE firms in a particular type of work and inhibit their ability to diversify.

In response to these comments, the Department proposes adding a provision that tells recipients to grant certification to firms only for specific types of work in which the owners have the ability to control the firms.

However, to become certified in an additional area, the firm need only demonstrate that its owners have the ability to control the firm in this type of work as well. A complete recertification or new application would not be needed.

Because the Department has received a number of questions about how partnerships and franchises should be handled under the rule, the SNPRM would add paragraphs on these subjects. The provision concerning franchises has been adopted from the Department's regulation concerning the DBE program for airport concessions (see Subpart G). The provision generally permits franchises to participate in the program, notwithstanding the requirements that franchisers place on them with respect to some aspects of the business. As a policy matter, we do not wish to exclude all franchises, which may be an important route for disadvantaged individuals to enter the market. However, if the ties between franchiser and franchisee are so close as to constitute affiliation, then the franchisee could not participate as a DBE.

With respect to partnerships, the basic requirement would be that, in addition to other control criteria, the non-disadvantaged partners cannot have the power, without the concurrence of the disadvantaged partners, to commit the partnership in a contract or to take actions that subject the partnership to contract or tort liability. On another subject, a sentence would be added to this section to clarify that, for control purposes, the socially and economically disadvantaged owners must own and control 51 percent of the voting stock. Finally, in response to issues that have been raised in certification appeals and in questions to DOT staff, the SNPRM adds a paragraph saying that to be viewed as controlling a firm, a disadvantaged owner cannot engage in outside employment or business

interests that prevent the individual from devoting enough time and attention to his duties with the firm. For example, it is unlikely that an individual could control a full-time firm while he spent only part of his or her time working with the business.

**§26.63 What are other rules affecting certification?**

This section includes several miscellaneous provisions concerning certification. One of them concerns the role of not-for-profit organizations in the DBE program. The December 1992 NORM proposed to maintain the Department's long-standing policy of excluding such organizations. Thirty-three commenters agreed, citing such reasons as that the program was designed for entrepreneurs and that the not-for-profit sector has a different, generally more favorable, tax status. Four commenters favored allowing not-for-profits to participate, because they often included useful community organizations, could help individuals with disabilities enter the program, and because some may specialize in technical assistance to DBEs. The Department will retain its existing policy. The basic purpose of this program is to assist firms in entering into and succeeding within the competitive business marketplace. Not-for-profit organizations are often very worthy and useful, but assisting them does not achieve this purpose. The different tax and legal status of not-for-profit organizations in most jurisdictions also weights against permitting them to be certified as DBEs in competition with for-profit businesses.

The December 1992 NORM proposed to specify that certification decisions be made on the basis of the present, not the past, status of the firm Eleven comments supported this proposal, while five said that recipients should be able to take the firm's history into account in making certification

decisions. We agree with one of the former group that said that this provision should not be construed to preclude a recipient taking action against a DBE for previous fraudulent or deceptive conduct that has come to light. We disagree with a comment in the latter group that suggested that if a firm applies for certification in Year 1, is turned down for lack of expertise on the part of the disadvantaged owner, and reapplies in Year 3 after the owner has acquired the needed expertise, the recipient should have discretion to refuse certification again based on the owner's lack of expertise in Year 1. If the owner now has enough expertise to control the firm, it is illogical to say that he or she is ineligible today because of a three-year-old expertise deficit that has since been corrected. Certainly no one would argue that a firm that was eligible three years ago must be retained as a certified DBE when its circumstances change so that it presently fails to meet ownership and control criteria. The same rationale applies in both directions.

A few comments suggested that recipients should be able to use "commercially useful function" as a certification or recertification criterion. The Department disagrees. "Commercially useful function" is a concept that concerns solely how credit is counted toward goals for a DBE that has already been certified. It is a contract-specific concept: a DBE may perform a commercially useful function on one contract but not on another. It has nothing to do with determining group membership, disadvantage, size, ownership, or control, which are the factors involved in certification. We agree with those comments that said that a pattern of conduct designed to evade program requirements, which can include such things as repeated instances of operating as a "pass-through" for prime contractors, can be taken into account in certification decisions, however.

A few other commenters suggested that there should be, in effect, a prequalification standard for businesses seeking certification, so that only "viable" businesses entered the program. The Department believes that it is appropriate to require prequalification for DBEs only if prequalification is required for all contractors. To require more of DBEs than of other participants would, in our view, be discriminatory. Policy on prequalification is at the recipient's discretion, but the policy cannot single out DBEs. That is, it would be consistent with nondiscrimination requirements to require prequalification of DBE subcontractors only if all subcontractors are required to be prequalified. One suggestion that we received would, in fact, call for all subcontractors to be prequalified, DBEs as well as non-DBEs. The intent of the suggestion is to ensure, in advance, that all subcontractors are fully qualified, and to counter assertions that primes cannot find qualified DBEs. The Department seeks comment on this suggestion.

The SNPRM continues to include provisions of the December 1992 NORM that are derived either from uncontroversial Part 23 language or long-standing DOT policy, concerning Indian tribal firms, cooperation with recipients' information requests, and the limited effect of legal or tax status of firms on determinations concerning independence. Except for one comment agreeing with the Indian tribal firms provision, there were no comments on these provisions. The SNPRM would change one NORM provision, on which there was also no comment. The December 1992 NORM proposed to allow certification of a subsidiary of a DBE firm. That is, if Company Q is a small business 51 percent owned and controlled by one or more certified DBE firms, then Company Q could be certified. On further reflection, we have decided that this proposal is inconsistent with the

statutes underlying Part 26, which require DBEs to be owned and controlled by socially and economically disadvantaged individuals. If Company Q is owned by other business organizations, rather than by disadvantaged individuals, as such, then it would not be certified.

## SUBPART E - CERTIFICATION PROCEDURES

### §26.71 What are the requirements for Unified Certification Programs?

By better than a 4-1 margin, commenters endorsed the December 1992 NPRM's proposal to establish unified certification programs (UCPs) in each state that would provide "one-stop shopping" to firms seeking DBE certification. Eighty-two comments favored the proposal, 12 opposed it, and 9 either said UCPs should be optional or expressed concern that it would be difficult to obtain resources for this purpose.

Among the comments favoring the proposal, most agreed that the present system's administrative burden on small businesses seeking multiple certifications was unduly heavy and that it led to a waste of recipient resources. Many of these comments favored regional certification as well, most on a voluntary but some on a mandatory basis. Some of the comments said that more time was needed to establish UCPs than the three years proposed in the December 1992 NORM, though equal numbers of comments approved the three-year phase-in period or advocated quicker implementation (e.g., one or two years). Some comments asked questions concerning whether individual recipients could "veto" UCP decisions with which they disagreed, whether there could be several regional mini-UCPs in a state as distinct from a single state agency, and whether the agencies would be required to follow DOT certification standards.

Comments opposing or expressing concern about the concept said that a UCP would be too difficult to administer, would lessen local autonomy in certification decisions, lead to a "lowest common denominator" approach to certification, or would require funding and agency resources that comments said was probably unavailable.

A related issue discussed by a substantial number of comments was mandatory reciprocity. Currently, and under the December 1992 NPRM, recipients have the discretion to accept certification decisions made by other recipients if they choose. Under mandatory reciprocity, a recipient would be required to accept other recipients' decisions. Twenty-six comments favored adopting mandatory reciprocity, at least within a state or region or particular industry, while 33 opposed the idea.

Proponents cited mandatory reciprocity as a way of reducing the impact of multiple certification requirements on applicants, while opponents were concerned that mandatory reciprocity would lead to "least common denominator" certification practices, where applicants would "forum shop" for recipients with less stringent certification processes, obtain certification, and then force these certifications on recipients who would otherwise not certify them.

The SNPRM would adopt the UCP proposal with certain modifications that respond to commenters' concerns. Restructuring government programs to provide better and more economical services to customers, while making more efficient use of scarce resources, is consistent with the purpose of the Clinton Administration's Regulatory Reform Initiative. Introducing the UCP in DOT Federally-assisted programs is a step similar to many reforms adopted for the Federal government itself as a result of the National Performance Review.

By providing one-stop shopping to small businesses seeking certification, this reform would reduce significant burdens on DBEs. Some comments estimated that going through the certification process one time can cost a business as much as $5000. Avoiding repetitions of this process within a state can save substantial money for these businesses. Moreover, if several recipients within a state have to review an application from the same firm, there is an obviously inefficient use of the recipients' collective resources. UCPs will avoid this costly duplication of effort. Given appropriate cooperation and sharing among the recipients in the state, operation of a UCP should save resources, not increase costs.

The proposed UCP requirement takes fully into account the needs of recipients for flexibility and adequate time for negotiation and implementation of UCP agreements. Recipients within each state would have three years to form an agreement creating a UCP, with the possibility of a one-year extension if granted by the Secretary. The UCPs will have an additional 18 months after DOT approval of the agreement to become fully operational. The Department seeks comment on whether it is desirable and feasible to shorten these time periods (e.g., to two years for forming an agreement and a year for implementation).

Moreover, the recipients in a state would have discretion to devise a type of UCP that best fits their needs. This SNPRM would not prescribe any particular administrative structure. Recipients could choose from among a number of types of UCPs listed in the regulation or construct a different structure of their choosing, which can be responsive to recipient concerns about resources, the role of local recipients, etc. Whatever structure is constructed would have to follow Part 26 certification standards and all other certification requirements applying to recipients, in whose shoes the

UCP stands. It would also have to ensure genuine one-stop shopping, which means that individual recipients would have to accept UCP certification decisions.

While mandatory reciprocity within recipients in a state is one optional way to structure a UCP, the SNPRM does not propose mandatory reciprocity among recipients or among UCPs, primarily because of concern about the "least common denominator" problem. (Nevertheless, the Department is interested in commenters views on whether nationwide mandatory reciprocity would be, on balance, a good idea.) The SNPRM would authorize, and DOT encourages, multistate UCPs and other regional cooperation ventures. DOT will work with recipients both to assist in setting up UCPs and in fostering regional arrangements.

Commenters also addressed some implementation issues. Twenty-four comments favored, and seven opposed, a system that would require a firm to be certified in its "home state" before it could be certified in other states. Proponents believed this could reduce resource needs for out-of-state site visits and place basic certification responsibility on the recipients that are closest to the applicant and know the most about it. Opponents said this could lead to hardship for a firm who for some reason was on the wrong side of its local recipient, or which simply found it most expedient, for business reasons, to seek most of its work in a state other than the one in which it was domiciled. The SNPRM takes a middle ground on this issue, permitting UCPs (but not recipients prior to the establishment of UCPs) to decline to accept an application from a firm that had not first been certified by the UCP in the state in which it maintained its principal place of business. Home-state certification would be much harder to implement before UCPs are in place (i.e., would it mean certification by any transit

authority, airport, or state highway agency in the state? What if some home state recipients certified the firm and others did not?). Giving UCPs flexibility with respect to accepting out-of-state applicants not having home-state UCP certifications also is preferable to requiring home-state certification in all cases.

The December 1992 NORM had proposed that UCP certifications be "precertifications" (i.e., certifications decided in advance of the proposed use of a firm to meet DBE goals on a particular contract). Commenters' opinion was split on this issue, with seven comments favoring and six opposing the proposal. The SNPRM would adopt this proposal for two reasons. First, certification under pressure of a procurement deadline is more likely than precertification to lead to hurried, less adequate, certification decisions. Second, UCPs' resources and priorities are likely to be more effectively allocated in the absence of pressures from recipients to give precedence to processing an application involved in a pending procurement.

Finally, it makes sense, once UCPs are in place, for the UCP, rather than individual recipients, to maintain the DBE directory. This directory would cover all firms certified by the UCP. Since so many agencies and businesses are now equipped with computer communications capability, this unified directory would be made available electronically as well as on paper.

**§26.73 What procedures do recipients follow in making certification decisions?**

The December 1992 NORM listed a series of actions that recipients would be required to perform in each certification. They are essentially the same as those in the existing regulation. The only one of these to inspire

significant comment was the requirement for a site visit. Fourteen commenters opposed mandatory site visits, while six favored mandatory site visits by each recipient (i.e., they opposed a provision in the December 1992 NØRM that would allow one recipient to rely on another recipient's site visit report). The opponents of mandatory site visits generally cited the cost and burden of carrying out this requirement, particularly when the firm seeking certification was located elsewhere. The Department cannot eliminate the requirement for site visits, because it is statutory. A recipient that fails to make site visits is out of compliance with the rule. On the other hand, allowing a recipient to make use of a site visit report compiled recently by another recipient can be a useful way of conserving resources, and the SNPRM would permit it.

The December 1992 NØRM proposed to require recertification reviews of certified DBEs every two years; that a DBE would remain certified unless it were decertified through a decertification proceeding; and that a DBE had to notify the recipient of any changes in its circumstances that would affect its certification and submit a sworn statement at the time of the recertification review concerning any changes in the firm that could affect its eligibility. Eleven comments favored this general approach, three of which said that the process should be abbreviated (e.g., through the use of a short form or certification instead of a full-fledged review). Another comment said that recipients should not be permitted to force already-certified firms to reapply for certification on an annual or other periodic basis on the rationale that a certification had expired, allowing firms to be effectively decertified without due process. Most of these comments said that two years was an appropriate interval, though two said that annual recertification was preferable. Thirteen commenters supported the specific

proposal that DBEs be required to report changes as they occur, a few of which asked for greater specificity in terms of what changes had to be reported and a few others of which suggested that the requirement would be difficult to enforce.

The Department has decided, in response to comments, to modify the NORM proposal in the SNPRM. First, the Department would retain the requirement for DBEs to submit an affidavit when there is a change in their circumstances that can affect certification. The rule would specify that the recipient must report changes affecting size, disadvantaged status, ownership, control, or any material changes to the information presented on the certification form. Second, in response to comments about simplifying the recertification process, and in order to reduce administrative burdens on DBEs and workload requirements on recipients, the SNPRM would drop the proposed requirement for a recertification review to be conducted by the recipient. (Recipients would remain free to conduct reviews of the status of firms at their discretion, however.) The SNPRM does include the requirement that the DBE would submit an annual affidavit that nothing in its circumstances has changed beyond what it has told the recipient and that it continues to meet size criteria (with supporting documentation).

The December 1992 NØRM proposed that firms would remain certified unless the recipient decertifies them through a decertification proceeding. The proposal was based on the view that requiring frequent reapplications, besides imposing unnecessary paperwork burdens on DBEs that have already been through a certification process, tends to divert recipients' resources from new certifications and decertifications. These resources can better be used for reducing or avoiding certification backlogs.

The Department continues to believe that this view has merit. However, we also believe that is inappropriate to require that DBEs remain certified indefinitely. As a means of accommodating both these concerns, the SNPRM would require that a recipient permit a firm to remain certified for three years without any "recertification" or "reapplication" process, absent cause for decertifying the firm. The Department seeks comment on whether this period should be longer (e.g., five years).

The December 1992 NPRM said that UCPs would have to make certification decisions within 60 days of receiving a complete application. Commenters were divided on this issue. Ten comments said a 60-day period was not enough, suggesting that 90 days or a period of the recipient's discretion was more reasonable. Nine comments supported the 60-day period, saying that it was useful in preventing recipients from unduly delaying responses to applications. One of these said there could be a DOT waiver of the deadline. Three comments supported a shorter period, such as 15 or 30 days, suggesting that such a period was useful in preventing bureaucratic stalling. Many of the commenters on all sides of this issue discussed the deadline in terms of certifications in general, not just those to be performed by UCPs.

The Department has decided, in response to these comments, to propose extending the deadline to 90 days, with a possibility of a 60-day extension of this period if the recipient sends a specific written explanation to the applicant. The Department is persuaded that a 60-day deadline is unrealistic in light of the certification workloads facing many recipients. However, a deadline remains necessary to give firms the assurance of reasonably timely handling of their applications. With the approval of the concerned operating administration, the recipient could alter the deadline

involved, but the appropriate DOT office would be very careful to grant only what relief is necessary to recipients.

One issue that has arisen since the publication of the December 1992 NORM is whether recipients should be able to impose user fees or other charges on applicants for certification. Recipients have taken different positions on this issue, and the Department's rule provides no guidance on the issue. The Department has decided to propose that recipients may impose a modest, reasonable application processing fee, not to exceed the actual cost of processing the application. Such a fee would have to be approved by the concerned operating administration as part of the DBE program approval process. The Department seeks comment on whether there should be a cap on such fees.

Under Part 23, the Department published a model certification form (Schedule A). Recipients had discretion to modify this form. This led to a proliferation of somewhat similar forms that often differed significantly in their details, leading to confusion and difficulty for those applicants who sought certification in more than one jurisdiction. Based in part on the Department's experience in our drug testing program, where a similar approach created similar problems for participants, the December 1992 NØRM proposed requiring the use of a standard, uniform, form by all recipients. Commenters were divided on this proposal. Twenty-four comments favored the idea of a single nationwide form. Two additional comments advocated allowing recipients to add material to the standard form. Twenty commenters preferred the approach of the existing rule, with a model form that recipients could modify. A number of commenters suggested specific modifications to the form published with the December 1992 NØRM.

The Department believes that requiring a single, uniform, nationwide form that all recipients must use without modification is the best approach to take. Many firms seek certification with more than one recipient. Having them have to fill out somewhat different forms providing the same basic substance to different recipients (as distinct from photocopying a standard form they have already filled out) is a waste of their time and money. The same Part 26 standards apply to all these certifications. Each recipient needs the same information to make determinations according to these standards. When UCPs become operational, each UCP (particularly those UCPs that rely on centralized or relatively centralized structures) will presumably need to have a standard form. Under these circumstances, we do not believe that allowing different recipient forms is productive. However, as a few comments suggested, we will allow recipients to supplement (not alter) the standard form to capture additional information that is consistent with Part 26 requirements and reasonably necessary for program administration. Such supplements will have to be approved by the concerned operating administration as part of the recipient's DBE program.

The SNPRM incorporates this policy decision. We are also requesting renewed comment on the content and format of the standard form, including examples of existing forms that commenters would recommend and suggestions about how to make the form both complete and user-friendly. We are also seeking comment on whether, at least when UCPs are operational, we should require that they have a capability of accepting application forms electronically. To assist commenters in formulating responses, we are publishing in Appendix C to the SNPRM a

proposed form, but the Department is not committed to adopting the specifics of this form.

**§26.75 What rules govern recipients' denials of initial requests for certification?.**

The December 1992 NØRM proposed that, within 30 days of a recipient's denial of an application, the applicant could fix problems that had led to the denial, and resubmit a revised application to the recipient for consideration at that time. Two comments favored this proposal, while 18 opposed it, mostly out of concern that repeated resubmissions within a short period of time would waste agency resources. Some commenters were also concerned that it would lead to successful resubmissions based on little more than rearranging paperwork. The Department believes that the opponents of this proposal have the better of this argument, and we are not adopting this proposal. However, recipients should allow applicants to correct minor paperwork errors or non-material mistakes or omissions in applications before rejecting the application.

The December 1992 NØRM proposed that after an application was denied, the recipient could set a waiting period of 6-12 months before the firm could reapply. Eighteen comments supported a 12-month waiting period, 12 supported a shorter period (generally 3-6 months), two supported a longer period (12-18 months), five supported letting recipients have discretion in establishing a waiting period, and two advocated having no waiting period. The Department believes that 12 months is long enough to meet recipients' concerns about avoiding wasting their resources on rapidly repeating reapplications and is also consistent with the reported practices of most recipients who commented. A longer period would have too harsh

an impact on potential reapplicants. Therefore, the SNPRM proposes a waiting period of no more than 12 months. If a recipient wants to establish a shorter waiting period (e.g., 3, 6 or 9 months), it can seek approval from the relevant DOT administration as part of its DBE program.

The December 1992 NØRM also proposed that the recipient must notify a firm of the denial of its application in writing, with a written explanation of the reasons for the denial. The explanation would have to specifically reference the evidence in the record supporting each reason for the denial. Six comments supported this proposal, while another five wanted additional due process protections (e.g., equivalent to those required in decertification proceedings). The Department has decided to retain the NØRM provision, which we believe provides sufficient protection to applicants in initial denial circumstances. We do not believe that the additional due process protections needed in decertifications (where a recipient is proposing to take away from a firm an existing status, which takes on some of the character of a property interest) are essential here.

**§26.77 What procedures does a recipient use to remove a DBE's eligibility?**

The December 1992 NØRM proposed a set of procedures to govern recipient's decertification proceedings. Comments focused on a relatively small number of the procedural points proposed in the December 1992 NØRM. The subject of the most comments was the proposal that decertification actions must provide administrative due process protections to DBEs, particularly that separation of functions be incorporated into the procedure.

By separation of functions, we mean the principle that, to preserve the fairness of a proceeding, the proponent of an action should not also be the

decisionmaker. A prosecuting attorney, for example, is not permitted to serve as the judge or jury. Likewise, the December 1992 NPRM said, a recipient official who proposes that a firm be decertified should not be the same official who decides whether or not the proposal has merit. Fourteen comments supported the separation of functions proposal, a few of whom said that a requirement for administrative law judges (ALJs) or other officials completely separate from the recipient's DBE certification office would be even better. Eight commenters opposed the proposal, many in the apparent belief that it would require the use of ALJs, the hiring of extra personnel.

With respect to the more general issue of administrative due process (e.g., requirements for notice, the opportunity for a hearing, written statement of reasons for a decision, etc.), 21 comments supported the proposal to require these protections. Five comments opposed the proposal, generally saying that it was too burdensome.

The Department believes that it is essential to provide administrative due process to DBEs when recipients propose to decertify them. Basic requirements like notice, the opportunity for a hearing on the record, separation of functions, and a written statement of reasons for a decision are necessary to avoid the appearance, and sometimes the reality, of arbitrary decisions. Through the Department's certification appeals process, we have become aware of situations in which these protections have not been provided. For the sake of fairness to participants, and to uphold the legitimacy of the program, this must change. In addition, DBE certification may take on, to a degree, the character of a property interest. Taking away an interest in property without appropriate due process raises issues under the 5th and 14th Amendments to the Constitution.

Separation of functions is one of the most important features of administrative due process, since it avoids a major potential source of unfairness. Clearly, if a DBE owner walks into a proceeding and sees, in the role of the decisionmaker, the same official who proposed to decertify the firm, the owner may well have a justified perception that the deck is stacked against the company. We would emphasize that separation of functions can be provided in a number of ways, and it does not require hiring ALJs or other "outside" personnel. For these reasons, the SNPRM adopts, with minor modifications (e.g., a simplification of the notice procedure, a change requested by several comments), the administrative due process proposals of the December 1992 NORM.

There were eight comments on the issue of the burden of proof in a decertification proceeding, equally divided between those who agreed with the December 1992 NORM that the recipient should have the burden of proving the firm should not be certified (including one that said the recipient should have to carry its case by a "clear and convincing evidence" standard) and those who said that the firm should have the burden of proving it should remain certified. The SNPRM would continue to require the recipient to carry the burden of proof. In virtually all proceedings in the U.S. legal system, the proponent (e.g., the state in a criminal proceeding, the plaintiff in a civil suit, the agency in a regulatory enforcement proceeding) bears the burden of proof. We do not think that adopting a system contrary to this norm would be fair or appropriate. Moreover, the DBE, to become certified in the first place, has had to carry a burden of proof. It is reasonable to ask the recipient to carry the burden to remove the certification. We believe that it is appropriate to apply the

preponderance of the evidence standard -- the same standard that the DBE must meet to be certified -- to attempts by the recipient to decertify the firm.

A few commenters said that recipients should be able to accept anonymous complaints, which the December 1992 NØRM proposed to prohibit. The SNPRM would change this provision so that recipients are not required to accept such complaints, though they may. The December 1992 NØRM also proposed that DOT could act to suspend a firm's certification and direct a recipient to start a decertification proceeding. Three comments objected to this proposal. The SNPRM would modify this provision. Concerned operating administrations would have the discretion to direct a recipient to initiate a proceeding when the Department reasonably believes that a certified DBE is ineligible. However, DOT would not assert the authority to suspend the firm's certification pending the outcome of the recipient's proceeding.

One of the grounds for decertification in the December 1992 NØRM was a documented finding that the recipient's previous decision to certify a firm was clearly erroneous. The intent of this provision was to prevent a recipient from decertifying a firm on the basis of nothing more substantial than a change of mind about an unchanged set of facts. Three commenters questioned this proposal, saying that a recipient should be able to reopen a certification, at least if there were an error. One suggested modifying the language to refer to a "substantial evidence" rather than "clearly erroneous" standard. Another supported the NØRM language. The standard applying to all decertifications is that the recipient demonstrate by a preponderance of the evidence that the firm does not meet eligibility standards. It would be confusing to introduce another standard here, so we are removing reference to the "clearly erroneous" standard. While we are not adopting the

"substantial evidence" standard here (it is more appropriate as a standard in reviews of administrative proceedings, as distinct from *de novo* proceedings like this), we do think that the emphasis of this standard on factual backing for determinations is appropriate.

The point of this provision is to allow recipients to correct factual mistakes that resulted in certifications, not to reverse judgment calls. For this reason, this SNPRM refers to situations when a previous certification was factually erroneous.

The December 1992 NPRM proposed that if a firm was decertified in the midst of a contract, the remainder of its performance would not count toward contract or overall goals, since it was no longer a DBE. A few comments suggested allowing the remainder of the contract to count at least toward contract goals, assuming that the prime contractor had used the firm in good faith. We have decided to adopt this comment. The remainder of the contract would not count toward the recipient's overall goal, however.

As a general matter, it is not appropriate to remove a firm's eligibility until the recipient has determined that the firm is ineligible. However, there may be situations in which the case against a firm looks very strong, but the process will not conclude before the firm is awarded a contract. In this case, the SNPRM proposes that the recipient can suspend the firm's eligibility to receive new contracts, pending the outcome of the proceeding. This would be a sort of administrative preliminary injunction designed to protect the program from harm.

There was not significant comment on the remainder of the proposed section, and the SNPRM would adopt it with minor modifications (e.g., a cross-reference to SBA regulations has been dropped, given that Appendix

F, which is adapted from SBA rules, provides guidance concerning social and economic disadvantage issues).

**§26.79 What is the process for certification appeals to the Department of Transportation?**

Part 23 lacked specific procedures for certification appeals. The Department's procedures for handling appeals evolved as a matter of informal practice. The December 1992 NØRM proposed filling in this gap. Commenters focused on a few points of the proposed procedures.

The December 1992 NØRM proposed that DOT would decide appeals within 60 days of receiving a complete administrative record. Six comments suggested a shorter period (e.g., 30 days) or a longer period (e.g., 90 days); others favored no stated period at all, lest there be reversals or affirmances through inaction; and 12 comments favored the NØRM proposal, some of which supported affirmances or reversals when the time frame was not met. The SNPRM notes that, while we would administratively set a goal of 90 days for finishing appeal decisions once a complete administrative record is acquired, a regulatory time frame would not be advisable, particularly given the often heavy workload of certification appeals. In short, we do not want to promise what we cannot ensure delivering. We think that affirmances or reversals resulting from failure to meet a self-imposed deadline, rather than on the merits of the appeals, would be inconsistent with the purposes of the appeals system.

Currently, firms have 180 days after a denial or decertification to make a certification appeal. The NØRM proposed reducing that number -- which was based on the amount of time used for Title VI complaints -- to 90 days, since firms always would have specific notice of the recipient's action

on which to base an appeal. Four of the five comments on this issue supported the change, which the SNPRM incorporates for the reason stated above. This change would help the system run reasonably quickly, and provide closure for recipient decisions that are not appealed promptly.

The December 1992 NORM proposed that, as under Part 23, the effects of a recipient's decision would remain in force pending the DOT appeal. For instance, a firm that the recipient had decertified would stay decertified unless and until DOT reversed the recipient's decision. Sixteen comments supported this position, while two said that DOT should grant stays of recipients' actions in appropriate cases. The SNPRM adopts the NPRM provision.

In the December 1992 NORM, the Department proposed that we would reverse a recipient's decision if we found that it was unsupported by substantial evidence or inconsistent with this regulation. Nine comments supported the proposal, while six preferred a different standard, such as "arbitrary and capricious." Both the "substantial evidence" and "arbitrary and capricious" standards are used for the judicial review of administrative action, a function which is analogous to the role of the Department in the certification appeals process. The standards are closely linked, and there is no "bright line" between them in most administrative law cases. For example, courts will sometimes say that an agency decision is arbitrary and capricious because it is not supported by substantial evidence.

