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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Parts 23 and 26 269

[Docket **OST-97-2550; Notice** 97-51

RIN 2105-AB92

Participation by Disadvantaged Business Enterprises in Department of Transportation Programs

AGENCY: Office of the Secretary. DOT.

ACTION: Final rule.

SUMMARY: This final rule revises the Department of Transportation's regulations for its disadvantaged business enterprise (DBE) program. The DBE program is intended to remedy past and current discrimination against disadvantaged business enterprises. ensure a "level playing field" and foster equal opportunity in DOT-assisted contracts. improve the flexibility and efficiency of the DBE program, and reduce burdens on small businesses. This final rule replaces the former DBE regulation, which now contains only the rules for the separate DBE program for airport concessions. with a new regulation. The new regulation reflects President Clinton's policy to mend. not end, affirmative action programs. It modifies the Department's DBE program in light of developments in case law requiring "narrow tailoring" of such programs and last year's Congressional debate concerning the continuation of the DBE program. It responds to comments on the Department's December 1992 notice of proposed rulemaking (NPRM) and its May 1997 supplemental notice of proposed rulemaking (SNPRM).

DATES: This rule is effective March 4, 1999. Comments on Paperwork Reduction Act matters should be received by April 5, 1999; however, late-filed comments will be considered to the extent practicable.

ADDRESSES: Persons wishing to comment on Paperwork Reduction Act matters (see discussion at end of preamble) should send comments to Docket Clerk, Docket No. OST-97-2550. Department of Transportation, 400 7th Street, SW., Room 4107. Washington, DC 20590. We emphasize that the docket is open only with respect to Paperwork Reduction Act matters. and the Department is not accepting comments on other aspects of the regulation. 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 5:00 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: 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), bob.ashby@ost.dot.gov (email); or David J. Goldberg. Office of Environmental, Civil Rights and General Law, Department of Transportation. 400 7th Street. SW.. Room 5432. Washington, DC 20590, phone number (202) 366-8023 (voice). (202) 366-8536 (fax).

SUPPLEMENTARY INFORMATION:

Background

The Department has the important responsibility of ensuring that firms competing for DOT-assisted contracts are not disadvantaged by unlawful discrimination. For eighteen years, the Department's most important tool for meeting this responsibility has been its Disadvantaged Business Enterprise (DBE) program. This program began in 1980. Originally, the program was a minority/women's business enterprise program established by regulation under the authority of Title VI of the Civil Rights Act of 1964 and other nondiscrimination statutes that apply to DOT financial assistance programs. See 49 CFR part 23.

In 1983. Congress enacted. and President Reagan signed, the first statutory DBE provision. This statute applied primarily to small firms owned and controlled by minorities in the Department's highway and transit programs. Firms owned and controlled by women. and the Department's airport program. remained under the original 1980 regulatory provisions. In 1987, Congress enacted, and President Reagan signed, statutes expanding the program to airports and to women-owned firms. In 1991 (for highway and transit programs) and 1992 (for airport programs), Congress enacted. and President Bush signed, statutes reauthorizing the expanded DBE program.

After each statutory amendment. and at other times to resolve program issues. the Department amended part 23. The result has been that part 23 has become a patchwork quilt of a regulation. In addition, years of interpretation by various grantees and different DOT offices has created confusion and inconsistency in program administration. These problems. particularly in the area of certification, were criticized in General Accounting Office reports. The Department's desire to improve program administration and make the rule a more unified whole led to our publication of a December 1992 notice of proposed rulemaking (NPRM).

The Department received about 600 comments on this NPRM. The Department carefully reviewed these comments and, by early 1995. had prepared a draft final rule responding to them. However. in light of the Supreme Court's June 1995 decision in *Adarand v. Peña* and the Administration's review of affirmative action programs, the Department conducted further review of the DBE program. As a result. rather than issuing a final rule. we issued a supplemental notice of proposed rulemaking (SNPRM) in May 1997. This SNPRM incorporated responses to the comments on the 1992 NPRM and proposed further changes in the program. primarily in response to the "narrow tailoring" requirements of *Adarand*. We received about 300 comments on the SNPRM. The Department has carefully considered these comments, and the final rule responds to them. The final rule also specifically complies with the requirements that the courts have established for a narrowly tailored affirmative action program.

At the same time that the Department was working on this final rule. Congress once again considered reauthorization of the DBE program. In both the House and the Senate. opponents of affirmative action sponsored amendments that would have effectively ended the program. In both cases, bipartisan majorities defeated the amendments. The final highway/transit authorization legislation. known as the Transportation Equity Act for the 21st Century (TEA-21). retains the DBE program. In shaping this final rule. the Department has listened carefully to what both supporters and opponents of the program have said in Congressional debates.

Key Points of the Final Rule

This discussion reviews and responds to the SNPRM comments and the Congressional debates on certain key issues. Congressional debate references *are to* the Congressional *Record* for March 5 and 6, 1998, for the Senate debate and April 1, 1998, for the House debate, unless otherwise noted.

1. Quotas and Set-Asides

SNPRM Comments: Most comments on this issue came from non-DBE contractors. who argued that the *program was a de facto quota program.* Many of these contractors said that recipients insisted that they meet numerical goals regardless of other considerations, and that the recipients did not take showings of good faith efforts seriously. Some non-DBE contractor organizations argued, in addition, that the program was a quota program because it was based on a statute that had a 10 percent target for the use of businesses defined by a racial classification.

Congressional Debate: Opponents of the DBE program generally asserted that it created quotas or set-asides. Senator McConnell described the entire program. particularly the provision that "not less than 10 percent" of authorized funds go to DBEs, as

> * * * a $17.3 billion quota. In other words, if the government decides that you are the preferred race and gender, then you are able to compete for $17.3 billion of taxpayer-funded highway contracts. But, if you are the wrong race and gender. then-too bad-you can't compete for that $ 17 billion pot. (S1936).

The "not less than 10 percent" language also led opponents, such as Senator Ashcroft. to label the program a "set-aside," (S1405), a term also employed in testimony provided by a law professor from California who said that the statute "imposes a set-aside that's required regardless of the availability of race-neutral solutions." (S1407). Senator Gorton said that the DBE statute provides that "those not defined as disadvantaged in our society are absolutely barred and prohibited from getting certain governmental contracts." (S1415).

On the other hand, supporters of the program were adamant that it was not a quota program. Senator Baucus argued that the program. as implemented by DOT, allows substantial flexibility to recipients and contractors. Recipients could have an overall goal other than 10 percent under current rules, he pointed out. Senator Kerry of Massachusetts added that what the statute does is to "set a national goal. And it is appropriate in this country to set national goals for what we will do to try to break down the walls of discrimination. * * *" (S1408). He also alluded to the flexibility of the Secretary to permit overall goals of less than 10 percent. Senator Robb stated:

> I want to stress at the outset that this program is not a "quota program," as some have suggested. There is a great difference [between] an aspirational goal and a rigid numerical requirement. Quotas utilize rigid numerical requirements as a means of implementing a program. The DBE program uses aspirational goals. (S1425).

With respect to individual contract goals. Senator Baucus said, "once a goal is established for a contract, each contractor must make a good-faith effort to meet the goal--not mathematically required. not quota required, but a good faith effort to meet it." (S1402). Senator Baucus pointed to provisions of the SNPRM concerning overall goals, means of meeting them, and good-faith efforts as further narrowly tailoring the program. The SNPRM confirms, he said, that "contract goals are not binding. If a contractor makes good faith efforts to find qualified women or minority-owned subcontractors. but fails to meet the goal. there is no penalty." (S1403). Senator Robb added that "Contract goals are not operated as quotas because they require that the prime contractor make 'good faith efforts' to find DBEs. If a prime contractor cannot find qualified and competitive DBEs, the goal can be waived." (S1425).

One of the Senators who addressed the quota/set-side issue in the most detail was Senator Domenici. He concluded that "I do not agree that this minority business program we have in this ISTEA bill before us is a program that mandates quotas and mandates set-asides." (S1426). He made this statement. in part, on the basis of March 5, 1998. letter to him signed by Secretary of Transportation Rodney Slater and Attorney General Janet Reno. In relevant part. this letter (which Senator Domenici inserted into the record) read as follows:

> The 10 percent figure contained in the statute is not a mandatory set aside or rigid quota. First, the statute explicitly provides that the Secretary of Transportation may waive the goal for any reason * * * Second, in no way is the 10 percent figure imposed on any state or locality * * * Moreover. state agencies are permitted to waive goals when achievement on a particular contract or even for a specific year is not possible. The DBE program does not set aside a certain percentage of contracts or dollars for a specific set of contractors. Nor does the "BE program require recipients to use seasides. The DBE program is a goals program which encourages participation without imposing rigid requirements of any type. Neither the Department's current nor proposed regulations permit the use of quotas. The DBE program does not use any rigid numerical requirements that would mandate a fixed numb& of dollars or contracts for DBEs. (S1427).

The debate in the House proceeded in similar terms. Opponents of the DBE program. such as Representative Roukema (H2000), Representative Cox (H2004) and Speaker Gingrich (H2009) said the legislation constituted a quota. while proponents. such as Representatives Tauscher (H2001), Poshard (H2003), Bonior (H2004) and Menendez (H2004) said the program did not involve quotas or set-asides.

DOT Response: The DOT DBE program is not a quota or set-aside program, and it is not intended to operate as one. To make this point unmistakably clear. the Department has added explicitly worded new or amended provisions to the rule.

Section 26.41 makes clear that the 10 percent statutory goal contained in ISTEA and TEA-21 is an aspirational goal at the national level. It does not set any funds aside for any person or group. It does not require any recipient or contractor to have 10 percent (or any other percentage) DBE goals or participation. Unlike former part 23, it does not require recipients to take any special administrative steps (e.g.. providing a special justification to DOT) if their annual overall goal is less than 10 percent. Recipients must set goals consistent with their own circumstances (see § 26.45). There is no direct link between the national 10 percent aspirational goal and the way a recipient operates its program. The Department will use the 10 percent goal as a means of evaluating the overall performance of the DBE program nationwide. For example, if nationwide DBE participation were to drop precipitously, the Department would reevaluate its efforts to ensure nondiscriminatory access to DOT-assisted contracting opportunities.

Section 26.43 states flatly that recipients are prohibited from using quotas under any circumstances. The section also prohibits set-asides except in the most extreme circumstances where no other approach could be expected to redress egregious discrimination. Section 26.45 makes clear that in setting overall goals, recipients aspire to achieving only the amount of DBE participation that would be obtained in a nondiscriminatory market. Recipients are not to simply pick a number representing a policy objective or responding to any particular constituency.

Section 26.53 also outlines what bidders must do to be responsive and responsible on DOT-assisted contracts having contract goals. They must make good faith efforts to meet these goals. Bidders can meet this requirement either by having enough DBE participation to meet the goal or by documenting good faith efforts, even if those efforts did not actually achieve the

goal. These means of meeting contract goal requirements are fully equivalent. Recipients are prohibited from denying a contract to a bidder simply because it did not obtain enough DBE participation to meet the goal. Recipients must seriously consider bidders' documentation of good faith efforts. To make certain that bidders' showings are taken seriously. the rule requires recipients to offer administrative reconsideration to bidders whose good faith efforts showings are initially rejected.

These provisions leave no room for doubt: there is no place for quotas in the DOT DBE program. In the Department's oversight, we will take care to ensure that recipients implement the program consistent with the intent of Congress and these regulatory prohibitions.

2. Sanctions for Recipients Who Fail To Meet Overall Goals

SNPRM Comments: The issue of sanctions for recipients who fail to meet overall goals was not a subject of comments on the SNPRM. Since the Department has never imposed such *sanctions,* this absence of comment is not surprising.

Congressional Debate: DBE program opponents asserted, in connection with their argument that the DBE program is a quota program. that the Department could impose sanctions for failure to meet goals. "The goals have requirements and the real threat of sanctions," Senator McConnell said. (S1488). Citing a provision of a Federal Highway Administration (FHWA) manual saying that if "a state has violated or failed to comply with Federal laws or * * * regulations." FHWA could withhold Federal funding. Senator McConnell said,

> In other words, there are sanctions. The same threats appear in * * * the Federal transportation regulations * * * When the Federal government is wielding that kind of weapon from on high, it does not have to punish them. A 10 percent quota is still a quota. even if the States always comply and no one is formally punished. (Id.)

Defenders of the DBE program pointed out that the Department had never punished a recipient for failing to meet an overall goal (e.g.. Rep. Tauscher, H2001; Senator Boxer, S1433). Senator Domenici asked Secretary Slater and Attorney General Reno whether there are sanctions, penalties, or fines that may be (or ever have been) imposed on a recipient who does not meet DBE program goals. He entered the following reply in the record:

> No state has ever been sanctioned by DOT for not meeting its goals. Nothing in the statute or regulations imposes sanctions on any state recipient that has attempted in goad faith, but failed. to meet its self-imposed goals. (51427).

Senator Lieberman added that if states fail to meet their own goals, "there is no Federal sanction or enforcement mechanism." (S1493).

DOT Response: The Department has never sanctioned a recipient for failing to meet an overall goal. We do not intend to do so. To eliminate any confusion, we have added a new provision (§ 26.47) that explicitly states that a recipient cannot be penalized. or treated by the Department as being in noncompliance with the rule. simply because its DBE participation falls short of its overall goal. For example, if a recipient's overall goal is 12 percent. and its participation is 8 percent, the Department cannot and will not penalize the recipient simply because its actual DBE participation rate was less than its goal.

Overall goals are not quotas, and the Department does not sanction recipients because their participation levels fall short of their overall goals. Of course, if a recipient does not have a DBE program, does not set a DBE goal. does not implement its DBE program in good faith, or discriminates in the way it operates its program. it can be found in noncompliance. But its noncompliance would never be having failed to "make a number."

3. Economic Disadvantage

SNPRM Comments: Some commenters favored eliminating the presumption of economic disadvantage. saying that applicants should have to prove their economic disadvantage. Other commenters favored obtaining additional financial information from applicants so that, even if the presumption remained in force, recipients would have a better idea of whether applicants really were disadvantaged. The question of the standard for determining disadvantage generated substantial comment. with some commenters favoring, and others objecting to, the proposed use of a personal net worth standard to assist recipients in determining whether an applicant was economically disadvantaged. There was also disagreement among commenters concerning the level at which such a standard should be set (e.g.. $750.000. or something higher or lower). These comments, and the Department's response to them, are further discussed in the section-by-section analysis for § 26.67.

Congressional *Debate:* The Congress debated the topic of who is regarded as economically disadvantaged under the statute. DBE opponents, including Senators Ashcroft (S1405) and McConnell (S1418) and Representative Cox (H2004), asserted that outrageously rich people could be eligible to participate as DBEs, frequently using the Sultan of Brunei as an example. The basic thrust of their argument was that if the program does not exclude wealthy members of the designated groups—meaning those who are not, in fact, disadvantaged-then it is "overinclusive" and therefore not narrowly tailored. Senator McConnell added that, because the Department's SNPRM did not include a specific dollar amount for a cap on personal net worth. it would not be effective. (S1486). On the other hand. DBE program supporters cited the SNPRM's proposed net worth cap as an effective device to stop wealthy people from participating in the program. These included Minority Leader Daschle (with a reference to a letter from the Associate Attorney General. S1413), Senator Baucus (S1414, S1423), Senator Lieberman (S1493). Senator Boxer (S1433), and Senator Moseley-Braun, who responded to the Sultan of Brunei example by noting that the program was directed primarily at U.S. citizens (S1420).

DOT Response: The final rule (526.67) specifically imposes a personal net worth cap of $750.000. This means that, regardless of race. gender or the size of their business, any individual whose personal net worth exceeds $750,000 is not considered economically disadvantaged and is not eligible for the DBE program. The provision also makes it much easier for recipients to determine whether an individual's net worth exceeds the cap. Applicants will have to submit a statement of personal net worth and supporting documentation to the recipient with their applications. If the information shows net worth above the cap. the recipient would rebut the presumption based on the information in the application itself and the individual would not be eligible for the program. In such a case, it would not be necessary for a third party to challenge the economic disadvantage of an applicant in order to rebut the presumption. While there have been very few documented cases of wealthy individuals seeking to take advantage of the Department's program. the revised provisions of part 26 virtually eliminate even the possibility of this type of abuse.

4. Social Disadvantage

SNPRM Comments: A few commenters suggested that the

presumption of social disadvantage, as well as that of economic disadvantage, be eliminated. so that applicants would have to demonstrate both elements of disadvantage. Any presumption of disadvantage tied to a racial classification, in the view of some of these commenters. undermined the constitutionality of the program. Other commenters noted that persons who are not members of the presumptively disadvantaged groups can be eligible and. in some cases, suggested that the criteria for evaluating such applications be clarified.

Congressional *Debate:* The presumption of social disadvantage drew fire from DBE program opponents because it was allegedly overinclusive. For example, Senator McConnell produced a map illustrating the over 100 countries of origin leading to inclusion in one of the presumed socially disadvantaged groups, pointing out that people from some countries (e.g., Pakistan) are presumed to be socially disadvantaged while those from other countries (e.g., Poland) are not. (S1418). Senator McConnell said that there was no basis for selecting this definition over any other. (Id.) Senator Hatch also listed the countries from which Asian-Pacific Americans and Subcontinent Asian-Americans can originate, suggesting that it was inappropriate to create "all kinds of special interest groups who are vying for these programs." (S1411).

DBE proponents responded that discrimination against minorities and women in general, and against specific minorities in particular (e.g.. African Americans) was very real and formed a basis for the presumption of social disadvantage (see discussion below concerning the existence of discrimination). Senator Baucus also noted that this presumption could be overcome. (S1402).

Opponents also charged that the presumption of social disadvantage was underinclusive: that is, "you underinclude people who have a right to be included in the bid process." (Senator McConnell, S1399). The people who are not included who have a right to be, in the view of opponents. are white males (e.g., Senator Sessions' reference to testimony from Adarand Constructors' owner, S1400). senator Kennedy disagreed with this assertion, saying

Of course. this program doesn't just help women and minorities. It extends a helping hand to firms owned by white males, as well. They can be certified to [participate] if they prove that they have been disadvantaged. Just ask Randy Pech—owner of the Adarand Construction Firm-because he is currently seeking certification. (S1482).

Senator Domenici was interested in the same question, and entered into the record the following response from Secretary Slater and Attorney General Reno:

Any individual owning a business may demonstrate that he is socially and economically disadvantaged. even if that individual is not a woman or a minority. Both the current and proposed regulations provide detailed guidance to recipients to assist them in making individual determinations of disadvantaged status. And in fact, businesses owned by white males have qualified for DBE status. (S1427).

DOT Response: By having passed the DBE statutory provision, after lengthy and specific debate, Congress has once again determined that members of the designated groups should be presumed socially disadvantaged. All of these groups are specifically incorporated by reference in the legislation that Congress debated and approved. This presumption (i.e.. a determination that it is not necessary for group members to prove individually that they have been the subject of discrimination or disadvantage) is based on the understanding of Members of Congress about the discrimination that members of these groups have faced. The presumption is rebuttable in the DOT program. If a recipient or third party determines that there is a reasonable basis for concluding that an individual from one of the designated groups is not socially disadvantaged, it can pursue a proceeding under § 26.87 to remove the presumption. Likewise, a white male, or anyone else who is not presumed to be disadvantaged, can make an individual showing of social and economic disadvantage and participate in the program on the same basis as any other disadvantaged individual (see § 26.67).

5. The "Low-Bid System"

SNPRM Comments: Non-DBE contractors expressed concern that a variety of provisions under the program and the SNPRM adversely affected the low-bid system. including contract goals. evaluation credits, and good faith efforts guidance concerning prime contractors' handling of subcontractor prices and consideration of other bidders' success in meeting goals.