Generally, the "arbitrary and capricious" standard is viewed as slightly narrower, with courts considering whether the agency's decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment. If there was a rational basis for the agency's decision, court decisions say that courts should not substitute their

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Generally, the "arbitrary and capricious" standard is viewed as slightly narrower, with courts considering whether the agency's decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment. If there was a rational basis for the agency's decision, court decisions say that courts should not substitute their

judgment for that of the agency. The "substantial evidence" test is said to go to the reasonableness of what the agency did on the basis of the evidence before it. "Substantial evidence" must do more than create a suspicion of the fact to be established, requires objective evidence affording a rational basis for the agency's conclusions, and must be capable of convincing an unprejudiced "reasonable person" of the truth or validity of the agency's findings. It is less than a preponderance of the evidence, however. There can be "substantial evidence" supporting the agency's conclusion even though the record would also support a different conclusion. Use of the "substantial evidence" standard implies a somewhat more intensive inquiry into the facts of the case by the reviewing body than the "arbitrary and capricious." Under either standard, inconsistency with governing law is a ground for invalidating an agency's finding.

The SNPRM uses "substantial evidence" as the standard for review of agency certification decisions. The Administrative Procedure Act (APA) uses this standard for cases "reviewed on the record of an agency hearing provided by statute" (5 U.S.C. §706(2)(E)). In this process, DOT is acting in a role analogous to that of a court reviewing agency action. DOT is reviewing cases on the record of a recipient hearing provided by, in this case, Part 26. The same considerations that support using this standard in court review of agency action, such as the desirability of authorizing a reasonably limited inquiry into the factual basis of the agency's decision, apply in the case of certification appeals. Under the APA, the "arbitrary and capricious" standard applies not to adjudications by agencies but to their more purely administrative actions, such as issuing regulations and adopting environmental impact statements. We believe the APA model is an appropriate one for DOT to use in responding to certification appeals.

Two comments said that DOT should hold hearings in certification appeal cases. Such hearings are not appropriate to a review of an administrative record. Two other comments said that a firm should have to pay for a transcript when it appeals. To make possible the administrative review of the record, a recipient who does not already have a transcript of the hearing will have to prepare it to send to DOT. The only appropriate charge to the company, in our view, is for the cost of photocopying the transcript, not for its preparation. Twenty-five commenters supported the Department having an improved indexing/retrieval system for certification appeal decisions. The Department agrees that this is desirable, and we will work to establish such a system for decisions rendered under Part 26. We hope to utilize existing or planned computer bulletin boards in the Department to make certification appeal decisions, as well as guidance, interpretations, etc. of Part 26 available to the public electronically.

**§26.81 What actions do recipients take following DOT certification appeal decisions?**

This section concerns what happens to recipients' certification actions concerning a firm -- including those of recipients other than the one whose decision was appealed to DOT -- following a DOT certification appeal decision. The December 1992 NPRM proposed that certification appeal decisions would be binding only on the recipient from whom the appeal was taken. Most of the comment on this section concerned the effects on other recipients.

Twenty-four comments said that other recipients should be able to adopt the Department's certification appeal decisions as their own, without the necessity of conducting further proceedings of their own. That is, if

State A decertified Company X, and DOT upheld the decertification, then States B, C, etc. should be able to decertify Company X without being required to go through a §26.77 decertification proceeding. Most of these comments did not discuss automatically certifying firms when DOT overturned a recipient's denial. Nine comments said that other recipients should have to go through their own due process procedure, rather than automatically taking action to follow a DOT decision.

As a legal matter, it would be inappropriate for recipients, other than the recipient directly involved in the appeal, to automatically take action to certify or decertify firms based on the outcome of a DOT certification appeal. This is because the nature of a DOT certification appeal proceeding. DOT is not, as such, determining whether a firm meets Part 26 eligibility criteria. All DOT is determining is whether a particular recipient's decision about a firm's eligibility is supported by substantial evidence and consistent with Part 26 standards. Under the substantial evidence standard, the Department can uphold a recipient's decision as supported by substantial evidence even though an alternative decision could also be supported by substantial evidence. The Department could reverse a recipient's decision as unsupported by substantial evidence even though another recipient could have substantial evidence to come to the same result. The Department's decision is necessarily specific to the administrative record of the particular recipient involved and is not a legally definitive statement about the eligibility of the firm. The Department recognizes that it would be possible for the Department to uphold different decisions on the eligibility of a firm by different recipients, if both met the substantial evidence test.

Consequently, when a DOT certification appeal decision upholds or directs a denial of eligibility to a firm, this would provide a basis for other

recipients to initiate a decertification proceeding, but they must go through such a proceeding to decertify the firm. Where DOT's action results in a firm being certified, this fact would be taken into account by other recipients to whom the firm is applying, but it would not result in automatic certifications elsewhere. The Department's decision, and its reasoning, would be taken into consideration by other recipients in their proceedings.

Other parts of the NPRM proposal for this section were not the subject of comment, and the SNPRM adopts them without substantive modification.

**§26.83 What procedures govern direct ineligibility complaints to DOT?**

Under the existing Part 23, the Office of Civil Rights has accepted so-called "third party complaints," in which a party complains that a recipient has erroneously certified a firm. The NPRM did not include such a mechanism, on the basis that DOT's most useful role was the administrative review of the record of proceedings held at the recipient level. Nevertheless, there may be situations in which it is important for the Department to take a direct hand in responding to an ineligibility complaint.

To handle these situations, the SNPRM proposes that any person may file a direct ineligibility complaint. The Office of Civil Rights would have complete discretion concerning the disposal of the complaint. It could accept the complaint, decline to accept it, or refer it to the appropriate recipient for action. In no case would the Department be required to accept such a complaint; nor would it have to offer explanation for not accepting it.

If the Office of Civil Rights accepted the complaint, it would follow essentially the same procedure as a recipient would in a §26.79 ineligibility

complaint. As in the case of a recipient, the Department could invoke the "administrative preliminary injunction" procedure in an appropriate case.

## SUBPART F - COMPLIANCE AND ENFORCEMENT

Sections 26.91 - 26.99 concern compliance and enforcement procedures under the rule. They were the subject of little comment. One comment favored leaving them as they were in the December 1992 NPRM. Five comments supported including additional measures, such as requirements for liquidated damages or making more use of the Program Fraud Civil Remedies Act of 1986 (PFCRA). Five comments supported the use of suspension and debarment remedies for program abuses, while six others said that this remedy should be limited to cases of indictment or conviction for criminal offenses (some of these said suspension should only be used where there has been a conviction).

The SNPRM retains the enforcement provisions of the December 1992 NPRM with little change. We are adding a specific reference to PFCRA. We are also deleting paragraphs discussing decertification in cases of criminal conduct, since we believe suspension and debarment remedies are adequate to deal with DBEs involved in criminal offenses. Recipients would retain discretion to begin decertification proceedings concerning DBEs involved in criminal activity, however. Under normal suspension and debarment practice relating to criminal offenses, a firm may be suspended when it is indicted but is only debarred following conviction. The Department will follow this practice in suspension and debarment actions related to criminal activity in the DBE program.

## SUBPART G - DBE PARTICIPATION IN AIRPORT CONCESSIONS

On October 3, 1993, the Department published an NPRM in the Federal Register, proposing to revise its DBE program requirements applicable to airport concessions. (58 F.R. 52050) The NPRM proposed to implement statutory provisions which would allow airport sponsors to count new forms of DBE participation toward the overall goals of a DBE concession plan. These new forms include purchases from DBEs of goods and services used in the operation of a concession, as well as management contracts and subcontracts with DBEs. To make these and other changes, the Department proposed to amend Subpart F of 49 CFR Part 23, DOT's existing DBE rule.

The statutory provisions authorizing these changes were cited in the NPRM as Sections 511(a)(17) and 511(h) of the Airport and Airway Improvement Act (AAIA) of 1982, as amended by Section 117 of the Airport and Airway Safety, Capacity, Noise Improvement, and Intermodal Transportation Act of 1992 (Pub. L. 102-581). The AAIA and other transportation statutes were repealed effective July 5, 1994, by Public Law 103-272 and have been recodified in title 49 of the United States Code (U.S.C.). The recodification does not change substantively the legal authority of the DOT or the Federal Aviation Administration (FAA) or any prior interpretations of that authority, but is merely a restatement of the authority granted under prior statutes using different language and a reordering of provisions.

In accordance with this change, the Department will cite title 49 of the U.S.C., rather than the AAIA or any act which amended it, as authority for administering the DBE program. References to the Airport Improvement Program (AIP) will continue to be made, however.

49 U.S.C. 47107(e) (formerly Sections 511(a)(17) and (h) of the AAIA) provides as follows:

> *(e) Written Assurances of Opportunities for Small Business Concerns.--*
>
> *(1) The Secretary of Transportation may approve a project application under this subchapter for an airport development project only if the Secretary receives written assurances, satisfactory to the Secretary, that the airport owner or operator will take necessary action to ensure, to the maximum extent practicable, that at least 10 percent of all businesses at the airport selling consumer products or providing consumer services to the public are small business concerns (as defined by regulations of the Secretary) owned and controlled by a socially and economically disadvantaged individual (as defined in section 47113(a) of this title).*
>
> *(2) An airport owner or operator may meet the percentage goal of paragraph (1) of this subsection by including any business operated through a management contract or subcontract. The dollar amount of a management contract or subcontract with a disadvantaged business enterprise shall be added to the total participation by disadvantaged business enterprises in airport concessions and to the base from which the airport's percentage goal is calculated. The dollar amount of a management contract or subcontract with a non-disadvantaged business enterprise and the gross receipts of business activities to which the management contract or subcontract pertains may not be added to this base.*
>
> *(3) Except as provided in paragraph (4) of this section, an airport owner or operator may meet the percentage goal of paragraph (1) of this subsection by including the purchase from disadvantaged business enterprises of goods and services used in businesses conducted at the airport, but the owner or operator and the businesses conducted at the airport shall make good faith efforts to explore all available options to achieve, to the maximum extent practicable, compliance with the goal through direct ownership arrangements, including joint ventures and franchises.*
>
> *(4)(A) In complying with paragraph (1) of this subsection, an airport owner or operator shall include the revenues of car rental firms at the airport in the base from which the percentage goal in paragraph (1) is calculated.*
>
> *(B) An airport owner or operator may require a car rental firm to meet a requirement under paragraph (1) of this subsection by purchasing or leasing goods or services from a disadvantaged business enterprise. If an owner or operator requires such a purchase or lease, a car rental firm shall be permitted to meet the requirement by including purchases or leases of vehicles from any vendor that qualifies as a*

*small business concern owned and controlled by a socially and economically disadvantaged individual.*

*(C) This subsection does not require a car rental firm to change its corporate structure to provide for direct ownership arrangements to meet the requirements of this subsection.*

*(5) This subsection does not preempt--*

*(A) a State or local law, regulation, or policy enacted by the governing body of an airport owner or operator; or*

*(B) the authority or a State or local government or airport owner or operator to adopt or enforce a law, regulation, or policy related to disadvantaged business enterprises.*

*(6) An airport owner or operator may provide opportunities for a small business concern owned and controlled by a socially and economically disadvantaged individual to participate through direct contractual agreement with that concern.*

*(7) An air carrier that provides passenger or property-carrying services or another business that conducts aeronautical activities at an airport may not be included in the percentage goal of paragraph (1) of this subsection for participation of small business concerns at the airport.*

The NPRM was drafted based on the language in the AAIA, and redrafting the rule to reflect the recodification would be cumbersome. Thus, when appropriate, the SNPRM (as well as this preamble) uses the language in the AAIA. Final rule language will be modified, as needed, to conform to the recodified version of the statute.

Of the entities that submitted comments to the October 1993 NPRM, 16 are minority or female owners of car dealerships. Of these, 13 submitted comments in advance of publication of the NPRM. Five industry associations commented. These include the Airport Minority Advisory Council (AMAC); American Bar Association (ABA); American Car Rental Association (ACRA); Airports Council International - North American Region (ACI-NA); and National Automobile Dealers Association (NADA). Representatives of ten airport operators or owners (sponsors) commented individually. Representatives of 5 car rental agencies also commented individually, including Alamo Rent a Car, Inc.; Avis Rent a Car System, Inc.;

Dollar Systems, Inc.; the Hertz Corporation; Thrifty Rent-a-Car System. Thrifty and Dollar submitted comments jointly, while Avis and Hertz each filed several comments. Hertz filed its major papers jointly with ACRA. The remaining comments (9) came from Congresswomen Eleanor Holmes Norton and Cardiss Collins; the Small Business Administration (SBA); two DBEs that are not car dealers; Host Marriott Corporation; Tie Rack, Plc; Smarte Carte, Inc., and one consulting firm.

Much of proposed Subpart G in this SNPRM reflects the Department's response to comments on the October 1993 NPRM. Subpart G also includes proposals for revising overall goals and contract goals based on *Adarand* and proposed implementing guidance issued by the Department of Justice. Generally, the Department intends to employ the same methodology in revising the concession program as the DOT-assisted contracting program. Following the close of the comment period, the Department expects to publish a final rule setting forth the concession provisions in Subpart G to 49 CFR Part 26. This subpart will respond to comments to this SNPRM and the comments to the October 1993 NPRM.

The following analysis includes a discussion of the Department's response to comments on the October 1993 NPRM. As with the other portions of this rule, we request that commenters focus on those matters responsive to *Adarand* and issues on which the Department specifically requests comment.

**Section 26.101 Definitions**

In one of several matters unrelated to the grant legislation or to *Adarand*, the October 1993 NPRM proposed to modify the definition of "affiliation." Subpart F of 49 CFR Part 23, as issued in 1992, incorporated the

definition of the term from Section 121.401 of the SBA's regulation, 13 CFR Part 121. The Department chose to adopt the SBA definition but was not required by the statute to do so. 49 U.S.C. Section 47107(e) delegates authority to the Secretary to designate size standards for the concession program.

As set forth in 13 CFR Section 121.401(l), affiliation may arise through a joint venture agreement, requiring the parties thereto to combine their gross receipts in making a determination of business size. The NPRM proposed to delete Section 121.401(l) from the definition employed in the concession program.

Based on a review of the comments, the SNPRM retains this provision as proposed. Of five comments submitted to the docket which address the matter, four are generally supportive, while one is opposed. Two commenters are concerned that DBEs qualifying under the SBA's existing definition may have trouble competing against joint ventures involving a very large firm and a DBE. Another commenter, writing in support of the change, opposes any restrictions on a DBE owning an interest in another firm. This commenter points out that in the concession area, operations often are organized under separate businesses at individual airports, and separate partnerships often are established.

The Department does not believe that this provision would adversely affect a significant number of DBEs meeting SBA's definition of affiliation. The SNPRM does not require modification or abrogation of existing concession agreements during their term. Thus, if a DBE meeting SBA's affiliation standards currently operates a concession, its concession agreement could not be disturbed during the remainder of the term. Further, any DBE could compete for the award of future concession contracts by forming joint ventures or other eligible arrangements under the revised standard. The

Department believes that joint ventures can offer DBEs a viable means of participating in a direct ownership arrangement when a lease, sublease, or other arrangement is not feasible.

The Department does not concur that all affiliation requirements should be suspended, and the NPRM did not propose this. Only Section 121.401(l) of 13 CFR Part 121, pertaining to joint ventures, has been deleted from the definition of "affiliation" used in the concession program. All other provisions of Section 121.401 would be retained. Under the remaining provisions, affiliation can arise through a variety of other arrangements, such as through an identity of interest, through stock ownership, or through common management. We also point out that the affiliation standards set forth in 13 CFR Part 121 apply regardless of the location of the businesses. To illustrate: if the same socially and economically disadvantaged individual owns 100 percent and clearly exercises management control over a retail concession at an airport and two other businesses located off-airport, the firms are affiliated. The gross receipts earned by all three would be summed in determining the size of the airport concession.

The SNPRM also would amend the definition of "concession" to exclude long distance telephone service. The proposed change is intended to formalize 1993 administrative guidance issued by the FAA. The FAA concluded that facilities operated by long distance carriers generally are not "located at an airport" as provided in the definition of a concession and thus, should be excluded from the program. Local pay telephone service, by contrast, generally qualifies as a concession and hence, would be subject to the requirements of the rule.

In further regard to the term "concession," one commenter apparently advocates inclusion of car rentals in the definition if the firm holds a license

or permit to pick up or deliver customers to airport terminals. Another organization comments to the contrary, stating that there is no evidence that Congress envisaged such an extension to the program. The Department concurs with the latter position and, to date, the rule has been administered using this latter approach. Since this matter has been the source of some confusion, the SNPRM proposes to clarify it.

As proposed, the SNPRM states that a car rental firm servicing the public from an on-airport facility is deemed "at the airport," while one that only picks up and/or delivers customers to the airport is not so regarded. The same principle would apply to taxicabs, limousines, hotels, and other businesses. In a related matter, an off-airport hotel that maintains a direct telephone in a terminal building would not be considered "at the airport," while a hotel doing business anywhere on airport property would be so regarded.

The SNPRM would further clarify that any firm meeting the definition of "concession" is covered by the program, regardless of the name given to its legal agreement with the sponsor or other organization.

The SNPRM proposes to add a definition of "direct ownership arrangement." The term appears in the legislation at 49 U.S.C. Sections 47107(e)(3) and (4). Section 47107(e)(3) names "joint ventures" and "franchises" as examples of direct ownership arrangements. Under the proposed definition in the SNPRM, such arrangement is one in which a firm owns and controls a concession. "Subleases" and "partnerships" are other examples of direct ownership arrangements that the SNPRM proposes to reference.

Four commenters favor expanding the definition of "management contract or subcontract" to include firms hired by concessionaires. The

October 1993 NPRM limited the scope of the term to only those firms hired by sponsors. Although the statute does not define the term, 49 U.S.C. Section 47107(e)(2) explicitly provides for counting DBE management contracts and subcontracts toward a sponsor's overall goal. However, the legislation is devoid of any reference to counting such contracts toward a goal imposed on a concessionaire.

Furthermore, as set forth in Section 47107(e)(2), when a sponsor counts a management contract or subcontract with a DBE toward its overall goal, the gross receipts earned by the business activity to which the management contract applies must be excluded from the base. Section 47107(e)(2) also explicitly requires exclusion of the dollar value of management contracts or subcontracts with non-DBEs from the base.

Thus, if the definition of a management contract is expanded as these commenters request, the gross receipts accrued by a non-DBE *concessionaire* that hires a DBE management contractor or subcontractor would presumably be excluded from the base. In such case, the *only* expenditures from the concession added to the base would be the value of the DBE management contracts and/or subcontracts, as well as any goods or services purchased or leased from DBEs, if such provisions apply. DBE participation in the concession would necessarily equal 100 percent, even though the concessionaire is a *non-DBE*. To take another example, if a non-DBE concessionaire hires a non-DBE management contractor and purchases no goods or services from DBEs, no expenditures or gross receipts from the concession would be added to the base.

The Department concludes that expanding the scope of the term management contract could result in calculating overall DBE goals from a

base which is not inclusive of all concession gross receipts. This, in our view, would conflict with 49 U.S.C. Section 47107(e)(1), which requires overall goals to be calculated as a percentage of the gross receipts from all concessions (in the case of a sponsor that uses gross receipts, rather than number of concession agreements, as the base.) Further, adopting an expanded definition of management contract could allow an airport to achieve a high percentage of DBE participation, while not reporting substantial gross receipts accrued by non-DBE concessions.

Since we have no indication that Congress intended such results, we do not propose to expand the scope of the term beyond those agreements with airport sponsors. However, under the SNPRM, managerial services procured by concessionaires, like other services used to operate a concession, can count toward the goals pursuant to the procedures of 49 U.S.C. Section 47107(e)(3) or (4).

In response to another comment, the wording in the definition of "management contract or subcontract" would be changed from "operates a business activity" to "operates or directs one or more business activities." As this comment points out, in some management contracts, the contractor directs the activities of other entities rather than conducting operations directly. In addition, the Department concurs with the comment that the words "the assets of which are owned by the sponsor" should be changed to "the assets of which are owned, leased or otherwise controlled by the sponsor." This makes clear that the sponsor's interest in the business activity is not limited strictly to an ownership interest. One other comment recommends a slight variation–inserting the words "or in which the airport sponsor has a significant interest or over which the airport sponsor exercises

control" after "the assets of which are owned." However, this version makes no reference to "leased" assets and would require a further definition of "significant interest."

To further distinguish between a "concessionaire" and "management contractor," the SNPRM proposes to modify the former to mean a firm that owns and controls a concession, as opposed to one that simply operates one.

We propose to amend the definition of "small business concern" to specify that the appropriate size standard is the one which best describes the type of business a firm seeks to operate under the DBE concession program. The sole exception would be the size standard for car dealerships. This matter is discussed below under "Appendix G - Size Standards for the Airport Concession Program." The SNPRM would also clarify that a small business concern must be an "existing" firm.

Under provisions of the SNPRM for DOT-assisted contractors (including FAA-assisted contractors), the presumption of social and economic disadvantage is deemed to be rebutted when an individual's personal net worth exceeds $750,000. The October 1993 NPRM proposed to not apply the $750,000 personal net worth limit to the concession program.

All five comments to the October 1993 NPRM that address this matter supported the Department's proposal to not apply the $750,000 standard to the concession program. The rationale for not applying this standard to airport concessions is that, given the larger businesses that may participate in the concessions DBE program, the $750,000 figure would be unreasonably low. excluding businesses that the Department intends to be able to participate.

Nevertheless, there are grounds for having some disadvantage threshold or other in this part of the rule. Even though larger businesses are

intended to be eligible to participate in airport concessions, the concept of program eligibility based on economic disadvantage appears to call for a criterion to determine when someone is no longer disadvantaged. The Department is seeking comment on the appropriate dollar level for the economic disadvantage threshold in the financial assistance part of the SNPRM. We will ask the same question in the context of airport concessions. In this context, is it reasonable to have a higher threshold than in the case of the financial assistance program and, if so, what should it be?

**Section 26.103 Applicability**

As modified, this section would state that the subpart applies to any sponsor that received a grant for airport development after January 1988.

**Section 26.105 Requirements for airport sponsors**

In response to one comment, we propose to modify this section to require insertion of the nondiscrimination clause in management contracts. The NPRM required inclusion of the provisions only in concession agreements executed by the sponsor. The clause also would also be required as part of any subsequent contract or subcontract covered by the rule, including contracts for the provision of goods or services. The Department also concurs with a recommendation to include recordkeeping requirements in the rule that will enable sponsors to monitor contract awards and payments by concessionaires to DBEs which provide goods or services. A section would be added pertaining to all recordkeeping and reporting requirements; it would apply to both primary and non-primary airports.

We have not adopted a recommendation to allow small primary airports to submit their DBE concession plans to the FAA for review less frequently than annually, as currently required. We point out that, as administered by the FAA, the concession plan covers a three year period, which requires sponsors to do long-range planning. One purpose of an annual review and update is to include any information in the plan not previously available to the sponsor. Submission of an entirely new document is not required. Additionally, since the rule requires overall annual goals, accomplishments in meeting them must be reported yearly. Thus, the Department believes that the current requirements are appropriate.

Another comment opposes a quarterly reporting requirement, which the Department proposed for the DOT-assisted contracting program. Currently, the FAA requires an annual report of accomplishments in the concession program and does not propose to increase the frequency.

The SNPRM would retain a provision established in 1992 with the issuance of Subpart F of 49 CFR Part 23. Under the proposal, only primary airport sponsors would be required to implement a DBE concession plan. Other airports would not be subject to goal-setting and other components of a plan. Rather, these sponsors would be required to take appropriate outreach steps to encourage available DBEs to participate as concessionaires whenever there is a concession opportunity. This approach is consistent with the narrow tailoring principle of applying race-neutral mechanisms whenever possible to accomplish program objectives.

**Section 26.107 Elements of a DBE concession plan**

1. <u>Overall goals</u>

This section has been modified for consistency with the Department's approach to overall goals in the DOT-assisted contracting portion of the SNPRM. A discussion of Section 26.41 is found above. In it, we note that provisions of the SNPRM concerned with data collection and analysis could be burdensome to recipients. Realizing that the market for airport concessionaires is different from the market for many kinds of contractors for DOT-assisted contracting, we seek comment on how these concepts can best be adapted to the concessions industry and what data sources are available or should be developed to assist this process.

DBE program costs incurred in connection with an approved project are eligible for reimbursement with Federal funds. However, it should be noted that costs incurred in administering the airport concession program are not eligible for AIP funds. The Department therefore invites additional comments on resources available to sponsors to collect and analyze concession program data as required by the SNPRM.

A new requirement has been added to the SNPRM. It would require sponsors to provide for public participation in establishing overall annual goals. This provision is intended to assist sponsors in arriving at appropriate goals.

Several comments to the October 1993 NPRM concern calculation of overall goals. One favors the use of net payment to the airport in lieu of gross receipts as the base from which overall goals are calculated. This commenter opposes using a combination of net payment and gross receipts, as currently required when the gross receipts from a particular concession are not known to the sponsor. This matter was fully considered when Subpart F of Part 23 was published in 1992 and was not raised as an issue under the current rulemaking. (See discussion in preamble to Subpart F at 57 F.R. 18400, April

30, 1992.) We also do not propose to adopt a comment to allow DBEs that perform an aeronautical business to count toward concession goals. 49 U.S.C. Section 47107(e)(7) provides that air carriers and other businesses conducting aeronautical activities are not included in the "overall percentage goal."

Another comment favors calculating goals based on "committed" dollar values derived from agreed-to contracts or contingent purchase orders, rather than estimated dollars. This commenter also disagrees with the proposal to exclude from the base from which the overall goal is calculated, the value of non-DBE management contracts and the gross revenues from the activity to which the management contract pertains. It advocates establishing a base annually to reflect all eligible DBE program activity.

Regarding the latter comment, as discussed above, the statute explicitly requires exclusion of these figures referenced from the base. Further, the goal of "at least 10 percent" is expressed in 49 U.S.C. Section 47107(e)(1) as a percentage of "all businesses at the airport selling consumer products or services to the public," language that the Department interprets to mean "concessions." The statute permits a sponsor to count management contracts with DBEs or goods or services purchased or leased from DBEs toward meeting the goal. Thus, Section 47107(e)(2) provides that a sponsor "may meet the percentage goal of paragraph (1) of this subsection by including any business operated through a management contract or subcontract." Section 47107(e)(3) provides that a sponsor "may meet the percentage goal of paragraph (1) of this subsection by including the purchase from [DBEs] of goods and services used in businesses conducted at the airport..." The Department believes that expanding the base to include all management contract fees or all purchases or leases of goods or services would be inconsistent with these statutory provisions.

Concerning the use of "estimated" versus "committed" dollars when setting overall goals, we note that overall annual goals are required as part of a three year plan. Some projections must be made a year or two in advance. Thus, sponsors would not ordinarily have sufficient information to base overall goals on committed dollars. To the extent that they do, however, such information should be reflected in the goals.

The SNPRM states that all overall goals must provide for participation by all certified DBEs and that goals may not be subdivided by specific groups. The Department's rationale for applying this provision to DOT-assisted contracting is discussed above in connection with 49 CFR Section 26.41. Since the concession program authorized by 49 U.S.C. Section 47107(e) incorporates the definition of "socially and economically disadvantaged individuals" from the contracting provisions of 49 U.S.C. Section 47113, the Department's rationale applies equally to concessions.

In response to two comments, a provision has been added stating that in setting overall goals, a sponsor is permitted to include only those projected expenditures/gross receipts or number of agreements, as applicable, as the rule allows to be counted toward meeting such goals.