Congressional Debate: Opponents of the DBE program assert that the program results *in* white male contractors not receiving contracts they would otherwise expect to receive. Senator Sessions cited the statement of the Adarand company to this effect. (S1400). Senator Ashcroft said that "if two bids come in from two subcontractors, one owned by a white male and the other by a racial minority, and the bids are the same. or even close, the job will go to the minority-owned company, not the low bidder." (S1405). Senator Gorton inserted into the record letters from a Spokane subcontractor asserting that, in a number of cases, it had lost subcontracts to DBE firms despite having a lower quote. (S1415–16). Representative Roukema also cited examples of firms who made similar assertions. (H2000).

In contrast. DBE program proponents argued that the program was about leveling the playing field for DBEs. Senator Moseley-Braun cited letters from her constituents for the point that

* * * the DBE program is not about taking away contracts from qualified male-owned businesses and handing them over to unqualified female-owned firms. The program is not about denying contracts to Caucasian low bidders in favor of higher bids that happen to have been submitted by Hispanics or African Americans or Asians or women. (S1420).

Without such a program. her constituents' letters said, they would lose the chance to compete. (Id.). Citing testimony from a Judiciary Committee hearing, Senator Kennedy noted that it was the experience of some DBEs that white male prime contractors had accepted higher bids from other firms to avoid working with DBEs. (S1430).

Why would a general contractor accept a higher bid? It doesn't make sense unless you remember that the traditional business network doesn't include women or minorities * * * [A woman business owner testified] that some general contractors would rather lose money than deal with female contractors. (Id.)

DOT Response: For the most part, statutory low-bid requirements exist only at the prime contracting level. That is, state and local governments. in awarding prime contracts, must select the low bidder in many procurements (there may be exceptions in some types of purchases). Nothing in this regulation requires, under any circumstances, a recipient to accept a higher bid for a prime contract from a DBE when a non-DBE has presented a lower bid. This rule does not interfere with recipients' implementation of state and local low-bid legislation.

The selection of subcontractors by a prime contractor is typically not subject to any low-bid requirements under state or local law. Prime contractors have unfettered discretion to select any subcontractor they wish. Price is clearly a key factor, but nothing legally compels a prime contractor to hire the subcontractor who makes the lowest quote. Other factors, such as the prime

contractor's familiarity and experience with a subcontractor. the quality of a subcontractor's work. the word-of-mouth reputation of the subcontractor in the prime contracting community, or the prime's comfort or discomfort with dealing with a particular subcontractor can be as or more important than price in some situations. It is in this context that § 26.53 requires that prime contractors make good faith efforts to achieve DBE contract goals. The rule does not require that recipients ignore price or quality, let alone obtain a certain amount of DBE participation without regard to other considerations. The good faith efforts requirements are intended to ensure that prime contractors cannot simply refuse to consider qualified, competitive DBE subcontractors. At the same time, the good faith efforts waiver of contract goals serves as a safeguard to ensure that prime contractors will not be forced into accepting an unreasonable or excessive quote from a DBE subcontractor.

6. *Constitutionality*

SNPRM Comments: Non-DBE contractors and their groups argued that the SNPRM proposals, particularly with respect to overall goals and the use of race-conscious measures, failed to meet the *Adarand* narrow tailoring test. Many of these commenters said that the overall goals were suspect because they did not adequately consider the capacity of DBEs to perform contracts and *Adarand* requires that race-conscious measures may be used only after a recipient has demonstrated that race-neutral means have failed. The use of presumptions based on racial classifications was viewed as intrinsically unconstitutional by these commenters. many of whom cited the language of Judge Kane's decision in the *Adarand* remand to this effect. Some commenters also contended that. absent recipient-specific findings of compelling need. the program could not be constitutional. They said that existing information alleging compelling interest-such as various disparity studies or information compiled by the Department of Justice-was inadequate to meet the compelling interest test. DBEs and recipients who commented defended the constitutionality of the program. often citing experience with discrimination in the marketplace and contending that the SNPRM succeeded in narrowly tailoring the program.

Congressional *Debate*: Proponents and opponents of the DBE program extensively debated the constitutionality of the DBE statutory provision and the entire DBE program. Generally, opponents argued that the Supreme Court and District Court decisions in *Adarand* rendered the program unconstitutional. while proponents said that the decisions did not have that effect.

Proponents and opponents of the DBE program agreed that the Supreme *Court's Adarand* decision established a two-part test for the constitutionality of a program that uses a racial classification. The program must be based on a compelling governmental interest and be narrowly tailored to further that interest (e.g.. Senator McConnell, S1396; Senator Baucus, S1403). Opponents relied on the finding of a Colorado district court on remand that the program was not narrowly tailored and was thus unconstitutional (Senator McConnell, S 1396: Senator Ashcroft. S1405). Proponents replied that the remand decision represented the views of only one district court (Senator Baucus, S1403), that it failed to properly apply the reasoning of the Supreme Court decision with respect to narrow tailoring (Senator Domenici, S1425), and that the Department's forthcoming regulations would ensure that the program was narrowly tailored (see discussion below).

A. Compelling Interest

(1) *Existence of Discrimination.* Proponents (and some opponents) of the DBE provision said that discrimination and/or disadvantage with respect to minorities and/or women persists. In the House. these included Representative Roukema (H2000–01), Representative Norton (H2003), Representative Poshard (H2003), Representative Menendez (H2004), Representative Davis of Illinois (H2005), Representative Boswell (H2005), Representative Lampson (H2006), Representative Kennedy (H2006), Representative Jackson-Lee (H2006), Representative Edwards (H2007), Representative Andrews (H2007), Representative Rodriguez (H2008), Representative Towns (H2010), Representative Dixon (H2010), and Representative Millender-McDonald (H201 1). DBE opponents typically remained silent on this point, neither affirming nor denying the existence of discrimination against women and minorities.

There was a similar pattern in the Senate debates. Opponents typically did not address the present existence of discrimination or disadvantage with respect to minorities and women or its continuing effects, spoke of such discrimination as something that existed in the past (Senator Sessions, S1399; Senator Hatch, S14 11), or asserted that race-based disadvantage or discrimination no longer exists (Senator Ashcroft. S1406).

The Senators who said that such discrimination persists included Senator Baucus (S1403, S1413, S1496), Senator Warner (S1403), Senator Kerry (S1408), Senator Wellstone (S1410), Senator Moseley-Braun (S14 19–20), Senator Robb (S1422); Senator Brownback (S1423–24), Senator Domenici (S1425–26), Senator Kennedy (S1429–30, S1482), Senator Specter (S1485), Senator McCain (S1489), Senator Lautenberg (S 1490), Senator Durbin (S1491), Senator Daschle (S1492), Senator Lieberman (S1493), Senator Bingaman (S1494). Senator Murray (S1495), and Senator Dorgan (S1495).

(2) *Evidence of discrimination or disadvantage. In comments on* the passage of the TEA-21 conference report in the Senate. Senator Chafee noted a Colorado Department of Transportation disparity study that found a disproportionately small number of women- and minority-owned contractors participating in that state's highway construction industry. More than 99 percent of contracts went to firms owned by white men. (Congressional Record, May 22, 1998: S5413). In the House discussion of the conference report. Representative Norton presented an extensive summary of relevant evidence of discrimination forming the basis for a compelling need for the DBE program. (H3957).

Throughout the debate, the Members who affirmed the existence of discrimination and/or disadvantage asserted a number of factual bases for concluding that the DBE program was necessary. This information is largely drawn from the Senate debate: the briefer House debate contains less detail.

Senator Baucus cited disparities between the earnings of women and men and between the percentage of small businesses women own and the percentage of Federal procurement dollars they receive. He also noted that minorities make up 20 percent of the population, own 9 percent of construction businesses, and get only 4 percent of construction receipts. (S1403). Finally, Senator Baucus. via a letter From the Associate Attorney General, cited to numerous Congressional findings concerning the effects of discrimination in the construction industry and in DOT-assisted programs. (S1413).

Senator Kerry added that women own 9.2 percent of the nation's construction firms but their companies earn only about half of what is earned by male-owned firms. (S1409). Senator Robb

commented that the evidence of racially based disadvantage is "compelling and disturbing." He continued. stating that, "White-owned construction firms receive 50 times as many loan dollars as African-American owned firms that have identical equity." (S1422). Senator Kennedy said that the playing field for women and minorities and other victims of discrimination was still not level. Job discrimination against minorities and the "glass ceiling" for women still persisted, he said, adding that "Nowhere is the deck stacked more heavily against women and minorities than in the construction industry." (S1429). He cited a number of instances in which minority or female contractors encountered overt discrimination in trying to get work. (S1429–30).

Senator Lautenberg said that, for transportation-related contracts. minority-owned firms get only 61 cents for every dollar of work that white male-owned businesses receive. The comparable figure for women-owned firms was 48 cents. He also mentioned that "women-owned businesses have a lower rate of loan delinquency. yet still have far greater difficulty in obtaining loans." (S1490). He then spoke of the continuing effects of past discrimination:

> Jim Craw laws were wiped off the books *over 30* years ago. However, their pernicious effects on the construction industry remain. Transportation construction has historically relied on the old bay network which. until the last decade. was almost exclusively a white. old boy network. * * * This is an industry that relies heavily on business friendships and relationships established decades. sometimes generations. ago--years before minority-owned firms were even allowed to compete. (Id.)

Senator Durbin referred to recent studies concerningjob bias against minorities and women. (S1491). Senator Lieberman referred generally to previous Congressional committee findings and testimony concerning still-existing barriers to full participation for minorities and women. (S1493). He also cited the May 1996 Department of Justice survey of discrimination and its effects in business and contracting. He referred to a recent study in Denver showing that African Americans were 3 times. and Hispanics 1.5 times. more likely than whites to be rejected for business loans. Senator Daschle summed up by saying. "[t]here is clearly a compelling interest in addressing the pervasive discrimination that has characterized the highway construction industry." (S1492).

Throughout the portion of the debate described above. many of the Members stressed that goal-based programs like the DBE program were the only effective way to combat the continuing effects of discrimination.

Senator Baucus cited the experience of Michigan, in which DBE participation in the state-funded portion of the highway program fell to zero in a nine-month period after the state terminated its DBE program, while the Federal DBE program in Michigan was able to maintain 12.7 percent participation. (S1404). Senator Kerry also raised the Michigan example, and went on to cite similar sharp decreases in DBE participation when Louisiana, Hillsborough County, Florida, and San Jose. California, eliminated affirmative action programs covering state- and locally-funded programs. Senator Kerry asked rhetorically:

> * * * is that just the economy of our country speaking. an economy at one moment that is capable of having 12 percent and at another moment. where they lose the incentive to do so, to drop down to zero. to drop down by 99 percent. to drop dawn by 80 percent. to have .4 at the Stare level while at the Federal level there are 12 percent? You could not have a more compelling interest if you tried. * * * (S1409–10).

Senator Moseley-Braun added the examples of Arizona. Arkansas. Rhode Island, and Delaware to the jurisdictions cited by other members where state-funded projects without a DBE program have significantly less DBE participation than Federally funded projects subject to the DBE program. She added, "Where there are no DBE programs, women- and minority-owned small businesses are shut out of highway construction." (S1420–21). Senator Kennedy added Nebraska, Missouri, Tampa and Philadelphia to the list ofjurisdictions that experienced precipitous drops in DBE participation after goals programs ended. (S1429–30; S1482). He also cited comments from DBE companies that goal programs were needed to surmount discrimination-related barriers. (S1482). Senator Domenici repeated many of the same points as previous DBE proponents concerning the basis for concluding that the program was needed (S1426). as did Senator Kempthorne. (S1494).

Senator Robb emphasized that the DBE program was essential to combating discrimination and ensuring economic opportunity. explicitly linking the fall-off in DBE participation to continuing discrimination:

> Where DBE programs at the State level have been eliminated, participation by qualified women and qualified minorities in government transportation contracts has plummeted. There is no way to know whether this discrimination is intentional or subconscious. but the effect is the same. This experience demonstrates the sad but inescapable truth that, when it comes to providing economic opportunities to women and minorities, passivity equals inequality. (S1422).

3. Narrow tailoring.-DBE proponents cited the Department's proposed DBE rule as the vehicle that would ensure that the DBE program would be narrowly tailored. They cited features of the SNPRM including a new mechanism for calculation of overall goals, giving priority to race-neutral measures in meeting goals, a greater emphasis on good faith efforts, DBE diversification, added flexibility for recipients, net worth provisions. ability to challenge presumptions of social and economic disadvantage, and flexibility in goal-setting. In comments on the Senate consideration of the TEA-21 conference report. Senator Baucus concluded by saying:

> As I explained in my statements during the debate on the McConnell amendment * * * the program is narrowly tailored, both under the current and the new regulations, which emphasize flexible goals tied to the capacity of firms in the local market, the use of race-neutral measures. and the appropriate use of waivers for goad faith efforts. (Congressional Record. May 22. ,998; S5414).

Following Senator Baucus' remarks. Senator Chafee, Chairman of the committee ofjurisdiction, requested that he be associated with Senator Baucus' remarks on constitutionality. (S54 14).

DBE opponents denied that regulatory change could result in a narrowly tailored program. Senator Smith said "The administration's attempt to comply with the Court's decision by fiddling around with the DOT regulations does not meet the constitutional litmus test." (S1398). The most frequent argument against the efficacy of regulatory change was that a racial classification is inherently unable to be narrowly tailored. (Senator Sessions. S1399–1400; Senator Ashcroft, S1407).

DOT Response: The 1998 debate over DBE legislation was the most thorough in which Congress has engaged since the beginning of the program. The record of this debate clearly supports the Department's view that there is a compelling governmental interest in remedying discrimination and its effects in DOT-assisted contracting. Congress clearly determined that real. pervasive, and injurious discrimination exists. Congress backed up that determination with reference to a wide range of factual material, including private and public contracting, DOT-assisted and state-and locally-funded programs and the financing of the contracting industry. By retaining the DBE statutory provisions

against this factual background, Congress clearly found that there was a compelling governmental interest in having the program.

The courts, including the court in the *Adarand Constructors Inc.* v. *Peña*. *965* F.Supp. 1556 (D. Colo., 1997) and the *court* in *In re: Sherbrooke Sodding*, 6-96-CV-41 (D. Minn. 1998). agree that Congress has the power to legislate on a nationwide basis to address nationwide problems. Congress has a unique role as the national legislature to look at the whole of the United States for the basis to find a compelling governmental interest supporting the use of race-based remedies. Congress is not required to make particularized findings of discrimination in individual localities to which a nationwide program may apply. Nor is Congress required to find that the Federal government itself has discriminated before applying a race-conscious remedy. (Id. at 1573).

Having reviewed the extensive evidence of discrimination and its relationship to DOT-assisted contracting, the District Court in *Adarand* determined that current and previous DBE provisions were a "considered response by Congress to the effects of discrimination on the ability of minorities to participate in the mainstream of federal contracting." (Id. at 1576). The court stated that "Congress has a strong basis in evidence for enacting the challenged statutes. which thus serve a 'compelling governmental interest."' (Id. at 1577). The extensive Congressional debate and information supporting the enactment of the 1998 DBE provision significantly strengthens the existing basis for declaring that this program serves a compelling governmental interest.

The basis for District Court's view that the program at issue in *Adarand is* unconstitutional is stated most clearly in the following passage:

> Contrary to the [Supreme] Court's pronouncement that strict scrutiny is not 'fatal in fact,' I find it difficult to envisage a race-based classification that is narrowly tailored. By its very nature, such [a] program is both underinclusive and overinclusive. (Id. at 1580).

By underinclusive. the court said it meant that caucasians and members of non-designated minority groups are excluded. By overinclusive, it said it meant that all the members of the designated groups are presumed to be economically and/or socially disadvantaged, without Congress having inquired whether a particular entity seeking a racial preference has suffered from the effects of past discrimination (citing the Supreme Court's *Croson* decision, which concerned the powers of state and local governments to use race-based remedies). (Id.)

As Senator Domenici pointed out (S1425), the key words *in* the District Court's opinion are "Contrary to the [Supreme] Court's pronouncement. * * *'' The District Court's analysis departs markedly from the controlling decision of the Supreme Court on this issue (*Adarand* v. *Peña*, 515 U.S. 200 (1995)). The Supreme Court's language with which the District Court disagreed is the following:

> Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." [citation omitted] The unhappy persistence of bath the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it * * * When race-based action is necessary to further a compelling interest. such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases. (515 U.S. at 237).

The Supreme Court evidently considers the "not fatal in fact" language to have continuing vitality, having cited it in a subsequent case (U.S. v. *Virginia, 5 18* U.S. 515. note 6 (1996)).

Under the District Court's analysis, Congress could never use a race-based classification, no matter how compelling the need. because any such classification would intrinsically fail to be narrowly tailored. This approach effectively moots the determination of whether there is a compelling governmental interest. The Supreme Court's approach. by contrast, permits a racial classification to be used. given the existence of a compelling interest, if it is narrowly tailored.

What is the test for narrow tailoring? As set forth in *United States* v. *Paradise*. 480 U.S. 149. 171 (1987). the test includes several factors: "the necessity for relief and the efficacy of alternative remedies: the flexibility and duration of the relief. including the availability of waiver provisions; the relationship of the goals to the relevant labor market; and the impact of the relief on the rights of third parties." In *Adarand*, the Supreme Court specifically invited inquiry into whether there was any consideration of the use of race-neutral means to increase minority business participation (related to the efficacy of alternative remedies) and whether the program was appropriately limited so that it will not last longer than the discrimination it is designed to eliminate (related to the duration of relief). (515 U.S. at 238).

This final rule successfully addresses each element of this test:

• *The* necessity *of* relief Throughout the debate on the compelling governmental interest. the bipartisan majority of both houses of Congress repeatedly described the necessity of the DBE program's goal-based approach to remedying the effects of discrimination in DOT-assisted contracting. The most significant evidence demonstrating the necessity of a go&oriented program is the evidence cited of the fall-off in DBE participation in state contracting when goal-oriented programs end, compared to participation rates in the Federal DBE program.

. *Efficacy of alternative remedies* This element of the narrow tailoring standard is related to the Supreme Court's inquiry concerning race-neutral programs. Under § 26.5 1 of this rule. recipients are required to meet the maximum feasible portion of their overall goals by using race-neutral measures. Recipients are not required to have contract goals on each contract. Instead, they are instructed to use contract goals only for any portion of their overall goal they cannot meet through race-neutral measures. Contract goals are intended as a safety net to be used when race-neutral means are not effective to ensure that a recipient can achieve "level playing field." Moreover. the regulations provide that recipients must reduce the use of contract goals when other means are sufficient to meet their overall goals. This ensures that race-conscious relief is used only to the extent necessary and is replaced by race-neutral as quickly as possible.

. *Flexibility of relief*. Flexibility is built into the program in a variety of ways. Recipients set their own goals, based on local market conditions; their goals are not imposed by the federal government nor do recipients have to tie them to any uniform national percentage. (§ 26.45). Recipients also choose their own method for goal setting and can choose to base the goal on the evidence that they believe best reflects their market conditions. (526.45). Recipients have broad discretion to choose whether or not to use a goal on any given contract. and if they do choose to use a contract goal. they are free to set it at any level they believe is appropriate for the type and location of the specific work involved. (§ 26.51). The rule also ensures flexibility for contractors by requiring that any contract goal be waived entirely for a prime contractor that demonstrates that it made good faith efforts but was still unable to meet the goal. (§ 26.53). The rule also allows recipients that believe they can achieve equal opportunity for DBEs through different approaches to get waivers releasing

them from almost any of the specific requirements of the rule. (§ 26.103). Recipients can also get exemptions from the rule if they have unique circumstances that make complying with the rule impractical. (§ 26.103).

. Duration *of relief*. The TEA-21 DBE program will end in 2004 unless reauthorized by the Congress. In each successive reauthorization bill for the surface transportation and airport programs, Congress will have the opportunity to examine the current state of transportation contracting and determine whether the DBE program statutes are still necessary to remedy the continuing effects of discrimination. In addition, the duration of relief for individuals and firms are limited by the personal net worth threshold and business size caps. When an individual's personal wealth grows beyond the threshold, he or she will lose the presumption of disadvantage. (§ 26.67). Similarly, when a firm's receipts grows beyond the small business size standards, it loses its eligibility to participate in the program. (§ 26.65). Finally, to ensure that race-conscious remedies are not used any longer than absolutely necessary, § 26.5 1 requires recipients to reduce the use of contract goals and rely on race-neutral measures to the extent that they are effective.