2. Counting DBE participation toward meeting goals

Several comments point out that the October 1993 NPRM does not clearly state whether the requirement to perform a commercially useful function applies to all expenditures that can be counted toward DBE goals. One commenter favors doing so, and we concur. The SNPRM clarifies this provision. In the preamble to the NPRM, the Department indicated that this was its intention from the outset. It states, "While the requirement to perform a commercially useful function would be made applicable to any DBE eligible under subpart F, it would be particularly useful in evaluating

firms which provide services or supplies, and which subsequently enter into subcontracts." (58 F.R. 52050 at 52053)

Although the NPRM incorporated the provisions of Section 23.47(d), it did not include guidance on other counting provisions, such as the definition of "regular dealer," "manufacturer," and others. One commenter believes that it would be useful to add a definition of "providers of goods or services," while another believes that the NPRM is too broad in allowing credit for procurement of goods and services which may be "pass-throughs", such as with distributors and brokers. Other comments, discussed below, express the same concerns.

The Department concurs that additional guidance is needed. The SNPRM proposes to adopt many of the counting provisions proposed for DOT-assisted contracting. Although "providers of goods or services" would not be defined as such, the SNPRM lists all types of transactions in which a DBE may participate, including as a regular dealer, manufacturer, or provider of a professional, technical, consultant or other service.

a. Counting purchases or leases of vehicles by car rental firms. The NPRM proposed to count the total dollar value of purchases or leases of vehicles toward DBE goals. Of 10 comments which address this proposal, 6 favor it, 3 oppose it, while one recommends additional review. Of those opposed, two suggest that the profit earned by the DBE is the appropriate amount to be counted.

The comments indicate that car rentals generally acquire their vehicles through fleet purchases. The Department was unaware of this practice at the time the NPRM was developed, and indeed, there is no reference to fleet purchases in the NPRM. According to the comments, most states have franchise laws requiring that fleet purchases be made through a car

dealership. Commenters also state that the major automobile manufacturers have franchise agreements with their dealers, which require all car sales to be made through the dealers.

Fleet purchase transactions vary from one car rental firm to another and from one new car dealer to another. The dealer and car rental firm often agree to have the cars delivered directly from the manufacturer to the car rental firm, a practice known as "drop shipment," in which the dealer neither sees nor touches the cars. The profit margin in a fleet purchase is generally lower than a single car acquired in a retail sale. According to one comment, in a recent year, a minority dealer made a gross profit of approximately $8 per unit on fleet sales of 15,737 cars. The same dealer made $1,090 per unit on 770 cars through retail sales. This dealer comments that car dealers buy and resell these vehicles all in one transaction for which they generally receive a fee of between $10 and $20. Another comment refers to a dealer that made $44 per car or less.

Commenters point out that in a fleet purchase, car rental firms generally adhere to one of two scenarios in processing a new vehicle's ownership documents. In many cases, the new vehicle is delivered to the car rental company and its ownership documents are sent to the new car dealer. In these instances, the dealer handles the titling and registering of the vehicle. In other cases, a new vehicle's ownership documents are sent to the car rental company's regional office or its national headquarters. At these locations, employees of the car rental company, acting as agents for the dealer, perform the various procedures necessary to title and register these new vehicles.

Based on the comments, the Department has concluded that a fleet purchase is a separate function from retail sales of vehicles, and that car dealerships handle the transactions differently. Indeed, a dealer may use a

separate account for its fleet purchases. In our view, the statute does not require that 100 percent of the cost of vehicles acquired in a fleet purchase count toward meeting DBE goals. Section 511(h)(3)(B) of the AAIA provided in part, "In the event that an airport owner or operator requires the purchase or lease of goods or services from DBEs, a car rental firm shall be permitted to meet such requirement by including purchases or leases of vehicles from any vendor that qualifies as a small business concern..."

Moreover, we do not interpret the statute to preclude application of "commercially useful function" principles to purchases or leases of vehicles. As referenced above, the additional counting provisions included in the SNPRM represent a logical outgrowth in response to comments to the NPRM. Hence, we do not concur with one comment which contends that the Department must issue a new NPRM and obtain additional comments on this matter. Also, we are unable to concur with the rationale provided by commenters who state that the total dollar value of vehicles acquired in fleet purchases must be counted so that a car rental can achieve the goals imposed by a sponsor. Under the SNPRM, a concessionaire that fails to meet a DBE contract goal would be permitted to demonstrate that it made good faith efforts.

The Department believes that the car dealer's role in a fleet purchase best fits the description in 49 CFR Section 26.107(2)(iii)(E), which provides for counting the fee or commission charged by a DBE that is neither a manufacturer nor a regular dealer. Under paragraph (1) of this section, the entire amount of the fee or commission charged by a DBE for assistance in the procurement of goods would be counted toward the goals, provided that it is determined by the sponsor to be reasonable and not excessive as compared with fees customarily allowed for similar services. However, no portion of

the goods themselves (in this case, vehicles) would be counted toward the goals.

While a car dealership may qualify as a "regular dealer" in other types of transactions, the Department does not believe that it functions as such in arranging a fleet purchase of vehicles. "Regular dealer" is defined in the SNPRM at Section 26.49(f)(2)(ii), applicable to DOT-assisted contracting, and is incorporated into the concession program. It reads in part as follows: "A firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question..."

Part 23 contained a similar definition at Section 23.47(e)(3). We point out that the vehicles acquired in a fleet purchase are not "bought, kept in stock, and regularly sold or leased to the public in the usual course of business." Rather, they are always acquired from a manufacturer and often shipped directly to the car rental agency.

The fee or commission earned by a car dealer in a fleet purchase generally will equal the gross profit–the difference between the amount charged by the manufacturer and the amount charged by the car dealer. To facilitate compliance with the rule, a definition of "fleet purchase" is proposed, as follows: "a purchase of vehicles in volume from a manufacturer at a discounted price, which is made through a car dealer. While the process may vary by manufacturer and by car dealer, the vehicles are frequently 'drop-

shipped' directly to the car rental firm. A car dealer may handle fleet purchases through a separate account. The minimum number of vehicles in a fleet may vary, but as few as 10 have been used."

Under the SNPRM, a car dealer may qualify as a regular dealer in retail sales of vehicles (other than fleet sales) or when it leases vehicles or sells supplies or new parts. As proposed, 100 percent of the cost of goods purchased or leased from a DBE regular dealer would be counted toward DBE goals.

b. Other counting issues pertaining to car rentals. Two commenters make reference to car repair services performed under a manufacturer's warranty. In some instances, the car rental that purchased the vehicle can select the company to perform the warranty work. The manufacturer, rather than the car rental, pays for the service. One commenter requests that the cost of such warranty services performed by a DBE be counted toward the goals.

Reference is made to 49 U.S.C. Section 47107(e)(4)(B), which provides that a sponsor "may require a car rental firm to meet a requirement under paragraph (1) of this subsection by purchasing or leasing goods or services from a [DBE]..." Since the manufacturer, not the car rental, pays for the work performed under a warranty agreement, we conclude that such purchases do not meet the standard in the legislation. As such, they would not count toward DBE goals.

The SNPRM proposes to incorporate a recommendation by a sponsor to credit toward the goals, the amount paid by a car rental franchise to a DBE hired to manage its leased facilities. This provision relates to the discussion of "management contracts and subcontracts" set forth above.

3. Counting purchases of goods and services by concessionaires (other than car rentals).

Seven comments address the proposal in the NPRM to count the total dollar value of purchases of goods and services by non-DBE concessionaires. As proposed, counting such expenditures would be subject to a requirement that the sponsor and non-DBE make good faith efforts to explore all available options to attain, to the maximum extent practical, a direct ownership arrangement with a DBE. This good faith efforts "test" would apply to concessionaires other than car rentals. Three commenters favor the proposal, while four are opposed.

Of those opposed, three prefer use of a "discount factor" similar to DOT-assisted contracting procedures, in which 60 percent of supplies obtained from a DBE regular dealer can be counted. Another comment wishes to minimize "pass-throughs" such as with distributors and brokers, while one other believes that all concessionaires should be given the same latitude as car rentals, by being exempted from the good faith efforts test.

The SNPRM proposes to apply the same principles of commercially useful function to these transactions as to the ones involving car rentals. Thus, 100 percent of the cost of goods purchased from a DBE acting as a regular dealer or manufacturer would count toward the goals.

If a concessionaire purchases goods from a DBE which is acting neither as a regular dealer nor a manufacturer, only the fee or the commission charged for assistance in the transaction or the cost of the transportation provided would count toward goals, provided that it is determined by the sponsor to be reasonable and not excessive as compared with fees customarily allowed for similar services. However, no portion of the cost of the goods themselves would be counted. Further, the entire amount of fees or commissions charged by a DBE firm that provides a *bona fide* service to a non-DBE concessionaire would be counted toward goals. Counting any of

these expenditures would be predicated on a good-faith efforts test, a condition that is not imposed on car rentals.

The SNPRM makes clear that such purchases of goods and/or services would count even if a non-DBE concessionaire meets a goal for a direct ownership arrangement with a DBE. In response to one comment, we point out that any qualifying DBE participation could count toward goals. The commenter notes that only a limited number of manufacturers of equipment used in baggage cart concessions exist throughout the country. While the rule does not impose restrictions on the geographical location of firms, 49 CFR Section 26.123 does allow a sponsor to employ a geographical preference under the conditions stated in that section.

One comment inquires about warehousing and distribution systems, which have acquired their inventories from DBEs. The commenter proposes that concessionaires be given credit for purchases from such warehousing and distribution systems in proportion to the DBE product mix as a part of the total inventory. Based on a review of the legislation, we do not propose to adopt this comment. 49 U.S.C. Section 47107(e)(3) authorizes sponsors to count purchases from DBEs of goods and services used in "businesses conducted at the airport," words which we interpret to mean "concessions." Thus, only those goods actually purchased by a concessionaire from a DBE and used in operating a concession would be counted toward meeting DBE goals under this SNPRM.

In response to several comments, the SNPRM incorporates a provision stating that packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers.

4. Other counting provisions

One commenter recommends that a DBE should not be required to perform at least 30 percent of the work of a contract with its own forces in order to be considered to perform a commercially useful function. The commenter notes that for management contacts, the 30 percent requirement, which appeared in the December 1992 NPRM, may impose an unrealistically high standard, particularly if it is applied to any work of a concession or activities associated with a management contract. The Department concurs. Thus, while the 30 percent standard and other provisions of 49 CFR Section 26.49(e)(3) would be incorporated into the concession program, management contracts and subcontracts would be exempt. Concession agreements would also be exempt based on our observation that DBEs frequently make up less than 30 percent of a joint venture or sublease less than 30 percent from a prime concessionaire. Other participants in the DBE concession program would be covered by Section 26.49(e)(3), however, in order to be consistent with DOT-assisted contracting provisions.

In response to another comment, the Department could not find a basis in the statute to count purchases of goods or services from DBEs made by non-DBE management contractors. 49 U.S.C. Section 47107(e)(2) makes no reference to such a procedure, while we interpret Section 47107(e)(3) to apply only to concessions. Under the SNPRM, however, a sponsor may impose a contract goal on a management contractor to attain DBE participation through a management subcontract. (See 49 CFR Section 26.115(d).)

**Section 26.107(g) Certification procedures**

The SNPRM gives sponsors the discretion of participating in the Unified Certification Process (UCP) with regard to certifying DBEs under the concession program. (All sponsors would be required to participate in the

UCP with regard to certifying DOT-assisted contractors.) A sponsor that elects not to participate in the UCP would need to independently certify firms that will count toward overall and contract goals set under the concession program. These sponsors could choose to adopt precertification or certify only firms to be counted toward DBE goals.

**Section 26.107(h) Certification process**

A sponsor that does not participate in the UCP would not be subject to the timeframes set forth in 49 CFR Section 26.73(i) in which to make an eligibility determination. These sponsors would be required to determine that a firm is eligible before it could count toward the overall goal or to a firm's contract goal.

Nine comments responded to the Department's proposal for considering the feasibility of adopting a self-certification procedure in limited circumstances, such as for providers of goods and services holding contracts of less than a designated dollar value. Six favor such a procedure, while three are opposed. One proponent recommends using procedures similar to SBA's under which a contracting officer may accept a self-certification in the absence of a written protest by competitors or other credible information. A second proponent suggests imposing penalties for fraud or willful misrepresentation, such as fines or debarment, and also recommends that the Department conduct random samplings of self-certified firms. Those opposed are concerned that self-certification will allow ineligible firms to participate in the program to the detriment of legitimate DBEs.

Significantly, a state department of transportation estimates that 25 percent of applications for DBE certification it receives do not meet eligibility standards and are denied. We concur with the comment that since these

applicants believe their firms to be eligible, there may be an inherent problem with a self-certification process. Self-certification may also offer greater opportunity for fraud and abuse. We believe that these potential difficulties would offset any advantages gained by streamlining the process.

Concerning the proposal to allow sponsors to give "full faith and credit" to certifications of other DOT recipients, all 10 comments on the subject favor it. Two organizations recommend that both the certifying and accepting agency be held harmless if a defect is discovered in the certification, while another recommends that the certifying agency be held harmless. While the SNPRM would allow UCPs to form reciprocal agreements, it does not propose giving "full faith and credit" to certifications of DOT-assisted contractors made by other UCPs or recipients. In view of this, allowing such a practice in the concession program could cause confusion. The Department also believes that the sponsor that counts a firm toward its goals should be the entity responsible for the validity of the certification. If full faith and credit is allowed, a sponsor could knowingly and with impunity accept a defective certification.

Two comments address the feasibility of accepting certifications by local or state agencies that are not DOT recipients, but which use the same eligibility criteria as DOT. Both commenters support such a provision. The Department believes, however, that such agencies would not be proficient in applying the new eligibility standards proposed in this SNPRM, even if their local procedures incorporate them. Also, these agencies would not have the same interest as a recipient in ensuring that their certifications are valid.

For the reasons cited, the SNPRM does not include provisions for self-certification, giving "full faith and credit," or accepting certifications of agencies that are not DOT recipients. We have attempted, however, to

minimize administrative requirements associated with certification, whenever feasible. For example, the SNPRM retains the provision in Subpart F of Part 23 that on-site visits are not mandatory in all instances. The establishment of the UCPs and other provisions pertaining to DOT-assisted contracting would also result in a reduction of administrative costs. The following proposed provisions address many concerns raised by commenters.

A UCP would make all certification decisions on behalf of all DOT recipients in the state, except for sponsors that elect not to participate in regard to their concession programs. If a sponsor does elect to participate, the certification decisions made by the UCP would be binding on it. Subject to the Department's approval, recipients in two or more states could form a regional UCP. UCPs could also enter into reciprocity agreements with other UCPs. A UCP would be permitted but not required to accept the certifications of another UCP. A UCP would not be required to process an application for certification from a firm having its principal place of business outside the state if the firm is not certified by the UCP in the state in which it maintains its principal place of business.

Concerning a comment that sponsors be permitted to contract out certification, the FAA issued guidance to sponsors in 1993 on the eligibility of such costs under the AIP. In response to comments recommending that the Federal government or other agencies be responsible for certification, the Department is proposing recipients retain that responsibility. Regarding certification schedules, Subpart G would incorporate provisions of section 26.73(c), which requires potential DBEs to complete and submit an appropriate application form. Sponsors would be required to use the form provided in Appendix C without change or revision, except that subject to approval by

FAA, additional information not inconsistent with the rule could be requested.

**Section 26.107(j) Certification Standards**

We received 7 comments concerning automobile dealer development programs operated and financed by major car manufacturers. All 7 commenters would support a provision to allow these firms to participate as DBEs. They suggest that the Department grant a limited exception to the ownership requirements in the rule. The comments explain that firms seeking to become car dealerships do not have access to the $700,000 to $1 million in start-up costs necessary to place a new car dealership in business. The commenters state that since commercial banks have not been interested in lending money to these unestablished dealers, the automobile manufacturers have provided start-up financing as a component of their dealer development programs.

Comments indicate that under the program, a candidate must provide a minimum of 15 percent of the start-up capital for the dealership, in return for which the candidate receives 100 percent of the common stock of the new dealership. The manufacturer loans the candidate the remainder of the start-up capital, taking back what is in effect a security interest in the new dealership. This security interest takes the form of a controlling interest in the preferred stock of the corporation. The dealership contract is structured so that as long as the preferred stock is outstanding, the common stockholders in the corporation will not have voting control over the corporation.

This dealership contract is often for a period of ten years, after which the contract will lapse if certain performance and profit conditions have not

been met. The intent of the arrangement is that the candidate/dealer will redeem, on an annual basis, a portion of the preferred stock held by the manufacturer out of the profits of the dealership. The dealer gradually redeems all of the preferred stock and gains full control of the dealership within ten years of inception. During the early years of their contracts, dealers in development will not be able to participate in the DBE concession program because they do not own 51 percent of the their dealerships. These commenters do not advocate waiving any other eligibility criteria. They state that the industry recognizes the importance of assuring that disadvantaged owners are actively involved in the daily management of the dealership and meet appropriate size standards.

In considering this matter, we make reference to the definition of a "DBE" as follows: "a for-profit small business concern--(a) which is at least 51 percent owned by one or more socially and economically disadvantaged individuals 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." (49 CFR Sections 26.5 and 26.101)

The comments request that we waive the requirements in paragraph (a) concerning ownership. As paragraph (b) makes clear, to qualify as a DBE, the management and daily operations of the firm must be controlled by one or more disadvantaged individuals who are the 51 percent owners. In the case of some dealers in development, however, disadvantaged individuals own less than 51 percent of the business. Thus, control of such a firm cannot rest with disadvantaged individuals, as specified in paragraph (b), if the manufacturer is a non-DBE. Additionally, the comments indicate that the

manufacturer and developing firm are in a franchisor/franchisee relationship. If this is the case, and the franchisor controls the franchisee, the firms would be affiliated. Under 49 CFR Section 26.107(j)(4), a business operating under a franchise agreement is eligible for certification only if it qualifies as a DBE and the franchise is not affiliated with the franchisee. Firms are affiliated if one firm controls or has the power to control the other or they meet other criteria stated in the definition of "affiliation" found in 49 CFR Section 26.101.

Inasmuch as both ownership and control criteria would need to be waived, the SNPRM would not grant an exemption for dealers in development. However, in the event that the Department adopts a developmental program or a mentor-protégé program for concessions at a future date, we would reexamine our position to determine if dealers in development could qualify.

A commenter notes that while the Department's program encourages the formation and growth of new firms, it may be difficult to make an eligibility determination of a newly formed firm that intends to perform a concession. A provision has been added which would address such situations. The SNPRM states that while a new firm applying for certification as a concessionaire must meet all eligibility standards, a sponsor cannot deny certification solely because it is new, without applying the eligibility standards.

The rule would also clarify that a limited partnership is not eligible for DBE certification if a non-DBE or a non-disadvantaged individual is the general partner.

**Section 26.107(k) Good faith efforts**

This section would require sponsors to use race neutral means, such as outreach and technical assistance, in an effort to meet overall goals, prior to applying the race-conscious technique of contract goals. In many cases, we anticipate that sponsors will need to apply race-conscious means in order to overcome the effects of past discrimination.

This section includes a list of good faith efforts, which is not exhaustive, that a sponsor would consider making to meet its overall annual goals. The efforts would also apply, as appropriate, to firms subject to a DBE contract goal, as well as to a sponsor and firm required to make good faith efforts to attain a direct ownership arrangement with a DBE. To assist sponsors and businesses, a definition of "good faith efforts" has been added.

One commenter to the October 1993 NPRM requests that a method be developed for obtaining nationwide information about the availability of certified DBE providers of goods and services. The FAA will provide such information or sources of information that it has. Another commenter requests additional guidance to clarify the meaning of suggested good faith efforts for attaining a direct ownership arrangement with a DBE. The Department suggests, as one example, that the firm conduct a pre-bid meeting concerned with the DBE portion of the contract to explain the solicitation and proposal process.

Another comment observes that the statute requires concessionaires to enter into joint venture agreements with DBEs only if "practical" and urges the Department to clarify that concessionaires cannot be required to offer DBEs financial assistance, management training, or other support as a means of making a joint venture arrangement practical. The Department concurs, and an appropriate provision would be added at 49 CFR Section 26.115(g).

The Department believes, however, that it is within the authority of the legislation to require sponsors and concessionaires to provide technical assistance to DBEs in overcoming limitations, such as the inability to obtain bonding or financing. This assistance may include providing DBEs with information on lending institutions. A provision to this effect now appears in the SNPRM. A sponsor and/or concessionaire may also work with banks in their community in an effort to encourage loans to DBE program participants. A regulation of the Board of Governors of the Federal Reserve System, implementing the Community Reinvestment Act, imposes a continuing and affirmative obligation on financial institutions to help meet the credit needs of their local communities. (See 12 CFR Part 228.)

**Section 26.107(l) Monitoring and compliance procedures**

One commenter recommends establishing a requirement to ensure that non-DBE concessionaires actually fulfill their promised levels of DBE participation. We concur. A new provision would direct sponsors to implement appropriate mechanisms to ensure that all program participants comply with the requirements established pursuant to this subpart. The sponsor would utilize its own local authority to enforce these contractual conditions.

**Section 26.115 Obligations of concessionaires, contractors, and competitors**

The Department concurs with a comment to the NPRM stating that a sponsor is authorized to impose a DBE contract goal on competitors for concession agreements. This provision is included in the SNPRM. It would also permit a sponsor to impose a contract goal on a management contractor to attain DBE participation through a management subcontract.

Like the current rule, the SNPRM does not require a DBE contract on each concession; rather, the sponsor has discretion to select agreements to be covered by this requirement.

Three commenters to the NPRM support the provision that requires sponsors to seek DBE participation in all types of concessions to the extent practical. They believe that the overall percentage of DBE participation should be distributed equitably among concessionaires. Another commenter requests that the rule expressly prohibit sponsors from levying disproportionate requirements on small concessions. It believes such a provision is a corollary to the statement in the current rule that sponsors "not concentrate participation in one category or a few categories to the exclusion of others."

The SNPRM retains the provision in the existing rule requiring sponsors, to the maximum extent practical, to seek DBE participation in all types of concession activities and not concentrate participation in any one or few categories to the exclusion of others. However, we do not propose to adopt a recommendation to require all contract goals to be set at the same percentage level. The SNPRM proposes that a contract goal may be higher or lower than the overall goal, depending on such factors as the type of work involved, its location, and the availability of DBEs for the work of the contract or concession. Unreasonably high contract goals, unrelated to the availability of DBEs, would not be authorized.

The SNPRM proposes that when a contract goal is set, the sponsor would be required to notify competitors that as a condition of receiving the award, the firm must submit information indicating that it will meet the goal by using named DBEs or that it made good faith efforts. Sponsors would be prohibited from using more stringent mechanisms than good faith efforts,

such as a set-aside or conclusive presumption, except under specific conditions. A similar approach is proposed under Section 26.45 for DOT-assisted contracting.

Like overall goals, all contract goals would provide for participation by all certified DBEs and could not be divided into group-specific goals. We concur with one comment that opposes demands by sponsors to give preferential treatment to one group of DBEs over another.

Under the SNPRM, a sponsor may impose either of two requirements on a non-DBE concessionaire or firm competing for the award of a concession agreement, other than a car rental. A contract goal may be set to attain DBE participation solely through a direct ownership arrangement. Alternatively, a contract goal may be set for the purchase of goods or services. In the latter case, the sponsor would be subject to the procedures in 49 CFR Section 26.117, pertaining to making good faith efforts to attain a direct ownership arrangement.

The Department concurs with a comment that sponsors should not be required to allow car rental firms to meet DBE goals through purchase or lease of goods and services. Accordingly, the SNPRM proposes that a sponsor may levy one or both of the following requirements on such firms. First, it may set a contract goal for purchases or leases of goods or services, in which case, the car rental would be permitted to meet the goal by including costs associated with purchases or leases of vehicles from any firm that qualifies as a DBE.

A sponsor could also require a car rental to state in writing whether a change to its corporate structure is needed in order to form a direct ownership arrangement with a DBE; and to identify any such arrangements. If the car rental can provide for a direct ownership arrangement with a DBE without

altering its corporate structure, the sponsor could require it to make good faith efforts to achieve a contract goal through such arrangement. If, however, the car rental cannot form a direct ownership arrangement with a DBE without altering its corporate structure, the sponsor must deem the firm to be responsive to any requirement pertaining to direct ownership arrangements.

The SNPRM proposes that DBEs may participate as prime concessionaires or management contractors through direct contractual agreements with the sponsor. Although the NPRM made reference only to DBEs as prime concessionaires, the legislation does not limit the provision in this way.

Since several comments address the matter of calculating DBE contract goals, we have included a new section on this matter. If a goal applies to a direct ownership arrangement, it would be calculated as a percentage of the total estimated annual gross receipts from the concession. If the goal applies to purchases and/or leases of goods and services, it would be calculated by dividing the estimated dollar value of such purchases/leases from DBEs by the sum of that amount and the estimated annual gross receipts from the concession. The latter is expressed in the following formula, which is designed to parallel the statutory direction for calculating overall goals:

$$\text{DBE Contract Goal} = \frac{\text{Estimated purchases/leases from DBEs (\$)}}{\text{Estimated purchases/leases from DBEs(\$)} + \text{Estimated gross receipts from concession (\$)}}$$

To illustrate: A concession is expected to generate $1 million in gross receipts, and the sponsor wishes to set a DBE contract goal of 10 percent. To meet the goal, the concessionaire must purchase/lease $111,111 in goods or services from DBEs.

$$10\% \text{ DBE Goal} = \frac{\$111{,}111}{\$111{,}111 + \$1{,}000{,}000}$$

While the rule would not include a formula for calculating a DBE contract goal imposed on a management contractor, it may be calculated as a percentage of the amount of the prime contract. The Department seeks comment on whether this approach is a sensible one for contract goals, or whether there are other approaches the Department should consider.

Several comments address the proposal under which car rentals are not required to make good faith efforts to form a direct ownership arrangement with a DBE as a condition of counting the purchase or lease of goods and services from DBEs. All representatives of the car rental industry agree with the proposal. Another comment states that the statute does not relieve sponsors or any business operating at airports from making good faith efforts to achieve direct DBE participation. This commenter states that alternative methods of compliance through purchase of goods and services from DBEs is permitted only when direct participation is not practical. Yet another comment states that the statute does not preclude car rental firms from entering into a joint venture, partnership, sublease, or other direct ownership arrangement with a DBE, where such an arrangement is practical or desirable. This comment states that the statute does not relieve car rental firms of the "good faith" requirement applicable to every other non-DBE business operating at the airport.

Still another commenter, contending that the good faith efforts test should be applied to car rentals, strongly disagrees with the NPRM. It points out that much of the intent of Congress was stated between the time of the 1987 amendments to the AAIA and the subsequent 1992 Act. This

commenter notes that several members of Congress made very key and explicit statements in their remarks on the good faith efforts issue.

Based on its review, the Department has concluded that the Congressional statements cited by this last commenter either do not support its position or are largely irrelevant because they refer to an early version of Section 117 of the 1992 Act which is substantially different than the language of Section 117 that was enacted into law. The position advocated by the commenter was thoroughly considered by Congress during its early deliberations on the 1992 Act but was discarded by Congress in drafting the final statutory language.

Moreover, the Department believes that the plain language of the statute does not impose a good faith efforts test on car rental firms before they are permitted to engage in vendor purchases. 49 U.S.C. Section 47107(e)(3) of 49 U.S.C. (formerly Section 511(h)(2) of the AAIA), which covers all concessionaires except car rental companies, contains the good faith efforts test. Section 47104(e)(4)(B) (formerly Section 511(h)(3)(B) of the AAIA), which covers car rental concessionaires only, contains no such language. Standard rules of statutory construction require that the words of a statute must be given their plain meaning, and the absence of the good faith efforts test from the provision covering car rental concessionaires shows that the test is not mandated for these concessionaires. In Russello v. United States, 464 U.S. 16.23 (1983), the U.S. Supreme Court held that where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

The Department concurs with other comments on this matter to the extent that a sponsor may, within the constraints imposed by the statute, levy certain requirements on car rentals pertaining to direct ownership arrangements. These requirements are discussed above.

The NPRM proposed that a car rental firm would not be required to change its corporate structure in order to provide for a direct ownership arrangement with a DBE. A change in corporate structure was defined to include a "transfer of corporate assets, or execution of a joint venture, partnership, or sublease agreement." One commenter disagrees with the proposal, while several others agree. The one opposed comments that it does not see a "coming-together" of two businesses such as in a joint venture, partnership, or a specific sublease as a change in corporate structure, and the rule should not define it as such. The Department believes, however, that a firm that does not generally conduct its operations through such arrangements may need to alter its corporate structure to provide for doing so. Although the statute does not define "change to corporate structure," Senator Wendell Ford addressed this point as follows:

> *Section 511(h)(3) of the AAIA, as amended provides that nothing in the law on DBE assurance 'shall require a car rental firm to change its corporate structure to provide for direct ownership arrangements.' For example, a car rental firm is not required, but is permitted, by the DBE assurance sections 511(a)(17) and 511(h) of the AAIA, as amended, to transfer corporate assets or engage in joint ventures, partnerships, or subleases. I would like to repeat that this language has been agreed to by both the car rental industry and the airports.* 138 Cong. Rec. S17843 (October 8, 1992) (statement of Sen. Ford).

In an extension of his remarks on the floor of the House of Representatives on October 2, 1992, Representative James L. Oberstar submitted a similar statement for the Congressional Record on October 8, 1992 (138 Cong. Rec. E 3501). Representative William F. Clinger submitted the

same statement to the Congressional Record, as an extension of his remarks. (138 Cong. Rec. D 3257.) The SNPRM retains the definition of "change to corporate structure" consistent with the sense of Congress described above.

One commenter requests clarification of whether an airport can express a preference for a car rental that can achieve a DBE goal through a direct ownership arrangement without changing its corporate structure, for instance, a firm that traditionally franchises. The SNPRM would prohibit sponsors from granting such a preference. The Department believes that if adopted, the practice could have the effect of imposing a *de facto* requirement on some firms to change their corporate structure in order to enter direct ownership arrangements. The prohibition in the rule applies to the selection by sponsors of car rental concessionaires and to the terms and conditions of concession agreements.

**Section 26.117 Conditions precedent to counting purchases of goods and services by concessionaires (other than car rentals) toward DBE goals**

The rule would include this separate section on the good faith efforts test, which lists the conditions precedent to counting purchases of goods and services toward DBE goals by concessionaires (other than car rentals). For each covered concession, the sponsor would be obligated to either (1) set a DBE contract goal for a direct ownership arrangement and require the non-DBE firm to make good faith efforts; or (2) submit information to the FAA demonstrating that the sponsor and firm made appropriate good faith efforts to attain DBE participation through a direct ownership arrangement.

In the latter case, the sponsor would be permitted, if appropriate, to submit an explanation as to why the nature of a particular concession makes a direct ownership arrangement not economically feasible or otherwise

impractical. Any contract goals established under this section would be subject to FAA approval. The Department interprets 49 U.S.C. 47107(e)(3) as authority to require a contract goal for a direct ownership arrangement, whenever practicable. The statute requires the sponsor and concessionaire to "make good faith efforts to explore all available options to achieve, to the maximum extent through practicable, compliance with the [overall DBE] goal through direct ownership arrangements, including joint ventures and franchises."

Purchases of goods and services covered by this section would be counted toward DBE goals throughout the duration of the concession agreement, as long as the requirements of this section and subpart are met. For example, if a concessionaire meets a contract goal for a direct ownership arrangement, the purchases of goods and services can also count toward the goals.

**Section 26.121 Prohibition on long-term, exclusive concession agreements**

Under the SNPRM, a sponsor would be permitted to enter into a long-term, exclusive agreement only if one or more DBEs participate throughout the term of the agreement. These DBEs must account for a percentage of the gross receipts equal to a level set in accordance with the goaling process of §26.107. The SNPRM would specify that such DBE involvement must be in the form of a concession.

However, purchases of goods and services from DBEs would also count toward the goals, as provided in §26.117. The SNPRM also proposes that if a DBE concessionaire cannot perform successfully, the non-DBE concessionaire must replace the firm with another DBE, if the remaining term of the

agreement makes this feasible. Under a newly proposed provision, if such a replacement would not be feasible, the non-DBE would be required to make good faith efforts during the remaining term of the agreement to encourage DBEs to compete for the purchase and/or leases of goods and services that it procures.

**Section 26.123 Compliance procedures**

One commenter recommends that the final rule include relatively short deadlines for completing the various stages of investigating a complaint, and that in any case, the FAA be required to resolve a complaint within six months. Two commenters believe that unless the areas relating to car rental concessions are more specific in terms of what a sponsor is permitted to require, many complaints will be generated. One of these commenters recommends that this section be modified accordingly.

The FAA considered matters pertaining to complaint processing in connection with the development of 14 CFR Part 16 (61 FR 53998; October 16, 1996). In the NPRM leading to this rule (59 FR 29889; June 9, 1994), the Department invited comments on specific procedures that would apply to complaints filed under the DBE program. Prior to issuance of Part 16, the procedures in 14 CFR Part 13 governed.

The obligations that would be imposed on concessionaires, including car rentals, are set forth in other sections of the rule, including 49 CFR Section 26.115. 49 CFR Section 26.123 would provide for processing complaints and taking enforcement actions in the event of noncompliance. Complaints would be processed in accordance with the procedures of FAA regulation 14 CFR Part 16, while Title 49 of the United States Code (U.S.C.), including Sections 47106(d), 47111(d), and 47122, would govern the enforcement actions

the Administrator is empowered to take in the event of noncompliance. We would like to point out that these procedures would apply to any noncompliance matter, regardless of whether it involves a car rental or other covered organization. We note that other procedures (e.g., DOT Title VI procedures) may apply concurrently in some cases.

**Section 26.125 Effect of subpart**

The SNPRM retains the provision in the NPRM concerning nonpreemption of State or local requirements. A new paragraph is proposed concerning local geographical preference, which formalizes FAA guidance on the matter. This section would also incorporate certain miscellaneous requirements from 49 CFR Section 26.99, concerning the availability of records, confidentiality of information on complainants, cooperation, and the prohibition on intimidation and retaliation. These provisions would apply equally to the concession program.

**Appendix G - Size Standards for the Airport Concession Program**

The NPRM focused on two issues relating to size standards. It solicited comments on an appropriate size standard for car dealerships, and proposed use of SBA size standards for other off-airport firms and for management contractors.

Regarding car dealerships, the NPRM incorrectly stated that the SBA size standard was $11.5 million. The actual standard at the time was $18 million. The standard has since been raised to $21 million, due to an inflationary adjustment to the receipts-based size standards in 13 CFR Part 121, not otherwise prohibited by statute from change. SBA announced this change April 7, 1994. (See 59 F.R. 16513.)

All car rental agencies that commented and four other commenters strongly support basing the size standard for car dealers on number of employees. The number recommended by these organizations ranges from 100 (unaggregated where a DBE owns more than one dealership) to 500 (if aggregated). The SBA believes that its size standard is reasonable for car dealerships, although it comments that a moderately higher standard would also be acceptable. Two commenters suggest basing the standard on annual net profits, while five commenters recommend that the Department conduct additional research prior to setting a standard. Two of these latter propose that no size limit be imposed during the initial implementation of the rule, while one favors use of an interim standard. Those recommending additional research believe that a number of factors should be studied, including average annual gross receipts earned by dealerships; impact of fleet purchases on gross receipts; number and location of minority dealerships; recognition that not all dealers are given the same line of credit, and that a small dealer may be unable to obtain the credit needed for a fleet inventory.

One sponsor observes that in processing applications for certification, DBE car dealers who own less than 51 percent of a dealership are more likely to meet SBA's size standard, while DBEs who own more that 51 percent of a dealership often exceed this cap. Of the comments favoring the use of gross receipts, one recommends a standard of $58 million, another in excess of $200 million, while another recommends setting the standard based on non-fleet sales, together with other revenues earned from service, parts, and body shop work. Ten car dealerships comment that fleet sales result in very low profits even though dollar volume is high. All car dealers that commented voice the concern that a low gross receipts cap such as $17 million would make them ineligible immediately.

Most dealers provided information on their own gross receipts and number of employees. Only one dealer reports yearly revenues of less than $5 million; five range between $17 and $29 million; three between $45 and $62 million; and three between $100 and $150 million. Two have multiple dealerships (four and five), with aggregated revenues of approximately $424 million and approximately $250 million respectively. The number of employees ranged from 38 to 150 per dealership. Most employment levels range from 38 to 70, with only one dealer reporting more than 600 at four dealerships.

As suggested by one commenter, we obtained the SBA's study, "Review of Auto Dealer Size Standard March 1991," prepared by Robert N. Ray. The study, which has been included in the docket, was undertaken to determine what assistance the SBA could provide to new and used automobile dealers. The industry was in distress at the time of the study due to a downturn in the business cycle. The study recommended an increase in the size limit to $13.5 million or $14.5 million.

The Department concurs with commenters who believe that a size standard based on gross receipts is inappropriate to the extent that revenues from fleet purchases are included, as only a small profit is made by the dealer in these transactions.

The Department has concluded that car dealers meeting the SBA's size standard, in general, are not large enough to handle fleet purchases or are participating in a dealer development program and may own less than 51 percent of the dealership. As noted above, such dealers in development cannot qualify as DBEs. Thus, adopting the current SBA standard of $21 million may leave only a small pool of DBEs to perform the type of work eligible to be counted toward DBE goals. This approach could also eliminate

many firms soon after "graduating" from a dealer development program and which could benefit significantly from the DOT's DBE program. Selection of a size standard must also consider the substantial capital investment that a new car dealer makes. Setting the standard too low may not provide sufficient time for the firm to develop and grow.

Extensive research may be required in order for the Department to determine an appropriate receipts-based standard that excludes revenues from fleet purchases. A commenter observes that SBA regulations include an employee-based size standard of 500 employees for Division G, "Retail Trade," non-manufacturers engaged in government procurement, and 100 employees for wholesale dealers for Division F, "Automobiles and Other Motor Vehicles." The Department is proposing to use a maximum of 500 employees as the standard. It would apply to any firm that meets the definition of SIC 5511, "Motor Vehicle Dealers (New and Used)," found in 49 CFR Section 26.101 under "small business concern." Given the nature of the comments, we do not believe that this standard would result in a very few DBEs dominating the market, to the detriment of smaller DBEs.

If the proposal is adopted, the FAA would notify sponsors in the event of a change to the definition of SIC 5511. The size standard of 500 employees would apply to any firm meeting this definition, regardless of the type of goods and/or services it seeks to provide under the concession program. Thus, if a DBE dealer arranges for a fleet purchase and provides vehicle repair services to a concessionaire, a maximum of 500 employees would be used as the standard for both transactions (whereas, the SBA standard for many types of automobile repair and services is $5.0 million, as in Major Group 75). We believe that this approach would simplify administration of the program and is proposed based on many of the same factors as discussed above.

One comment addresses the matter of the size standard for management contractors. This commenter believes that SBA's size standard of $3.5 million for parking lot contractors may be low, given the experience necessary to manage a parking lot. It suggests a survey of DBE firms currently in this business and of the minimum qualification criteria set by airports.

In proposing to use SBA's size standards, the Department commented that management contractors, unlike concessionaires, generally are not required to make a substantial capital investment in a leasehold facility. Thus, they would not encounter the hardships associated with "graduating" from the DBE program after exceeding the size standard, that ordinarily would befall concessionaires. Indeed, the turnover of DBEs would allow more firms to enter and benefit from the program.

The SBA's April 7, 1994, final rule increased the size standard for parking lot operators to a maximum of $5.0 million. (See SIC 7521, "Automobile Parking.") The Department points out that rulemaking procedures do not require a survey of organizations having an interest in the matter. Further, at least some of the information that would be obtained in a survey could have been addressed by commenters. Significantly, no firms and only one sponsor commented. In view of this and the recent increase in the standard, the Department proposes to use $5.0 million as the size standard for parking lot operators.

The rule would also incorporate the SBA's size standards for all other providers of goods or services. With regard to leasing of vehicles, if a firm does not fall under SIC 5511, "Motor Vehicle Dealers (New and Used)," the appropriate size standard would generally be SIC 7515, "Passenger Car Leasing," which is set at $18.5 million.

The SNPRM would make an inflationary adjustment to the size standards for concessionaires, pursuant to the Secretary's authority under 49 CFR Section 26.101. The Department of Commerce, Bureau of Economic Analysis, prepares estimates of personal consumption expenditures using suitable price indices. These indices include purchases of goods and services, many of which are sold to the public by airport concessionaires. The implicit price deflator for personal consumption expenditures was 10.9 from June 1992 to March 1996. Since size standards for concessionaires were originally established and became effective June 1, 1992, the second quarter of 1992 is used as the base period. 10.9 percent represents the rate of increase since that time. By multiplying the appropriate size standard by 1.109 we are able to adjust dollar figures for inflation.

Thus, $40,000,000 multiplied by 1.109 yields $44,360,000 as the proposed new size standard for auto rental concessionaires. $30,000,000, when multiplied by 1.109, yields $33,270,000 as the proposed new size standard for many other categories of concessionaires. These standards would apply to concessions as listed in Appendix G, until such time as they are amended. The standards will be further adjusted upon issuance of a final rule.

Miscellaneous comments to the NPRM

The SNPRM does not incorporate a recommendation by one commenter to require prompt payment to DBE contractors. The Department has no experience in administering a concession program involving providers of goods or services and does not know whether prompt payment to DBEs is an issue under such contracts. This matter can be reconsidered at a later point if problems are brought to our attention.

Two commenters believe that the proposed revisions are not in the best interest of minorities. One is concerned that the resources required to monitor purchases of goods and services and management contractors will make it more difficult to facilitate DBE involvement in direct ownership arrangements. The Department does not concur that such monitoring will impose an unreasonable burden. Additionally, the Department is required by statute to issue a regulation implementing the provisions relating to goods and services.

Another commenter supports the idea of implementing a "managed growth" program in which DBEs move from threshold to threshold in terms of development. Upon attaining the level of progress that enables the firm to compete in the free marketplace, the DBE program will have accomplished its goal. The comment does not indicate whether such "thresholds" are size standards or other types of developmental stages. Another commenter believes that the proposed development program presents major problems and should not be included without research and testing. We point out that the October 3, 1993, NPRM did not propose a developmental program for DBEs. Such a program was proposed for DOT-assisted contractors and is addressed in that section of the SNPRM.

Other matters pertaining to *Adarand*

The SNPRM does not include a proposal for diversifying DBEs in concessions similar to the one proposed under Section 26.33 for DOT-assisted contractors. There are several reasons for this. First, available data does not indicate that DBEs are concentrated in particular types of concessions. Further, when all primary airports are included, DBEs have accounted for less than 10 percent of total gross receipts earned during each of

the past three years. Many individual airports are also below this level. Additionally, in contrast to highway construction, very few non-DBEs have complained to the Department of being excluded from particular types of concessions due to a concentrations of DBEs.

Like the current rule, the SNPRM would require a DBE to leave the program once it exceeds a specified size standard. As in the the other portions of the SNPRM, Subpart G does not propose additional "graduation" provisions. However, the Department seeks comment on whether additional provisions affecting the duration element of narrow tailoring should be added to this portion of the rule.

## REGULATORY ANALYSES AND NOTICES

### Executive Order 12866

This is a significant NPRM under Executive Order 12886. We view it as significant because it has substantial policy and public interest and affects a broad variety of parties across three DOT modes. As noted earlier in the preamble, this SNPRM is one part of the Clinton Administration's overall reform of affirmative action programs. For the same reasons, it is also significant under the Department's Regulatory Policies and Procedures.

We do not believe that the SNPRM would have significant ecnomic impacts, however. In evaluating the potential economic impact of this SNPRM, we begin by noting that this proposal would not create a new program. It would revise the rule governing an existing program. The economic impacts of the DBE program are created by the existing regulation

and the statutes that mandate it. The changes that we propose in this program are likely to have some positive economic impacts. For example, "one-stop shopping" and clearer standards in certification are likely to reduce costs for small businesses applying for DBE certification, as well as reducing administrative burdens on recipients.

"Narrow tailoring" changes are likely to be neutral in terms of their overall economic impact. These could have some distributive impacts (e.g., if the proposed goal-setting mechanism results in changes in DBE goals, a different mix of firms may work on DBE contracts), but there would probably not be net gains or losses to the economy. There could be some short-term costs to recipients owing to changes in program administration resulting from "narrow tailoring," however.

In any event, the economic impacts are quite speculative and appear nearly impossible to quantify. We do not now have any data that would allow us to quantify these impacts. The Department is working with other agencies to see if data on DBE participation and potential effects of the proposal can be obtained. We also seek comments and information on the issue of economic impacts or costs to participants. We will conduct further analysis if information or comments we receive make it possible.

**Regulatory Flexibility Act Analysis**

The DBE program is aimed at improving contracting opportunities for small businesses owned and controlled by socially and economically disadvantaged individuals. Virtually all the businesses it affects are small entities. There is no doubt that a DBE rule always affects a substantial number of small entities.

The SNPRM, while improving program administration and facilitating DBE participation (e.g., by making the certification process clearer) and responding to legal developments, appears essentially cost-neutral with respect to small entities in general (as noted above, the one-stop shopping feature is intended to benefit small entities seeking to participate). It does not impose new burdens or costs on small entities, compared to the existing rule. It does not affect the total funds or business opportunities available to small businesses who seek to work in DOT financial assistance programs. To the extent that the proposals in this SNPRM (e.g., with respect to changes in the methods used to set overall goals) lead to a different goals than the existing rule, some small firms may gain, and others lose, business.

There is no data of which the Department is aware that would permit us, at this time, to measure the distributive effects of the proposed revisions on various types of small entities. It is likely that any attempt to gauge these effects would be highly speculative. For this reason, we are not able to make a quantitative, or even a precise qualitative, estimate of these effects.

Nevertheless, the Department seeks any information that commenters may have on potential small entity impacts of the SNPRM, particularly the provisions concerning goal-setting and DBE diversification. In addition to reviewing information we receive in comments, DOT anticipates working with other agencies involved in the Administration's affirmative action reform effort to benefit from research and analysis they have performed. Based on the information we have ontained (or program data after a final rule is implemented), the Department may be in a position to do a more detailed analysis of small entity impacts in the future.

**Paperwork Reduction Act**

At the present time, under 49 CFR Part 23, the Department has one information collection item approved under the Paperwork Reduction Act. This is for a quarterly DBE data report from recipients to DOT (OMB No. 2105-0510). This approval expires July 31, 1997. Under the SNPRM, the frequency of reporting would change from four times a year to twice a year, which would reduce the burden involved.

Under Part 23, there are other regulatory requirements that may have Paperwork Reduction Act implications. These include the requirement for applicants for DBE participation to submit eligibility information to recipients (Appendix C of the SNPRM contains a proposed certification form that applicants would use) and for recipients to submit DBE programs and overall goals to DOT for approval. Similar requirements apply in the airport concessions portion of the rule. These provisions, for the most part, originated before the current version of the Paperwork Reduction Act, and the Department did not, at the time, submit Paperwork Redution Act approval requests concerning them. These activities would continue under the SNPRM, which would also add a one-time requirement for the submission of a unified certification program plan to the Department for approval.

The Department intends to analyze information collection requirements in the DBE program in greater detail before the issuance of a final rule, and we seek comments on information collection issues. The Department intends, based on its own analysis and information we receive in comments, to submit a formal information collection approval request to OMB in connection with paperwork contained in Part 26.

Organizations and individuals wishing to submit comments on these proposed requirements should direct comments to OMB's Office of

Information and Regulatory Affairs, Room 10235, New Executive Office Building, Washington, D.C., 20503: Attention: Desk Officer for U.S. Department of Transportation. OMB is required to make a decision concerning the collection of information proposed in this SNPRM between 30 and 60 days after its publication. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the Department's comment closing date.

**Regulatory Reform Initiative**

This proposal is intended to help the Department achieve the goals of the Clinton Administration's Regulatory Reform Initiative. It does so in several ways. It proposes to reduce the frequency of reports. It proposes to reduce the burden on small businesses by creating a one-stop shopping certification system in each state and by ensuring that recipient certification processes treat all applicants fairly and consistently.

One of the most burdensome aspects of the current administration of the program is the vagueness of certification standards and the multiplicity of interpretations and varying guidance and policies that have implemented these standards at the Federal, state, and local levels. To address this problem, the SNPRM reinvents the certification standards and provides clear, specific, uniform, nationwide standards for certification. This will provide greater certainty to all participants and reduce the time, difficulty, and cost involved in the certification process. It will also substantially improve the fairness of the process to applicants.

One aspect of regulatory reinvention is enhancing partnership with state and local governments, providing greater opportunities for state and local innovation and responsibility in carrying out programs. The SNPRM

seeks to do so in a number of ways, such as the program waiver provision and the flexibility provided to establish the unified certification process in each state. The Department seeks comment on additional ways the DBE program can accomplish this objective.

The Department also seeks comment on additional ways in which the Department's regulation can be reinvented, simplified, clarified, or made easier for participants to work with, consistent with the goals of the Administration's Regulatory Reform Initiative.

**Federalism**

The SNPRM does not have sufficient Federalism impacts to warrant the preparation of a Federalism assessment. While the rule concerns the activities of state and local governments in DOT financial assistance programs, the proposal would not significantly alter the role of state and local governments vis-a-vis DOT from the present Part 23. The proposal to permit program waivers could allow greater flexibility for state and local participants, however.

**ISSUED THIS** 21 **DAY OF** May **, 1997, AT WASHINGTON, D.C.**

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**Rodney E. Slater**

**Secretary of Transportation**

For the reasons set forth in the preamble, the Department proposes to remove Title 49, Part 23, of the Code of Federal Regulations and to create a new Title 49, Part 26, of the Code of Federal Regulations, to read as follows:

## PART 26 - PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS

### Subpart A - General

§26.1 - What are the purposes of this rule?
§26.3 To whom does this rule apply?
§26.5 What do the terms used in this rule mean?
§26.7 What discriminatory actions are forbidden?
§26.9 How does the Department issue guidance, interpretations, exemptions and program waivers under this rule?
§26.11 What records do recipients keep and report?
§26.13 What assurances must recipients and contractors make?
§§26.15 - 26.19 - [Reserved]

### Subpart B - Administrative Requirements for DBE Programs for Federally-Assisted Contracting

§26.13 What assurances must recipients and contractors make?
§26.23 What is the requirement for a policy statement?
§26.25 What is the requirement for a liaison officer?
§26.27 What efforts must recipients make concerning DBE financial institutions?
§26.29 What prompt payment mechanisms may recipients have?
§26.31 What requirements pertain to the DBE directory?
§26.33 What steps must a recipient take to foster DBE diversification?
§26.35 What are a recipient's responsibilities for monitoring the performance of other program participants?
§§26.37 - 39 [Reserved]

### Subpart C - Goals, Good Faith Efforts, and Counting

§26.41 How do recipients set overall goals?
§26.43 How are overall goals established for transit vehicle manufacturers?
§26.45 What means do recipients use to meet overall goals?
§26.47 What are the good faith efforts procedures recipients follow in situations where there are contract goals?
§26.49 How is DBE participation counted toward goals?

### Subpart D - Certification Standards

§26.51 How are burdens of proof allocated in the certification process?
§26.53 What rules govern group membership determinations?
§26.55 What rules govern business size determinations?
§26.57 What rule determine determinations of social and economic disadvantage?
§26.59 What rules govern determinations of ownership?
§26.61 What rules govern determinations concerning control?
§26.63 What are other rules affecting certification?
§§26.65 - 26.69 - [Reserved]

**Subpart E - Certification Procedures**

§26.71 What are the requirements for Unified Certification Programs?
§26.73 What procedures do recipients follow in making certification decisions?
§26.75 What rules govern recipients' denials of initial requests for certification?.
§26.77 What procedures does a recipient use to remove a DBE's eligibility?
§26.79 What is the process for certification appeals to the Department of Transportation?
§26.81 What actions do recipients take following DOT certification appeal decisions?
§26.83 What procedures govern direct ineligibility complaints to DOT?
§§26.85 - 26.89 - [Reserved]

**Subpart F - Compliance and Enforcement**

§26.91 What compliance procedures apply to recipients?
§26.93 What enforcement actions apply in FHWA and FTA programs?
§26.95 - What enforcement actions apply in FAA Programs?
§26.97 - What enforcement actions apply to firms participating in the DBE program?
§26.99 What are the rules governing information, confidentiality, cooperation, and intimidation or retaliation?

**Subpart G - DBE Participation in Airport Concessions**

26.101 - Definitions.
26.103 - Applicability.
26.105 - Requirements for airport sponsors.
26.107 - Elements of Disadvantaged Business Enterprise (DBE) concession plan.
26.109 - Rationale for basing overall goals on the number of concession agreements.
26.111 - Obligations of concessionaires, contractors, and competitors.

26.113 - Conditions precedent to counting purchases of goods and services (other than car rentals) toward DBE goals.
26.115 - Privately-owned terminal buildings.
26.117 - Prohibition on exclusive, long-term concession agreements.
26.119 - Compliance procedures.
26.121 - Effect of subpart.

**Appendix A - Explanation and Construction of Provisions of 49 CFR Part 26**
**Appendix B - Good Faith Efforts**
**Appendix C - DBE Certification Form**
**Appendix D - DBE Developmental Program Guidelines**
**Appendix E - Mentor-Protégé Program Guidelines**
**Appendix F - Guidance for Making Individual Determinations of Social and Economic Disadvantage**
**Appendix G - Size Standards for Airport Concessionaires**

**Authority:** Section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991; Airport and Airway Improvement Act of 1982, as amended, 49 U.S.C. 47113, 47107, 47123; Section 19 of the Federal Transit Act of 1964, as amended (49 U.S.C. 1615); 23 U.S.C. 324; and Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d, *et seq.*).

## SUBPART A - GENERAL

### §26.1 - What are the purposes of this rule?

In this rule, the Department seeks to achieve several objectives:

(a) To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs;

(b) To result in programs that, consistent with Federal law, create significant opportunities for DBEs to participate, on a nondiscriminatory basis, in the DOT-assisted contracts

(c) To carry out the statutory requirement concerning DBE participation in concessions at airports receiving Federal grant funds;

(d) To assist the development of firms that can compete successfully in the marketplace outside the DBE program;

(e) To ensure that only firms that fully meet this Part's eligibility standards are permitted to participate as DBEs; and

(f) To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

**§26.3 To whom does this rule apply?**

(a) If you are a recipient of any of the following types of funds, this rule applies to you:

(1) Federal-aid highway funds authorized Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240.

(2) Federal transit funds authorized by Titles I, III, V and VI of Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code.

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

(b) If you are an airport sponsor that has received a grant for airport development after January 1988 authorized by the AAIA, as amended, Subpart G of this rule applies to you.

(c) If you are letting a contract, and that contract is to be performed entirely outside the United States, its possessions, Puerto Rico, Guam, or the Northern Marianas Islands, this rule does not apply to the contract.

(d) If you are letting a contract in which DOT financial assistance does not participate, this rule does not apply to the contract.

**§26.5 What do the terms used in this rule mean?**

"Affiliation" has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR Part 121. Except as otherwise provided in 13 CFR Part 121, concerns are affiliates of each other when, either directly or indirectly:

(a) one concern controls or has the power to control the other; or

(b) a third party or parties controls or has the power to control both; or

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

In determining whether affiliation exists, you must consider all appropriate factors, including common ownership, common management, and contractual relationships. You must consider affiliates together for the when you determine if a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

"Compliance" means that you have correctly implemented the requirements of this rule.

"Contract" means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them.

"Contractor" means one who participates, through a contract or subcontract (at any tier), in a DOT-assisted highway, transit, or airport program.

"Department" or "DOT" means the U.S. Department of Transportation, including the Office of the Secretary and FHWA, FTA, and FAA.

"DOT-assisted contract" means any contract between a you and a contractor 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.

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

(a) which is at least 51 percent owned by one or more socially and economically disadvantaged individuals 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.

"Good faith efforts" means efforts to achieve a DBE goal or other requirement of this rule which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

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

"Noncompliance" means that you have not correctly implemented the requirements of this rule.

"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.

"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 (1) the individual's ownership interest in an applicant or participating DBE firm or (2) 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.

You are a "Primary recipient" if you receive DOT financial assistance and pass some or all of it on to another recipient.

"Program" means any undertaking on your part to use DOT financial assistance.

You are a "Recipient" if you are any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or if you have applied for such assistance.

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

"Set-aside" means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

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

"Small business concern" means, with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR Part 121) that also does not exceed the cap on average annual gross receipts specified in §26.55(b).