• *Relationship of goals to the relevant market*. The overall goal setting provisions of § 26.45 require that recipient set overall goals based on demonstrable evidence of the relative availability of ready, willing and able DBEs in the areas from which each recipient obtains contractors. These provisions ensure that there is as close a fit as possible between the goals set by each recipient and the realities of its relevant market. When a recipient sets contract goals, § 26.5 1 provides that these goals are to be set realistically in relation to the availability of DBEs for the type and location of work involved.

• *Impact of relief on the rights of third parties*. The legitimate interests of third parties (e.g., prime contractors. non-DBE subcontractors) are only minimally impacted by the DBE program, since the program is aimed at replicating a market in which there are no effects of discrimination and the program affects only a relatively small percentage of total federal-aid funds. The design of the overall and contract goal provisions ensures that the use of race-conscious remedies having the potential to affect the interests of third parties is limited to the extent necessary to counter the effects of discrimination. Individual prime contractors are further protected from suffering any undue burdens by § 26.51, which prevents a prime contractor from losing a contract if it made good faith efforts but was still unable to meet a goal. Non-DBE firms are also protected by § 26.33, which directs recipients to take appropriate steps to address areas of overconcentration of DBE firms in certain types of work that could unduly burden non-DBE firms seeking the same type of work.

. *Inclusion of appropriate beneficiaries*. The certification provisions of Subparts D and E, and particularly the social and economic disadvantage provisions of § 26.67. ensure that only firms owned and controlled by individuals who are in fact socially and economically disadvantaged can participate in the program. Eligibility provisions guard against overinclusiveness by ensuring that individuals with too great net worth are not presumed disadvantaged and by permitting the recipient—on its own initiative or as the result of a complaint-to follow procedures to rebut the presumption of social and/or economic disadvantage. They guard against underinclusiveness by permitting any business owner. including a white male. to demonstrate social and economic disadvantage on an individual basis.

Section-by-Section Analysis

Section 26. 1 What Are the Objectives of This Part?

There were relatively few comments on this section of the SNPRM. most of which agreed with the proposed language. We have adopted the suggestion of some commenters that specific reference be made to the role of the DBE program in helping DBEs overcome barriers (e.g.. access to capital and bonding) to equal participation. We have also added a specific reference to the role of the program in creating a level playing field on which DBEs can compete fairly for DOT-assisted contracts. Some non-DBE contractors urged that language be added to explicitly oppose "reverse discrimination." The rule clearly states that nondiscrimination is the program's first objective and the Department reiterates here that it opposes unlawful discrimination of any kind.

Section 26.3 To Whom Does This Part Apply?

This provision is unchanged from the SNPRM. except for references to the new TEA-2 1 statutory provisions. A few commenters wanted this provision to apply to Federal Railroad Administration (FRA) programs, as did the original version of former part 23. However, FRA does not have specific statutory authority for a DBE program parallel to the TEA-21 language. One commenter asked if the language saying that DBE requirements do not apply to contracts without any DOT funding is inconsistent with Federal Transit Administration (FTA) guidance on applicability. While the structure of the FTA program is such that FTA funds are commingled with local funds in many transit authority contracts (e.g.. any contract involving FTA operating assistance funds), to which DBE requirements would apply. a contract which is funded entirely with local funds-and without any Federal funds-would not be subject to requirements under this rule.

Section 26.5 *What Do The Terms Used in This Part Mean?*

There were relatively few comments on the definitions proposed in the SNPRM. One commenter wanted to substitute the term "historically underutilized business" for DBE. Given the continued use of the DBE term in Congressional consideration of the program, the continued use of the "socially and economically disadvantaged individuals" language in the statute. and the familiarity of concerned parties with the DBE term. we do not believe changing the term would be a good idea.

A few commenters asked for additional definitions or elaboration of existing definitions (e.g., "form of arrangement,'' "financial assistance program,'' "commercially useful function"). These terms are either already defined sufficiently or are best understood in context of the operational sections in which they are embedded. and abstract definitions in this section would not add much to anyone's ability to make the program work well. Consequently, we are not adding them. Otherwise the final rule adopts the SNPRM proposals for definitions with only minor editorial changes.

The Department has added, for the sake of clarity and consistency with other Federal programs, definitions of the terms Alaskan native. Alaskan native corporation (ANC), Indian tribe, immediate family member, Native Hawaiian, Native Hawaiian organization, principal place of business, primary industry classification, and tribally-owned concern. These definitions are taken from the SBA's new small disadvantaged business program regulation (13 CFR § 124.3). The definitions of the designated groups included in the definition of "socially

and economically disadvantaged individual" also derive from the SBA regulations, as the Department's DBE statutes require. We believe these will be useful terms of art in implementing the DBE program.

A few commenters requested definitions for the terms "race-conscious" and "race-neutral," and we have provided definitions. A race-conscious program is one that focuses on, and provides benefits only for, DBEs. The use of contract goals is the primary example of a race-conscious measure in the DBE program. A race-neutral program is one that, while benefiting DBEs, is not solely focused on DBE firms. For example, small business outreach programs. technical assistance programs. and prompt payment clauses can assist a wide variety of small businesses, not just DBEs.

Section *26.7 What Discriminatory Actions Are Forbidden?*

One commenter wanted to add prohibitions of discrimination based on age, disability and religion. The Department is not doing so. because discrimination on these grounds is already prohibited by other statutes (e.g., the Americans with Disabilities Act with respect to disability). Also, statutes which form the basis for this rule focus on race, color, national origin, and sex. Congress determined that remedial action focused on these areas is necessary. These grounds for discrimination are also most relevant to problems in the DBE program that have been alleged to exist (e.g., disparate treatment of DBE certification applicants by race or sex). Some opponents of the program said that the DBE program discriminates against non-DBEs. However, the Department believes that the program is constitutional and does not violate equal protection requirements. A reference to DOT Title VI regulations has been deleted as unnecessary: otherwise, this provision is the-same as in the SNPRM.

Section 26.9 How Does the Department Issue Guidance and Interpretations Under This Part?

Commenters. most of whom were recipients, focused on two issues in this section. First, a majority of the comments favored the "coordination mechanism" concept for ensuring consistent DOT guidance and interpretations. The few that disagreed with this approach did so out of a concern that the mechanism would add delays to the process. These commenters favored additional training or an 800 number hot line to speed up the process.

We believe that proper coordination of interpretations and guidance is vital to the successful implementation of this rule. As the preambles to the 1992 and 1997 proposed rules mentioned, inconsistent implementation of part 23 has been a continuing problem, which has been criticized by a General Accounting Office report and which has created unnecessary difficulty for recipients, contractors. and the Department itself. A process for ensuring that the Department speaks with one voice on DBE implementation matters. and for letting the public know when DOT has spoken, will greatly improve the service we give our customers.

We do not believe this coordination process will result in significant delays in providing guidance. Nor will it inhibit the ability of DOT staff and customers to communicate with one another. For example, the process does not apply to informal advice provided by staff to recipients or contractors over the phone or in a letter or e-mail. It does maintain, however, the important distinction between informal staff assistance on one hand and a binding institutional position on the other.

For clarity in the process. we have modified the language of the rule text to make clear that interpretations and guidance are binding, official Departmental positions if the Secretary signs them or if the document includes a statement that they have been reviewed and approved by the General Counsel. The General Counsel will consult fully with all concerned offices as part of this review process.

We intend to post significant guidance documents and interpretations on the Department's web site to make them widely and quickly available. As some commenters suggested. we are also continuing to consider forming an advisory committee (or working group of an existing committee) to facilitate customer input into DBE program matters. This is separate from the coordination mechanism, however, which is an internal DOT process.

The rule's provisions regarding exemptions and waivers, previously found in the SNPRM's § 26.9 (c) and (d), are now included as a separate section at § 26.15.

Section 26.11 What Records do Recipients Keep and Report?

The Department asked, in the SNPRM. whether it would be advisable to have one standard reporting form for information about the DBE program. Currently. each operating administration (OA) has its own reporting form and requirements. Virtually all the commenters that addressed this issue favored a single. DOT-wide reporting form. Commenters also had a wide variety of suggestions for what data should be reported. formats, and retention periods.

The Department is adopting the suggestion of having a single reporting form, which we believe will reduce administrative burdens for recipients, particularly those who receive funds from more than one OA. Because we do not want to delay the issuance of this rule while a form is being developed, we are reserving the date on which this single form requirement will go into effect. We will take comments on the specifics of reporting into account and consult with interested parties as we devise the form, which will be published subsequently in Appendix B to this rule. The Appendix will also address the issues of reporting frequency and record retention periods. Meanwhile, recipients will continue to report as directed by the concerned OA(s), using existing reporting forms.

The rule is also adding a requirement that recipients develop and maintain a "bidders" list. The bidders list is intended to be a count of all firms that are participating. or attempting to participate, on DOT-assisted contracts. The list must include all firms that bid on prime contracts or bid or quote subcontracts on DOT-assisted projects, including both DBEs and non-DBEs. Bidders lists appear to be a promising method for accurately determining the availability of DBE and non-DBE firms and the Department believes that developing bidders data will be useful for recipients. Creating and maintaining a bidders list will give recipients another valuable way to measure the relative availability of ready, willing and able DBEs when setting their overall goals. (See § 26.45). We realize that identifying subcontractors, particularly non-DBEs and all subcontractors that were unsuccessful in their attempts to obtain contracts. may well be a difficult task for many recipients. Mindful of that potential burden, the rule will not impose any procedural requirements for how the data is collected. Recipients are free to choose whether or not they wish to gather this data through their existing bidding and reporting processes. Recipients are encouraged to make use of all of the data already available to them and all methods of reporting and communication with their contracting community that they already have in place. In addition, the Department suggests that recipients consider using a widely publicized public notice or a

widely disseminated survey to encourage all firms that have bid or quoted contracts to make themselves known to recipients.

Once recipients have created the list of bidders, they will have to supplement that information with the age of each firm (since establishment) and the annual gross receipts of the firm (or an average of its annual gross receipts). Recipients can gather this additional information by sending a questionnaire to the firms on the list, or by any other means that the recipient believes will yield reliable information. The recipient's plan for how to create and maintain the list and gather the required information must be included in its DBE program.

Section 26.13 What Assurances Must Recipients and Contractors Make?

There were few comments on this section. Most of these supported the proposal. One comment suggested specific mention of prompt payment. but in view of the substantive requirements on this subject, we do not believe such a mention is needed. Some commenters favored requiring additional public participation as part of the assurance for recipients. Again, given substantive provisions of this rule concerning public participation. we do not believe that repetition here is needed. One commenter said that incorporating the requirements of part 26 in the contract was confusing, since many provisions of part 26 apply only to recipients. We have rewritten the assurance for contractors in response to this concern, specifying that contractors are responsible only for carrying out the requirements of part 26 that apply to them.

Section 26.15 How Can Recipients Apply for Exemptions or Waivers?

There has been some confusion as to this rule's distinction between exemption and waiver. Put simply, exemptions are for unique situations that are most likely not to be either generally applicable to all recipients or to have been contemplated in the rulemaking process. If such a situation occurs and it makes it impractical for a particular recipient to comply with a provision of part 26, the recipient should apply for an exemption from that provision. The waiver provision, by contrast, is not designed for extraordinary circumstances where a recipient may not be able to comply with part 26. Waiver is for a situation where a recipient believes that it can better accomplish the objectives of the DBE program through means other than the specific provisions of part 26.

There were a number of comments about the proposed program waiver provision. Most commenters on this issue favored the proposal, believing it could add flexibility to the way recipients implement the DBE program. A few commenters were concerned that too liberal use of the waiver provision might undermine the goals of the rule.

The Department believes that the waiver provision is an important aspect of the DBE program. The provision ensures that the Department and a recipient can work together to respond to any unique local circumstances. Recipients are encouraged to carefully review the circumstances in their own jurisdictions to determine what mechanisms are best suited to achieving compliance with the overall objectives of the DBE program. If a recipient believes it is appropriate to operate its program differently from the way that a provision of Subpart B or C provides. including, but not limited to. any provisions regarding administrative requirements. overall or contract goals, good faith efforts or counting provisions, it can apply for a waiver. For example. waiver requests could pertain to such subjects as the use of a race-conscious measure other than a contract goal, different ways of counting DBE participation in certain industries, use of separate overall or contract goals to address demonstrated discrimination against specific categories of socially and economically disadvantaged individuals. the use or wording of assurances, differences in information collection requirements and methods. *etc.*

The Department will, of course. carefully review any applications for waivers-to make sure that innovative state or local programs are able to meet the objectives of the statutes and regulation. Decisions on waiver requests are made by the Secretary. This authority has not been delegated to other officials. The waiver provision, which the Department believes will help assist recipients to "narrowly tailor" the program to state and local circumstances and ensure nondiscrimination, remains in the final rule.

Section 26.21 Who Must Have a DBE Program?

The only substantive comment concerning this provision asked that Federal Railroad Administration (FRA) programs be included. The Department is not including FRA programs under this rule because FRA does not have a specific DBE program statute parallel to those covering the Federal Aviation Administration (FAA), FTA, and FHWA. FRA could consider issuing a rule similar to part 26 under its own, separate statutory authority. The Department shortened paragraph (b)(l) to make it easier to understand. Within 180 days of the effective date of this rule, all recipients with existing programs must submit revised programs to the relevant OA for approval. The only changes from existing programs that recipients would have to make are changes needed to accommodate differences between former part 23 and part 26. Future new recipients would. of course. submit a DBE program as part of the approval process for financial assistance.

Section 26.23 What is the Requirement for a Policy Statement?

Section 26.25 What is the Requirement for a Liaison Officer?

Section 26.27 What Efforts Must Recipients Make Concerning DBE Financial Institutions?

There were no substantive comments concerning §§ 26.23–26.27, and the Department is adopting them as proposed.

Section 26.29 What Prompt Payment Mechanisms Must Recipients Have?

There was substantial comment on the issue of prompt payment. A majority of commenters supported the concept of prompt payment provisions. Some recipients pointed out that they already had prompt payment provisions on the books. DBEs generally supported mandating prompt payment provisions though they. as well as other commenters, recognized that slow payment is a problem affecting many subcontractors. not just DBEs. Some of these comments suggested making prompt payment requirements applicable to subcontracts in general, not just DBE subcontracts. Some recipients were concerned about getting in the middle of disputes between prime contractors and subcontractors. Some commenters wanted the Department to mandate prompt payment provisions, while others preferred that their use by recipients remain optional.

Having considered the variety of views expressed on this subject, the Department believes that prompt payment provisions are an important race-neutral mechanism that can benefit DBEs and all other small businesses. Under part 26, all recipients must include a provision in their contracts requiring prime contractors to make prompt payments to their subcontractors, DBE and non-DBE alike. It is clear that DBE subcontractors are significantly--and, to the extent that

they tend to be smaller than non-DBEs, disproportionately-affected by late payments from prime contractors. Lack of prompt payment constitutes a very real barrier to the ability of DBEs to compete in the marketplace. It is appropriate for the Department to require recipients to take reasonable steps to deal with this barrier. We recognize that delayed payments do not affect only DBE contractors; a prompt payment requirement applying to all subcontracts is an excellent example of a race-neutral measure that will assist DBEs, and we are therefore requiring that recipients' prompt payment mechanisms apply to all subcontracts on Federally-assisted contracts.

Paragraph (a) of this section requires recipients to put into their DBE programs a requirement for a prompt payment contract clause. This clause would appear in every prime contract on which there are subcontracting possibilities, and it would obligate the prime contractor to pay subcontractors within a given number of days from the receipt of each payment the recipient makes to the prime contractor. Payment is required only for satisfactory completion of the subcontractor's work. The clause would also apply to the return of retainage from the prime to the subcontractor. Retainage would have to be returned within a given number of days from the time the subcontractor's work had been satisfactorily completed, even if the prime contract had not yet been completed. A majority of commenters on the retainage issue favored a requirement of this kind.

The number of days involved would be selected by the recipient. subject to OA approval as part of the recipient's DBE program. In approving these time frames, the OAs will consider whether they are realistic and sufficiently brief to ensure genuinely prompt payment. Recipients who already operate under prompt payment statutes may use their existing authority in implementing this requirement. It may be necessary to add to existing contract clauses in some cases (e.g., if existing prompt payment requirements do not cover retainage).

Paragraph (b) lists a series of additional measures that the regulation authorizes. but does not require, recipients to use. These include alternative dispute resolution, holding of payments to primes until subcontractors are paid, and other mechanisms that the recipient may devise. All these mechanisms could be made part of the recipient's DBE programs.

Section 26.31 What Requirements Pertain to the DBE Directory?

Recipients maintain directories listing certified DBEs. The issue most discussed by commenters on this section was whether the directory should include material concerning the qualifications of the firm to do various sorts of work. For example, has the firm been prequalified by the recipient? Can it do creditable work? What kinds of work does the firm prefer to do? Some commenters also asked that the directory should list the geographical areas in which the firm is willing to work. Other commenters opposed the idea of including this kind of information in the directory.

The Department believes that the directory and the certification process are closely intertwined. The primary purpose of the directory is to show the results of the certification process. Consequently. the directory should list all firms that the recipient has certified. along with basic identifying information for the firm. Since certification under this rule pertains to the various kinds of work a firm's disadvantaged owners can control, it is important to list those kinds of work in the directory. For example, if a firm seeks to work in fields A. B, and C, but the recipient has determined that its disadvantaged owners can control its operations only with respect to A and B, then the directory would recite that the firm is certified to perform work as a DBE in fields A and B.

The focus of the directory is intended to be eligibility. A directory is a list of firms that have been certified as eligible DBEs, with sufficient identifying information to permit interested firms to contact the DBEs. We do not intend to turn a recipient's directory into a comprehensive business resource manual. For example, information about firms' qualifications, geographical preferences for work, performance track record. capitalization, etc. are not required to be part of the directory. Some commenters favored including one or more of these elements, but we are concerned that other business information-however useful in its own right-could clutter up the directory and dilute its focus on certification.

Section 26.33 *What Steps Must a Recipient Take to Address Overconcentration of DBEs in Certain Types of Work?*

For some time, the Department has heard allegations that DBEs are overconcentrated in certain fields of highway construction work (e.g.. guardrail, fencing, landscaping, traffic control, striping). The concern expressed is that there are so many DBEs in these areas that non-DBEs are frozen out of the opportunity to work. In an attempt to respond to these concerns, the SNPRM asked for comment on a series of options for "diversification" mechanisms, various incentives and disincentives designed to shift DBE participation to other types of work.

The Department received a great deal of comment on these proposals, almost all of it negative. There were few comments suggesting that overconcentration was a serious problem, and many comments said that the alleged problem was not real. Some FTA and FAA recipients said that if there was a problem with overconcentration, it was limited to the highway construction program. As a general matter, recipients said that the proposed mechanisms were costly, cumbersome, and too prescriptive.

Prime contractors opposed the provisions because they would make it more difficult for them to find DBEs with which to meet their goals, while DBEs opposed them because they felt the provisions would penalize success and force them out of areas of business in which they were experienced. Many commenters suggested using outreach or business development plans as ways of assisting DBEs to move into additional areas of work.

The Department does not have data from commenters or other sources to support a finding that "overconcentration" is a serious, nationwide problem. However, as part of the narrow tailoring of the DBE program. we believe it would be useful to give recipients the authority to address overconcentration problems where they may occur. In keeping with the increased flexibility that this rule provides recipients, we give recipients discretion to identify situations where overconcentration is unduly burdening non-DBE firms. If a recipient finds an area of overconcentration, it would have to devise means of addressing the problem that work in their local situations. Possible means of dealing with the problem could include assisting prime contractors to find DBEs in non-traditional fields or varying the use of contract goals to lessen any burden on particular types of non-DBE specialty contractors. While recipients would have to obtain DOT approval of determinations of overconcentration and measures for dealing with them, the Department is not prescribing any specific mechanisms for doing so.

Section 26.35 *What Role do Business Development and Mentor-Protégé Programs Have in the DBE Program?*

In the SNPRM. both mentor-protégé programs and business development programs (BDPs) were cast as tools to use for diversification. They still may be used for that purpose. as noted in § 26.33. However, the Department believes that they may have a broader application, and their use in the final rule is not limited to diversification purposes. BDPs, in particular, are good examples of race-neutral methods recipients can use to promote the participation of DBEs and other small businesses in their contracting programs.

There were few comments on these provisions. Recipients wanted flexibility, and suggested that these kinds of programs should be optional. Their comments said that such programs were resource-intensive, and that Federal financial assistance for them would be welcome. One contractors' organization offered its own mentor-protégé plan as a model. A few comments voiced suspicion of mentor-protégé plans. on the basis that they allowed fronts and frauds into the program.

The final rule makes the use of BDPs and mentor-protégé programs optional for recipients. An operating administration can direct a particular recipient to institute a BDP, but BDPs are not mandatory across the board. The operating administration would negotiate with the recipient before mandating a BDP.

One feature added to this provision allows recipients to establish a kind of mini-graduation requirement for firms that voluntarily participate in BDPs. One of the purposes of a BDP is to equip DBE firms to compete in the market outside the DBE program. Therefore, a recipient could ask BDP participants to agree--as a condition of receiving BDP assistance-to agree to leave the DBE program after a certain number of years. or after certain business development objectives had been achieved.

Standing alone, mentor-protégé programs are not an adequate substitute for the DBE program. While they can be an important tool to help selected firms, they cannot be counted on to level the playing field for DBEs in general. An effective mentor-protégé program requires close monitoring to guard against abuse. which further limits the number of DBEs they can assist. Even with these limits, a mentor-protégé program that has safeguards to prevent large non-DBE firms from circumventing the DBE program can be a useful component of a recipient's overall strategy to ensure equal opportunities for DBEs.

The final rule includes safeguards intended to prevent the misuse of mentor-protégé programs. Only firms that a recipient has already certified as DBEs (necessarily including a determination that they are independent firms) can participate as protégés. This is intended to preclude non-DBE firms from creating captive DBE firms to serve as protégés. A non-DBE mentor firm cannot get credit for more than half its goal on any contract by using its own protégé. Moreover, a non-DBE mentor firm cannot get DBE credit for using its own protégé on more than every other contract performed by the protégé. That is. if Mentor Firm X uses Protégé Firm Y to perform a subcontract, X cannot get DBE credit for using Y on another subcontract until Y had first worked on an intervening prime contract or subcontract with a different prime contractor.

To make mentor-protege relationships feasible, the rule provides that mentors and protégés are not treated as affiliates of one another for sire determination purposes. Mentor-protégé programs and BDPs must be approved by the concerned operating administration before they take effect. Recipients who already have such programs in place would make them part of their revised DBE programs sent to the concerned OA within 180 days of the effective date of part 26.

Section 26.37 What Are a Recipient's Responsibilities for Monitoring the Performance of Other Program Participants?

The few comments on this section asked for more detail and clarification. In the interest of flexibility, the Department is reluctant to be prescriptive in the matter of monitoring and enforcement mechanisms. What we are looking for is a strong and effective set of monitoring and compliance provisions in each recipient's DBE program. These mechanisms could be most anything available to the recipient under Federal. state, or local law (e.g., liquidated damages provisions, responsibility determinations, suspension and debarment rules. etc.)

One of the main purposes of these provisions is to make sure that DBEs actually perform work committed to them at contract award. The results that recipients must measure consist of payments actually made to DBEs, not just promises at the award stage. Credit toward goals can be awarded only when payments (including, for example, the return of retainage payments) are actually made to DBEs. Under the final rule. recipients would keep a running tally of the extent to which, on each contract, performance had matched promises. Prime contractors whose performance fell short of original commitments would be subject to the compliance mechanisms the recipient had made applicable.

Section 26.41 What Is the Role of the Statutory JO Percent Goal in This Program?

This is a new section, intended to explain what role the 10 percent statutory goal plays in the DBE program. Under former part 23, the 10 percent figure derived from the statute had a role in the setting of overall goals by recipients. For example, if recipients had ,a goal of less than 10 percent. the rule required them to make a special justification.

This section makes clear that the 10 percent goal is an aspirational goal that applies to the Department of Transportation on a national level, not to individual recipients. It is a goal that the Department can use to evaluate its overall national success in achieving the objectives that Congress has established for this program. However, the national IO percent goal is not tied to recipients' goal-setting decisions. Recipients set goals based on what will achieve a level playing field for DBEs in their own programs, without regard to the national goal. Recipients are not required to set their overall or contract goals at 10 percent or any other particular level. Recipients are no longer required to make a special justification if their overall goals are less than 10 percent.

As discussed in connection with the Congressional debate on the TEA-21 DBE provision. Congress viewed flexibility concerning the statutory 10 percent goal as an important feature of narrow tailoring and made clear that it was setting a national goal, not a goal for any individual recipient. The Department wants to ensure that state and local programs have sufficient flexibility to implement their programs in a narrowly tailored way. This section is part of the Department's effort toward that end.

Section 26.43 *Can Recipients Use Quotas or Set-Asides as Part of This Program?*

The DBE program has often been labeled as a "quota" or "set-aside" program. especially, though not exclusively. by its opponents. This label is, and always has been. incorrect. Fifteen years ago. in the preamble to the Department's first rule implementing a DBE statute. the Department carefully

specified that neither quotas nor set-asides were required (see 48 FR 33437-38; July 21. 1983). This remains true today. However, in light of *Adarand* and this year's Congressional debates on the DBE statutes, we believe this point deserves additional emphasis. This regulation prohibits quotas under any circumstances and makes clear that set-asides can only be used as a means of last resort for redressing egregious discrimination.

A number of non-DBE contractors and their organizations continued to assert. in comments on the SNPRM. that the DBE program operates as a quota program. This section makes clear that recipients cannot use quotas on DOT-assisted contracts under any circumstances. A quota is a simple numerical requirement that a recipient or contractor must meet, without consideration of other factors. For example, if a recipient sets a 12 percent goal on a particular contract and refuses to award the contract to any bidder who does not have 12 percent DBE participation, either refusing to look at showings of good faith efforts or arbitrarily disregarding them. then the recipient has used a quota. The Department's regulations have never endorsed this practice. The issue of good faith efforts is discussed further below in connection with § 26.51.

A set-aside is a very specific tool. A contracting agency sets a contract aside for DBEs if it permits no one but DBEs to compete for the contract. Firms other than DBEs are not eligible to bid. The Department's DBE program has never required the use of set-asides and has allowed recipients to use set-asides only under very limited circumstances.

Under the SNPRM. a recipient could use a set-aside on a DOT-assisted contract only if other methods of meeting overall goals were demonstrated to be unavailing *and* the recipient had legal authority independent of part 26. Comments were divided concerning the use of set-asides. A number of non-DBE contractors opposed the use of set-asides, some of them saying that set-asides might be something they could live with if their use were balanced by the elimination of DBE contract goals on other contracts in the same field. Some recipients and DBEs said, however. that set-asides were a useful tool to achieve goals. particularly for start-up contractors or small contracts.

The Department has carefully reviewed these comments and continues to believe that set-asides should not be used in the DBE program unless they are absolutely necessary to address a specific problem when no other means would suffice. If a recipient has been unable to remedy the effects of egregious discrimination through other means. it may, as a last resort, make limited use of set-asides to the extent necessary to resolve the problem.

Section 26.45 How Do Recipients Set Overall Goals?

Since its inception, the recipient's overall goal has been the heart of the DBE program. Responding to *Adarand*, DOT clarified the theory and purpose of the overall goal in the SNPRM. In the proposed rule. the Department made clear that the purpose of the overall goal-and, in fact, the DBE program as a whole-is to achieve a "level playing field" for DBEs seeking to participate in federal-aid transportation contracting. To reach a level playing field, recipients need to examine their programs and their markets and determine the amount of participation they would expect DBEs to achieve in the absence of discrimination and the effects of past discrimination. The focus of the goal section of the SNPRM was to propose ways to measure what a level playing field would look like and to seek input on the availability of data to make such a measurement.

The Proposed Rule and Comments

The Department proposed several options that recipients might use for setting overall goals, including three alternative formulas for measuring the availability of ready, willing and able DBEs in local markets. The specific formulas will be discussed below, but generally, they each called for setting a goal that reflected the percentage of locally available firms that were DBEs (i.e. dividing the number of DBEs by the number of all businesses). On all of the alternatives, the SNPRM sought comments on both the feasibility and practical value of the options, as well as the prospects for combining any of the approaches and the question of whether to mandate a single approach or allow each recipient to choose amongst the options. We invited commenters to propose changes to any of the details of the options or to devise entirely new ones. Finally, we asked commenters for their input on the availability of reliable data for use with each of the options.

Hundreds of commenters of all types-including DBEs and non-DBEs, prime and subcontractors, state and local recipients, industry and interest groups and private individuals—responded with a wealth of feedback, opinions and data. It is an understatement to say that there was no consensus among commenters as to the best way to set overall goals. Support for the proposed options was almost evenly spread over the choices presented. with many commenters firmly against all of the options. Still more suggested that the current. non-formulaic method was the best way to ensure the flexibility to respond to local market conditions. Similarly, among those who expressed an opinion, commenters were split between the propriety of choosing a single "best" method and imposing it on all recipients and allowing recipients to choose amongst all the options. One of the few universal themes in the goal-setting comments was the problem of the availability of reliable data on the number of DBE and non-DBE contractors.

There were a few common threads that different groups of commenters tended to apply to all of the formulas. Among recipients, many comments focused on the lack of data about non-DBE contractors, especially subcontractors. Recipients often noted that they would not have the information needed for the denominator of any of the formulas (i.e. the total number of available businesses). Non-DBE contractors-and industry groups representing them-generally believed that there should be a capacity measure built into any goal setting mechanism. Finally, DBEs—and their industry associations-were concerned that all of the formulas would create goals based only on the current number of DBEs, locking in the effects of past discrimination by ignoring the fact that the lack of opportunities in the past has suppressed the number of DBE firms available today.

Under the proposed rule's Alternative 1. recipients would calculate the percentage of DBE firms in their directories among all firms available to work on their DOT-assisted contracts. Under Alternative 2. recipients would calculate the percentage of all minority- and women-owned firms in certain SIC codes in their areas among all firms in these SIC codes in the same areas. Under Alternative 3. recipients would calculate a percentage based on the average number of DBE firms that had worked on their DOT-assisted contracts in recent years divided by the average number of all firms that had worked on their DOT-assisted contracts in the same period. The SNPRM also proposed that recipients could use other means. such a disparity studies or goals developed by other recipients serving the same area. as a basis for their goals.

Each of the three proposed alternatives received some support, though this was often the rather tepid endorsement of commenters who felt that one or another alternative was the

best of a bad lot. Non-DBE contractors often claimed that the alternatives would unfairly increase goals. while DBE contractors often claimed that the same proposals would unfairlv decrease goals.'

Commenters said that data foı determining the denominators of the equations in Alternatives 1 and 2, as well as the numerator in Alternative 2, did not exist and that it would be a major, time-consumingjob to begin to obtain the data. Adaptation of existing information from other sources (e.g., Census data) was said to have significant statistical difficulties. The difficulty of getting data on out-of-state firms was emphasized in some comments.

Commenters looked on the alternatives as cumbersome, creating unreasonable administrative burdens. and as producing statistical results that were skewed in various ways. The use of DBE directories as the source of the numerator in Alternative 1 was criticized on the basis that directories may contain firms that never actually participate in DOT-assisted contracts. It was suggested that the number of firms bidding rather than the number of firms certified would be a more reliable guide, but it was also pointed out that, because subcontractors seldom formally bid for work. this data would be hard to obtain. Some commenters proposed adding overall population statistics to the mix.

A significant number of commenters-primarily non-DBE contractors, but including some recipients and other commenters as well-emphasized the need to take "capacity" into account. Most popular among these comments was using a capacity version of Alternative 3. These comments did not propose a method of determining the capacity of the firms contracting with the recipient.

The Final Rule

In view of the complexity and importance of the goal setting process and the many issues raised by commenters, the Department has decided to adopt a two step process for goal setting. The process is intended to provide the maximum flexibility for recipients while ensuring that goals are based on the availability of ready, willing and able DBEs in each recipient's relevant market. The Department believes that this approach is critical to meeting our constitutional obligation to ensure that the program is narrowly tailored to remedy the effects of discrimination. The first step of the process will be to create a baseline figure for the relative availability of ready, willing and able DBEs in each recipient's market. The second step will be to make adjustments from the base figure, relying on an examination of additional evidence, past experience, local expertise and anticipated changes in DOT-assisted contracting over the coming year.

Step 1: Determining a Base Figure for the Overall Goal

The base figure is intended to be a measurement of the current percentage of ready, willing and able businesses that are DBEs. Ensuring that this figure is based on demonstrable evidence of each recipient's relevant market conditions will help to ensure that the program remains narrowly tailored. To be explicit. recipients cannot simply use the 10 percent national goal. their goal from the previous year, or their DBE participation level from the previous year as their base figure. Instead, all recipients must take an actual measurement of their marketplace, using the best evidence they have available, and derive a base figure that is as fair and accurate a representation as possible of the percentage of available businesses that are DBEs.

There are many different ways to measure the contracting market and assess the relative availability of DBEs. As discussed above, the SNPRM proposed three alternate formulas to measure relative availability, none of which were particularly popular with commenters. In this final rule. the Department is placing primary emphasis on the principles underlying the measurement, mandating only that a measurement of the relative availability of DBEs be made on the basis of demonstrable evidence of relevant market conditions, rather than requiring that any particular procedure or formula be used. The final rule contains a number of examples of how to create a base figure which recipients are free to adopt in their entirety or to use as guidelines for how to devise their own measurement.

There are several reasons we have taken this approach. First, the Department is aware of the differences in available data in various markets across the nation. The flexibility inherent in this approach will ensure that all recipients can use the procedure to set a reasonable goal and allow each recipient to use the best data available to it. As discussed in another section. this rule will also provide for the development of more standard data for future goal setting. Second, for many recipients. setting goals in this way will be a new exercise. By fixing only the basic principle, but allowing the methodology to change, recipients will have the opportunity to fine tune the process each year as their experience grows and the data available to them improve. Finally, the rule makes sure that every recipient will have at least one reasonable and practical goal setting method available to them.

The first example for setting a base figure relies on data sources that are immediately available to all recipients: their DBE directories, and a Census Bureau database that DOT and the Census Bureau will make available to all recipients that wish to use it. This example has its roots in the first two goal setting formulas proposed in the SNPRM. Recipients would first assess the number of ready, willing and able DBEs based on their own directories. For some recipients this will be as simple as counting the number of firms in their directory. For others, particularly those using directories maintained by other agencies, the directories will have to be "filtered" for firms involved in transportation contracting. The resulting number of DBEs would become the numerator. The denominator would then be derived from the Census Bureau's County Business Pattern (CBP) database. We will provide user-friendly electronic access to the database via the internet to allow recipients to input the geographic area and SIC codes in which they contract and receive a number for the availability of all businesses.

There are several issues that must be addressed when comparing numbers derived from two different data sources. some of which were raised in the comments on the SNPRM. Recipients will need to ensure that the scope of businesses included in the numerator is as close as possible to the scope included in the denominator. Using as close as possible to the same SIC codes and geographic base is very important. A recipient using its own DBE directory, particularly one that contains only firms in the fields in which it contracts, will still need to determine what fields it will use for the denominator when sorting through the CBP database. The best way to do this would be to examine their contracting program and determine the SIC codes in which they let the substantial majority of their contracts and subcontracts. The geographic area used for both the numerator and the denominator should cover the area from which the recipient draws the substantial majority of its contractors. While it may be sufficient for some state recipients to use their state borders as their contracting area, local transit and airport recipients will rarely have such an obvious choice. Those recipients will need to more carefully examine the

geographic area from which they draw contractors and base their calculation of both the numerator and denominator of the equation on the same area.

The Department and the Census Bureau will make the CBP data available in a format that gives recipients as much flexibility as possible to tailor the data to their contracting programs. Recipients will be able to extract the data in one block for all of the SIC codes they expect to contract in. or by individual SIC codes. allowing them to weight the relative availability of DBEs in various fields, giving more weight to the fields in which they spend more money. For example, let us assume a recipient estimates that it will expend 10% of its federal aid funds within SIC code 15. 40% in SIC code 16.25% in SIC code 17, and the remaining 25% on contracting spread over SIC codes 07, 42 and 87. The recipient could separately determine the relative availability of DBEs for each of the three major construction SIC codes (i.e.. 15, 16 and 17) and the relative availability of DBEs in the other three SIC codes grouped together and weight each according to the amount of money to be spent in each area. In this example, the recipient could calculate its weighted base figure by first determining the number of DBEs in its directory for each of the groups, then extracting the availability of CBP businesses for the same groups. It would then perform the following calculation to arrive at a base figure for step one of the goal setting process:

$$\text{Base Figure} = \left[.10 \frac{(\text{DBEs in SIC } 15)}{\text{CBPs in SIC } 15} + .40 \frac{(\text{DBEs in } 16)}{\text{CBPs in } 16} + .25 \frac{(\text{DBEs in } 17)}{\text{CBPs in } 17} + 25 \frac{(\text{DBEs in } 07,42,87)}{\text{CBPs in } 07,42,87} \right] \times 100$$

As has been stated generally. this formula is offered only as an example of a way that a recipient could choose to use the CBP database. Recipients using the CBP data should choose whether to weight their calculation. and whether to do so by individual SIC codes or by groups of SIC codes. based on their own assessment of what method will best fit their spending pattern.[1]

Finally, there is still the question of the propriety of comparing data from two sources as different as DBE directories and the CBP. As mentioned above. some commenters asserted that the directories may contain firms that do not normally perform DOT-assisted contracts. This problem is greatest. of course, for directories maintained by other agencies for purposes beyond DOT-assisted contracting. We believe that the recipient's knowledge of its contracting needs and the contents of its DBE directory will allow it to solve this problem by sorting the directories by SIC code to extract only the firms likely to be interested in DOT-assisted contracting. Any remaining effect from DBEs that are certified in the relevant SIC codes but still do not intend to compete for DOT-assisted contracts will be more than offset by the hurdles involved in actually becoming a DBE. It is important to note here that the certification process itself, with its paperwork, review and on-site inspection, create a filter on the number of existing firms that will be counted in the numerator without there being any equivalent filter culling firms out of the denominator. Ultimately, the Department chose these two data sources for the example because; while they may not be perfect, they represent the best universally available current data on both the presence of DBEs and the presence of all businesses in local markets. Any recipient that believes it has available to it better sources of local data from which to make a similar calculation for its base figure is encouraged to use them.

The second example for calculating a base figure is using a bidders list to determine the relative availability of DBEs. The concept is similar to the one described above. The recipient would divide the number of available ready. willing and able DBEs by the number for all firms. The difference is that instead of measuring availability by DBE certifications and Census data, the recipient would measure availability by the number of firms that have directly participated in, or attempted to participate in, DOT-assisted contracting in the recent past. This approach has its roots in Alternative 3 from the SNPRM. Of fundamental importance to this approach is that the recipient would need to include all firms that have sought DOT-assisted contracts. regardless of whether they did so by bidding on a prime contract or quoting a job as a subcontractor. Because most DOT recipients derive the substantial majority of their DBE participation through subcontracting. it is absolutely essential that all DBE and non-DBE firms that quote subcontracts be included in the bidders list.* Bidders lists are a very focussed measure of ready, willing and able firms because they filter the pool of available firms by requiring a demonstration of their ability to participate in the process through tracking and identifying contracting opportunities. understanding the requirements of a particularjob and assembling a bid for it. Another attractive feature of the bidding "filter" is that it applies equally to both DBEs and non-DBEs.