"Socially and economically disadvantaged individuals" means individuals who are citizens (or lawfully admitted permanent residents) of the United States and who are:

(a) Individuals in the following groups, who 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, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(3) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, 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, Kirbati, 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.

(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.

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

"You" refers to recipients, unless the context requires otherwise.

**§26.7 What discriminatory actions are forbidden?**

(a) You must never exclude any person from participation in, denied any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by this rule on the basis of race, color, sex, or national origin.

(b) In administering you DBE program, you must not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex, or national origin (see the Department's rule's implementing Title VI of the Civil Rights Act of 1964, 49 CFR Part 21)..

**§26.9 How does the Department issue guidance, interpretations, exemptions and program waivers under this rule?**

(a) This rule supersedes the former 49 CFR Part 23. Only guidance and interpretations (including interpretations set forth in certification appeal decisions) consistent with and issued after the effective date of this rule have definitive, binding, or precedential effect in implementing the provisions of this rule.

(b) The Office of the Secretary of Transportation and FHWA, FTA, and FAA may issue written interpretations of or written guidance concerning this

rule. Interpretations are valid and binding only if they contain the following statement:

> This interpretation of 49 CFR Part 26 has been reviewed and approved through the Department of Transportation DBE Coordination Mechanism for consistency with the language and intent of Part 26.

(c) If you want an exemption from any provision of this rule, you must request it in writing from the Office of the Secretary of Transportation, FHWA, FTA, or FAA. We will grant the request only if it meets these criteria:

(1) The request documents special or exceptional circumstances, not likely to be generally applicable, and not contemplated in connection with the rulemaking that established this rule, that make your compliance with a specific provision of this rule impracticable. You must agree to take steps we specify to comply with the intent of the provision from which an exemption is granted.

(2) We will issue written responses to all exemption requests. Grants or denials of exemption requests are valid and binding only if they contain the following statement:

> This response to a request for an exemption from 49 CFR Part 26 has been reviewed and approved through the Department of Transportation DBE Coordination Mechanism for consistency with the language and intent of Part 26.

(d) If you want a program waiver authorizing you to operate a DBE program that achieves the objectives of this rule by means that differ from one or more of the requirements of Subparts B, C or G of this rule, you must follow these procedures:

(1) You must apply through the concerned operating administration. The application must include a specific program proposal and address how you will meet the criteria of paragraph (2) of

this paragraph. Before submitting its application, you must have had public participation in developing your proposal, including consultation with the DBE community and at least one public hearing. Your application must include a summary of the public participation process and the information gathered through it.

(2) Your application must show that --

(i) There is a reasonable basis to conclude that you could achieve a level of DBE participation consistent with the objectives of this rule using different, innovative, or less prescriptive means than are provided in Subparts B , C or G.

(ii) Conditions in your jurisdiction are appropriate for implementing the proposal.

(iii) Your proposal would prevent discrimination against any individual or group in access to contracting opportunities or other benefits of the program; and

(iv) Your proposal is consistent with legal and program requirements of the concerned operating administration's financial assistance program.

(3) The Secretary decides whether to grant your application. If the Secretary grants your application, you may administer your DBE program as provided in your proposal, subject to the following conditions:

(i) DBE eligibility is determined as provided in Subparts D and E of this Part, and DBE participation is counted as provided in §26.49 of this Part or Subpart G, as applicable;

(ii) Your level of DBE participation continues to be consistent with the objectives of this Part;

(iii) There is a reasonable limitation on the duration of the your modified program; and

(iv) Any other conditions the Secretary makes on the grant of the waiver.

(4) The Secretary may end a program waiver at any time and require you to comply with this rule's provisions. The Secretary may also extend the waiver, if he or she determines that all requirements of paragraphs (2) and (3) of this paragraph continue to be met. Any such extension shall be for no longer than period originally set for the duration of the program.

(5) The Secretary and Administrators of the concerned operating administrations may establish a limit on the number of recipients' programs operating under a waiver provided under this paragraph.

**§26.11 What records do recipients keep and report?**

(a) You must retain sufficient basic information about its program implementation, its certification of DBEs, and the award and performance of contracts and subcontracts to enable the concerned operating administration to monitor your compliance with this Part. Keep this data for at least three years after the completion of the contract or project.

(b) You must report data to the concerned operating administration concerning DBE participation in DOT-assisted contracts twice a year, in a format and on dates determined by the appropriate DOT office.

(c) You must follow the requirements in this section whether or not you have to have a DBE program under §26.21 of this Part.

**§26.13 What assurances must recipients and contractors make?**

(a) Except as provided in paragraph (b) of this section, each financial assistance agreement you sign with a DOT operating administration (or a primary recipient) must include the following assurance:

> *The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements of this Part. The recipient shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, if required by 49 CFR Part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).*

(b) An operating administration may, in place of the assurance in paragraph (a) of this section, prescribe other language you must agree to in grant agreements or certifications of compliance.

(c) Each contract you sign with a contractor (and each subcontract the prime contract signs with a subcontractor) must include the assurance in this paragraph.

> *The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The requirements of 49 CFR Part 26 and the recipient's DOT-approved DBE program (where required) are incorporated in this contract by reference. The contractor shall take all necessary and reasonable steps in accordance with Part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.*

## SUBPART B - ADMINISTRATIVE REQUIREMENTS FOR DBE PROGRAMS FOR FEDERALLY-ASSISTED CONTRACTING

### §26.21 Who must have a DBE program?

(a) If you are in one of these categories and let DOT-assisted contracts, you must have a DBE program meeting the requirements of Subparts B, C, D, and E of this Part:

(1) All FHWA recipients;

(2) FTA recipients that receive $250,000 or more in FTA planning, capital, and/or operating assistance in a Federal fiscal year.

(3) FAA recipients that receive a grant of $250,000 or more for airport planning or development.

(b) (1) You must submit your program for approval to the concerned operating administration. You must submit revised programs conforming to this Part by [a date 180 days from the effective date of this Part]. Once we approve your program, the approval counts for all DOT programs.

(2) You don't have to submit regular updates of your DBE programs, as long as you remain in compliance. However, you must submit significant changes in the program for approval.

(c) You are not eligible to receive DOT financial assistance unless DOT has approved your DBE program you are compliance with it and this rule. You must continue to carry out your program until all funds from DOT financial assistance have been expended.

### §26.23 What is the requirement for a policy statement?

You must issue a signed and dated policy statement which expresses your commitment to your DBE program, states its objectives, and outlines

responsibilities for its implementation. You must circulate the statement throughout your organization and to the DBE and non-DBE business communities that perform work on your DOT-assisted contracts.

**§26.25 What is the requirement for a liaison officer?**

You must have a DBE liaison officer, who shall have direct, independent access to your Chief Executive Officer concerning DBE program matters. The liaison officer shall be responsible for implementing all aspects of your DBE program. You must also have adequate staff to administer the program in compliance with this rule.

**§26.27 What efforts must recipients make concerning DBE financial institutions?**

You must thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in its community and make reasonable efforts to use these institutions. You must also encourage prime contractors to use such institutions.

**§26.29 What prompt payment mechanisms may recipients have?**

You may establish, as part of your DBE program, one or more mechanisms to ensure that DBE subcontractors are promptly and fully paid.

(a)You may include a contract clause to require prime contractors to pay DBE subcontractors for satisfactory performance of their contracts no later a specific number of days (e.g., 10 days) from receipt of each payment you make to the prime contractor. This prompt payment clause may also provide for

appropriate penalties for failure to comply, the terms and conditions of which you set.

(b) Prompt payment clauses may also provide that any delay or postponement of payment among the parties may take place only for good cause, with your prior written approval.

(c) You may also use a contract clause that requires prime contractors to include in their DBE subcontracts language providing that prime contractors and DBE subcontractors will use appropriate alternative dispute resolution mechanisms to resolve payment disputes. You may specify the nature of such mechanisms.

(d) You may include a contract clause providing that the prime contractor will not be reimbursed for work performed by DBE subcontractors unless and until the prime contractor ensures that the DBE subcontractors are promptly paid for the work they have performed.

(e) You may establish other mechanisms, consistent with this Part and applicable state and local law, to ensure that DBEs are fully and promptly paid, including the prompt return of retainage payments following the satisfactory completion of the DBE's portion of the work.

**§26.31 What requirements pertain to the DBE directory?**

You must maintain and make available to interested persons a directory identifying all eligible DBEs. In the listing for each firm, you must include its address, phone number, and the types of work the firm has been certified to perform as a DBE. The listing may include additional relevant information. You must revise your directory at least annually and make updated information available to contractors and the public on request.

**§26.33 What steps must a recipient take to foster DBE diversification?**

(a) You must include in your DBE program a diversification mechanism to discourage the concentration of DBEs in certain fields. The mechanism shall provide that --

**ALTERNATIVE 1**

If DBE firms receive [50, 75] percent or more of the contracts in a particular field in a given year, you will count toward overall and contract goals in the next year 50 percent of the DBE participation in that field that is normally countable under §26.49.

**ALTERNATIVE 2**

If the cumulative DBE participation in a particular field during any year exceeds four times your overall goal percentage as applied to the work projected to be available in that field over the entire year , you will not count any DBE credit for participation in that field for contracts awarded during the remainder of the year.

**ALTERNATIVE 3**

If all DBEs receive [50, 75] percent or more of the contracts in a particular field in a given year, you will not, in the following year, count toward overall and contract goals any participation in that field of a particular DBE firm (or its affiliate) that has received four or more contracts in that field over the preceding four years.

**ALTERNATIVE 4**

If DBEs receive [50, 75] percent or more of the contracts in a particular field in a given year, you will, in the following year, tailors its contract goals to specify participation in other fields.

(b) In operating outreach and technical assistance programs under §26.45(a), you must give priority to assisting firms to enter fields in which DBEs receive [10, 25, 50] percent or fewer of the contracts.

(c) You may, or, if an operating administration directs you to, must establish a DBE business development program (BDP) to assist selected DBE firms in becoming able to compete in fields in which DBEs receive [10, 25, 50] percent or fewer of the contracts awarded. You may include in this program only firms that meet these criteria:

(1) A DBE firm must have been certified by you for at least two years and must have participated in at least one of your DOT-assisted contracts during that time.

(2) You must have made the following determinations about the firm:

(i) It has as its primary area of operation a field in which DBEs have received at least [50, 75] percent of your DOT-assisted contracts in at least one of the previous three years, and

(ii) It is capable, with business development assistance, of competing successfully in one or more fields in which DBEs have received [10, 25, 50] percent or fewer of your DOT-assisted contracts in at least one of the previous three years.

(3) In providing business development assistance to DBE firms, you must be guided by the provisions of Appendix D of this rule.

(d) As part of a BDP established under paragraph (c) of this section, you may establish a "mentor-protégé" program, in which another DBE or non-DBE firm is a principal source of business development assistance. To participate in such a program, a DBE firm must meet these criteria:

(1) It must meet the criteria of paragraphs (1) and (2) of paragraph (c) may participate in such a program.

(2) It must have participated, during the preceding two years, in at least one contract you let in which the mentor firm did not participate.

(e) In operating a mentor-protégé p;program, you must follow these additional requirements:

(1) During the course of the mentor-protégé relationship, you must not award DBE credit to the mentor firm for using the protégé firm for more than one half of its goal on any contract let by the recipient.

(2) For purposes of making determinations of business size under this rule, you must not treat protégé firms as affiliates of mentor firms, when both firms are participating under an approved mentor-protégé program.

(5) You must operate your mentor-protégé program consistent with the guidelines of Appendix E to this rule.

(e) For purposes of this section, a "field" means an industry as defined by a four-digit SIC code in 13 CFR Part 121 or a readily identifiable category of work in your DOT-assisted contracting, as designated in your DBE program with the approval of the concerned operating administration.

**§26.35 What are a recipient's responsibilities for monitoring the performance of other program participants?**

You must implement appropriate mechanisms to ensure compliance with the rule's requirements by all program participants. You must include in your DBE program the contract provisions, enforcement mechanisms, or

other means you use to ensure compliance. These must include a monitoring and enforcement mechanism to verify that the work committed to DBEs at contract award is actually performed by the DBEs.

**§§26.37 - 39 - [Reserved]**

## SUBPART C - GOALS, GOOD FAITH EFFORTS, AND COUNTING

### §26.41 How do recipients set overall goals?

(a) You must have an overall goal and calculate it as follows:

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

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

(b) Except as provided in paragraphs (c) - (e) , you must calculate its overall goal in the following way:

**ALTERNATIVE 1**

(1) Calculate the number of DBE firms available to work on your DOT-assisted contracts. This is the number of certified DBE firms in your DBE directory.

(2) Calculate the total number of firms available to work on your DOT-assisted contracts. This number includes both the DBE firms in your DBE directory and non-DBE firms available to work on your DOT-assisted contracts.

(3) Calculate the percentage of DBEs among the total number of firms available to work on the recipient's DBE contracts. The result represents DBE capacity and becomes your overall goal.

EXAMPLE: You have 10 DBE firms in your Directory. There are 100 firms, including the 10 DBEs and 90 non-DBEs, available to work on your DOT-assisted contracts. Your overall goal is 10 percent.

**ALTERNATIVE 2 -**

(1) Calculate the number of minority and women-owned firms in your jurisdiction, using 2-digit SIC codes covering the principal types of work in your DOT-assisted contracts.

(2) Calculate the total number of firms in your jurisdiction in the same SIC codes.

(3) Calculate the percentage that minority- and women-owned firms make up of all firms. This percentage becomes your DBE goal.

EXAMPLE: You determine that there are 10 minority- and women-owned firms (not just DBE firms) in your jurisdiction in the three two-digit SIC codes in which you do the bulk of your DOT-assisted contracting. In these same SIC codes, there are a total of 100 firms in your jurisdiction. Your overall goal is 10 percent.

**ALTERNATIVE 3 -**

(1) Calculate the average number of DBE firms that have worked on your DOT-assisted contracts in any capacity (e.g., as prime contractors, subcontractors, suppliers) in the preceding five years.

(2) Calculate the average number of all firms that have worked on your DOT-assisted contracts in any capacity in the preceding five years.

(3) Using the average numbers calculated in paragraphs (1) and (2), determine the percentage that DBE firms make up of all firms that have worked for you in the preceding five years. This percentage becomes your overall goal.

EXAMPLE: Over the five years preceding this year, the following numbers of firms have worked for you:

| | DBEs | ALL FIRMS |
|---|---|---|
| Year 1 | 4 | 45 |
| Year 2 | 5 | 49 |
| Year 3 | 6 | 42 |
| Year 4 | 4 | 38 |
| Year 5 | 6 | 41 |
| TOTAL | 25 | 215 |
| AVERAGE | 5 | 43 |

PERCENTAGE - 11.6% - becomes the overall goal

(c) Under the following circumstances, you may use as an overall goal developed by another agency:

(1) You may use a "benchmark" developed by the U.S. Department of Commerce (DOC) for purposes of Federal procurement if --

(i) The geographic scope of your market with respect to the type of business involved is generally similar to the geographic scope of the market studied by DOC; and

(ii) You make an appropriate adjustment to the "benchmark" to account for the participation of women-owned DBEs (which are not included in the DOC numbers).

(2) You may use an overall goal developed under paragraph (b) by another DOT recipient if the other recipient's goal pertains to an area generally similar to the area from which you obtain contractors for DOT-assisted contracts.

EXAMPLE: City X is located within State Y. The city transit authority could use the State DOT's overall goal, assuming that it procures from the same general area. It could also use the local airport's overall goal, assuming that the airport and transit authority typically obtained contractors for DOT-assisted projects from the same general area.

(3) When you use the overall goal of another agency, you may adjust that goal upward or downward based on information about differences between your market and that of the other agency.

EXAMPLE: City X uses the overall goal developed by State Y's DOT. However, there is a heavier concentration of minority-owned businesses in City X than there is statewide. City X could adjust its goal upward to take this demographic difference into account.

(d) With the approval of the concerned operating administration, you could use another means (e.g., a disparity study) of calculating your overall goal, provided that this means is narrowly tailored to redress the effects of discrimination.

(e) On the basis of evidence that discrimination has suppressed business development by DBEs, you must increase the overall goal by a

percentage representing the degree to which DBE capacity has been suppressed.

EXAMPLE: You determine that discrimination has suppressed DBE business development by 20 percent. DBE capacity is 10 percent. The overall goal becomes 12 percent (i.e., the 10 percent capacity number plus 20 percent of that number).

(f) (1) If you set overall goals on a fiscal year basis, you must submit them to the applicable DOT operating administration for review 60 days before the beginning of the Federal fiscal year to which the goal applies, or at another time determined by the Administrator of the concerned operating administration.

(2) If you are an FTA or FAA recipient and set your overall goal on a project or grant basis, you must submit the goal for review at a time determined by the FTA or FAA Administrator.

(3) You must include with your overall goal submission a description of the methodology you used to establish the goal and the basis for selecting the particular goal submitted.

(4) You are not required to obtain prior operating administration concurrence with the your overall goal. However, if the operating administration's review suggests that your overall goal has not been correctly calculated, or that its justification is inadequate, the operating administration may, after consulting with you, adjust your overall goal. The adjusted overall goal is binding on you.

(g) In establishing an overall goal, you must provide for public participation. This public participation must include:

(1) Consultation with minority, women's and general contractor groups, community organizations, and other officials or organizations

which could be expected to have information concerning the availability of disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and your efforts to increase the participation of DBEs.

(2) A published notice announcing your proposed overall goal, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at the your principal office for 30 days following the date of the notice, and informing the public that the you and the Department will accept comments on the goals for 45 days from the date of the notice. The notice must include addresses to which comments may be sent, and you must publish it in general circulation media and available minority-focus media and trade association publications.

(h) If you don't establish and implement an overall goal as provided in this section, you are in noncompliance with this rule and you are not eligible. to receive FHWA, FTA, or FAA financial assistance.

(i) If you don't meet your overall goal, you will have an opportunity to explain to the concerned operating administration why you could not do so and why meeting the goal was beyond your control. If you do not make such an explanation, or the explanation is inadequate, the operating administration may direct you to take remedial action. If you don't take this remedial action, you are in noncompliance with this rule.

(j) Your overall goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

**§26.43 How are overall goals established for transit vehicle manufacturers?**

(a) If you are an FTA recipient, you must require in your a DBE program that each transit vehicle manufacturer, as a condition of being authorized to bid on FTA-assisted transit vehicle procurements, certify that it has complied with the requirements of this section. You do not include FTA assistance used in transit vehicle procurements in the base amount from which your overall goal is calculated.

(b) If you are a transit vehicle manufacturer, you must use an overall goal determined by FTA on a national basis for the industry. The base from which the goal shall be calculated is the amount of FTA financial assistance participating in transit vehicle contracts you will perform b during the fiscal year in question. FTA will not include funds attributable to work performed outside the United States and its territories, possessions, and commonwealths in this base.

(c) If you are an FTA recipient, you may, with FTA approval, establish project-specific goals under §26.41 for DBE participation in the procurement of transit vehicles in place of complying with this section.

(d) If you are an FHWA or FAA recipient, you may, with FHWA or FAA approval, in a case where FHWA or FAA has established a national goal, use the procedures of this section with respect to procurements of vehicles or specialized equipment.

**§26.45 What means do recipients use to meet overall goals?**

(a) You must meet as much of your overall goal as you can by using outreach, technical assistance, and other methods to facilitate DBE participation, including but not limited to the following:

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

DBE participation (e.g., unbundling large contracts to make them more accessible to DBEs);

(2) Providing assistance to DBEs in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process , reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs obtain bonding and financing);

(3) Providing technical assistance and other services;

(4) Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential DBE subcontractors; provision of information in languages other than English, where appropriate);

(5) Implementing a supportive services program to develop and improve immediate and long-term business management, recordkeeping, and financial and accounting capability for DBEs;

(6) Providing services to help DBEs improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;

(7) Establishing a race/gender-neutral program to assist new, start-up firms, particularly in fields in which DBE participation has not been traditionally significant;

(8) Ensuring distribution of its DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors.

(b) To meet any portion of your overall goal you cannot meet using the means provided in paragraph (a) of this section, you must use the means provided in paragraphs (c) and/or (d) of this section.

(c) The following provisions apply to the use of contract goals:

(1) You may use contract goals only on those DOT-assisted contracts that have subcontracting possibilities.

(2) You must calculate contract goals on the basis of the entire amount of the prime contract (i.e., both the state/local and Federal share of the contract).

(3) You are not required to set each contract goal at the same percentage level as the overall goal. The goal for a specific contract may be higher or lower than that percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. However, over the period covered by its overall goal, you must set contract goals so that they will cumulatively result in the meeting any portion of your overall goal not met through use of the mechanisms in paragraph (a) of this section.

(4) Operating administration approval of each contract goal is not necessarily required. However, operating administrations may review and approve or disapprove any contract goal you establish.

(5) Your overall goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

(d) The following provisions apply to the use of evaluation credits:

(1) You may use evaluation credits only to the award of prime contracts.

(2) You may provide that a responsible and responsive DBE firm competing for the prime contract will receive the contract if the price it offers is a stated percentage, between one and 10 percent, higher than the lowest price offered by any responsible and responsive non-DBE firm.

(3) You may also provide that a responsible and responsive non-DBE firm competing for the prime contract that provides a stated level of DBE participation will receive the contract if the price it offers is a stated percentage, between one and 10 percent of the amount that is subcontracted, higher than the lowest price offered by any responsible and responsive non-DBE firm that does not provide this level of DBE participation.

(4) In establishing the level of DBE participation used in this mechanism, you must use the factors set forth in paragraphs (c) (2) - (5) of this section. You must require competitors for the prime contract to submit DBE participation information as provided in §26.47(b)(2) (i) - (v) and (3) of this part.

(5) Your evaluation credit procedures must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

(e) You must not use more stringent mechanisms (including, but not limited to, set-asides or a conclusive presumption) on DOT-assisted contracts unless --

(1) you have legal authority independent of this rule to use such mechanisms; and

(2) you have a continuing, substantial inability to meet your overall goal using the mechanisms provided for in this section. In

such a case, you must document in its file for the contract the basis for the determination that other available methods have proven unable to meet DBE goals.

(f) You must review, at appropriate intervals, the methods and procedures used to comply with this section to ensure that they continue to be needed to overcome the effects of discrimination, modifying them as needed for this purpose.

(1) If the your actual DBE participation significantly exceeds your overall goals over a substantial period of time, you must consider appropriate reductions in your use of race/gender-conscious means of meeting overall goals.

(2) (i) You must calculate --

(A) The percentage that minority- and women-owned businesses in your state (not just DBEs) in types of work relevant to DOT-assisted contracting make up of all such businesses; and

(B) The percentage of all business receipts in these types of work attributable to minority- and/or women-owned businesses.

EXAMPLE: In State Z, minority- and women-owned firms account for 20 percent of all businesses. These same firms account for 10 percent of business volume (i.e., as measured by receipts).

(ii) Where the percentage calculated in paragraph (B) is greater than that calculated in paragraph (A), you must consider appropriate reductions in its use of race/gender-conscious means of meeting overall goals.

EXAMPLE: In State Z, minority- and women-owned firms continue to account for 20 percent of all businesses, but now account for 27 percent of business volume. Particularly where this pattern persists over a significant period of time, you would rely more on race/gender-neutral methods of achieving goals in construction contracts and less on race/gender-conscious means.

**§26.47 What are the good faith efforts procedures recipients follow in situations where there are contract goals?**

(a) When you have established a DBE contract goal, you must award the contract only to a contractor who either meets the contract goal requirement or demonstrates that it has made adequate good faith efforts to do so. If the contractor does document adequate good faith efforts, you must not deny award of the contract on the basis that the contractor failed to meet the goal.

(b) In your solicitations for DOT-assisted contracts for which a contract goal has been established, you must require the following of competitors:

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

(2) All bidders/offerors will be required to submit the following information to the recipient, at the time provided in paragraph (3):

(i) The names and addresses of DBE firms that will participate in the contract;

(ii) A description of the work that each DBE will perform;

(iii) The dollar amount of the participation of each DBE firm participating;

(iv) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;

(v) Written confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment; and

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

(3) At your discretion, the bidder/offeror must present the information required by paragraph (2) --

(i) Under sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contract negotiation procedures; or

(ii) At any time before you commit yourself to the performance of the contract by the bidder/offeror, as a matter of responsibility.

(c) If the DBE participation submitted by the bidder/offeror does not meet the contract goal, you must determine whether the bidder/offeror's good faith efforts are adequate. In making this determination, use the guidance provided in Appendix B. If the bidder/offeror makes a showing of adequate good faith efforts, you must award the contract to the bidder/offeror, even if the bidder/offeror did not meet the contract goal.

(d) You must make sure all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts committing yourself to the performance of the contract by the bidder/offeror.

(e) When the apparent successful bidder/offeror for a contract fails to meet the DBE contract goal, and you determine that the bidder/offeror has

failed to make adequate good faith efforts, you must, before awarding the contract, provide the bidder/offeror an opportunity for administrative reconsideration.

(1) As part of this reconsideration, the bidder/offeror must have the opportunity to provide written documentation or argument concerning the issue of whether it made adequate good faith efforts to meet the contract goal.

(2) The bidder/offeror must also have the opportunity to meet in person with your officials to discuss the issue of whether it made adequate good faith efforts to meet the contract goal.

(3) Your decision on reconsideration must be made by an official who did not take part in the original determination that the bidder/offeror failed to make adequate good faith efforts.

(4) Your must send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not make adequate good faith efforts.

(5) The result of the reconsideration process is not administratively appealable to the Department of Transportation.

(f) A DBE prime contractor --

**ALTERNATIVE I -** is required to meet DBE contract goals on the same basis as other prime contractors.

**ALTERNATIVE 2 -** is not required to meet DBE contract goals.

**ALTERNATIVE 3** - that will perform, with its own forces, a sufficient percentage of the work on the contract to meet the contract goal is not required to obtain other DBE participation to meet the goal. If a DBE prime contractor will not perform such a percentage of the work with its own forces, it must obtain other DBE participation sufficient to meet

the remainder of the goal, or demonstrate that it made adequate good faith efforts to do so.

(g) (1) You must require that a prime contractor not terminate for convenience a DBE subcontractor listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm) and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without your prior written consent.

(2) When a DBE subcontractor is terminated, or fails to complete its work on the contract, for any reason, you must require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform 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.

(3) You must include in each prime contract a provision for appropriate administrative remedies that you will invoke if the prime contractor fails to comply with the requirements of this section.

**§26.49 How is DBE participation counted toward goals?**

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

(b) (1) Count the entire amount of a construction contract toward DBE goals, including the cost of supplies and materials obtained by the DBE for the work of the contract.

(2) Count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional,

technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, toward DBE goals, provided you determine to the fee be reasonable and not excessive as compared with fees customarily allowed for similar services.

(c) When a DBE performs as a participant in a joint venture, count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs toward DBE goals.

(d) Do not count any portion of the value of a contract that a DBE subcontractor subcontracts to any non-DBE firm (including a non-DBE prime contractor or its affiliate) toward DBE goals. Provided, however, that you may count value of supplies purchased or equipment leased by a DBE subcontractor from a non-DBE firm (other than the prime contractor or its affiliate) and used by the DBE in the performance of the subcontract toward DBE goals.

(e) Count expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.

(1) A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, you must evaluate the

amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.

(2) A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, you must examine similar transactions, particularly those in which DBEs do not participate.

(3) If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, you must presume that it is not performing a commercially useful function.

(4) You must presume that a DBE engaged in transporting materials is not performing a commercially useful function if the DBE does not own at least 50 percent of the vehicles used for the contract.

(5) When a DBE is presumed not to be performing a commercially useful function as provided in paragraph (3) or (4) of this paragraph, the DBE may present evidence to rebut this presumption. You may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.

(6) Your decisions on commercially useful function matters are subject to review by the concerned operating administration.

(f) Count expenditures with DBEs for materials or supplies toward DBE goals as provided in this paragraph:

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

(ii) For purposes of this paragraph, a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

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

(ii) For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.

(A) To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.

(B) A regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt may be a person who owns and operates

distribution equipment for the products and/or owns, operates, or maintains a store, warehouse, or other place of business in which products of the general character described by the specifications and required under the contract are bought for the account of such person and sold to the public in the usual course of business. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.

(C) Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this paragraph.