The third example included in the final rule for setting a base figure is using data derived from a disparity study. As was discussed in the SNPRM, the Department is not requiring recipients to do a disparity study, but is only making clear that use of disparity study data by recipients that have them or choose to conduct them is a valid means of setting a goal. Disparity studies generally contain a wide array of statistical data, as well as anecdotal data and analysis that can be particularly useful in the goal setting process. We list disparity studies here, not because they are needed to justify operating the DBE program-congress has already established the compelling need for the DBE program-but because the data a good disparity study provides can be an excellent guide for a recipient to use to set a narrowly tailored goal.

The Department will not set out specific requirements for what data or analysis is required before a disparity study can be used for setting a goal, because we believe that the design and conduct of the study is best left to the local officials and the professional organizations with which they contract to conduct the studies. Instead, we again offer simple general principles that should apply to all studies used for goal setting. Any study data relied on in the goal setting process should be as recent as possible and be focused on the transportation contracting industry. When setting the goal. first use the study's statistical evidence to set a base figure for the relative availability of DBEs. Other study information, whether it is anecdotal data. analysis or statistical information about related

[1] While it is not statistically necessary to account for 100% of program dollars when performing this type of weighting, the greater the percentage accounted for, the more accurate the resulting calculation will be.

[2] To prevent any confusion, it is important to note that the DBE program does not use the so-called "benchmarking" system employed in direct Federal procurement. The benchmarking system relies on a unique database created specifically for use in the federal procurement program.

fields, should be included when making adjustments to the base figure (discussed in more detail below), but not included in the base figure for the relative availability of DBEs.

The last specific example included in the rule is using the goal of another recipient as the base figure for goal setting. This option was also included in the SNPRM. It is intended to avoid duplicative work and to lighten the burden the goal setting process might put on smaller recipients. It is important to note that a recipient could only use another recipient's goal if it was set in accordance with this rule and the other recipient performed similar contracting in a similar market area. Using another recipient's approved goal would only satisfy the first step of the goal setting process. It would serve as the base figure, and could not be used to skip over step two of the process. The recipient would need to examine the same additional evidence it would otherwise use to determine whether to adjust its goal from the base figure, as well as being required to make adjustments to account for differences in its local market or contracting program.

The final rule also maintains the option of devising an alternative method of calculating a base figure for the goal setting process. Explicitly listing this option serves to emphasize the point that the options in the rule are examples meant as guidelines intended to ensure maximum flexibility for recipients. Recipients can use this option to take advantage of their unique expertise or any unique source of data that they have that may not be available to other recipients. The concerned operating administration will review and approve the proposals of recipients that believe they can calculate a base figure that will better reflect their relevant market than any of the examples provided in this rule. Approval will be contingent on the proposals following the same principles that apply to any recipient: the methodology must be based on demonstrable data of relevant market conditions and be designed to reach a goal that the recipient would expect DBEs to achieve in the absence of discrimination.

Step 2: Adjusting the Base Figure

As alluded to above, measuring the relative availability of DBEs to derive a base figure is only the first step of the goal setting process. To ensure that they arrive at goals that truly and accurately reflect the participation they would expect absent the effects of discrimination, recipients must go beyond the formulaic measurement of current availability to account for other evidence of conditions affecting DBEs. To accomplish this second step, recipients must first survey their jurisdiction to determine what types of relevant evidence is available to them. Then. relying on their own knowledge of their contracting markets they must review the evidence to determine whether either an up or down adjustment from the base figure is needed.

One universally available form of evidence that all recipients should consider is the proven capacity of DBEs to perform work on DOT-assisted contracts. All recipients have been tracking and reporting the dollar volume of work that is contracted and subcontracted to DBEs each year. Viewed in isolation, the past achievements of DBEs do not reflect the availability of DBEs relative to all available businesses. but it is an important and current measure of the ability of DBEs to perform on DOT-assisted contracts.

Though not universally available, there are hundreds of existing disparity studies that contain a wealth of statistical and anecdotal evidence on the utilization of disadvantaged businesses. In addition to being a possible source of data for Step 1 of the goal setting process. disparity studies should be considered during Step 2 of the process. The base figure from Step 1 is intended to determine the relative availability of DBEs. The data and analysis in a disparity study can help a recipient determine whether those existing businesses are under- or over-utilized. If a recipient has a study with disparity ratios showing that existing DBEs are receiving significantly less work than expected. an upward adjustment from the base figure is called for. Similarly, if the disparity ratio shows overutilization, a downward adjustment to the base figure would be warranted. The anecdotal evidence and analysis of contracting requirements and conditions that may have a discriminatory impact on DBEs are also important sources that should be examined when determining what adjustment to make to the base figure.[3] Finally, disparity studies that are conducted within a recipient's jurisdiction should be examined even if they were not done specifically for the recipient. For example, a state highway agency may find useful data and analysis in either a statewide disparity study covering other agencies or in a disparity study examining contracting in a county or city within the state.

If a recipient uses another recipient's goal as its base figure under Step I of the goal setting process. it will have to make additional adjustments to ensure that its final goal is narrowly tailored to its market and contracting program. For example. if a local transit or airport authority adopts a statewide goal as its base figure. it must determine the extent that local relative availability of DBEs differs from the relative availability of DBEs in the contracting area relied on by the state. The local recipient would also need to examine the differences in the type of contracting work in its program and determine whether there are significant differences in the relative availability of DBEs in any fields that are unique to its program-or unique to the program of the other recipient. Similarly, if one local recipient used the goal of another local recipient in the same market as its base figure. it would also need to adjust for differences in the contracting fields used by the two programs.

Finally. the rule contains a brief list of other types of data a recipient could consider when adjusting its base figure to arrive at an overall goal. The list is by no means intended to be exhaustive. Instead, it is meant as a guide to the types of information a recipient should look for in Step 2 of the goal setting process. There is a wide array of relevant local, regional and national information about the utilization of disadvantaged businesses. Recipients are encouraged to cast as wide a net as they can to carefully examine their contracting programs and the public and private markets in which they operate.

Additional Goal Setting Issues

The Department proposed. in both the 1992 NPRM and the 1997 SNPRM. that overall goals be calculated as a percentage of DOT funds a recipient expects to expend in DOT-assisted contracts. This is different from the existing part 23 rule. which asked recipients to set overall goals on the basis of all funds, including state and local funds. to be expended in DOT-assisted contracts. This change is for accounting and administrative convenience and is not intended to have a substantive effect on the program. While not the subject of many comments, those who did comment on the proposal favored the change. The final rule adopts this approach.

A few recipients commented that public participation concerning goal setting was bothersome. Nevertheless,

[3] It is important to note that adjusting the goal is only part of the response a recipient should make to evidence of discriminatory barriers for DBEs. All recipients have a primary responsibility to ensure non-discrimination in their progrms and should act aggressively to remove any discriminatory barriers in their programs.

we view it as an essential part of the goal setting process. There are many stakeholders involved in setting goals. and it is reasonable that they should be involved in the process and have an opportunity for comment. The part 23 provision requiring getting a state governor's approval of a goal of less than 10 percent has been eliminated, both because overall goals are no longer tied to the national 10 percent goal and to reduce administrative burdens.

The goal setting provision of the final rule continues to direct recipients to set one annual overall goal for DBEs, rather than group-specific goals separating minority and women-owned businesses.

Section 26.47 Can Recipients Be Penalized for Failing To Meet Overall Goals?

This is a new section of the regulation, the purpose of which is to clarify the Department's views on the situations in which it is appropriate to impose sanctions on recipients with respect to goals. The provision states explicitly what has long been the Department's policy: no recipient is sanctioned, or found in noncompliance. simply because it fails to meet its overall goal. In fact, through the history of the DBE program. the Department never has sanctioned a recipient for failing to obtain a particular amount of DBE participation.

On the other hand, if a recipient fails to set an overall goal which the concerned operating administration approves, or fails to operate its program in good faith toward the objective of meeting the goal. it is subject to a finding of noncompliance and possible sanctions. For example, if a recipient refuses to establish a goal or. having established one. does little or nothing to work toward attaining it. it would be reasonable for the Department to find the recipient in noncompliance. Like all compliance provisions of the rule, this provision is subject to the "court order" exception recently created by statute (see § 26.101 (b)).

Section 26.49 How Are Overall Goals Established for Transit Vehicle Manufacturers?

This provision basically continues in effect the existing transit vehicle manufacturer (TVM) provisions of the rule. The SNPRM proposed to change the existing rule in two respects. FHWA or FAA recipients could avail themselves of similar provisions. if they chose. The final rule retains this flexibility. Also, it was proposed that FTA, rather than manufacturers, would set TVM goals. The few comments we received on this section objected to the latter change. Consequently. we will not adopt the proposed change and will continue to require the TVMs themselves to set their own goals based on the principles outlined in § 26.45 of this rule.

Section 26.51 What Means Do Recipients Use To Meet Overall Goals?

One of the key points of both the SNPRM and this final rule is that. in meeting overall goals. recipients have to give priority to race-neutral means. By race-neutral means (a term which, for purposes of this rule, includes gender neutrality). we mean outreach, technical assistance, procurement process modification, etc.--measures which can be used to increase opportunities for all small businesses, not just DBEs, and do not involve setting specific goals for the use of DBEs on individual contracts. Contract goals, on the other hand, are race-conscious measures.

In the context of these definitions, it is important to note that awards of contracts to DBEs are not necessarily race-conscious actions. Whenever a DBE receives a prime contract because it is the lowest responsible bidder, the resulting DBE participation was achieved through race-neutral means. Similarly, when a DBE receives a subcontract on a project that does not have a contract goal, its participation was also achieved through race-neutral means. Finally, even on projects that do carry contract goals, when a prime awards a particular subcontract to a DBE because it has proven in the past that it does the best or quickest work, or because it submitted the lowest quote. the resulting DBE participation has, in fact, been achieved through race-neutral means. We also note that the use of race-neutral measures (e.g., outreach, technical assistance) specifically to increase the participation of DBEs does not convert these measures into race-conscious measures.

A number of non-DBE contractors commented that race-neutral measures should not only be given priority, but must be tried and fail before any use of contract goals can occur. This, they asserted. is essential for a program to be narrowly tailored. The law on this point is fairly clear, and does not support the commenters' contention. The extent to which race-neutral alternatives were considered and deemed inadequate to remedy the problem is the relevant narrow tailoring question. Both in past legislation and when considering TEA-21. Congress did consider race-neutral alternatives. In fact, as described above, throughout the debate, Member after Member gave examples of how state and local race-neutral programs without goals fail to overcome the discriminatory barriers that face DBEs. Congress' careful consideration and conclusion that race-neutral means are insufficient, buttressed by this rule's emphasis on achieving as much of the goal as possible through race-neutral means, satisfies this part of the narrow tailoring requirement.

No one opposed the use of race-neutral means, though a number of DBEs and recipients stressed that these means, standing alone. were insufficient to address discrimination and its effects. Most recipients and non-DBE contractors supported the use of race-neutral measures. though some recipients said that increased use of these measures would require additional resources.

The relationship between race-conscious and race-neutral measures in the final rule is very important. The recipient establishes an overall goal. The recipient estimates, in advance. what part of that goal it can meet through the use of race-neutral means. This projection, and the basis for it. would be provided to the concerned operating administration at the same time as the overall goal. and is subject to OA approval.

The requirement of the rule is that the recipient get the maximum feasible DBE participation through race-neutral means. The recipient uses race-conscious measures (e.g., sets contract goals) to get the remainder of the DBE participation it needs to meet the overall goal. If the recipient expects to be able to meet its entire overall goal through race-neutral means. it could, with OA approval. implement its program without any use of contract goals.

For example. suppose Recipient X establishes an 11 percent overall goal for Fiscal Year 2000. This is the amount of DBE participation that X has determined it would have if the playing field were level. Recipient X projects that. using a combination of race-neutral means. it can achieve 5 percent DBE participation. Recipient X then sets contract goals on some of its contracts throughout the year to bring in an additional 6 percent DBE participation. Recipients would keep data separately on the DBE participation obtained through those contracts that either did or did not involve the use of contract goals. Recipients would use this and other data to adjust their use of race-neutral means and contract goals during the remainder of the year and in future years. For example. if Recipient X projected being able to attain 5 percent DBE participation through race-neutral measures. but was only able to obtain 1 percent from the race-neutral measures

it used. Recipient X would increase its future use of contract goals. On the other hand, if Recipient X exceeded its prediction that it would get 5 percent DBE participation from race-neutral measures and actually obtained 10 percent DBE participation from the contracts on which there were no contract goals. it would reduce its future use of contract goals. A recipient that was consistently able to meet its overall goal using only race-neutral measures would never need to use contract goals.

Most recipients and non-DBE contractors agreed with the SNPRM's proposal that (contrary to the part 23 provision on this subject) contract goals not be required on all contracts. This provision is retained in the final rule. We believe that this provision provides recipients the ability to achieve the objective of a narrowly tailored program. The rule also reiterates that the contract goal need not be set at the same level as the overall goal. To express this more clearly. let us return to the above example of Recipient X. Just because Recipient X has an overall goal of 11 percent, it does not have to set a contract goal on each contract. Nor does it have to establish an 1 1 percent goal on each contract on which it does set a contract goal. Indeed. since X has projected that it can achieve almost half of its overall goal through race-neutral means. it would most likely set contract goals on some contracts but not on others. On contracts with a contract goal. the goal might be 4 percent one time, 18 percent another time, 9 percent another time, depending on the actual work involved in each contract, the location of the work and the subcontracting opportunities available. The idea is for X to set contract goals that, cumulatively over the year, bring in 6 percent DBE participation, which. added to the 5 percent participation X projects achieving from race-neutral measures, ends up meeting the 11 percent overall goal.

The SNPRM asked for comment on evaluation credits as an additional race-conscious measure that recipients could use to meet overall goals. The vast majority of the many comments on this subject opposed the use of evaluation credits, on both legal (e.g., as contrary to narrow tailoring) and policy (e.g.. as confusing and subjective) grounds. A smaller number of commenters favored at least giving recipients discretion to use this tool. While the Department does not agree with the contention that evaluation credits are legally suspect. we do agree with much of the sentiment against using them in the DBE program. particularly the practical difficulties they might involve when applied to subcontracting (which constitutes the main source of DBE participation in the program). As a result, the final rule does not contain an evaluation credits provision.

The SNPRM proposed certain mechanisms for determining when it was appropriate to ratchet back the use of contract goals. Most commenters said they found these particular mechanisms complicated and confusing. The Department believes that, as a matter of narrow tailoring, it is important to have concrete mechanisms in place to ensure that race-conscious measures like contract goals are used only to the extent necessary to ensure a level playing field. The final rule contains examples of four such mechanisms.

The first mechanism applies to a situation in which a recipient estimates that it can meet its overall goal exclusively through the use of race-neutral goals. In this case, the recipient simply does not set contract goals during the year. The second mechanism takes this approach one step further. If the recipient meets its overall goal two years in a row using only race-neutral measures, the recipient continues to use only race-neutral measures in future years, without having to project each year how much of its overall goal it anticipates meeting through race-neutral and race-conscious means, respectively. However, if in any year the recipient does not meet its overall goal. the recipient must make the projection for the following year. using race-conscious means as needed to meet the goal.

The third mechanism applies to recipients who exceed their overall goals for two years in a row while using contract goals. In the third year. when setting their overall goal and making their projection of the amount of DBE participation they will achieve through race-neutral means. they would determine the average percentage by which they exceeded their overall goals in the two previous years. They would then use that percentage to reduce their reliance on contract goals in the coming year. as noted in the regulatory text **example.** The rationale for this reduction is that the recipient's overall goal represents its best estimation of the participation level expected for DBEs in the absence of discrimination. By exceeding that goal consistently, the recipient may be relying too heavily on race-conscious measures. Scaling back the use of contract goals-while keeping careful track of DBE participation rates on projects without contract goals--will ensure that the recipient's DBE program remains narrowly tailored to overcoming the continuing effects of discrimination.

The fourth mechanism operates within a given year. If a recipient determines part way through the year that it will exceed (or fall short of) its overall goal, and it is using contract goals during that year. it would scale back its use of contract goals (or increase it use of race-neutral means and/or contract goals) during the remainder of the year to ensure that it is using an appropriate balance of means to meet its "level playing field" objectives.

There were also a number of comments on how contract goals should be expressed. Most favored continuing the existing practice of adding together the Federal and local shares of a contract and expressing the contract goal as a percentage of the sum because it works well and avoids confusion. A few comments favored expressing contract goals as a percentage of only the Federal share of a contract. Ultimately, we believe that it is not necessary for the Department to dictate which method to use. Recipients may continue to use whichever method they feel works best and allows them to accurately track the participation of DBEs in their program. Recipients need only ensure that they are consistent and clearly express the method they are using, and report to the Department the total federal aid dollars spent and the federal aid dollars spent with DBEs.

As a last note on this topic, FAA recipients are reminded that funds derived from passenger facility charges (PFCs) are not covered by this part and should not be counted as part of the Federal share in any goal calculation. If a recipient chooses to express its contract goals as a percentage of the combined Federal and local share, it may include the PFC funds as part of the local share.

Section 26.53 What Are the Good Faith Efforts Procedures Recipients Follow in Situations Where There Are contract Goals?

There was little disagreement about the main point of this section. When a recipient sets a contract goal. the basic obligation of bidders is to make good faith efforts (GFE) to meet it. They can demonstrate these efforts in either of two ways. which are equally valid. First, they can meet the goal, by documenting that they have obtained commitments for enough DBE participation to meet the goal. Second, even though they have not met the goal, they can document that they have made good faith efforts to do so. The Department emphasizes strongly that this requirement is an important and serious one. A refusal by a recipient to accept valid showings of

good faith is not acceptable under this rule.

Appendix A discusses in greater detail the kinds of good faith efforts bidders are expected to make. There was a good deal of comment concerning its contents. Non-minority contractors recited that good faith efforts standards should be "objective, measurable. realistically achievable, and standardized." Not one of these comments provided any examples or suggestions of what "objective, measurable, realistically achievable. and standardized" standards would look like. however. Certainly a one-size-fits-all checklist is neither desirable nor possible. What constitutes a showing of adequate good faith efforts in a particular procurement is an intrinsically fact-specific judgment that recipients must make. Circumstances of procurements vary widely. and GFE determinations must fit each individual situation as closely as possible.

The proposed good faith efforts appendix suggested that one of the factors recipients could take into account is the behavior of bidders other than the apparent successful bidder. For example. if the latter failed to meet the contract goal, but other bidders did. that could suggest that the apparent successful bidder had not exerted sufficient efforts to get DBE participation. Recipients who commented on this issue favored the concept: non-DBE contractors opposed it. The final rule's Appendix A makes clear that recipients are not to use a "conclusive presumption" approach, in which the apparent successful bidder is summarily found to have failed to make good faith efforts simply because another bidder was able to meet the goal. However, the track record of other bidders can be a relevant factor in a GFE determination, in more than one way. If other bidders have met the goal, and the apparent successful bidder has not. this at least raises the question of whether the apparent successful bidder's efforts were adequate. It does not, by itself. prove that the apparent successful bidder did not make a good faith effort to get DBE participation, however. On the other hand. if the apparent successful bidder-even if it failed to meet the goal-got as much or more DBE participation than other bidders, then this fact would support the apparent successful bidder's showing of GFE. The revised Appendix makes these points.

The proposed good faith efforts appendix also expanded on language in part 23 concerning price-based decisions by prime contractors. The existing language provides that a recipient can use. as evidence of a bidder's failure to make good faith efforts, the recipient's rejection of a DBE subcontractor's "reasonable price" offer. The SNPRM added that a recipient could set a price differential from 1–10 percent to evaluate bidders' efforts. If a bidder did not meet the goal and rejected a DBE offer within the range, the recipient could view the bidder as not making good faith efforts. This was an attempt to provide additional, quantified, guidance to recipients on this issue.

Comment was mixed on this issue. Non-DBE prime contractors generally opposed the price differential idea. saying that it encouraged deviations from the traditional low bid system. It should be noted. however, that subcontracts are typically awarded outside any formal low bid system. Some recipients thought that it was a bad idea to designate a range. because it would limit their discretion, while others liked the additional definiteness of the range. Most recipients supported the "reasonable price" concept in general, even if they had their doubts about the value of a range. Some DBE organizations favored the range approach.