(3) With respect to materials or supplies are purchased from a DBE which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, provided you determine the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the materials and supplies themselves toward DBE goals, however.

(g) If a firm is not currently certified as a DBE in accordance with Subpart D standards at the time of the execution of the contract, do not count the firm's participation toward DBE goals.

(h) Do not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward the your overall goal.

(i) Do not count the participation of a DBE subcontractor toward the prime contractor's goal attainment until the amount being counted toward the goal has been paid to the DBE.

## SUBPART D - CERTIFICATION STANDARDS

### §26.51 How are burdens of proof allocated in the certification process?

(a) In determining whether to certify a firm as eligible to participate as a DBE, you must apply the standards of this Subpart.

(b) The firm seeking certification has the burden of demonstrating to you, by a preponderance of the evidence, that it meets the requirements of this Subpart concerning group membership, business size, ownership, and control.

(c) You must rebuttably presume that members of the designated groups identified in §26.57(a) are socially and economically disadvantaged. This means that they do not have the burden of proving to you that they are socially and economically disadvantaged.

(d) 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 to you, by a preponderance of the evidence, that they are socially and economically disadvantaged.

(e) You must make determinations concerning whether individuals and firms have met their burden of demonstrating group membership, ownership, control, and social and economic disadvantage (where

disadvantage must be demonstrated on an individual basis) by considering all the facts in the record, viewed as a whole.

**§26.53 What rules govern group membership determinations?**

(a) If you have reason to question whether an individual is a member of a group that is presumed to be socially and economically disadvantaged, you must require the individual to demonstrate, by a preponderance of the evidence, that he is a member of the group.

(b) In making such a determination, you must consider whether the person has held himself out to be a member of the group over a long period of time prior to application for certification and whether the person is regarded as a member of the group by the relevant minority community. You may require the applicant to produce appropriate documentation of group membership.

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

(2) Your decisions concerning membership in a designated group are subject to the certification appeals procedure of §26.79.

**§26.55 What rules govern business size determinations?**

(a) To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. You must apply current SBA business size standard(s) found in 13 CFR Part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts.

(b) Even if it meets the requirements of paragraph (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 fiscal years, in excess of $17.77 million. The Secretary adjusts this amount for inflation from time to time.

**§26.57 What rule determine determinations of social and economic disadvantage?**

(a) Presumption of disadvantage.

(1) You must rebuttably presume that 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 socially and economically disadvantaged individuals. You must not require an individual who are members of a designated group to demonstrate, in connection with his or her firm's application for certification, that he or she is , in fact, socially and economically disadvantaged.

(2) Except as provided in paragraph (3) of this paragraph, you must not collect information related to the social and economic disadvantage of individuals who are members of the designated groups (including, but not limited to, information concerning personal net worth, personal income tax returns, or other personal financial data) as part of the certification process, except information essential to ascertain the individuals' ownership and control of a business that is unavailable from any other source. When you require an applicant to submit personal financial information, you must provide a written

statement to the applicant stating with specificity what information is required, why the information is essential to a determination of ownership and control, and why the information is unavailable from any other source.

(3) You must require applicants for certification to submit a signed, notarized certification that each socially and disadvantaged owner is, in fact, a socially and economically disadvantaged individual, as provided in this part. You must also require applicants for certification to submit a brief summary statement of the personal net worth of each socially and economically disadvantaged owner.

(b) Rebuttal of presumption of disadvantage.

(1) If you have a reasonable basis to believe that an individual who is a member of one of the designated groups is, in fact, not socially and/or economically disadvantaged, you may start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual.

(2) In the case of a firm that is applying for initial certification, do not start such a proceeding unless and until you have determined that the individual owns and controls the firm and that the firm meets business size criteria. In this case, you may hold the issuance of a certification in abeyance pending the outcome of the proceeding.

(3) Your proceeding must follow the procedures of §26.77.

(4) In such a proceeding, you have the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged.

(5) If you demonstrate that the personal net worth of the individual exceeds [an amount to be inserted in the final rule], you

have met this burden, and the presumption of social and economic disadvantage is rebutted for that individual. In this case, the individual must, in order for his or her firm to be certified, demonstrate on an individual basis that he or she is socially and economically disadvantaged.

(6) For purposes of such a proceeding, you may require the individual whose disadvantage is being questioned to provide information about his or her personal net worth. You may require only such information as is necessary to establish whether the individual's personal worth exceeds [the amount inserted in the final rule].

(c) (8(a) Firms. (1) If a firm applying for certification has a current, valid certification from the SBA under the 8(a) program, you must presume it to be eligible for the DBE program, subject to demonstrating that it meets the average annual gross receipts limit referenced in §26.55(b) and that it meets SBA business size criteria for the type(s) of work it seeks to perform in your DBE program. If the firm does not meet these requirements, it is not an eligible DBE, even though it has a valid 8(a) certification from SBA.

(2) Consistent with this presumption, you must not, in connection with the firm's application for certification, require an 8(a) firm to provide information related to ownership, control, or social and economic disadvantage. You may require the firm to provide information to demonstrate that it meets the average annual gross receipts limit and that it meets SBA small business size criteria for any type of contracting it expects to perform in your DBE program. You

may also require the firm to provide information that will appear in your DBE directory.

(3) If you have a reasonable basis to believe that the ownership, control, or disadvantaged status of an 8(a) firm is not consistent with its participation in the DBE program, bring your concerns to the attention of, and request a response from, the SBA. Following the receipt of the response from SBA, or after 60 days if no response from SBA has been received, you may initiate a proceeding under §26.77 of this Part, including in the record and taking into account any response received from SBA. If the 8(a) firm is making its initial application for certification, you may hold the firm's certification in abeyance pending the outcome of this proceeding.

(d) Individual Determinations of Social and Economic Disadvantage. Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. You must make a case-by-case determination of whether such an individual is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to you, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. In making these determinations, use the guidance in Appendix F.

**§26.59 What rules govern determinations of ownership?**

(a) In determining whether the socially and economically disadvantaged participants in a firm own the firm, you 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. In the case of a corporation, such individuals must own unconditionally at least 51% of the stock. In the case of an applicant firm which is a partnership, 51% of the partnership interest must be unconditionally owned by socially and economically disadvantaged individuals. Such unconditional ownership must be reflected in the firm's partnership agreement.

(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, 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 (other than in a revocable living trust) are 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 is a disadvantaged individual who, rather than the trustee, exercises effective control over the management, policy-making, and daily operational activities of the firm.

(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 which lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

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

(g) You must 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 --

(1) As the result of a property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce decree is inconsistent with this section; or

(2) Through inheritance, or otherwise because of the death of the former owner.

(h) (1) You must presume as not being 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 as the result of a gift, or transfer without adequate

consideration, from any non-disadvantaged individual or non-DBE firm that is --

(i) Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;

(ii) Involved in the same or a similar line of business; or

(iii) Engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.

(2) To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual firm must demonstrate to you, by clear and convincing evidence, that --

(i) The gift or transfer 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 provided the gift or transfer.

(i) You must apply the following rules in situations in which marital assets form a basis for ownership of a firm:

(1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled.

(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) You may consider the following factors in determining the ownership of a firm. However, you must 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, you must 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.

**§26.61 What rules govern determinations concerning control?**

(a) In determining whether socially and economically disadvantaged owners control a firm, you must consider all the facts in the record, viewed as a whole.

(b) Only an independent business may 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, you must scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.

(2) You must 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) You must 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, you 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. In the case of a corporation, the socially and economically disadvantaged owners must own and control at least 51 percent of voting stock. 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) 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 §26.59(i)(2) of this Part.

(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.

(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 must 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 must be revocable, and the socially and economically disadvantaged owners must 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 must be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.

(g) The socially and economically disadvantaged owners must have an overall understanding of, and managerial or 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 must 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 a potential DBE firm of that type must 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, the you must not deny certification solely on the ground that the person lacks the license or credential. However, you 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) You 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. You may determine that a firm is controlled by its socially and economically disadvantaged owner although that owner's remuneration is lower than that of some other participants in the firm. In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, you may consider a difference between 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.

(k) A socially and economically disadvantaged individual may control a firm even though one or more members of the individual's family participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, you must make a judgment about the control the socially and economically disadvantaged owner exercises vis-a-vis other persons involved in the business as it does in other situations, without regard to whether or not the other persons are family members.

(1) If you 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.

(2) Where a firm was formerly owned and/or controlled by a non-disadvantaged individual, 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 must demonstrate to you, 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.

(l) In determining whether a firm is controlled by its socially and economically disadvantaged owners, you may consider whether the firm owns equipment necessary to perform its work. However, you must 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.

(m) You must grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the

ability to control the firm. To become certified in an additional type of work, the firm need demonstrate to you only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. You may not, in this situation, require that the firm be recertified or submit a new application for certification.

(n) A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licenser is not affiliated with the franchisee or licensee. In determining whether affiliation exists, you 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.

(o) In order for a partnership to be controlled by socially and economically disadvantaged individuals, any non-disadvantaged partners shall not have the power, without the specific written concurrence of the socially and economically disadvantaged partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.

**§26.63 What are other rules affecting certification?**

(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 DBEs.

Except as provided in paragraph (2) of this paragraph, you must not consider commercially useful function issues in any way in making decisions about whether to certify a firm as a DBE.

(2) You 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) You must evaluate the eligibility of a firm on the basis of present circumstances. You must 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. Nor must you refuse to certify a firm solely on the basis that it is a newly formed firm.

(c) DBE firms and firms seeking DBE certification shall cooperate fully with your 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 may be eligible DBEs. Not-for-profit organizations, even though controlled by socially and economically disadvantaged individuals, are not eligible to be certified as DBEs.

(e) Except as provided in paragraph (f) of this section, an eligible DBE firm shall be owned by individuals who are socially and economically disadvantaged. A firm that is owned not by such individuals, but by another firm, is not an eligible DBE, even if the other firm is itself an eligible DBE.

(f) A firm owned by an Indian tribe recognized by the Department of the Interior or an Alaskan Native Corporation may be regarded as owned by

socially and economically disadvantaged individuals, notwithstanding the fact that ownership may formally reside in the tribe or corporation as an entity, rather than in individual members of the tribe. Such a firm must meet the control and business size criteria of this section in order to be an eligible DBE. In determining business size, recipients shall apply the affiliation standards of 13 CFR Part 121.

(g) 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.

(h) You must not require a DBE firm to be prequalified as a condition for certification unless the recipient requires all firms that participate in its contracts and subcontracts to be prequalified.

**§§26.65 - 26.69 [Reserved]**

## SUBPART E - CERTIFICATION PROCEDURES

### §26.71 What are the requirements for Unified Certification Programs?

(a) Except as provided in paragraph (b) of this section, you and all other DOT recipients in your state must participate in a Unified Certification Program (UCP).

(1) Within three years of the effective date of this section, you and the other recipients in your state must sign an agreement establishing the UCP for that state and submit the agreement to the Secretary for approval. The Secretary may, on the basis of extenuating circumstances shown by the recipients in the state, extend this deadline for no more than one additional year.

(2) The agreement must provide the establishment of a UCP meeting all the requirements of this section. The agreement must specify that the UCP will follow all certification procedures and standards of this rule, on the same basis as recipients; that the UCP shall cooperate fully with oversight, review, and monitoring activities of DOT and its operating administrations; and that the UCP shall implement DOT directives and guidance concerning certification matters. The agreement shall also commit recipients to ensuring that the UCP has sufficient resources and expertise to carry out the requirements of this Part. The agreement shall include an implementation schedule ensuring that the UCP is fully operational no later than 18 months following the approval of the agreement by the Secretary.

(3) Subject to approval by the Secretary, the UCP in each state may take any form acceptable to the recipients in that state.

(4) The Secretary shall review the UCP and approve it, disapprove it, or remand it to the recipients in the state for revisions. A complete agreement which is not disapproved or remanded within 180 days of its receipt is deemed to be accepted.

(5) If the you and the other recipients in your state fail to meet the deadlines set forth in this paragraph, you shall have the opportunity to make an explanation to the Secretary why a deadline could not be met and why meeting the deadline was beyond the your control. If you fail to make such an explanation, or the explanation does not justify the failure to meet the deadline, the Secretary shall direct you to complete the required action within a time certain. If you

and the other recipients fail to carry out this direction in a timely manner, you are collectively in noncompliance with this rule.

(b) If you are an airport sponsor, you may, but are not required to, participate in the UCP for your state with respect to firms seeking certification as airport concessionaires. If you choose not to participate in the UCP with respect to the concession program, you must certify concessionaires and other concession program participants independently. You must participate in the UCP for your state with respect to contractors on FAA-assisted contracts.

(c) The UCP shall make all certification decisions on behalf of all DOT recipients in the state with respect to participation in the DOT DBE Program. Certification decisions by the UCP shall be binding on all DOT recipients within the state. The UCP shall provide "one-stop shopping" to applicants for certification, such that an applicant is required to apply only once for a DBE certification that will be honored by all recipients in the state.

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

(e) A UCP is not required to process an application for certification from a firm having its principal place of business outside the state if the firm is not certified by the UCP in the state in which it maintains its principal place of business.

(f) Subject to DOT approval as provided in this section, the recipients in two or more states may form a regional UCP. UCPs may also enter into written reciprocity agreements with other UCPs. Such an agreement shall outline the specific responsibilities of each participant. A UCP may accept the certification of any other UCP or DOT recipient.

(g) Pending the establishment of UCPs meeting the requirements of this section, you may enter into agreements with other recipients, on a regional or inter-jurisdictional basis, to perform certification functions required by this rule. You may also grant reciprocity to other recipient's certification decisions.

(h) Each UCP shall maintain a unified DBE directory containing, for all firms certified by the UCP, the information required by §26.31 of this Part. The UCP shall make the directory available to the public electronically as well as in print.

(i) Except as otherwise specified in this section, all provisions of this Subpart and Subpart D pertaining to recipients also apply to UCPs.

**§26.73 What procedures do recipients follow in making certification decisions?**

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

(b) You must determine the eligibility of firms as DBEs consistent with the standards of Subpart D.

(c) You must take all the following steps in determining whether a DBE firm meets the standards of Subpart D:

(1) Perform an on-site visit to the offices of the firm. You must interview the principal officers of the firm and review their resumes and/or work histories. You must also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in your jurisdiction or local area. You may rely upon the site visit report of any other recipient with respect to a firm applying for certification. If you have made a site visit to a firm,

you must promptly make available the report of that visit to any other recipient that makes a written request for it.

(2) If the firm is a corporation, analyze the ownership of stock in the firm;

(3) Analyze the bonding and financial capacity of the firm;

(4) Determine the work history of the firm, including contracts it has received and work it has completed;

(5) Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program and its preferred locations for performing the work, if any;

(6) Obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the DBE program;

(7) Require potential DBEs to complete and submit an appropriate application form.

(i) You must use the application form provided in Appendix B without change or revision. However, you may provide in your DBE program, with the approval of the concerned operating administration, for supplementing the form by requesting additional information not inconsistent with this rule.

(ii) You must 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 law to administer oaths or in the form of an unsworn declaration

executed under penalty of perjury of the laws of the United States.

(iii) You must review all information on the form prior to making a decision about the eligibility of the firm.

(d) Subject to the approval of the concerned operating administration as part of your DBE program, you may impose a reasonable fee for processing a firm's application for certification, which in no case shall exceed the actual cost of the administrative processing of the application. Fee waivers shall be made in appropriate cases.

(e) You must 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, and local law.

(f) Once you have certified a DBE, it shall remain certified for a period of at least three years unless and until its certification has been removed through the procedures of §26.77. You not require DBEs to reapply for certification as a condition of continuing to participate in the program during this three-year period.

(g) If you are a DBE, you must inform the recipient or UCP in writing of any change in its circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this rule or any material change in the information provided in its application form. You must attach supporting documentation describing in detail the nature of such changes. The notice must take 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. You must provide the written notification within 21 days of the occurrence of

the change. If you fail to make timely notification of such a change, you will be deemed to have failed to cooperate under §26.99(c) of this rule.

(h) If you are a DBE, you must provide to the recipient, every year on the anniversary of the date of its certification, 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. 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 this rule or any material changes in the information provided in its application form, except for changes about which you has notified the recipient under paragraph (g) of this section. The affidavit shall specifically affirm that your firm continues to meet SBA business size criteria and the overall gross receipts cap of this rule, documenting this affirmation with supporting documentation of your firm's size and gross receipts. If you fail to provide this affidavit in a timely manner, you will be deemed to have failed to cooperate under §26.99(c) of this rule.

(i) If you are a recipient, you must shall make decisions on applications for certification within 90 days of receiving from the applicant firm all information required under this rule. You 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. You may establish a different time frame in its DBE program, upon a showing that this time frame is not feasible, and subject to the approval of the concerned operating administration. Your failure to make a decision by the applicable deadline under this paragraph is deemed a constructive denial of the application, on the basis of which the firm may appeal to DOT under §26.79.

**§26.75 What rules govern recipients' denials of initial requests for certification?.**

(a) When you deny a request by a firm, which is not currently certified with you, to be certified as a DBE, you must 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 must be made available to the applicant, on request.

(b) When a firm is denied certification, you must establish a time period of no more than twelve months that must elapse before the firm may reapply to the recipient for certification. You may provide, in its DBE program, and subject to approval by the concerned operating administration, a shorter waiting period for reapplication. 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 you make an administratively final denial of certification concerning a firm, the firm may. appeal the denial to the Department under §26.79.

**§26.77 What procedures does a recipient use to remove a DBE's eligibility?**

(a) Ineligibility Complaints

(1) Any person may file with you a written complaint alleging that a currently-certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. You are not required to accept a general allegation that a firm is ineligible or an anonymous complaint. The complaint may include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not

continue to be certified. Confidentiality of complainants' identities may be protected as provided in §26.99(b) of this Part.

(2) You must review your records concerning the firm, any material provided by the firm and the complainant, and other available information. You may request additional information from the firm or conduct any other investigation that you deem necessary.

(3) If you determine, based on this review, that there is reasonable cause to believe that the firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. If you determine that such reasonable cause does not exist, you must 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 must specifically reference the evidence in the record on which each reason is based.

(b) Recipient-Initiated Proceedings. If, based on notification by the firm of a change in its circumstances or other information that comes to your attention, you determines that there is reasonable cause to believe that a currently-certified firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(c) DOT directive to initiate proceeding.

(1) If the concerned operating administration determines that information in your certification records, or other information available to the concerned operating administration, provides

reasonable cause to believe that a firm you certified does not meet the eligibility criteria of this rule, the concerned operating administration may direct you to initiate a proceeding to remove the firm's certification.

(2) The concerned operating administration concerned must provide you and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.

(3) You must immediately commence and prosecute a proceeding to remove eligibility as provided by paragraph (b) this section.

(d) Hearing. When you notify a firm that there is reasonable cause to remove its eligibility, under paragraph, (a), (b) or (c) of this section, you must 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) In such a proceeding, you bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this rule.

(2) You must maintain a complete record of the hearing, by any means acceptable under state law for the retention of a verbatim record of an administrative hearing. If there is an appeal to DOT under §26.79, you must provide a transcript of the hearing to DOT and, on request, to the firm. You must retain the original record of the hearing. You may charge the firm only for the cost of making a photocopy for the firm.

(3) The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, a decision you make to remove the firm's eligibility must be based on a preponderance of the evidence that the firm does not meet the eligibility standards of this rule.

(e) Separation of Functions. You 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.

(f) Grounds for Decision. You must not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to the recipient at the time of its certification of the firm. You may 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 the recipient that render the firm unable to meet the eligibility standards of this rule;

(2) Information or evidence not available to you at the time of its certification of the firm;

(3) Information that was concealed or misrepresented by the firm in previous certification actions by a recipient;

(4) A change in the certification standards or requirements of the Department since you certified the firm; or

(5) A documented finding that your determination to certify the firm was factually erroneous.

(g) Notice of Decision. Following your decision, you must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department of Transportation under §26.79. You must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed the recipient to initiate the proceeding.

(h) Status of firm during proceeding. (1) Except as provided in paragraph (h)(3), a firm remains an eligible DBE during the pendancy of your 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.

(3) If you determine that there is a strong likelihood that the firm will be determined to be ineligible, and it appears that the firm will be awarded a contract or subcontract before the conclusion of the proceeding, you may suspend the eligibility of the firm to receive any new contracts or subcontracts as a DBE, pending the conclusion of the proceeding.

(i) Effects of Removal of Eligibility. When you remove a firm's eligibility, you must take the following action:

(1) When a prime contractor has made a commitment to using the ineligible firm, or you have made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before you issue the decertification notice provided for in paragraph (g), the ineligible firm does not count toward the contract goal or overall goal. You must direct the prime contractor to meet the contract goal

with an eligible DBE firm or demonstrate good faith efforts to the recipient.

(2) If a prime contractor has executed a subcontract with the firm before you have 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 you have let a prime contract to the firm, the portion of ineligible firm's performance of the contract remaining after you issued the notice of its ineligibility shall not count toward the overall goal.

(3) When a firm is found to be ineligible, the effects of its ineligibilty (e.g., its participation not counting toward overall goals) are retroactive to the date you received the complaint of ineligibility or other event initiating the ineligibility proceeding.

(j) Availability of appeal. When you make an administratively final removal of a firm's eligibility under this section, the firm may appeal the removal to the Department under §26.79.

**§26.79 What is the process for certification appeals to the Department of Transportation?**

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

(2) If you are a complainant in an ineligibility complaint to a recipient (including the concerned operating administration in the circumstances provided in §26.77(c)), you may appeal to the Department if the recipient does not find reasonable cause to propose

removing the firm's eligibility or, following a removal of eligibility proceeding, determines that the firm is eligible.

(3) Send appeals to the following address:

Department of Transportation
Office of Civil Rights
400 7th Street, S.W., Room 2401
Washington, D.C. 20590

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

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

(1) If you are an appellant who is firm which has been denied certification, whose certification has been removed, whose owner is determined not to be a member of a designated disadvantaged group, or concerning whose owner the presumption of disadvantage has been rebutted, your letter must state the name and address of any other recipient which currently certifies the firm, which has rejected an application for certification from the firm or removed the firm's eligibility within one year prior to the date of the appeal, or before which an application for certification or a removal of eligibility is pending. Failure to provide this information may be deemed a failure to cooperate under §26.99(c).

(2) If you are an appellant other than one described in paragraph (1), the Department will request, and the firm whose certification has been questioned shall promptly provide, the information called for in subparagraph (1). Failure to provide this information may be deemed a failure to cooperate under §26.99(c).

(d) When it receives an appeal, the Department requests a copy of the recipient's complete administrative record in the matter. If you a the recipient, you must provide the administrative record, including a hearing transcript, within 20 days of the Department's request. To facilitate the Department's review of a recipient's decision, you must ensure that such administrative records are well organized, indexed, and paginated. Records that do not comport with these requirements are not acceptable and will be returned to you to be corrected immediately.

(e) The Department makes its decision based solely on the entire administrative record. The Department does not make a de novo review of the matter and does not conduct a hearing. The Department may supplement the administrative record by adding relevant information made available by the DOT Office of Inspector General; Federal, state, or local law enforcement authorities; officials of a DOT operating administration or other appropriate DOT office; a recipient; or a firm or other private party.

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

(f) (1) The Department affirms your decision unless it

determines, based on the entire administrative record, that your decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this rule concerning certification.

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

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

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

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

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

(7) The Department provides written notice of its decision to the you, the firm, and the complainant in an ineligibility complaint. The notice includes the reasons for the Department's decision, including specific references to the evidence in the record that supports each reason for the decision.

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

**§26.81 What actions do recipients take following DOT certification appeal decisions?**

(a) If you are the recipient from whose action an appeal under §26.79 is taken, the decision is binding. It is not binding on other recipients.

(b) If you are a recipient to which a DOT determination under §26.79 is applicable, you must take the following action:

(1) If the Department determines that you erroneously certified a firm, you must remove the firm's eligibility on receipt of the determination, without further proceedings on your part. Effective on the date of your receipt of the Department's determination, the consequences of a removal of eligibility set forth in section 26.77(i) take effect.

(2) If the Department determines that you erroneously failed to find reasonable cause to propose removing the firm's eligibility, you must expeditiously commence a proceeding to determine whether the firm's eligibility should be removed, as provided in §26.77.

(3) If the Department determines that you erroneously declined to certify or removed the eligibility of the firm, you must certify the

firm, effective on the date of your receipt of the written notice of Department's determination.

(4) If the Department determines that you erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, you must take appropriate corrective action as determined by the Department.

(5) If the Department affirms your determination, no further action is necessary.

(c) Where DOT has upheld your denial of certification to or removal of eligibility from a firm, or directed the removal of a firm's eligibility, other recipients with whom the firm is certified may commence a proceeding to remove the firm's eligibility under §26.77. Such recipients must not remove the firm's eligibility absent such a proceeding. Where DOT has reversed your denial of certification to or removal of eligibility from a firm, other recipients must take the DOT action into account in any certification action involving the firm. However, other recipients are not required to certify the firm based on the DOT decision.

**§26.83 What procedures govern direct ineligibility complaints to DOT?**

(a) Any person who believes that a recipient has erroneously certified a firm as a DBE may file a written complaint with the DOT Office of Civil Rights. The complaint should be sent to the address in §26.79(a)(3).

(b) The Office of Civil Rights may, at its discretion, accept the complaint, decline the complaint, or refer the complaint for action by a recipient under §26.77.

(c) If the Office of Civil Rights accepts the complaint, it investigates the facts of the matter and determines if there is reasonable cause to believe that

the firm is ineligible. The Office of Civil Rights notifies the firm of its determination, in the same way as provided in §26.77(a)(3).

(d) If the Office of Civil Rights determines there is reasonable cause to believe that the firm is ineligible, it provides an opportunity for a hearing and make a decision in the same way as provided in §26.77(d) - (g) (except that there is no further administrative appeal to the Department under §26.79). The effects of a Departmental decision to remove a firm's eligibility is the same as provided in §26.77(i).

(e) Except as provided in this paragraph, a firm remains eligible during the pendancy of a proceeding under this section. However, if the Office of Civil Rights determines that there is a strong likelihood that the firm will be determined to be ineligible, and it appears that the firm will be awarded a contract or subcontract before the conclusion of the proceeding, the Office of Civil Rights may direct the recipient to suspend, pending the conclusion of the proceeding, the eligibility of the firm to receive any new contracts or subcontracts as a DBE.

**§§26.85 - 26.89 [Reserved]**

## SUBPART F - COMPLIANCE AND ENFORCEMENT

### §26.91 What compliance procedures apply to recipients?

If you fail to comply with any requirement of this Part, you may be subject to formal enforcement action under §26.93 or §26.95 of this Subpart or appropriate program sanctions by the concerned operating administration, such as the suspension or termination of Federal funds, refusal to approve projects, grants or contracts until deficiencies are remedied. Program sanctions may include, in the case of the FHWA program, actions provided

for under 23 CFR §1.36; in the case of the FAA program, actions consistent with §519 of the AAIA, as amended; and in the case of the FTA program, any actions permitted under the Federal Transit Act of 1964, as amended, or applicable FTA program requirements.

**§26.93 What enforcement actions apply in FHWA and FTA programs?**

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

(a) Noncompliance Complaints. Any person who believes that a recipient has failed to comply with its obligations under this Part may file a written complaint with 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 rule. 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 §26.99(b) of this Part. 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.

(c) Reasonable Cause Notice. If it appears, from the investigation of a complaint or the results of a compliance review, that you, as a recipient, are in noncompliance with this rule, 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 you to reply within 30 days concerning whether you wish to begin conciliation.

(d) Conciliation.

(1) If you request conciliation, the appropriate DOT office shall pursue conciliation for at least 30, but not more than 120, days from the date of your request. The appropriate DOT office may extend the conciliation period for up to 30 days for good cause, consistent with applicable statutes.

(2) If you 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 its compliance. While a conciliation agreement is in effect, you remains eligible for FHWA or FTA financial assistance.

(3) The concerned operating administration shall monitor your implementation of the conciliation agreement and ensure that its terms are complied with. If you fail to carry out the terms of a conciliation agreement, you are in noncompliance.

(4) If you do not request conciliation, or a conciliation agreement is not signed within the time provided in subparagraph (1) of this paragraph, 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.