Taking all the comments into consideration. the Department has decided to retain language similar to that of part 23, without reference to any specific range. Appendix A now provides that the fact that some additional costs may be involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet a DBE contract goal. as long as such costs are reasonable. Along with this emphasis on the reasonableness of the cost necessarily comes the fact that prime contractors are not expected to bear unreasonable costs. The availability of a good faith efforts waiver of the contract goal helps to ensure that a prime contractor will not be in a position where it has to accept an excessive or unreasonable bid from a DBE subcontractor. At the same time. any burden that a non-DBE subcontractor might face is also limited by the reasonableness of competing bids. This approach retains flexibility for recipients while avoiding the concerns commenters expressed about a particular range.

The SNPRM proposed that recipients would have to provide for an administrative review of decisions that a bidder's GFE showing was inadequate. The purpose of the provision was to ensure that recipients did not arbitrarily dismiss bidders' attempts to show that they made good faith efforts. The provision was meant to emphasize the seriousness with which the Department takes the GFE requirement and to help respond to allegations that some recipients administered the program in a quota-like fashion. The SNPRM also asked whether such a mechanism should be operated entirely by the recipient or whether a committee including representatives of DBE and non-DBE contractors should be involved.

A number of recipients, and a few contractors. opposed the idea on the basis of concern about administrative burdens on recipients and potential delays in the procurement process. A greater number of commenters, largely non-DBE contractors but also including recipients and DBEs, supported the proposal as ensuring greater fairness in the process. A significant majority of all commenters said that the recipient should operate the system on its own. because a committee would make the process more cumbersome and raise conflict of interest issues.

The Department will adopt this proposal, which should add to the fairness of the system and make allegations of *de facto* quota operations less likely. The Department intends that reconsideration be administered by recipients. The regulation does not call for a committee involving non-recipient personnel. The Department intends that the process be informal and timely. The recipient could ensure that the process be completed within a brief period (e.g.. 5–10 days) to minimize any potential delay in procurements. The bidder would have an opportunity to meet with the reconsideration official, but a formal hearing is not required. To ensure fairness, the reconsideration official must be someone who did not participate in the original decision to reject the bidder's showing. The recipient would have to provide a written decision on reconsideration, but there would be no provision for administrative appeals to DOT.

A point raised by several non-DBE commenters was that DBEs should have to make good faith efforts (even when they were not acting as prime contractors). The commenters suggested things like providing capacity statements and documenting that they have bid on contracts. This point is unrelated to the subject of this section. which has to do with what efforts bidders for prime contracts have to make to show that they have made to obtain DBE subcontractors. It is difficult to see what purpose the additional paperwork burdens these commenters' requests would serve.

One of the most hotly debated issues among commenters was whether DBE

firms bidding on prime contracts should have to meet goals and make good faith efforts to employ DBE subcontractors. Under part 23, DBE prime contractors did not have to meet goals or make good faith efforts. The rationale for this position was that. as DBEs, 100 percent of the work of these contractors counted toward recipients' contract goals, which the firms automatically met.

A significant majority of commenters on this issue-particularly non-DBE contractors but also including some recipients and a few DBEs—argued that DBE primes should meet goals and make GFE the same as other contractors. Failing to do so. they said, went beyond providing a level playing field to the point of providing an unfair advantage for DBE bidders for prime contracts. This change would also increase opportunities for DBE subcontractors, they said. One comment suggested requiring DBE prime contractors to meet goals or make GFE. but stressed that work they performed with their own forces as well as work awarded to DBE subcontractors should count toward goals.

Supporters of the current system said that many prime contracts performed by DBEs are too small to permit subcontracting (of course. goals need be set only on contracts with subcontracting possibilities). Moreover. these commenters-mostly DBEs and recipients-said that there was already inequity as between DBEs and non-DBEs, and requiring DBEs to meet the same requirements simply maintained the inequity. There was also some support for a third option the Department included in the SNPRM. in which DBEs would have to meet goals and make GFE to the extent that work they proposed to perform with their own forces was insufficient to meet goals.

The Department believes that. in a rule aimed at providing a level playing field for DBEs, it is appropriate to impose the same requirements on all bidders for prime contracts. Consequently, part 26 will depart from the part 23 approach and require DBE prime contractors to meet goals and make good faith efforts on the same basis as other prime contractors. However, in recognition of the DBE bidders' status as DBEs, we will permit them to count toward goals the work that they commit to performing with their own forces, as well as the work that they commit to be performed by DBE subcontractors. DBE bidders on prime contracts will be expected to make the same outreach efforts as other bidders and to document good faith efforts in situations where they do not fully meet contract goals.

Under part 23 and the SNPRM. recipients have a choice between handling bidder compliance with contract goals and good faith efforts requirements as a matter of responsiveness or responsibility. Some recipients and other contractors recounted successful experience with one approach or the other, and suggested reasons why everyone should follow each approach (e.g.. responsiveness as a deterrent to bid-shopping; responsibility as a more flexible and cost-effective approach). Both approaches have their merits. and the Department believes the best course is to maintain the existing recipient discretion on this issue.

Some recipients use so-called "design-build" or "turnkey" contracts. in which the design and construction of an entire project is contracted out to a master contractor. The master contractor then lets subcontracts, which are often equivalent to the prime contracts that the recipient would let if it were designing and building the project directly. In a sense. the master contractor stands in the shoes of the recipient.

On design-build contracts. the normal process for setting contract goals does not fit the contract award process well. At the time of the award of the master contract, neither the recipient nor the master contractor knows in detail what the project will look like or exactly what contracting opportunities there will be. let alone the identity of DBEs who may subsequently be involved. In these situations, the recipient may alter the normal process, setting a project goal to which the master contractor commits. Later, when the master contractor is letting subcontracts, it will set contract goals as appropriate, standing in the shoes of the recipient. The recipient will exercise oversight of this process.

The final issue in this section has to do with replacement of DBEs that drop out of a contract. What actions. if any, should a prime contractor have to take when a DBE is unable to complete a subcontract, for whatever reason? Should it matter whether or not the DBE's participation is needed to achieve the prime contractor's goal?

Comment on this issue came mostly from recipients, with some non-DBE contractors and a few DBEs providing their views. A majority of the commenters believed that replacement of a fallen-away DBE with another DBE (or making a good faith effort toward that end) should be required only when needed to ensure that the prime contractor continued to meet its contract goal. Others said that. since using DBEs to which the prime had committed at the time of award was a contractual requirement, replacement or good faith efforts should be required regardless of the prime's ability to meet the goal without the lost DBE's participation.

The Department believes that, in a narrowly tailored rule. it is not appropriate to require DBE participation at a level exceeding that needed to ensure a level playing field. Consequently, we will require a prime contractor to replace a fallen-away DBE (or to demonstrate that it has made good faith efforts toward that end) only to the extent needed to ensure that the prime contractor is able to achieve the contract goal established by the recipient for the procurement. The Department will also retain the SNPRM provision-supported by most commenters who mentioned it-that a prime contractor may not terminate a DBE firm for convenience and then perform the work with its own forces without the recipient's written consent. This provision is intended to prevent abuse of the program by a prime contractor who would commit to using a DBE and then bump the DBE off the project in favor of doing the work itself.

Section 26.55 How Is DBE Participation Counted Toward Goals?

In a narrowly tailored program. it is important that DBE credit be awarded only for work actually being performed by DBEs themselves. The necessary implication of this principle is that when a DBE prime contractor or subcontractor subcontracts work to another firm. the work counts toward DBE goals only if the other firm is itself a DBE. This represents a change from the existing rule and the SNPRM. which said that all the work of a DBE's contract (implicitly including work subcontracted to non-DBEs) counts toward goals. A few comments urged such a change. The new language is also consistent with the way that the final rule treats goals for DBE prime contractor;

The value of work performed by DBEs themselves is deemed to include the cost of materials and supplies purchased. and equipment leased, by the DBE from non-DBE sources. For example, if a DBE steel erection firm buys steel from a non-DBE manufacturer, or leases a crane from a non-DBE construction firm, these costs count toward DBE goals. There is one exception: if a DBE subcontractor buys supplies or leases equipment from the prime contractor on its contract. these costs do not count toward DBE goals. Several comments from prime contractors suggested these costs should

count, but this situation is too problematic, in our view, from an independence and commercially useful function (CUF) point of view to permit DBE credit.

One of the most difficult issues in this section concerns how to count DBE credit for the services of DBE trucking firms. The SNPRM proposed that, to be performing a CUF. a DBE trucking firm had to own 50 percent of the trucks it used in connection with a contract. A number of comments said that this requirement was out of step with industry practice, which commonly involves companies leasing trucks from owner-operators and other sources for purposes of a project. In response to these comments. the Department revisited this issue and reviewed the trucking CUF policies of a number of states. The resulting provision requires DBEs to have overall control of trucking operations and own at least one truck. but permits leasing from a variety of sources under controlled conditions, with varying consequences for DBE credit awarded.

A DBE need not provide all the trucks on a contract to receive credit for transportation services, but it must control the trucking operations for which it seeks credit. It must have at least one truck and driver of its own, but it can lease the trucks of others, both DBEs and non-DBEs, including owner operators. For work done with its own trucks and drivers, and for work with DBE lessees, the firm receives credit for all transportation services provided. For work done with non-DBE lessees, the firm gets credit only for the fees or commissions it receives for arranging the transportation services. since the services themselves are being performed by non-DBEs.

When we say that a DBE firm must own at least one of the trucks *it uses on* a contract. we intend for recipients to have a certain amount of discretion for handling unexpected circumstances, beyond the control of the firm. For example, suppose firm X starts the contract with one truck it owns. The truck is disabled by an accident or mechanical problem part way through the contract. Recipients need not conclude that the firm has ceased to perform a commercially useful function.

Most commenters who addressed the issue agreed with the SNPRM proposal that a DBE does not perform a CUF unless if performs at least 30 percent of the work of a contract with its own forces (a few commenters suggested 50 percent). This provision has been retained. A commenter suggested that the use of two-party checks by a DBE and another firm should not automatically preclude there being a CUF. While we do not believe it is necessary to include rule text language on this point, we agree with the commenter. As long as the other party acts solely as a guarantor, and the funds do not come from the other party. we do not object to this practice where it is a commonly-recognized way of doing business. Recipients who accept this practice should monitor its use closely to avoid abuse.

One commenter noted an apparent inconsistency between counting 100 percent of the value of materials and supplies used by a DBE construction contractor (e.g., in the context of a furnish and install contract) and counting only 60 percent of the value of goods obtained by a non-DBE contractor from a DBE regular dealer. The two situations are treated differently. but there is a policy reason for the difference. There is a continuing concern in the program that, if non-DBEs are able to meet DBE goals readily by doing nothing more than obtaining supplies made by non-DBE manufacturers through DBE regular dealers, the non-DBEs will be less likely to hire DBE subcontractors for other purposes. As a policy matter. the Department does not want to reduce incentives to use DBE subcontractors, so we have not permitted 100 percent credit for supplies in this situation. Giving 100 percent credit for materials and supplies when a DBE contractor performs a furnish and install contract does not create the same type of disincentive, so the policy concern does not apply. In our experience. the 60 percent credit has been an effective incentive for the use of DBE regular dealers, so those firms are not unduly burdened.

Section 26.61 How Are Burdens of Proof Allocated in the Certification Process?

This section, which states a "preponderance of evidence" standard for applicants' demonstration to recipients concerning group membership, ownership, control. and business size. received favorable comment from all commenters who addressed it. We are retaining it with only one change, a reference to the fact that, in the final rule, recipients will collect information concerning the economic status of prospective DBE owners.

Section 26.63 What Rules Govern Group Membership Determinations?

There were several comments on details of this provision. One commenter suggested that tribal registration be used as an identifier for Native Americans. The suggestion is consistent with long-standing DOT guidance; however this section of the regulation is meant to set out general rules applicable to all determinations of group membership, not to enumerate means of making the determination for specific groups. The same commenter suggested that if someone knowingly misrepresents himself as a group member, he should not be given further consideration for eligibility. Misrepresentation of any kind on an application is a Serious matter. Indeed. misrepresentation of material facts in an application can be grounds for debarment or even criminal prosecution. While it would certainly be appropriate for recipients to take action against someone who so misrepresented himself, the regulatory text on group membership is not the place to make a general point about the consequences of misrepresentation.

Some commenters wanted further definition of what "a long period of time" means. We believe it would be counterproductive to designate a number of years that would apply in all cases. since circumstances are likely to differ. The point is to avoid "certification conversions" in which an individual suddenly discovers, not long before the application process, ancestry or culture with which he previously has had little involvement.

We are adopting the SNPRM provision without substantive change.

Section 26.65 What Rules Govern Business Size Determinations?

By statute. the Department is mandated to apply SBA small business sire standards to determining whether a firm is a small business. The Department is also mandated to apply the statutory size cap ($16.6 million in the current legislation, which the Department adjusts for inflation from time to time). Consequently, the Department cannot adopt the variety of *comments we* received to *adjust* size standards or the gross receipts cap to take differences among industries or regions into account. We are adopting the proposed language, using the new statutory gross receipts cap. As under part 23, a firm must fit under both the relevant SBA size standard and the generally applicable DOT statutory cap to be eligible for certification.

A few commenters asked for additional guidance for situations in which a firm is working in more than one SIC code, and the SBA sire standards for the different SIC codes are different. First. size determinations are made for the firm as a whole. not for one

division or another. Second, suppose the size of Firm X (e.g., determined through looking at the firm's gross receipts) is $5 million. and X is seeking certification as a DBE in SIC code yyyy and zzzz, whose SBA small business size standards are $3.5 and $7 million, respectively. Firm X would be a small business that could be certified as a DBE, and that could receive DBE credit toward goals, in SIC code zzzz but not in SIC code yyyy. This approach to the issue of differing standards being involved with the same firm fits in well with the general requirement of part 26 that certification be for work in particular SIC codes.

Section 26.67 What Rules Determine Social and Economic Disadvantage?

The statutes governing the DBE program continue to state that members of certain designated groups are presumed to be both socially and economically disadvantaged. Therefore, the Department is not adopting comments suggesting that one or both of the presumptions be eliminated from the DBE rule. While the rule does specify that applicants who are members of the designated groups do have to submit a signed certification that they are, in fact, socially and economically disadvantaged, this requirement should not be read as making simple "self-certification" sufficient to establish disadvantage. As has been the case since the beginning of the DBE program, the presumptions of social and economic disadvantage are rebuttable.

The Department is making an important change in this provision in response to comments about how to rebut the presumption of economic disadvantage. Recipient comments unanimously said that recipients should collect financial information. such as statements of personal net worth (PNW) and income tax returns. in order to determine whether the presumption of economic disadvantage really applies to individual applicants. Particularly in the context of a narrowly tailored program, in which it is important to ensure that the benefits are focussed on genuinely disadvantaged people (not just anyone who is a member of a designated group), we believe that these comments have merit. While charges by opponents of the program that fabulously wealthy persons could readily participate under part 23 have been exceedingly hyperbolic and inaccurate (e.g., references to the Sultan of Brunei as a potential DBE), it is appropriate to give recipients this tool to make sure that non-disadvantaged persons do not participate.

For this reason. part 26 requires recipients to obtain a signed and notarized statement of personal net worth from all persons who claim to own and control a firm applying for DBE certification *and* whose ownership and control are relied upon for DBE certification. These statements must be accompanied by appropriate supporting documentation (e.g.. tax returns. where relevant). The rule does not prescribe the exact supporting documentation that should be provided, and recipients should strive for a good balance between the need for thorough examination of applicants' PNW and the need to limit paperwork burdens on applicants. For reasons of avoiding a retroactive paperwork burden on firms that are now certified, the rule does not require recipients to obtain this information from currently certified firms. These firms would submit the information the next time they apply for renewal or recertification. The final rule's provisions on calculating personal net worth are derived directly from SBA regulations on this subject (see 13 CFR § 124.104(c)(2). as amended on June 30, 1998).

One of the primary concerns of DBE firms commenting about submitting personal financial information is ensuring that the information remains confidential. In response to this concern, the rule explicitly requires that this material be kept confidential. It may be provided to a third party only with the written consent of the individual to whom the information pertains. This provision is specifically intended to pre-empt any contrary application of state or local law (e.g., a state freedom of information act that might be interpreted to require a state transportation agency to provide to a requesting party the personal income tax return of a DBE applicant who had provided the return as supporting documentation for his PNW statement). There is one exception to this confidentiality requirement. If there is a certification appeal in which the economic disadvantage of an individual is at issue (e.g., the recipient has determined that he or she is not economically disadvantaged and the individual seeks DOT review of the decision), the personal financial information would have to be provided to DOT as part of the administrative record. The Department would treat the information as confidential.

Creating a clear and definitive standard for determining when an individual has overcome the economic disadvantage that the DBE program is meant to remedy has long been a contentious issue. In 1992, the Department proposed to use a personal net worth standard of $750.000 to rebut the presumption of disadvantage for members of the designated groups. In 1997, the Department proposed a similar idea, though rather than use the $750.000 figure, the SNPRM asked the public for input on what the specific amount should be. Finally, as discussed in detail above, the issue of ensuring that wealthy individuals do not participate in the DBE program was a central part of the 1998 Congressional debate.

Public comment on both proposals was sharply divided. Roughly equal numbers of commenters thought $750,000 was too high as thought it was too low. Commenters proposed figures ranging from $250,000 to $2 million. Others supported the $750,000 level. which is based on the SBA's threshold for participation in the SDB program (it is also the retention level for the 8(a) program). One theme running through a number of comments was that recipients should have discretion to vary the threshold depending on such factors as the local economy or the type of firms involved. Some comments opposed the idea of a PNW threshold altogether or suggested an alternative approach (e.g., based on Census data about the distribution of wealth).

Others commented that rebutting the presumption did not go far enough. pointing out that the only way to ensure that wealthy people did not participate in the program was for the threshold to act as a complete bar on the eligibility of an individual to participate in the program. Congress appears to share this concern. While they differed on the effectiveness of past DOT efforts, both proponents and opponents of the program agreed that preventing the participation of wealthy individuals was central to ensuring the constitutionality of the DBE program.

The Department agrees and, in light of the comments and the intervening TEA-21 debate, is adopting the clearest and most effective standard available: when an individual's personal net worth exceeds the $750.000 threshold, the presumption of economic disadvantage is conclusively rebutted and the individual is no longer eligible to participate in the DBE program. The Department is using the $750,000 figure because it is a well established and effective part of the SBA programs and is a reasonable middle ground in view of the wide range of comments calling for higher or lower thresholds. Using a figure any lower. as some commenters noted. could penalize success and make growth for DBEs difficult (since. for example, banks and insurers frequently

look to the personal assets of small business owners in making lending and bonding decisions). Operating the threshold as a cap on eligibility for all applicants also serves to treat men and women. minorities and non-minorities equally.

When a recipient determines, from the PNW statement and supporting information. that an individual's personal net worth exceeds $750,000, the recipient must deem the individual's presumption of economic disadvantage to have been conclusively rebutted. No hearing or other proceeding is called for in this case. When this happens in the course of an application for DBE eligibility, the certification process for the applicant firm stops, unless other socially and economically disadvantaged owners can account for the required 51 percent ownership and control. A recipient cannot count the participation of the owner whose presumption of economic disadvantage has been conclusively rebutted toward the ownership and control requirements for DBE eligibility.

There may be other situations in which a recipient has a reasonable basis (e.g., from information in its own files, as the result of a complaint from a third party) for believing that an individual who benefits from the statutory presumptions is not really socially and/or economically disadvantaged. In these cases, the recipient may begin a proceeding to rebut the presumptions. For example, if a recipient had reason to believe that the owner of a currently-certified firm had accumulated personal assets well in excess of $750,000. it might begin such a proceeding. The recipient has the burden of proving, by a preponderance of evidence, that the individual is not disadvantaged. However, the recipient may require the individual to produce relevant information.

It is possible that, at some time in the future. SBA may consider changing the $750,000 cap amount. The Department anticipates working closely with SBA on any such matter and seeking comment on any potential changes to this rule that would be coordinated with changes SBA proposes for Federal procurement programs in this area.

Under part 23, recipients had to accept 8(a)-certified firms (except for those who exceeded the statutory gross receipts cap). The SNPRM proposed some modifications of this requirement. Recipients were concerned that in some situations information used for 8(a) certification could be inaccurate or out of date. They noted differences between 8(a) and DBE certification standards and procedures. They asked for the ability to look behind 8(a) certifications and make their own certification decisions.

In response to these comments. the Department is providing greater discretion to recipients. Under part 26. recipients can treat 8(a) certifications as they do certifications made by other DOT recipients. A recipient can accept such a certification in lieu of conducting its own certification process or it can require the firm to go through part or all of its own application process. Because SBA is beginning a certification process for firms participating in the small and disadvantaged business (SDB) program. we will treat certified SDB firms in the same way. If an SDB firm is certified by SBA or an organization recognized by SBA as a certifying authority, a recipient may accept this certification instead of doing its own certification. (This does not apply to firms whose participation in the SDB program is based on a self-certification.) We note that this way of handling SBA program certifications is in the context of the development by DOT recipients of uniform certification programs. If a unified certification program (UCP) accepts a firm's 8(a) or 8(d) certification, then the firm will be certified for all DOT recipients in the state.

People who are not presumed socially and economically disadvantaged can still apply for DBE certification. To do so, they must demonstrate to the recipient that they are disadvantaged as individuals. Using the guidance provided in Appendix E. recipients must make case-by-case decisions concerning such applications. It should be emphasized that the DBE program is a disadvantage-based program. not one limited to members of certain designated groups. For this reason. recipients must take these applications seriously and consider them fairly. The applicant has the burden of proof concerning disadvantage, however.

Section 26.69 What Rules Govern Determinations of Ownership?

Commenters on the ownership provisions of the SNPRM addressed a variety of points. Most commenters agreed that the general burden of proof on applicants should be the preponderance of the evidence. A few commenters thought that this burden should also apply in situations where a firm was formerly owned by a non-disadvantaged individual. For some of these situations. the SNPRM proposed the higher "clear and convincing evidence" standard, because of the heightened opportunities for abuse involved. The Department believes this safeguard is necessary. and we will retain the higher standard in these situations.

Commenters asked for more guidance in evaluating claims that a contribution of expertise from disadvantaged owners should count toward the required 51 percent ownership. They cited the potential for abuse. The Department believes that there may be circumstances in which expertise can be legitimately counted toward the ownership requirement. For example, suppose someone with a great deal of expertise in a computer-related field, without whom the success of his or her high-tech start-up business would not be feasible, receives substantial capital from a non-disadvantaged source.

We have modified the final rule provision to reflect a number of considerations. Situations in which expertise must be recognized for this purpose are limited. The expertise must be outstanding and in a specialized field: everyday experience in administration. construction. or a professional field is unlikely to meet this test. (This is not a "sweat equity" provision.) We believe that it is fair that the critical expertise of this individual be recognized in terms of the ownership determination. At the same time, the individual roust have a significant financial stake in the company. This program focuses on entrepreneurial activity, not simply expertise. While we will not designate a specific percentage of ownership that such an individual must have, entrepreneurship without a reasonable degree of financial risk is inconceivable.

The SNPRM's proposals on how to treat assets obtained through inheritance, divorce, and gifts were somewhat controversial. Most comments agreed with the proposal that assets acquired through death or divorce be counted. One commenter objected to the provision that such assets always be counted, saying that the owner should have to make an additional demonstration that it truly owned the assets before the recipient counted them. We do not see the point of such an additional showing. If a white male business owner dies, and his widow inherits the business, the assets are clearly hers, and the deceased husband will play no further role in operating the firm. Likewise, assets a woman obtains through a divorce settlement are unquestionably hers. Absent a term of a divorce settlement or decree that limits the customary incidents of ownership of the assets or business (a contingency for which the proposed provision provided), there is no problem for which an additional showing of some

sort by the owner would be a useful remedy.

A majority of comments on the issue of gifts opposed the SNPRM proposal, saying that gifts should not be counted toward ownership at all. The main reason was that allowing gifts would make it easier for fronts to infiltrate the program. Some comments also had a flavor of opposition to counting what commenters saw as unearned assets. The Department understands these concerns. If a non-disadvantaged individual who provides a gift is no longer connected with the business, or a disadvantaged individual makes the gift, the issue of the firm being a potential front is much reduced. Where a non-disadvantaged individual makes a gift and remains involved with the business, the concern about potential fronts is greater.

For this reason. the SNPRM erected a presumption that assets acquired by gift in this situation would not count. The applicant could overcome this presumption only by showing. through clear and convincing evidence-a high standard of proof-that the transfer was not for the purpose of gaining DBE certification and that the disadvantaged owner really controls the company. This provides effective safeguards against fraud. without going to the unfair extreme of creating a conclusive presumption that all gifts are illegitimate. Also. for purposes of ownership, all assets are created equal. If the money that one invests in a company is really one's own. it does not matter whether it comes from the sweat of one's brow, a bank loan, a gift or inheritance, or hitting the lottery. As long as there are sufficient safeguards in place to protect against fronts-and we believe the rule provides them-the origin of the assets is unimportant. We are adopting the proposed provisions without change.

Commenters were divided about how to handle marital property, especially in community property states. Some commenters believed that such assets should not be counted at all. This was based, in part. on the concern that allowing such assets to be counted could make it difficult to screen out interspousal gifts designed to set up fronts, even if irrevocable transfers of assets were made. Other commenters said they thought the proposal was appropriate, and some of these thought the requirement for irrevocable transfers was unfair.

The Department is adopting the proposed language. In a community property state. or elsewhere where property is jointly held between spouses, the wife has a legal interest in a portion of the property. It is really hers. It would be inappropriate to treat this genuine property interest as if it did not exist for purposes of DBE ownership.

To ensure the integrity of the program. it is necessary to put safeguards in place. The regulation does so. First, recipients would not count more assets toward DBE ownership than state law treats as belonging to the wife (the final rule provision adds language to this effect). Second, the irrevocable transfer requirement prevents the husband from being in a position to continue to claim any ownership rights in the assets. If an irrevocable transfer of assets constitutes a gift from a non-disadvantaged spouse who remains involved in the business. then the presumption/clear and convincing evidence mechanism discussed above for gifts would apply to the transaction. If recipients in community property states wanted to establish a mechanism for allocating assets between spouses that was consistent with state law. but did not require court involvement or other more formal procedures. they could propose doing so as part of their DBE programs. subject to operating administration approval.

Most commenters supported the SNPRM's proposal concerning trusts. particularly the distinction drawn between revocable living and irrevocable trusts. One commenter favored counting revocable living trusts when the same disadvantaged individual is both the grantor and beneficiary. The Department believes there is merit in making this exception. If the same disadvantaged individual is grantor, beneficiary, and trustee (i.e., an individual puts his own money in a revocable living trust for tax planning or other legitimate purposes and he alone plays the roles of grantor, beneficiary, and trustee), the situation seems indistinguishable for DBE program purposes from the situation of the same individual controlling his assets without the trust. In all other situations, revocable living trusts would not count.

Some comments asked for clarification of the 51 percent ownership requirement, a subject on which the Department has received a number of questions over the years. The Department has clarified this requirement, with respect to corporations, by stating that socially and economically disadvantaged individuals must own 51 percent of each class of voting stock of a corporation. as well as 51 percent of the aggregate stock. A similar point applies to partnerships and limited liability companies. This latter type of company was not mentioned in the SNPRM. but a commenter specifically requested clarification concerning it. (We have also noted, in s26.83. that limited liability companies must report changes in management responsibility to recipients. This is intended to include situations where management responsibility is rotated among members.) These clarifications are consistent with SBA regulations.

There are some ownership issues (e.g.. concerning stock options and distribution of dividends) that SBA addresses in some detail in its regulations (see 13 CFR § 124.105 (c), (e), (f)) that were not the subject of comments to the DOT SNPRM. These issues have not been prominent in DOT certification practice, to the best of our knowledge, so we are not adding them to the rule. However. we would use the SBA provisions as guidance in the event such issues arise.

Section 26.71 *What Rules Govern Determinations Concerning Control?*

Commenters generally agreed with the proposed provisions concerning expertise and delegation of responsibilities, 51 percent control of voting stock, and differences in remuneration. A few commenters expressed concern about having to make judgments concerning expertise. However, this expertise standard, as a matter of interpretation, has been part of the DBE program since the mid-1980s. We do not believe that articulating it in the regulatory text should cause problems, and we believe it is a very reasonable and understandable approach to expertise issues. The provision concerning 51 percent ownership of voting stock, as discussed above. has been relocated in the ownership section of the rule. The Department has added three useful clarifications of the general requirement that disadvantaged owners must control the firm (e.g., by serving as president or CEO, controlling a corporate board). These clarifications are based on SBA's regulations (see 13 CFR § 124.106(a)(2), (b), (d)(l)). The Department intends to use other material in 13 CFR § 124.106 as guidance on control matters. when applicable. Otherwise, the Department is adopting these provisions as proposed.

There was some concern about the proposal concerning licensing. Some recipients thought that it would be better to require a license as proof of control in the case of all licensed occupations. We do not think it is justifiable for the DBE program to require more than state law does. If state law allows someone to run a certain

type of business (e.g., electrical contractors, engineers) without personally having a license in that occupation, then we do not think it is appropriate for the recipient to refuse to consider that someone without a license may be able to control the business. The rule is very explicit in saying that the recipient can consider the presence or absence of a license in determining whether someone really has sufficient ability to control a firm.

Family-owned firms have long been a concern in the program. The SNPRM provided explicitly that if the threads of control in a family-run business cannot be disentangled. such that the recipient can specifically find that a woman or other disadvantaged individual independently controls the business, the recipient may not certify the firm A business that is controlled by the family as a group, as distinct from controlled individually by disadvantaged individuals. is not eligible. Notwithstanding this provision, a few recipients commented that certifying any businesses in which non-disadvantaged family members participate would open the program to fronts. We do not agree. Non-disadvantaged individuals can participate in any DBE firm, as long as disadvantaged individuals control the firm. It is not fair and does not achieve any reasonable program objective to say that an unrelated white male may perform functions in a DBE while the owner's brother may never do so.

Commenters generally supported the provision calling for recipients to certify firms only for types of work in which disadvantaged owners had the ability to control the firm's operations. One commenter suggested that recipients. while not requiring recertification of firms seeking to perform additional types of work as DBEs (e.g., work in other than their primary industrial classification), should have to approve a written request from firms in this position. We do believe it is necessary for recipients to verify that disadvantaged owners can control work in an additional area, and we have added language to this effect. Recipients will have discretion about how to administer this verification process.

Commenters asked for additional clarification about the eligibility of people who work only part-time in a firm. We have done so by adding examples of situations that do not lead to eligibility (part-time involvement in a full-time firm and absentee ownership) and a situation that may, depending on circumstances. be compatible with eligibility (running a part-time firm all the time it is operating). It should be noted that this Provision does not preclude someone running a full-time firm from having outside employment. Outside employment is incompatible with eligibility only when it interferes with the individual's ability to control the DBE firm on a full-time basis.

One commenter brought to the Department's attention the situation of DBEs who use "employee leasing companies." According to the commenter. employee leasing companies fill a number of administrative functions for employers, such as payroll. personnel, forwarding of taxes to governmental entities, and drug testing. Typically, the employees of the underlying firm are transferred to the payroll of the employee leasing firm, which in turn leases them back to the underlying employer. The underlying employer continues to hire, fire, train, assign. direct, control etc. the employees with respect to their on-the-job duties. While the employee leasing firm sends payments to the IRS. Social Security, and state tax authorities on behalf of the underlying employer, it is the latter who is remains responsible for paying the taxes.

For practical and legal purposes. the underlying employer retains an employer-employee relationship with the leased employees. The employee leasing company does not get involved in the operations of the underlying employer. In this situation, the use of an employee leasing company by a DBE does not preclude the DBE from meeting the control requirements of this rule. Nor does the employee leasing company become an affiliate of the DBE for business size purposes. Case-by-case judgement, of course, remains necessary. Should an employee leasing company in fact exercise control over the on-the-job activities of employees of the DBE, then the ability of the DBE to meet control requirements would be compromised.

One commenter said, as a general matter, that independence and control should be considered separately. We view independence as an aspect of control: If a firm is not independent of some other business. then the other firm. not the disadvantaged owners, exercise control. While independence is an aspect of control that recipients must review. we do not see any benefit in separating consideration of the two concepts.

A recent court decision (*Jack Wood* Construction co., Inc. v. U.S. *Department of Transportation, 12* F. Supp. 2d 25 (D.D.C., 1998)) overturned a DOT Office of Civil Rights certification appeal decision that upheld a denial of certification based on lack of control. The court. reading existing part 23 closely, said that a non-disadvantaged individual who was an employee. but not an owner. of a firm could disproportionately control the affairs of a firm without making it ineligible. The court also said that the existing rule language did not make it necessary for a disadvantaged owner to have both technical and managerial competence to control a firm. Part 26 solves both problems that the court found to exist in part 23's control provisions (see § 26.71(e)-(g)).

Section 26.73 What Are Other Rules Affecting Certification?

There were relatively few comments on this section. One commenter disagreed with the proposal to continue the provision that a firm owned by a DBE firm, rather than by socially and economically disadvantaged individuals, was not eligible. The argument against this provision, as we understand it. is that precluding a DBE firm from being owned by, for example, a holding company that is in turn owned by disadvantaged individuals would deny those individuals a financing and tax planning tool available to other businesses.

This argument has merit in some circumstances. The purpose of the DBE program is to help create a level playing field for DBEs. It would be inconsistent with the program's intent to deny DBEs a financial tool that is generally available to other businesses. The Department will allow this exception Recipients must be careful, however. to ensure that certifying a firm under this exception does not have the effect of allowing the firm, or its parent company, to evade any of the requirements or restrictions of the certification process. The arrangement must be consistent with local business practices and must not have the effect of diluting actual ownership by disadvantaged individuals below the 51 percent requirement. All other certification requirements. including control by disadvantaged individuals and size limits, would continue to apply.

Another cornmenter suggested a firm should not be certified as a DBE if its owners have interests in non-DBE businesses. We believe that a *per se rule* to this effect would be too draconian. If owners of a DBE-whether disadvantaged individuals or not-also have interests in other businesses. the recipient can look at the relationships among the businesses to determine if the DBE is really independent.

One commenter opposed basing certification on the present status of

firms, seeking discretion to deny certification based on the history of the firm. We believe there is no rational or legal basis for denying certification to a firm on the basis of what it was in the past. Is it a small business presently owned and controlled by socially and economically disadvantaged individuals? If so. it would be contrary to the statute, and to the intent of the program, to deny certification because at some time-perhaps years-in the past. it was not owned and controlled by such individuals. The rule specifies that recipients may consider whether a firm has engaged in a pattern of conduct evincing an intent to evade or subvert the program.

The final provision of this section concerns firms owned by Alaska Native Corporations (ANCs), Indian tribes. and Native Hawaiian Organizations. Like the NPRM. it provides that firms owned by these entities can be eligible DBEs, even though their ownership does not reside, as such. in disadvantaged *individuals*. These firms must meet the size standards applicable to other firms, including affiliation (lest large combinations of tribal or ANC-owned corporations put other DBEs at a strong competitive disadvantage). Also, they must be controlled by socially and economically disadvantaged individuals. For example, if a tribe or ANC owns a company. but its daily business operations are controlled by a non-disadvantaged white male, the firm would not be eligible.

Commenters pointed us to the following provision of the Alaska Native Claims Settlement Act (ANCSA):

(e) Minority and economically disadvantaged status—

(1) For all purposes of Federal law, a Native Corporation shall be considered to be a corporation owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the Settlement Common Stock of the corporation and other stock of the corporation held by holders of Settlement Common Stock and by Natives and descendants of Natives. represents a majority of both the total equity of the corporation and the total voting power of the corporation for the purposes of electing directors.

(2) For all purposes of Federal law, direct and indirect subsidiary corporations. joint ventures, and partnerships of a Native Corporation qualifying pursuant to paragraph (I) shall be considered to be entities owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the shares of stock or other units of ownership interest in any such entity held by such Native Corporation and by the holders of its Settlement Common Stock represent a majority of both-

(A) The total equity of the subsidiary corporation, joint venture. or partnership: and

(B) The total voting power of the subsidiary corporation. joint venture, or partnership for the purpose of electing directors. the general partner. or principal officers. (43 U.S.C. 1626(e)).

The question for the Department is whether, reading this language together with the language of the Department's DBE statutes, DOT must alter these provisions.

The DOT DBE statute (TEA-21 version) provides as follows:

(b) Disadvantaged Business Enterprises.-

(l) General rule.—Except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts made available for any program under titles I. III, and V of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.

(2) Definitions.—In this subsection, the following definitions apply:

(A) Small business concern.-The term "small business concern" has the meaning such term has under section 3 of the Small Business Act (15 U.S.C. 632): except that such term shall not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals which has average annual gross receipts over the preceding 3 fiscal years in excess of $16,600,000, as adjusted by the Secretary for inflation.

(B) Socially and economically disadvantaged individuals.-The term "socially and economically disadvantaged individuals" has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and relevant subcontracting regulations promulgated pursuant thereto: except that women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection.

* * * * *

(4) Uniform certification.-The Secretary shall establish minimum uniform criteria for State governments to use in certifying whether a concern qualifies for purposes of this subsection. Such minimum uniform criteria shall include but not be limited to on-site visits. personal interviews. licenses. analysis of stock ownership. listing of equipment. analysis of bonding capacity, listing of work completed. resume of principal owners, financial capacity. and type of work preferred.

While the language § 1626(e) is broad, the terms used in the two statutes are not identical. Section 1626(e) refers to "minority and economically disadvantaged business enterprise[s]", while the Department's statutes refer to "small business concerns owned and controlled by socially and economically disadvantaged individuals." Requirements applicable to the former need not necessarily apply to the latter.

The legislative history of § 1626(e) lends support to distinguishing the two statutes. The following excerpt from House Report 102–673 suggests that the intent of Congress in enacting this provision was to focus on direct Federal procurement programs:

[The statute] amends section [1626(e)] of ANCSA to clarify that Alaska Native Corporations are minority and economically disadvantaged business enterprises for the purposes of implementing the SBA programs * * * This section would further clarify that Alaska Native Corporations and their subsidiary companies are minority and economically disadvantaged business enterprises for purposes of qualifying for participation in federal contracting and subcontracting programs. the largest of which include the SBA 8(a) program and the Department of Defense Small and Disadvantaged Business Program. These programs were established to increase the participation of certain segments of the population that have historically been denied access to Federal procurement activities. While this section eliminates the need for Alaska Native Corporations or their subsidiaries to prove their "economic" disadvantage the corporations would still be required to meet size requirements as small businesses. This will continue to be determined on a case-by-case basis. (Id. at 19.)

This statute, in other words, was meant to apply to direct Federal procurement programs like the 8(a) program or the DOD SBD program. rather than a program involving state and local procurements reimbursed by DOT financial assistance.

The TEA-21 program is a more recent. more specific statute governing DOT recipients' programs. In contrast. the older, more general section 1626(e) evinces no specific intent to govern the DOT DBE program. There is no evidence that Congress, in enacting section 1626(e). had any awareness of or intent to alter the DOT DBE program.

A number of provisions of the TEA–21 statute suggest that Congress intended to impose specific requirements for the DOT program. without regard to other more general statutory references. For example, the $16.6 million size cap and the uniform certification requirements suggest that Congress wanted the eligibility for the DOT program to be determined in very specific ways. giving no hint that they intended these specific requirements to be overridden in the case of ANCs.

The Department concludes that section 1626(e) is distinguishable from the DOT DBE statutes. and that the latter govern the implementation of the DBE program. The Department is not compelled to alter its approach to certification in the case of ANCs.