**§26.95 - What enforcement actions apply in FAA Programs?**

(a) Compliance with all requirements of this Part by airport sponsors and other recipients of FAA financial assistance is enforced through procedures of Title 49 of the United States Code, including 49 U.S.C. 47106(d), 47111(d), and 47122, and regulations implementing them.

(b) The provisions of §26.93 (b) and §26.97 apply to enforcement actions in FAA programs.

(c) Any person who knows of a violation of this Part by a recipient of FAA funds may file a complaint under 14 CFR Part 16 with the Federal Aviation Administration Office of Chief Counsel.

**§26.97 - What enforcement actions apply to firms participating in the DBE program?**

(a) If you are a firm that does not meet the eligibility criteria of Subpart D and which attempts to participate in a DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the Department may initiate suspension or debarment proceedings against you under 49 CFR Part 29.

(b) If you are a firm which, in order to meet DBE contract goals or other DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of Subpart D, the Department may initiate suspension or debarment proceedings against you under 49 CFR Part 29.

(c) In a suspension or debarment proceeding brought under paragraph (1) or (2) of this section, the concerned operating administration may consider the fact that a purported DBE has been certified by a recipient. Such

certification does not preclude the Department from determining that the purported DBE, or another firm that has used or attempted to use it to meet DBE goals, should be suspended or debarred.

(d) The Department may take enforcement action under 49 CFR Part 31, implementing the Program Fraud Civil Remedies Act of 1986, against any participant in the DBE program whose conduct is subject to such action under Part 31.

(e) The Department may refer to the Department of Justice, for prosecution under the 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program or otherwise violates applicable Federal statutes.

**§26.99 What are the rules governing information, confidentiality, cooperation, and intimidation or retaliation?**

(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. The Department may make available to the public any information concerning the DBE program release of which is not prohibited by Federal law.

(2) If you are a recipient, you shall safeguard from disclosure to unauthorized persons information that may reasonably be considered as confidential business information, consistent with Federal, state, and local law.

(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 must 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. FAA follows the procedures of 14 CFR Part 13 with respect to confidentiality of information in complaints.

(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; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts or suspension and debarment).

(d) Intimidation and Retaliation. If you are a recipient, contractor, or any other participant in the program, you must not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by this rule 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 rule. If you violate this prohibition, you are in noncompliance with this rule.

## SUBPART G - DBE PARTICIPATION IN AIRPORT CONCESSIONS

### § 26.101 Definitions

"Affiliation" has the same meaning the term has in regulations of the Small Business Administration, 13 CFR Part 121, except that the provisions of § 121.401(l), "Affiliation under joint venture agreements," shall not apply to the definition used in this subpart. Except as otherwise provided in 13 CFR Part 121 and in this section, concerns are affiliates of each other when either directly or indirectly

(a) One concern controls or has the power to control the other, or

(b) A third party or parties controls or has the power to control both, or

(c) An identity of interest between or among parties exists such that affiliation may be found. In determining whether affiliation exists, consideration shall be given to all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates are considered together for purposes of determining whether either concern meets the applicable small business size standard.

"Concession" means a for-profit business enterprise, located on an airport subject to this subpart, that is engaged in the sale of consumer goods or services to the public under an agreement with the sponsor, another concessionaire, or the owner of a terminal, if other than the sponsor. Businesses which conduct an aeronautical activity are not considered concessionaires for purposes of this subpart. Aeronautical activities include scheduled and non-scheduled air carriers, air taxis, air charters, and air couriers, in their normal passenger or freightcarrying capacities; fixed base

operators; flight schools; and sky-diving, parachute-jumping, flying guide services, and helicopter or other air tours.

(a) Appendix G to this Part contains a listing of the types of businesses that are frequently operated as concessions.

(b) Examples of entities that do not meet the definition of a concession include flight kitchens and inflight caterers servicing air carriers, government agencies, industrial plants, farm leases, individuals leasing hangar space, custodial and security contracts, telephone and electric utilities, long distance telephone service, and skycap services under contract with an air carrier.

(c) For purposes of this subpart, a business is not considered to be "located on the airport" solely because it picks up and/or delivers customers under a permit, license, or other agreement. This provision applies to, but is not limited to, taxicabs, limousines, hotels, and car rentals. A business is considered to be "located on the airport," however, if it has an on-airport facility which services the public. On-airport facilities include in the case of a taxi-cab, a dispatcher; in the case of a limousine, a booth selling tickets to the public; in the case of a car rental, a counter at which its services are sold to the public; and in the case of a hotel operator, a hotel located anywhere on airport property.

(d) Any business meeting the definition of concession is covered by this subpart, regardless of the name given to the agreement with the sponsor, concessionaire, or airport terminal owner. A concession may be operated under various types of agreements, including:

(1) Leases.

(2) Subleases.

(3) Permits.

(4) Contracts.

(5) Other instruments or arrangements.

"Concessionaire" means a firm that owns and controls a concession.

"Disadvantaged business enterprise" or "DBE" has the same meaning the term has in § 26.5 of this Part, except that for purposes of this subpart--

(a) the firm must qualify as a small business concern, as defined in this subpart; and

(b) the definition of "socially and economically disadvantaged individuals" set forth in this subpart shall apply.

"Direct ownership arrangement" means a joint venture, partnership, sublease, franchise, or other arrangement in which a firm owns and controls a concession.

"Management contract or subcontract" means an agreement with a sponsor or a derivative subagreement under which a firm directs or operates one or more business activities, the assets of which are owned, leased, or otherwise controlled by the sponsor.

(a) The managing agent generally receives, as compensation, a flat fee or a percentage of the gross receipts or profit from the business activity. For purposes of this subpart, the business activity operated or directed by the managing agent must be other than an aeronautical activity, be located at an airport subject to this subpart, and be engaged in the sale of consumer goods or services to the public.

(b) As used in this subpart, the term management contract or subcontract shall not include an agreement between a concessionaire and a managing agent. (In the event such managing agent qualifies as a DBE and meets other appropriate criteria in this subpart, it can be counted toward DBE goals as provided in paragraph (c)(2)(iii) or (c)(2)(iv) of § 26.107.)

"Material amendment" means a substantial change to the basic rights or obligations of the parties to a concession agreement. Examples of material amendments include an extension to the term not provided for in the original agreement or a substantial increase in the scope of the concession privilege. Examples of nonmaterial amendments include a change in the name of the concessionaire or a change to the payment due dates.

"Primary airport" means a commercial service airport which is determined by the Secretary to have more than 10,000 passengers enplaned annually.

"Small business concern" means an existing firm, including all its domestic and foreign affiliates, that qualifies under the appropriate size standard referenced in appendix G to this Part. Except as provided in subparagraph (d) of this definition, the appropriate standard is the one which best describes the type of concession the firm seeks to operate, or type of goods or services the firm seeks to provide under the DBE concession program.

(a) A concessionaire qualifying under this definition that exceeds the size standard after entering a concession agreement, but which otherwise remains eligible, may continue to be counted as DBE participation toward the overall goals and any contract goals set under this subpart, until the current agreement, including the exercise of options, expires.

(b) The Secretary may periodically adjust the size standards in Appendix G to this Part for inflation.

(c) If a concessionaire was certified as a minority/woman/or disadvantaged business enterprise (MBE/WBE/DBE) prior to the effective date of this subpart, pursuant to a requirement in § 23.43(d) or Subpart F of 49 CFR Part 23, and the firm has exceeded the size standard, it may be counted as

DBE participation until the current agreement, including the exercise of options, expires, provided that the firm remains otherwise eligible.

(d) Any firm falling under "Standard Industrial Classification (SIC)" code 5511 shall be considered a small business concern for purposes of this subpart, if it has no more than 500 employees, regardless of the nature of the goods and/or services it seeks to provide under the DBE concession program. SIC 5511, "Motor Vehicle Dealers (New and Used)," hereinafter "car dealerships," means: Establishments primarily engaged in the retail sale of new automobiles or new and used automobiles. These establishments frequently maintain repair departments and carry stocks of replacement parts, tires, batteries, and automotive accessories. Such establishments also frequently sell pickups and vans at retail.

"Socially and economically disadvantaged individuals" has the same meaning the term has in §26.5 and as further defined in §26.57 and Appendix F to this Part.

"Sponsor" means the recipient of an FAA grant.

**§ 26.103 Applicability.**

This subpart applies to any sponsor that received a grant for airport development after January 1988 which was authorized under Title 49 of the United States Code.

**§ 26.105 Requirements for airport sponsors.**

(a) General requirements. (1) Each sponsor shall abide by the non-discrimination requirements of § 26.7 with respect to the award and performance of any concession agreement, management contract or

subcontract, purchase or lease agreement, or other agreement covered by this subpart.

(2) Each sponsor shall take all necessary and reasonable steps to ensure nondiscrimination in the award and administration of contracts and agreements covered by this subpart.

(3) The following statements shall be included in all concession agreements and management contracts executed between the sponsor and any firm after the effective date of this subpart.

(i) "This agreement is subject to the requirements of the U.S. Department of Transportation's regulations, 49 CFR Part 26, subpart G. The concessionaire or contractor agrees that it will not discriminate against any business owner because of the owner's race, color, national origin, or sex in connection with the award or performance of any concession agreement, management contract, or subcontract, purchase or lease agreement, or other agreement covered by 49 CFR Part 26, subpart G."

(ii) "The concessionaire or contractor agrees to include the above statements in any subsequent concession agreement or contract covered by 49 CFR Part 26, subpart G, that it enters and cause those businesses to similarly include the statements in further agreements."

(4)(i) Each sponsor shall retain sufficient basic information about its program implementation, its certification of DBEs, and the award and performance of agreements and contracts to enable the FAA to monitor the sponsor's compliance with this subpart. Data shall be retained for a minimum of three years following the completion of the concession agreement or other covered contract.

(ii) Sponsors shall report data to the appropriate FAA Regional Office concerning DBE participation in concession activities. The reports shall be

made in a format, and with a frequency, as determined by the FAA Administrator.

(iii) The requirements of this paragraph apply to all obligated sponsors, whether or not it is required to establish a DBE concession plan under paragraph (b) of this section.

(b) Additional requirements for primary airports.

(1) Sponsors of primary airports shall implement a disadvantaged business enterprise (DBE) concession plan containing the elements listed in § 26.107. Sponsors of more than one primary airport shall implement a separate plan for each location that has received assistance for airport development. The plan shall be submitted to the appropriate FAA Regional Office for approval.

(2) The sponsor shall review and update the plan at least annually. The updated plan shall include any information required under § 26.107 that was not available to the sponsor when the previous submission was made. Updated plans shall be submitted to the appropriate FAA Regional Office for approval.

(c) Additional requirements for nonprimary airports.
Sponsors of commercial service airports (except primary), general aviation and reliever airports are not required to implement a DBE concession plan but shall take appropriate outreach steps to encourage available DBEs to participate as concessionaires whenever there is a concession opportunity.

**§ 26.107 Elements of a Disadvantaged Business Enterprise (DBE) concession plan.**

(a) Overall annual DBE goals.

(1) The sponsor shall establish an overall goal for the participation of DBEs in concession activities for each 12-month period covered by the plan.

(2) Sponsors shall calculate the overall DBE goal as a percentage of one of the following bases:

(i) The estimated gross receipts that will be earned by all concessions operating at the airport during the goal period.

(ii) The total number of concession agreements operating at the airport during the goal period.

(3) The plan shall indicate which base the sponsor proposes to use for calculating the overall goals.

(4) Sponsors that employ the procedures of paragraph (a)(2)(i) of this section may add the following amounts to the total DBE participation and to the base from which the overall percentage goal is calculated:

(i) The estimated dollar value of a management contract or subcontract with a DBE. (The dollar value of management contracts and subcontracts with non-DBE firms are not added to the base from which the overall percentage goal is calculated.)

(ii) Subject to the conditions set forth in § 26.117 of this subpart, the estimated dollar value of goods and services that a non-DBE concessionaire (except a car rental) will purchase from DBEs and use in operating the concession.

(iii) The estimated dollar value of goods and services that a non-DBE car rental firm will purchase or lease from DBEs and use in operating the concession.

(5) Sponsors that employ the procedures of paragraph (a)(2)(i) of this section shall also:

(i) Use the net payment to the airport for banks and banking services, including automated teller machines (ATM) and foreign currency exchanges, in calculating the overall goals.

(ii) Exclude from the overall goal calculation any portion of a firm's estimated gross receipts that will not be generated from a concession activity.

*Example.* A firm operates a restaurant in the airport terminal which services the traveling public and under the same lease agreement, provides in-flight catering service to the air carriers. The projected gross receipts from the restaurant are included in the overall goal calculation, while the gross receipts to be earned by the in-flight catering services are excluded.

(iii) State in the plan which concession agreements, if any, do not provide for the sponsor to know the value of the gross receipts earned. For such agreements, the sponsor shall use the net payment to the airport and combine these figures with the estimated gross receipts from other agreements, for purposes of calculating overall goals.

(6)(i) Sponsors that will employ the procedures of paragraph (a)(2)(ii) of this section shall submit a rationale as required by § 26.111.

(ii) In calculating overall goals, these sponsors may add the number of management contracts and subcontracts with DBEs to the total of DBE participation and to the base from which the overall percentage goal is calculated. Management contracts and subcontracts with non-DBEs shall not be included in this base.

(7) All overall goals established under this subpart shall provide for participation by all certified DBEs and may not be subdivided into group specific goals.

(8) In setting overall goals, sponsors shall include only those projected expenditures/gross receipts or number of agreements, as applicable, as

§ 26.107(c) allows to be counted toward meeting such goals.

(9) In establishing the overall annual goals of the concession plan, the sponsor shall provide for public participation by taking at least the steps listed in paragraphs (i) and (ii) of this section. If the FAA approves the overall annual goals of the concession plan, the sponsor is not required to repeat the steps in subsequent years covered by the plan.

(i) Consult with minority, women's and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and the sponsor's efforts to increase participation of DBEs.

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

(10) Failure to establish and implement overall annual goals as provided in this section constitutes noncompliance with this subpart. A sponsor that fails to comply with this requirement is not eligible to receive Federal financial assistance from the FAA.

(11) In setting overall DBE goals, the sponsor shall follow the procedures set forth in §26.41 (b) - (e), as applied to contractors who are available for airport concession leases or contracts.

(12) To the extent practicable, sponsors shall seek to obtain DBE participation in all types of concession activities and not concentrate participation in one category or a few categories to the exclusion of others.

(13) Approval by the appropriate FAA Regional Office of the sponsor's overall annual goals is required prior to implementation. If the FAA determines that the overall goals have not been correctly calculated or the justification is inadequate, the FAA may, after consulting with the sponsor, establish one or more adjusted overall annual goals. The adjusted overall goal(s) represents the FAA's determination of an appropriate overall goal for DBE participation in the sponsor's concession program, based on relevant data and analysis. The adjusted overall goal(s) shall be binding on the sponsor.

(b) Goal methodology. (1) The plan shall contain a description of the methodology used to calculate each overall DBE goal. The methodology shall include information on the concessions that will operate at the airport during the period covered by the plan. For each concession agreement, the sponsor shall provide the following information, together with any additional information requested by the Regional Civil Rights Officer:

(i) Name of firm (if known).

(ii) Type of business (e.g. bookstore, car rental, baggage carts).

(iii) Beginning and expiration dates of agreement, including options to renew.

(iv) For new agreements, method of solicitation proposed by sponsor (e.g. request for proposals, invitation for bids).

(v) Dates that material amendments will be made to the agreement (if known).

(vi) Except for sponsors covered by paragraph (a)(2)(ii) of this section, the estimated gross receipts for each goal period established in the plan.

(vii) Identification of those concessionaires that have been certified under this subpart as DBEs.

(viii) An indication of those concessions having potential for participation by DBEs.

(2) The plan shall provide information on other projected expenditures with DBE firms that the sponsor proposes to count toward meeting overall goals, including

(i) Name of each DBE firm (if known).

(ii) Type of business arrangement (e.g. management contract, vehicle leasing, building cleaning and maintenance service).

(iii) Estimated value of funds to be counted toward meeting the overall goals.

(iv) Identification of entity purchasing or leasing the goods or services from the DBE (e.g., the sponsor or name of non-DBE concessionaire).

(3) Sponsors that will levy a DBE contact goal or other requirements on competitors or concessionaires in accordance with § 26.115 of this subpart shall state those requirements in the plan.

(4) The plan shall include a narrative description of the types of efforts the sponsor intends to make in good faith to achieve the overall annual goals, in accordance with paragraph (k) of this section.

(c) Counting DBE participation toward meeting the goals.

(1) A sponsor or concessionaire may count toward DBE goals expenditures with DBEs as referenced in this section, provided that the DBE

performs a commercially useful function in the work of the contract. For purposes of this subpart, the term commercially useful function has the same meaning as in § 26.49(e) of this Part, except that the requirements of § 26.49(e)(3) shall not apply to a concession agreement or management contract or subcontract.

(2) If a sponsor is covered by paragraph (a)(2)(i) of this section, DBE participation is counted toward meeting goals as follows.

(i) The total dollar value of a management contract or subcontract with a DBE is counted toward the goals (but the value of the gross receipts of the business activity to which the management contract or subcontract pertains is not counted toward the goals.)

(ii)(A) The total dollar value of gross receipts a DBE earns under a concession agreement is counted toward the goals, provided, however, that if the DBE enters into a subconcession agreement with a non-DBE, no portion of the gross receipts earned by the non-DBE is counted.

(B) When a DBE performs as a subconcessionaire to a non-DBE, only the portion of the gross receipts earned by the DBE under its subagreement is counted toward the goals.

(C) When a concession is performed by a joint venture involving a DBE, a portion of the gross receipts equal to the percentage of the ownership and control by the DBE partner in the joint venture is counted toward the goals.

(iii) A non-DBE car rental firm may count toward a contract goal set under § 26.115, the expenditures with DBEs for goods and services listed in paragraphs (A) through (C), (D)(1), and (E) of this section, which are used in operation of the concession. A sponsor may count these same expenditures

toward its overall goal. Counting such expenditures toward DBE goals is subject to the additional condition stated in § 26.49(d) of this Part.

(A) Costs incurred in connection with the renovation, repair, or construction of a concession facility (sometimes referred to as the "build-out") are counted toward DBE goals in accordance with § 26.49 of this Part, except that 100 percent of the cost of any materials or supplies purchased from a DBE regular dealer and used in the project are counted toward the goals. For purposes of this subpart, the term regular dealer has the same meaning as in § 26.49(f)(2)(iii).

(B) The entire amount of fees or commissions charged by a DBE firm for a bona fide service is counted toward DBE goals, provided that it is determined by the sponsor to be reasonable and not excessive as compared with fees customarily allowed for similar services. Such services may include, but are not limited to, professional, technical, consultant, legal, security systems, advertising, building cleaning and maintenance, computer programming, or managerial.

(C) 100 percent of the cost of goods obtained from a DBE manufacturer is counted toward the goal. For purposes of this subpart, the term manufacturer has the same meaning as in § 26.49(f)(1)(ii) of this Part.

(D)(1) 100 percent of the cost of goods purchased or leased from a DBE regular dealer is counted toward the goals.

(2) 100 percent of the goods purchased from a DBE regular dealer is counted toward goals.

(E) If goods are purchased from a DBE which is neither a manufacturer nor a regular dealer, credit toward DBE goals may be counted as follows:

(*1*) The entire amount of fees or commissions charged for assistance in the procurement of the goods is counted toward the goals, provided that it is

determined by the sponsor to be reasonable and not excessive as compared with fees customarily allowed for similar services. No portion of the cost of the goods themselves may be counted toward DBE goals, however.

(2) The entire amount of fees or transportation charges for the delivery of goods required in a concession is counted toward DBE goals, provided that it is determined by the sponsor to be reasonable and not excessive as compared with fees customarily allowed for similar services. No portion of the cost of goods themselves may be counted toward the goals, however.

(iv) A non-DBE concessionaire (other than a car rental) may count toward a contract goal set under § 26.115, the expenditures listed in paragraphs (iii)(A) through (C), (D)(2) and (E) of this section that are used in the operation of a concession. A sponsor may count these same expenditures towards its overall goal. Counting such expenditures toward DBE goals is subject to meeting the additional conditions set forth in §s 26.117 of this subpart and § 26.49(d) of this Part.

(3) The following guidelines apply the counting provisions of paragraph (2) of this section to various transactions involving car rental firms.

(i) For purposes of this subpart, a fleet purchase means a purchase of vehicles in volume from a manufacturer at a discounted price, which is made through a car dealer. While the process used varies by manufacturer and by car dealer, the vehicles in a fleet purchase are frequently "dropped-shipped" directly to the car rental firm. A car dealer may use a separate account to handle fleet purchases. The minimum number of vehicles in a fleet purchase may vary, but as few as 10 have been used.

(ii) A car dealership shall not be regarded as a regular dealer in a transaction in which it assists a car rental firm to make a fleet purchase from a

manufacturer. The entire amount of the fee or commission charged by a DBE car dealership for arranging a fleet purchase is counted toward DBE goals, provided that it is determined by the sponsor to be reasonable and not excessive as compared to fees customarily allowed for similar services. No portion of the cost of the vehicles themselves is counted toward DBE goals, however.

(iii) A DBE car dealership may be regarded as a regular dealer with respect to other transactions, including but not limited to, retail sales or leasing of vehicles other than through a fleet purchase and selling motor vehicle supplies or new parts, provided that the operation meets appropriate criteria in this section. In these instances, 100 percent of the cost charged by the DBE car dealer for such goods is counted toward DBE goals.

(iv) The entire amount of the cost charged by a DBE for repairing vehicles is counted toward DBE goals, provided that it is determined by the sponsor to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(v) The entire amount of the fee or commission charged by a DBE to manage a car rental concession under an agreement with the concessionaire is counted toward DBE goals, provided that it is determined by the sponsor to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(vi) No portion of a fee paid by a manufacturer to a car dealership for reimbursement of work performed under the manufacturer's warranty shall be counted toward DBE goals.

(4) If the sponsor is covered by paragraph (a)(2)(ii) of this section, DBE participation is counted toward meeting overall goals and any contract goals set under this subpart as follows.

(i) A sponsor or concessionaire shall count each concession agreement with a DBE toward its goal.

(ii) A sponsor shall count each management contract or subcontract with a DBE toward its goal.

(5) If a firm has not been certified as a DBE in accordance with the standards in this Part, the firm's participation may not count toward DBE goals.

(6) Except in the case of a concessionaire that exceeds the small business size standard, as referenced under the definition of a "small business concern," the work performed or gross receipts earned by a firm after its eligibility has been removed may not be counted toward DBE goals.

(d) Reserved.

(e) Accomplishments in achieving DBE goals. The plan shall contain an annual analysis of the accomplishments made by the sponsor toward achieving the previous year's goals. The plan shall show the effect of those results on the overall level of DBE participation in the sponsor's concession program.

(f) Explanation for not achieving a goal. (1) If the analysis required under paragraph (e) of this section indicates that the sponsor failed to meet the previous year's overall goal, the plan shall include a statement of the reasons demonstrating why failure to meet the goal was beyond the sponsor's control.

(2) If the FAA determines that the reasons given by the sponsor are not sufficient justification, or if the sponsor fails to state any reasons, the FAA may require the sponsor to implement appropriate remedial measures. Such measures may include an adjustment to the overall goals of the concession plan.

(g) Certification procedures. (1) The procedures in § 26.71 apply to this subpart. The DBE concession plan shall state whether the sponsor participates in the unified certification program (UCP) for its state.

(i) A sponsor that participates in a UCP shall be subject to all certification procedures applicable to the UCP.

(ii) A sponsor that elects not to participate in the UCP shall independently certify concessionaires and other program participants counted toward DBE contract goals and overall goals under this subpart. Such a sponsor:

(A) is not authorized to accept the certifications made by another sponsor or by a UCP;

(B) may, at its own discretion, use the pre-certification procedures in § 26.71(d).

(2) Pending the establishment of a UCP meeting the requirements of this Part, any sponsor is authorized to take the actions set forth in § 26.71(g). A sponsor that does not participate in the UCP in its state is not authorized to take such actions, however, after the UCP has become operational.

(h) Certification process. (1) Except for paragraphs (c)(1) through (6), the requirements of § 26.73 of this Part apply to all certifications made under this subpart.

(2) In determining whether a firm is an eligible DBE, a sponsor or UCP shall take all steps listed in paragraphs (i) through (vi) of this section.

(i) Obtain the resumes or work histories of the principal owners of the firm and personally interview these individuals;

(ii) Analyze the ownership of stock of the firm, if it is a corporation;

(iii) Analyze the bonding and financial capacity of the firm;

(iv) Determine the work history of the firm, including any concession contracts or other contracts it may have received;

(v) Obtain or compile a list of the licenses of the firm and its key personnel to perform the concession contracts or other contracts it wishes to receive;

(vi) Obtain a statement from the firm of the type(s) of concession(s) it prefers to operate or the type(s) of other contract(s) it prefers to perform.

(3) When determined by the sponsor or UCP to be necessary to validate the certification information submitted by the firm, the sponsor or UCP shall perform an on-site visit to the offices of the firm and to any facilities within the sponsor's jurisdiction or local area prior to making an eligibility determination.

(4) Each certified DBE shall provide the affidavit required by paragraph 26.73(h) of this Part, except that, for certifications made under this subpart, the affidavit shall affirm that the firm meets the appropriate size standard in Appendix G.

(5) A sponsor described in paragraph (g)(1)(ii) of this section that does not adopt pre-certification procedures, is required to certify only those firms which will count toward DBE contract goals and overall goals set under this subpart. The provisions of § 26.73(i) shall not apply to such a sponsor if the application for certification is submitted by a firm that will not count toward such goals.

(i) Other certification procedures. (1) Except as provided in paragraph (2) of this section, the procedures in §§ 26.75, 26.77, 26.79, and 26.81 apply to this subpart. For purposes of this subpart, the term "prime contractor" in § 26.77(i) shall include:

(i) a firm holding a prime contract with an airport concessionaire to provide goods or services to the concessionaire; and

(ii) a firm holding a prime concession agreement with a sponsor.

(2) The procedures of § 26.77(i)(2) shall apply to this subpart, except when a sponsor removes a concessionaire's eligibility because the firm exceeded the size standard after entering a concession agreement. In such instances, the procedures set forth under the definition of a "small business concern" in § 26.101 shall apply.

(j) Certification standards. (1) Except as provided in paragraphs (i) and (ii) of this section, sponsors shall use the same standards as contained in §§ 26.51, 26.53, 26.57, 26.59, 26.61, and 26.63 of this Part to determine whether a firm may be certified as a DBE under this subpart.

(i) The personal net worth threshold used in rebutting the presumption of disadvantage, referenced in §§ 26.57(b)(5) and (b)(6) (and in appendix F) of this Part, shall be [a number to be inserted in the final rule] under this subpart;

(ii) The provisions of § 26.61(n) of this Part shall not apply to this subpart.

(2) A newly formed firm applying for DBE certification as a concessionaire must meet all applicable eligibility standards in this Part. A sponsor shall not deny certification solely because such firm was newly formed, without applying the standards in this Part.

(3) Businesses operating under the following structures may be eligible for certification as DBEs under this subpart:

(i) Sole proprietorships meeting the standards in this Part.

(ii) Corporations described in § 26.59(b).

(iii) Partnerships described in § 26.59(b).

(iv) Other structures that provide for ownership and control by the socially and economically disadvantaged owners.

(4) A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licenser is not affiliated with the franchisee or licensee. In determining whether affiliation as defined in § 26.101 exists, the restraints relating to standardizing quality, advertising, accounting format, and other provisions imposed on a franchisee or licensee by its franchise or license agreement generally shall not be considered, 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 the franchiser or licenser by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions upon the sale or transfer of the franchise interest or license.

(5) An association of a DBE firm and one or more other firms meeting the definition of a joint venture in § in 26.5 of this Part is eligible for certification under this subpart.

(6) Businesses operating under the following arrangements are not eligible for certification as DBEs under this subpart:

(i) A limited partnership, in which a non-DBE firm or a non-disadvantaged individual is the general partner.

(ii) Other arrangements that do not provide for ownership and control by the socially and economically disadvantaged owners.

(k) Good faith efforts. (1)(i) A sponsor shall make good faith efforts in accordance with this section to achieve the overall goals of an approved concession plan.

(ii) For purposes of this subpart, good faith efforts means efforts which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to achieve a DBE goal or fulfill another program requirement.

(2) To the maximum extent feasible, sponsors shall meet overall goals by using outreach, technical assistance, and other methods to facilitate DBE participation, including, but not limited to the steps listed in paragraphs (4)(i) through (iv) of this section.

(3)(i) To the extent that a sponsor has determined that it cannot meet its overall goals by using the means referenced in paragraph (2) of this section, the sponsor shall use the additional steps listed in paragraphs (4)(v) and (vi) of this section and the procedures in § 26.115.

(ii) Sponsors shall review at appropriate intervals the methods and procedures used to comply with this section to ensure that they continue to be needed to meet overall goals, modifying them as needed for this purpose. If the sponsor's actual DBE participation significantly exceeds its overall goals over a substantial period of time, the sponsor shall appropriately reduce the use of DBE contract goals as a means of meeting overall goals.

(4) Good faith efforts include the following:

(i) Locating and identifying DBEs who may be interested in participating as concessionaires or contractors under this subpart;

(ii) Notifying DBEs and other organizations of concession/contracting opportunities and encouraging them to compete, when appropriate;

(iii) When practical, structuring contracting activities so as to encourage and facilitate the participation of DBEs; and

(iv) Providing technical assistance to DBEs in overcoming limitations, such as inability to obtain bonding or financing.

(v) Informing competitors for concession/contracting opportunities of any DBE requirements during pre-solicitation meetings;

(vi) Providing information concerning the availability of DBE firms to competitors to assist them in meeting DBE requirements;

(5) A firm subject to a DBE contract goal set under § 26.115 of this subpart shall make good faith efforts to meet the goal. The firm shall consider implementing at least the steps listed in paragraph (4) of this section.

(6) A sponsor and firm covered by § 26.117(b)(2) of this subpart shall make good faith efforts to meet the requirements of that section. The sponsor and firm shall consider implementing at least the steps listed in paragraph (4) of this section.

(l) Monitoring and compliance procedures. The sponsor shall implement appropriate mechanisms to ensure compliance with the requirements of this subpart by all participants in the program. The sponsor shall include in its DBE concession plan the specific provisions to be inserted into concession agreements and management contracts, the enforcement mechanisms, and other means it uses to ensure compliance. These provisions shall include a monitoring and enforcement mechanism to verify that the work committed to DBEs as a condition of receiving the award of a covered contract is actually performed by the DBEs.

**§ 26.109 Reserved.**

**§ 26.111 Rationale for basing overall goals on the number of concession agreements.**

(a) A sponsor that proposes to calculate the overall DBE goals as a percentage of the number of concession agreements shall submit information

with the DBE plan to demonstrate that one of the following applies to the airport:

(1) In order to achieve the overall DBE goals of the plan on the basis of gross receipts, the airport would need to award a disproportionate percentage of concession agreements to DBEs. This rationale may address a time period that extends beyond that covered by the current plan; or

(2) Other circumstances at the airport exist that do not make it feasible to use gross receipts as the basis for calculating the goals.

(b) If the FAA approves the request, the sponsor shall not be required to provide further justification during subsequent years of the plan, unless requested by the FAA to do so.

(c) If the FAA determines that the information submitted by the sponsor fails to justify the requested goal-setting procedure, the sponsor shall resubmit the plan. The goals in the revised plan shall be calculated as a percentage of gross receipts, as outlined in § 26.107(a)(2)(i) of this subpart.

**§ 26.113 Reserved**

**§ 26.115 Obligations of concessionaires, contractors, and competitors.**

(a)(1) Nothing in this subpart shall require any sponsor to modify or abrogate an existing concession agreement (one executed prior to the date the sponsor became subject to this subpart G) during its term. When an option to renew such an agreement is exercised or when a material amendment is made, the sponsor shall assess potential for DBE participation and may, if permitted by the agreement, set a DBE contract goal in accordance with this section.

(2) Sponsors may impose DBE contract goals on competitors for concession agreements or management contracts. If a contract goal is established, the solicitation shall notify competitors that as a condition of receiving the award of the agreement/contract, the competitor shall be required to submit information indicating that the competitor--

(i) Will meet the contract goal through utilization of one or more named DBEs; or

(ii) Made good faith efforts in accordance with § 26.107(k) of this subpart.

(3) The sponsor shall award an agreement or contract for which a contract goal has been established only to a firm that is responsive to the requirements of this section.

(4) All DBE contract goals established under this subpart shall provide for participation by all certified DBEs and may not be subdivided into group-specific goals.

(5) Sponsors are not required to set each contract goal at the same percentage level as the overall goal. The goal for a specific contract may be higher or lower than the percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract or concession.

(6) DBE contract goals shall be calculated as set forth below.

(A) If the goal is to attain a direct ownership arrangement with a DBE, the goal is calculated as a percentage of the total estimated annual gross receipts from the concession.

(B) If the goal applies to purchases and/or leases of goods and services, the goal is calculated by dividing the estimated dollar value of such purchases

and/or leases from DBEs by the sum of this amount and the estimated annual gross receipts to be earned by the concession.

(b) A sponsor may impose the requirements of paragraphs (1) and/or (2) on a non-DBE car rental firm.

(1) The sponsor may set a DBE contract goal for the purchase or lease of goods or services, provided, that a car rental firm shall be permitted to meet such goal by including costs associated with purchases or leases of vehicles from any firm that qualifies as a DBE, as defined in this subpart.

(2)(i) The sponsor may require a car rental firm to state in writing--

(A) whether a change in its corporate structure is needed in order to provide for a direct ownership arrangement with a DBE; and

(B) to identify the particular arrangements it can utilize for such purpose, if any.

(ii) For purposes of this subpart, a change in corporate structure shall include a transfer of corporate assets or execution of a joint venture, partnership, or sublease agreement.

(iii) If a car rental firm identifies one or more direct ownership arrangements pursuant to paragraph (b)(2)(i)(B) of this section, the sponsor may require the firm to make good faith efforts to achieve a DBE contract goal through such arrangement.

(iv) If a car rental firm cannot provide for a direct ownership arrangement with a DBE without changing its corporate structure, the firm shall be considered responsive to any requirement established by the sponsor under this paragraph (2).

(3)(i) Nothing in this subpart shall require a car rental firm to change its corporate structure to provide for a direct ownership arrangement with a DBE in order to meet the requirements of this subpart.

(ii) In evaluating bids or proposals for a car rental concession, a sponsor shall not give preference or more favorable consideration solely because a firm can provide for a direct ownership arrangement with a DBE without changing its corporate structure.

(iii) A sponsor shall not grant more favorable terms or conditions in a car rental concession agreement solely because a firm can provide for a direct ownership arrangement with a DBE without changing its corporate structure.

(c) A sponsor may impose the requirements of paragraphs (1) and/or (2) on a non-DBE concessionaire or competitor (except a car rental firm):

(1) Subject to complying with the conditions in § 26.117, the sponsor may set a DBE contract goal for the purchase of goods or services.

(2) The sponsor may set a contract goal to attain DBE participation solely through a direct ownership arrangement.

(d) A sponsor may impose a contract goal on a management contractor to attain DBE participation through a management subcontract.

(e) A sponsor is permitted to afford DBE firms opportunities to participate as prime concessionaires or management contractors through direct contractual agreements with the sponsor.

(f) When a contract goal has been established in accordance with this section, sponsors are prohibited from using more stringent mechanisms than good faith efforts (including, but not limited to, set-asides and a conclusive presumption) unless--

(1) the sponsor has legal authority independent of this Part to use such mechanisms; and

(2) where the sponsor has a continuing, substantial inability to meet its overall goal using the mechanisms provided for in this section. In such a case, the sponsor shall document in its file for the contract the basis for the

determination that other available methods have proven unable to meet DBE goals.

(g) The concession plan shall include a description, together with a citation of state or local law, regulation, or policy, to support any requirement that a sponsor will levy on a firm which is in addition to the requirements of this subpart, such as a requirement to provide financial assistance to a DBE. This subpart does not provide authority to establish such a requirement.

**§ 26.117 Conditions precedent to counting purchases of goods and services by concessionaires (other than car rentals) toward DBE goals.**

(a) A sponsor that proposes to count expenditures referenced in § 26.107(c)(1)(iv) of this subpart toward a DBE goal, shall include information in the concession plan on how it will comply with the requirements set forth below.

(b)(1) Except as provided in paragraph (2) of this section, the sponsor shall, with respect to each concession agreement covered by this section, implement the procedures of paragraph (i) or (ii) as follows.

(i) Set a DBE contract goal for a direct ownership arrangement and require the non-DBE firm to make good faith efforts as provided in § 26.115 of this subpart.

(ii) Submit information demonstrating that the sponsor and non-DBE firm made good faith efforts, in accordance with § 26.107(k) of this subpart, to explore all available options to attain, to the maximum extent practical, DBE participation through a direct ownership arrangement. If appropriate, the submission may include an explanation why the nature of a particular concession makes DBE participation through a direct ownership arrangement not economically feasible or otherwise impractical.

(c)(1) The FAA shall approve or disapprove a DBE contract goal submitted by the sponsor pursuant to paragraph (b)(2)(i) of this section.

(2)(i) If a sponsor submits information meeting the standards in paragraph (b)(2)(ii) of this section, the FAA Regional Office shall approve the submission, and if appropriate, require the sponsor to reassess the feasibility of setting a DBE contract goal prior to exercising each option to renew the concession agreement, when a material amendment is made to the agreement, or at another appropriate time.

(ii) If a sponsor submits information that does not meet the standards in paragraph (b)(2)(ii) of this section, the FAA Regional Office may;

(A) require that additional efforts be made by the sponsor and concessionaire;

(B) direct the sponsor to set a DBE contract goal for a direct ownership arrangement; or

(C) take other appropriate action in accordance with this subpart.

(2) If the FAA approved a plan referenced in § 26.121(b)(2) of this subpart, the sponsor is not required to submit additional information pursuant to this paragraph (2), unless requested by the FAA to do so.

(d)(1) Purchases of goods and services covered by this section may be counted toward DBE goals throughout the duration of a concession agreement, provided, that all requirements of this section and subpart are being met.

(2) In the event the FAA determines that the sponsor and non-DBE firm did not comply with all requirements of this section and subpart, the FAA may direct that the purchases of goods and services affected by such determination shall not be counted toward DBE goals.

**27.119 Privately-owned terminal buildings.**

(a) The requirements of this subpart apply to concession activities conducted by a private owner of an airport terminal building. The sponsor shall levy the applicable requirements on the terminal owner through the agreement with the owner or by other means, except that certification shall, in the case of a primary airport, remain the responsibility of the sponsor. The sponsor shall ensure that the terminal owner complies with the requirements imposed pursuant to this subpart.

(b) If a terminal building is at a primary airport, the sponsor shall obtain from the terminal owner the overall goals and other elements of the DBE concession plan required under § 26.107. This information shall be incorporated into the concession plan and goals established by the sponsor and submitted to the FAA in accordance with this subpart.

(c) If the terminal building is at a commercial service airport (except primary), general aviation, or reliever airport, the sponsor shall ensure that the owner complies with the requirements in § 26.105(c).

**§ 26.121 Prohibition on long-term, exclusive concession agreements.**

(a) Except as provided in paragraph (b) of this section, sponsors shall not enter into long-term, exclusive agreements for the operation of concessions. For purposes of this section, a long-term agreement is one having a term in excess of five years. Guidelines for determining whether an agreement is exclusive, as used in this section, shall be issued by the FAA and be made available through any FAA Regional Civil Rights Officer or from the FAA Office of Civil Rights, 800 Independence Avenue, SW., Washington, DC 20591, Attention, ACR-4.

(b) A long-term, exclusive agreement is permitted under this subpart, provided that:

(1) Special local circumstances exist that make it important to enter such agreement, and

(2) The responsible FAA regional civil rights officer approves of a plan for ensuring adequate DBE participation throughout the term of the agreement.

(c) Sponsors shall submit the following information with the plan referenced in paragraph (b)(2) of this section:

(1) A description of the special local circumstances that warrant a long-term, exclusive agreement, e.g., a requirement to make certain capital improvements to a leasehold facility.

(2) A copy of the draft and final leasing and subleasing or other agreements. The long-term, exclusive agreement shall provide that:

(i) One or more DBEs will participate as concessionaires throughout the term of the agreement and account for at a percentage of the estimated annual gross receipts equivalent to a level set in accordance with §26.107(a)(11) of this subpart.

(ii) The extent of DBE participation will be reviewed prior to the exercise of each renewal option to consider whether an increase is warranted. (In some instances, a decrease may be warranted.)

(iii) A DBE concessionaire that is unable to perform successfully will be replaced by another DBE concessionaire, if the remaining term of the agreement makes this feasible. In the event that such action is not feasible, the sponsor shall require the concessionaire to make good faith efforts during the remaining term of the agreement encourage DBEs to compete for the purchase and/or lease of goods and services that it procures.

(3) Assurances that a DBE concessionaire will be in an acceptable form, such as a sublease, joint venture, or partnership.

(4) Documents used by the sponsor in certifying the DBEs.

(5) A description of the type of business or businesses to be operated, location, storage and delivery space, "back-of-the-house facilities" such as kitchens, window display space, advertising space, and other amenities that will increase the DBE's chance to succeed.

(6) Information on the investment required on the part of the DBE and any unusual management or financial arrangements between the prime concessionaire and DBE.

(7) Information on the estimated gross receipts and net profit to be earned by the DBE.

**§ 26.123 Compliance procedures.**

(a) Complaints. Any person who believes that there has been a violation of this subpart may personally, or through a representative, file a written complaint in accordance with FAA regulations (14 CFR Part 16). The complaint must be submitted to the Federal Aviation Administration, Office of the Chief Counsel, Attention: FAA Part 16 Airport Proceedings Docket (AGC-610), 800 Independence Avenue, SW., Washington, DC 20591. Complaints which meet the requirements of 14 CFR Part 16 shall be docketed and processed as formal complaints.

(b) Compliance procedures. In the event of noncompliance with this subpart by a sponsor, the FAA Administrator may take such action as provided in Title 49 of the United States Code (U.S.C.), including §§ 47106(d), 47111(d), and 47122.

**§ 26.125 Effect of subpart.**

(a) Local requirements not preempted. Nothing in this subpart shall preempt any State or local law, regulation, or policy enacted by the governing body of a sponsor, or the authority of any State or local government or sponsor to adopt or enforce any law, regulation, or policy relating to DBEs. In the event that a State or local law, regulation, or policy conflicts with the requirements of this subpart, the sponsor shall, as a condition of remaining eligible to receive Federal financial assistance from the DOT, take such steps as may be necessary to comply with the requirements of this subpart.

(b) Local geographical preference. Nothing in this subpart shall prohibit a sponsor from employing a local geographical preference in evaluating bids or proposals for a concession agreement or other contract covered by this subpart, provided that the procedure does not conflict with any provision in this Part or have the effect of defeating or substantially impairing accomplishment of the objectives of the program. An example of a prohibited practice is a local geographical preference that has the effect of discriminating against a business owner on the grounds of race, color, sex, or national origin, in violation of § 26.7 of this Part.

(c) The miscellaneous provisions set forth in § 26.99 of this Part apply to this subpart.

**APPENDIX A TO PART 26 -- EXPLANATION OF PROVISIONS**

The text of this appendix is not included in this SNPRM, since it is intended to reflect the Department's understanding of the meaning and proper interpretation of the provisions of the final version of Part 26. The Department, as an alternative or addition to publishing this Appendix in the final rule, may publish this material as part of a compliance guide responding

to the requirements of the Small Business Regulatory Enforcement Fairness Act of 1996.

## APPENDIX B TO PART 26 -- GUIDANCE CONCERNING GOOD FAITH EFFORTS

When, as a recipient, you establish a contract goal on a DOT-assisted contract, any bidder which does not meet this goal must show you that it made good faith efforts to do so. This means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this rule which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

It is important for you to look at not only the different kinds of efforts that the contractor has made, but also the quantity and intensity of these efforts. The efforts employed by the bidder should be those 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. The extent to which other bidders obtained DBE participation, and the kind and quality of steps they took in attempting to do so, can be considered by the recipient in the course of evaluating a bidder's good faith efforts.

The following is a list of types of actions which you should consider as part of the bidder's good faith efforts to obtain DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

A. Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The bidder must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

B. Selecting 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.

C. Providing 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.

D. Negotiating in good faith with interested DBEs. It is the bidder'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. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.

A bidder 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 extra cost involved in finding and utilizing DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. As a recipient, you may establish, as part of the solicitation, a reasonable range of additional cost that you will consider in making a good faith efforts determination. The range set forth in solicitation documents, or your finding of reasonableness in the absence of a predetermined range should be determined on a case-by-case basis appropriate to the circumstances of the contract involved.

We also note that the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to either meet the contract goal or demonstrate that it made adequate, but unsuccessful, good faith efforts.

E. Noting whether other bidders have met the contract goal. 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.
additional reasonable efforts, the

F. Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within the highway construction 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 contractor's efforts to meet the project goal.

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

H. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

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

In any situation in which you have established a contract goal, Part 26 requires you to use the good faith efforts mechanism of this rule in determining whether bidders/offerors have met program requirements. You must make a fair and reasonable judgment concerning the good faith efforts made by competitors for contracts, and must not accept a showing of efforts that are inadequate or merely pro forma.

You are also cautioned against requiring that a bidder meet a contract goal in order to be awarded a contract, even though the bidder makes an adequate good faith efforts showing. If you impose such a requirement, or reject reasonable showings of good faith efforts by bidders, you may create a de facto quota system. Except in the limited circumstances noted in §26.45(e), you are prohibited from using quotas, a conclusive presumption, or set-asides in the award of DOT-assisted contracts. Such actions may also expose you to lawsuits from contractors.

## APPENDIX C - DBE CERTIFICATION APPLICATION FORM

Application is hereby made by the Individual (organization) identified below for certification as a disadvantaged business enterprise (DBE) under the U.S. Department of Transportation DBE program pursuant to 49 CFR 26. Socially and Economically Disadvantaged (SED) Individuals are presumed to be members of the following groups: Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Subcontinent Americans, Women and any groups so designated by the Small Business Administration (SBA). Applicants who are not one of the presumed groups must prove social and economic disadvantage in accordance with the standards in 49 CFR Part 26, Appendix F.

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

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

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

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

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

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

8. NATURE OF THE FIRM'S BUSINESS:

_____

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

SIC_____ Size_____ SIC_____ Size_____

SIC_____ Size_____ SIC_____ Size_____

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

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

A. For each license/permit attached, indicate:

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

| | | | | |
|---|---|---|---|---|
| | | | | |
| | | | | |
| | | | | |

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

12. OWNERSHIP INFORMATION

___Sole Proprietor ___ Partnership ___Corporation ____Joint Venture ____Other

Date established/incorporated _____ State_____

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

| NAME | DBE Code | Gender M/F | Date of Ownership | No. of Shares | Voting % | U.S. Citizen or Permanent Resident? |
|---|---|---|---|---|---|---|
| | | | | | | |
| | | | | | | |
| | | | | | | |

Check here ____,if more space is needed and continue listing in Item 29.

14. List on an attachment to this form, any other companies in which any of their individuals are employed, have been employed within the past year, and also have more than a 5% ownership interest.

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

| Name | Title | DBE Code | M/F | Expiration of |
|---|---|---|---|---|
| | | | | |
| | | | | |
| | | | | |

Check here ____,if more space is needed and continue listing in Item 29.

16. List the contributions of money, equipment, real estate, or expertise of each of the owners/investor. **Attach proof of the initial investment in the firm (dollars, real estate, equipment, etc.) on behalf of each of the owners. If more space is required continue in Item 29**

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

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

18. Identify any owner or management official of the firm who is, or has been, an employee of another firm that has an ownership interest in or a present business relationship with the named firm. Provide details of the arrangement and relationship. Present business relationships include shared space, equipment, financing or employees, as well as both firms having the same owners.
**Be sure to list those persons who are currently working for any other business which has a relationship with this firm, whether on a full-time or part-time basis as an owner, partner, shareholder, advisor, consultant, or employee.**

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

| Project | Dollar amount | Date Completed | Prime Contractor/ Contact Person |
|---|---|---|---|
| | | | |
| | | | |
| | | | |
| | | | |

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

| YEAR ENDING | | | |
|---|---|---|---|
| GROSS RECEIPTS | $ | $ | $ |

21. Name of Surety Company _____Bonding limit _____

Agent _____ Telephone Number _____

22. Who signs for insurance and payroll? _____

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

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

| Source | Amount | Date | Terms |
|---|---|---|---|
| | | | |
| | | | |
| | | | |

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

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

26. WORKFORCE INFORMATION

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

A. Permanent Personnel Currently on Payroll

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

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

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

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

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

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

AFFIDAVIT

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

NOTE: If additional information is required to determine certification, the conditions stated in the affidavit are applicable. If there are any significant changes in the information provided above that would alter your status as a DBE inform the certifying agency (See 49 CFR 26.73(g)).

_____
Name of Firm

_____
Name Title

_____
Signature Date

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

Notary Public _____ Commission expires _____

[Seal]

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

| S | P | C | |
|---|---|---|---|
| | | | 1. Equipment rental and purchase agreement |

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

**S**- Sole Proprietorship **P** - Partnership **C** - Corporation

## APPENDIX D TO PART 26 -- DBE BUSINESS DEVELOPMENT PROGRAM GUIDELINES

(A) Each firm that participates in the developmental program is subject to a program term determined by the recipient. The term will consist of two stages; a developmental stage and a transitional stage.

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

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

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

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

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

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

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

5. Such other information as the recipient may require.

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

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

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

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

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

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

(G) Program participation is divided into two stages; (1) a developmental stage and (2) a transitional stage. The developmental stage is

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

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

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

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

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

(1) Profitability;

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

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

(4) Ability to obtain bonding;

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

(6) Good management capacity and capability.

(L) Upon determination by the recipient that the participant should be graduated from the developmental program, the recipient shall notify the participant in writing of its intent to graduate the firm in a letter of notification. The letter of notification shall set forth findings, based on the

facts, for every material issue relating to the basis of the program graduation with specific reasons for each finding. The letter of notification shall also provide the participant 45 days from the date of service of the letter to submit in writing information which would explain why the proposed basis of graduation is not warranted.

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

## APPENDIX E TO PART 26 -- MENTOR-PROTÉGÉ PROGRAM GUIDELINES

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

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

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

## APPENDIX F TO PART 26- INDIVIDUAL DETERMINATIONS OF SOCIAL AND ECONOMIC DISADVANTAGE

This appendix contains guidance for recipients as they make individual determinations of social and economic disadvantage for individuals who are not entitled to the statutory presumption of social and economic disadvantage. Applicants not entitled to the presumption must establish both social and economic disadvantage by a preponderance of the evidence.

### Social disadvantage

Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control. Social disadvantage must include the following elements:

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

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

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

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

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

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

(2) *Employment*. The recipient must consider, as evidence of an individual's social disadvantage, discrimination in hiring; discrimination in promotions and other aspects of professional advancement; discrimination in pay and fringe benefits; discrimination in other terms and conditions of employment; retaliatory behavior by an employer; social patterns or

pressures which have channeled the individual into nonprofessional of non-business fields; and other similar factors.

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

## Economic disadvantage

Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged, and such diminished opportunities have precluded or are likely to preclude such individuals from successfully competing in the open market (i.e., the individuals are not in a position to compete on a "level playing field" with non-disadvantaged businesses or business owners). The DBE program is not intended to assist concerns owned and controlled by socially disadvantaged individuals who have accumulated substantial wealth, who have unlimited growth potential or who have not experienced or have overcome impediments to obtaining access to financing, markets and resources.

In determining the degree of diminished credit and capital opportunities of a socially disadvantaged individual, the recipient must consider factors relating both to the applicant and to the individual(s) claiming disadvantaged status, including that individual's access to credit and capital; the financial condition of the applicant; and the applicant's access to credit, capital, and markets. That is, the recipient must look at the situation of the business as well as that of the owner personally. The recipient must compare the applicant's business and financial profile with profiles of businesses in the same or similar line of business which are not owned and controlled by socially and economically disadvantaged individuals.

The recipient must consider the following factors:

(a) *Personal financial condition of the individuals claiming disadvantaged status*.. This criterion is designed to assess the relative degree of economic disadvantage of the individual, as well as the individual's potential to capitalize or otherwise provide financial support for the business. The specific factors to be considered include, but are not limited to, the individual's personal net worth, the individual's personal income for at least the past two years, and the total fair market value of all assets. Generally, an individual whose personal net worth exceeds [a given amount] is viewed as not being economically disadvantaged, absent a showing by the individual that other factors in his or her economic situation, the nature of the markets

in which his or her firm is competing, the business financial condition of the firm, or its access to capital or credit, make that individual and his or her business relatively disadvantaged (i.e., not on a level playing field), compared to competing firms.

(b) *Business financial condition.* This criterion will be used to provide a financial picture of a firm at a specific point in time in comparison to other concerns in the same or similar line of business which are not owned and controlled by socially and economically disadvantage individuals. In evaluating a concern's financial condition, the recipient's consideration must include, but not be limited to, the following factors: business assets, revenues, pre-tax profits, working capital and net worth of the concern, including the value of the investments in the concern held by the individual claiming disadvantaged status.

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

**Claims of Disadvantage Based on Alleged Effects of DBE Program**

Individuals cannot establish they are socially and economically disadvantaged by relying on competitive disadvantages they allegedly suffer because of the operation of the DBE program itself, or of similar state and local programs. Over the years, there have been allegations from some white male-owned firms that they have difficulty getting contracts in certain fields or certain jurisdictions <u>because</u> the DBE program results in a significant portion of contracts going to DBEs. The Department is aware of arguments having been made that this situation may make a given white male-owned firm eligible for an individual finding of social and economic disadvantage. The Department does not accept this argument, which would have the effect of benefiting firms the DBE program is not intending to assist because the program has been successful in assisting the firms for which it is intended. Nothing in this appendix provides that the effect of government-sponsored affirmative action programs can be used as a basis for a finding of disadvantage. Recipients are instructed not to make findings of disadvantage on such a basis.

## APPENDIX G to PART 26

## SIZE STANDARDS FOR THE AIRPORT CONCESSION PROGRAM

### Maximum Average Annual Gross Receipts

**in Preceding 3 years**

(In millions of dollars)

| Concession | Amount |
|---|---|
| Food and beverage | 33.270 |
| Book stores | 33.270 |
| Auto rental | 44.360 |
| Banks | 100.00(1) |
| Hotels and motels | 33.270 |
| Insurance machines and counters | 33.270 |
| Gift, novelty, and souvenir shops | 33.270 |
| Newsstands | 33.270 |
| Shoe shine stands | 33.270 |
| Barber shops | 33.270 |
| Automobile parking | 33.270 |
| Jewelry stores | 33.270 |
| Liquor stores | 33.270 |
| Travel agencies | 33.270 |
| Drug stores | 33.270 |
| Pastries and baked goods | 33.270 |
| Luggage cart rental | 33.270 |
| Coin-operated T.V.'s | 32.040 |
| Game rooms | 33.270 |
| Luggage and leather goods stores | 33.270 |
| Candy, nut, and confectionery stores | 33.270 |

**Maximum Average Annual Gross Receipts**

**in Preceding 3 years**

(In millions of dollars)

| Concession | Amount |
|---|---|
| Toy stores | 33.270 |
| Beauty shops | 33.270 |
| Vending machines | 33.270 |
| Coin-operated lockers | 33.270 |
| Florists | 33.270 |
| Advertising | 33,270 |
| Taxicabs | 33.270 |
| Limousines | 33.270 |
| Duty free shops | 33.270 |
| Local pay telephone service | 1500 (2) |
| Gambling machines | 33.270 |
| Other concessions not shown above | 33.270 |

(1) As measured by total assets.

(2) As measured by number of employees.

**Other Participants**

Management contractors:

Parking lots.....5.0

Other.....As defined in 13 CFR Part 121

Motor vehicle dealers (new and used).....500 employees (3)

Other providers of goods or services.....As defined in 13 CFR Part 121

(3) See definition of "small business concern" in § 26.101 of this subpart for additional information regarding firms classified within this industry.