Section 26.81 What Are the Requirements for Unified Certification Programs?

As was the case following the 1992 NPRM, a significant majority of the large number of commenters addressing the issue favored implementing the proposed UCP requirement. which the final rule retains largely as proposed. A few commenters suggested that airports be included in UCPs for concession purposes as well as for FAA-assisted contracting. because there are not any significant differences between the certification standards for concessionaires and contractors (the only exception is size standards. which are easy to apply). We agree. and the final rule does not make an exception for concessions (regardless of the CFR part in which the concessions provisions appear). Some commenters wanted either a longer or shorter implementation period than the SNPRM proposed, but we believe the proposal is a good middle ground between the goal of establishing UCPs as soon as possible and the time recipients will need to resolve organizational. operational. and funding issues.

There were a number of comments and questions about details of the UCP provision. One recipient wondered whether a UCP may or must be separate from a recipient and what the legal liability implications of various arrangements might be. As far as the rule is concerned, a UCP can either be situated within a recipient's organization or elsewhere. Recipients can take state law concerning liability into account in determining how best to structure a UCP in their state. Another recipient asked if existing UCPs could be exempted from submitting plans for approval. Rather than being exempted, we believe that it would be appropriate for such UCPs to submit their existing plans. They would have to change them only to the extent needed to conform to the requirements of the rule.

Some commenters asked about the relationship of UCPs to recipients. For example, should a recipient be able to certify a firm that the UCP had not certified (or whose application the UCP had not yet acted on) or refuse to recognize the UCP certification of a firm the recipient did not think should be eligible? In both cases, the answer is no. Allowing this kind of discretion would fatally undermine the "one-stop shopping" rationale of UCPs. However. a recipient could, like any other party. initiate a third-party challenge to a UCP certification action. the result of which could be appealed to DOT.

We would emphasize that the form of the UCP is a matter for negotiation among DOT recipients in a state. and this regulation does not prescribe its organization. A number of models are available, including single state agencies. consortia of recipients that hire a contractor or share the workload among themselves, mandatory reciprocity among recipients. etc. It might be conceivable for a UCP to be a "virtual entity" that is not resident in any particular location. What matters is that the UCP meet the functional requirements of this rule and actually provide one-stop shopping service to applicants. The final rule adds a provision to clarify that UCPs—even when not part of a recipient's own organization-must comply with all provisions of this rule concerning certification and nondiscrimination. Recipients cannot use a UCP that does not do so. For example, if a UCP fails to comply with part 26 certification standards and procedures, or discriminates against certain applicants, the Secretary reserves the right to direct recipients not to use the UCP, effectively "decertifying" the UCP for purposes of DOT-assisted programs. In this case, which we hope will never happen. the Department would work with recipients in the state on interim measures and replacement of the erring UCP.

The SNPRM proposed "pre-certification." That is, the UCP would have to certify a firm before the firm became eligible to participate as a DBE in a contract. The application could not be submitted as a last-minute request in connection with a procurement action, which could lead to hasty and inaccurate certification decisions. Commenters were divided on this issue, with most expressing doubts about the concept. The Department believes that avoiding last-minute (and especially post-bid opening) applications is important to an orderly and accurate certification process. so we are retaining this requirement. However, we are modifying the timing of the requirement. by requiring that certification take place before the bid/offer due date, rather than before the issuance of the solicitation. The certification action must be *completed* by this date in order for the firm's proposed work on the particular contract to be credited toward DBE goals. It is not enough for the application to have been submitted by the deadline.

The SNPRM proposed that, once UCPs were up and running. a UCP in State A would not have to process an application from a firm whose principal place of business was in State B unless State B had first certified the firm. Most commenters supported this proposal, one noting that it would help eliminate problems of having to make costly out-of-state site visits. It would also potentially reduce confusion caused by multiple, and potentially conflicting, outcomes in certification decisions. One commenter was concerned that this provision would lead to "free-rider" problems among recipients. The Department will be alert to this possibility, but we do not see it as precluding going forward with this provision. We have added a provision making explicit that when State B has certified a firm, it would have an obligation to send copies of the information and documents it had on the firm to State A when the firm applied there.

All save one of the comments on mandatory reciprocity opposed the concept. That is, commenters favored UCPs being able to choose whether or not to accept certification decisions made by other UCPs. The Department urges UCPs to band together in multi-state or regional alliances, but we believe that it is best to leave reciprocity discretionary. Mandatory reciprocity, even among UCPs, could lead to forum shopping problems.

UCPs will have a common directory, which will have to be maintained in electronic form (i.e.. on the internet). One commenter suggested that this electronic directory be updated daily. We think this comment has merit. and the final rule will require recipients to keep a running update of the electronic directory. making changes as they occur.

Section 26.83 What Procedures Do Recipients Follow in Making Certification Decisions?

Commenters generally supported this certification process section. and we are adopting it with only minor changes. Commenters suggested that provision for electronic filing of applications be discretionary rather than mandatory. We agree. and the final rule does not mandate development of electronic filing systems. Some commenters remained concerned about site visits and asked for more guidance on the subject. We intend to provide future guidance on this subject.

Most commenters who address&the subject favored the development of a mandatory, nationwide. standard DOT application form for DBE eligibility. A number of commenters supplied the forms they use as examples. We believe that this is a good idea, which will help avoid confusion among applicants in a nationwide program. However. we have

not yet developed a form for this purpose. The final rule reserves a requirement for recipients to use a uniform form We intend to work on developing such a form during the next year. in consultation with recipients and applicants. Meanwhile, recipients can continue to use existing forms, modified as necessary to conform to the requirements of this part.

The SNPRM said recipients could charge a reasonable fee to applicants. A majority of commenters, both recipients and DBEs, opposed the idea of a fee or said it should be capped at a low figure. Fees are not mandatory. and they would be limited, under the final rule. to modest application fees (not intended to recover the cost of the certification process). However. if a recipient wants to charge a modest application fee. we do not see that it is inconsistent with the nature of the program to allow it to do so. Fee waivers would be required if necessary (i.e., a firm who showed they could not afford it). All fees would have to be approved by the concerned OA as part of the DBE program approval process, which would preclude excessive fees.

Given that reciprocity is discretionary among recipients. we thought it would be useful to spell out the options a recipient has when presented by an applicant with the information that another recipient has certified the firm. The recipient may accept the other recipient's certification without any additional procedures. The recipient can make an independent decision based, in whole or in part. on the information developed by the first recipient (e.g.. application forms, supporting documents, reports of site visits). The recipient may make the applicant start an entire new application process. The choice among these options is up to the recipient. (As noted above, UCPs will have these same options.)

Most commenters on the subject supported the three-year term for certifications. Some wanted a shorter or longer period. We believe the three-year term is appropriate, particularly given the safeguards of annual and update affidavits that the rule provides. In response to a few comments that recipients should have longer than the proposed 2 1 days after a change in circumstances to submit an update affidavit, we have extended the period to 30 days. If recipients want to have a longer term in their DBE programs than the three years provided in the rule. they can do so, with the Department's approval, as part of their DBE programs.

A few recipients said that the 90-day period for making decisions on applications (with the possibility of a 60-day extension) was too short. Particularly since this clock does not begin ticking until a *complete* application, including necessary supporting documentation, is received from the applicant, we do not think this time frame is unreasonable. We would urge recipients and applicants to work together to resolve minor errors or data gaps during the assembly of the package, before this time period begins to run.

Section 26.85 What Rules Govern Recipients' Denials of Initial Requests for Certification?

A modest number of commenters addressed this section, most of whom supported it as proposed. One commenter noted that it was appropriate to permit minor errors to be corrected in an application without invoking the 12-month reapplication waiting period. We agree. and we urge recipients to follow such a policy. Most commenters thought 12 months was a good length for a reapplication period. A few opposed the idea of a waiting period or thought a shorter period was appropriate. The rule keeps 12 months. but permits recipients to seek DOT approval. through the DBE program review process. for shorter periods.

Section 26.87 What Procedures Does a Recipient Use To Remove a DBE's Eligibility?

As long ago as 1983, the Department (in the preamble to the first DBE rule) strongly urged recipients to use appropriate due process procedures for decertification actions. Recipient procedures are still inconsistent and, in some cases, inadequate, in this respect. Quite recently, for example, litigation forced one recipient to rescind a decertification of an apparently ineligible firm because it had failed to provide administrative due process. We believe that proper due process procedures are crucial to maintaining the integrity of this program. The majority of commenters agreed, though a number of commenters had concerns about particular provisions of the SNPRM proposal.

Some recipients, for example, thought separation of functions was an unnecessary requirement, or too burdensome, particularly for small recipients. We believe separation of functions is essential: there cannot be a fair proceeding if the same party acts as prosecutor and judge. We believe that the burdens are modest, particularly in the context of state DOTs and statewide UCPs. We acknowledge that for small recipients, like small airports and transit authorities, small staffs may create problems in establishing separation of functions (e.g.. if there is only one person in the organization who is knowledgeable about the DBE program). For this reason, the rule will permit small recipients to comply with this requirement to the extent feasible until UCPs are in operation (at which time the UCPs would have to ensure separation of functions in all such cases). The organizational scheme for providing separation of functions will be part of each recipient's DBE program. In the case of a small recipient. if the DBE program showed that other alternatives (e.g., the airport using the transit authority's DBE officer as the decisionmaker in decertification actions, and vice-versa) were unavailable, the Department could approve something less than ideal separation of functions for the short term before the UCP becomes operational. In reviewing certification appeals from such recipients, the Department would take into account the absence of separation of functions.

It is very important that the decisionmaker be someone who is familiar with the DBE certification requirements of this part. The decisionmaker need not be an administrative law judge or some similar official; a knowledgeable program official is preferable to an ALJ who lacks familiarity with the program.

Another aspect of the due process requirements that commenters addressed was the requirement for a record of the hearing. which some commenters found to be burdensome. We want to emphasize that, while recipients have to keep a hearing record (including a verbatim record of the hearing). they do not need to produce a transcript unless there is an appeal. A hearing record is essential, because DOT appellate review is a review of the administrative record.

Some commenters suggested deleting two provisions. One of these allowed recipients to impose a sort of administrative temporary restraining order on firms pending a final decertification decision. The other allowed the effect of a decertification decision to be retroactive to the date of the complaint. The Department agrees that these two provisions could lead to unfairness, and so we have deleted them.

Section 26.89 What Is the Process for Certification Appeals to the Department of Transportation?

Several commenters addressed this section. supporting it with a few requests for modification. Some

commenters wanted a time limit for DOT consideration of appeals. We have added a provision saying that if DOT takes longer than 180 days from the time we receive a complete package, we will write everyone concerned with an explanation of the delay and a new target date for completion. Some commenters thought a different time limit for appeals to the Department (e.g., 180 days) would be beneficial. We believe that 90 days is enough time for someone to decide whether a decision of a recipient or UCP should be appealed and write a letter to DOT. This time period starts to run from the date of the final recipient decision on the matter. DOT can accept late-filed appeals on the basis of a showing of good cause (e.g.. factors beyond the control of the appellant). Some recipients thought that more time might be necessary to compile an administrative record, so we have permitted DOT to grant extensions for good cause. Generally, however, the Department will adhere to the 90-day time period in order to prevent delays in the appeals process. As a clarification, we have added a provision that all recipients involved must provide administrative record material to DOT when there is an appeal. For example, State A has relied on the information gathered by State B to certify Firm X. A competitor files an ineligibility complaint with State A. which decertifies the firm. Firm X appeals to the Department. Both State A and State B must provide their administrative record materials to DOT for purposes of the appeal. (The material would be provided to the Departmental Office of Civil Rights.)

Section 26.91 What Actions Do Recipients Take Following DOT Certification Appeal Decisions?

There were few comments concerning this section. Some comments suggested DOT appeal decisions should have mandatory nationwide effect. That is if DOT upheld the decertification action of Recipient A, Recipients B, C. D. E, etc. should automatically decertify the firm. This approach is inconsistent with the administrative review of the record approach this rule takes for appeals to DOT.

A DOT decision that A's decertification was supported by substantial evidence is not a DOT decision that the firm is ineligible. It is only a finding that A had enough evidence to decertify the firm, Other results might also be supported by substantial evidence, Nevertheless, when the Department takes action on an appeal, other recipients would be well advised to review their own decisions to see if any new proceedings are appropriate. One comment suggested the Department should explain a refusal to accept a complaint. This is already the Department's practice.

The SNPRM included a proposal to permit direct third-party complaints to the Department. There were few comments on this proposal. which would have continued an existing DOT practice. Some of these comments suggested dropping this provision, saying it made more sense to have all certification matters handled at the recipient level in the first instance. Others raised procedural issues (e.g., the possibility of the Department holding *de novo* hearings). The Department has reconsidered this proposal, and we have decided to delete it. We believe it will avoid administrative confusion and simplify procedures for everyone if all certification actions begin at the recipient level. with DOT appellate review on the administrative record.

Subpart F-Compliance and Enforcement

There were very few comments concerning this subpart, which we are adopting as proposed. One section has been added to reflect language in TEA-21 that prohibits sanctions against recipients for noncompliance in situations where compliance is precluded by a final Federal court order finding the program unconstitutional.

DBE Participation in Airport Concessions

The Department proposed a number of changes to its airport concessions DBE program rule in the 1997 SNPRM. We received a substantial number of comments on these proposals. The Department is continuing to work on its responses to these comments. as well as on refinements of the rule to ensure that it is narrowly tailored. This work is not complete. Rather than postpone issuance of the rest of the rule pending completion of this work, we are not issuing final concessions provisions at this time. The existing concessions provisions of 49 CFR part 23 will remain in place pending completion of the revised rule.

Regulatory Analyses and Notices

Executive Order 12866

This rule is a significant rule under Executive Order 12866. because of the substantial public interest concerning and policy importance of programs to ensure nondiscrimination in Federally-assisted contracting. It also affects a wide variety of parties, including recipients in three important DOT financial assistance programs and the DBE and non-DBE contractors that work for them. It has been reviewed by the Office of Management and Budget. It is also a significant rule for purposes of the Department's Regulatory Policies and Procedures.

We do not believe that the rule will have significant economic impacts, however. In evaluating the potential economic impact of this rule. we begin by noting that it does not create a new program. It simply revises 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, not by these revisions. 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.

The rule's "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 recipients' 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. Comments did not provide, and the Department does not have. any significant information that would allow the Department to estimate any such impacts.

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.

This rule, 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 that seek to work in DOT financial assistance programs. To the extent that the proposals in this rule (e.g.. with respect to changes in the methods used to set overall goals) lead to 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 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.

Paperwork Reduction Act

A number of provisions of this rule involve information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA). One of these provisions, concerning a report of DBE achievements that recipients make to the Department, is the subject of an existing OMB approval under the PRA.

With one exception, the other information collection requirements of the rule continue existing part 23 requirements. major elements of the DBE program that recipients and contractors have been implementing since 1980 or 1983. While the final rule modifies these requirements in some ways. the Department believes the overall burden of these requirements will remain the same or shrink. These requirements are the following:

- Firms applying for DBE certification must provide information to recipients to allow them to make eligibility decisions. Currently certified firms must provide information to recipients to allow them to review the firms' continuing eligibility. (After the UCP requirements of the rule are implemented, the burdens of the certification provisions should be substantially reduced.)
- When contractors bid on prime contracts that have contract goals. they must document their DBE participation and/or the good faith efforts they have made to meet the contract goals. (Given the final rule's emphasis on race-neutral measures, it is likely the burden in this area will be reduced.)
- Recipients must maintain a directory of certified DBE firms. (Once UCPs are implemented, there will be 52 consolidated directories rather than the hundreds now required. reducing burdens substantially.)
- Recipients must calculate overall goals and transmit them to the Department for approval. (The process of setting overall goals is more flexible, but may also be more complex. than under part 23. As they make their transition to the final rule's goal-setting process during the first years of implementation, recipients may temporarily expend more hours than in the past on information-related tasks.)
- Recipients must have a DBE program approved by the Department. (The final rule includes a one-time requirement to submit a revised program document making changes to conform to the new regulation.)

The Department estimates that these program elements will result in a total of approximately 1.58 million burden hours to recipients and contractors combined during the first year of implementation and approximately 1.47 million annual burden hours thereafter.

The final rule also includes one new information collection element. It calls for recipients to collect and maintain data concerning both DBE and non-DBE bidders on DOT-assisted contracts. This information is intended to assist recipients in making more precise determinations of the availability of DBEs and the shape of the "level playing field" the maintenance of which is a major objective of the rule. The Department estimates that this requirement will add 254,595 burden hours in the first year of implementation. This figure is projected to decline to 193.261 hours in the second year and to 161,218 hours in the third and subsequent years.

Both as the result of comments and what the Department learns as it implements the DBE program under part 26, it is possible for the Department's information needs and the way we meet them to change. Sometimes the way we collect information can be changed informally (e.g., by guidance telling recipients they need not repeat information that does not change significantly from year to year). In other circumstances. a technical amendment to the regulation may be needed. In any case, the Department will remain sensitive to situations in which modifying information collection requirements becomes appropriate.

As required by the PRA. the Department has submitted an information collection approval request to OMB. Organizations and individuals desiring to submit comments on information collection requirements should direct them to the Department's docket for this r&making. You may also submit copies of your comments to the Office of Information and Regulatory Affairs (OIRA). OMB, Room 10235. New Executive Office Building, Washington, DC, 20503; Attention: Desk Officer for U.S. Department of Transportation.

The Department considers comments by the public on information collections for several purposes:

- Evaluating the necessity of information collections for the proper performance of the Department's functions, including whether the information has practical utility.
- Evaluating the accuracy of the Department's estimate of the burden of the information collections, including the validity of the methods and assumptions used.
- Enhancing the quality. usefulness. and clarity of the information to be collected.
- Minimizing the burden of the collection of information on respondents. including through the use of electronic and other methods.

The Department points out that, with the exception of the bid data collection, all the information collection elements discussed in this section of the preamble have not only been part of the Department's DBE program for many years. but have also been the subject of extensive public comment following the 1992 NPRM and 1997 SNPRM. Among the over 900 comments received in response to these notices were a number addressing administrative burden issues surrounding these program elements. In this final rule. the Department has responded to these comments.

OMB is required to make a decision concerning information collections within 30-60 days of the publication of this notice. Therefore. for best effect, comments should be received by DOT/OMB within 30 days of publication. Following receipt of OMB approval, the Department will publish a Federal **Register** notice containing the applicable OMB approval numbers.

Federalism

The rule 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 rule does not significantly alter the role of state and local governments vis-a-vis DOT from the present part 23. The availability of program waivers could allow greater flexibility for state and local participants, however.

List of Subjects

49 CFR Parr 23

Administrative practice and procedure. Airports. Civil rights,

Concessions. Government contracts. Grant programs-transportation. Minority businesses, Reporting and recordkeeping requirements.

49 CFR Part 26

Administrative practice and procedure. Airports. Civil rights, Government contracts, Grant programs-transportation. Highways and roads. Mass transportation. Minority businesses, Reporting and recordkeeping requirements.

Issued this 8th day of January, 1999. at Washington. DC.

Rodney E. **Slater,**

Secretary of Transportation.

For the reasons set forth in the preamble, the Department amends 49 CFR subtitle A as follows:

PART 23—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISE IN AIRPORT CONCESSIONS

1. Revise the heading of 49 CFR part 23 as set forth above.

2. Revise the authority citation for 49 CFR part 23 to read as follows:

Authority: 42 U.S.C. 200d *et* seq.: 49 U.S.C 47107 and 47123: Executive Order 12138, 3 CFR, ,979 Comp., p. 393.

Subparts A, C, D, and E-[Removed and Reserved]

3. Remove and reserve subparts A. C, D. and E of part 23.

§ 23.89 [Amended]

4. Amend § 23.89 as follows:

a. In the definition of "disadvantaged business," remove the words "§ 23.61 of subpart D of this part" and add the words "49 CFR part 26"; and remove the words "§ 23.61" in the last line of the definition and add the words "49 CFR part 26".

b. In the definition of "small business concern." paragraph (b), remove the words "§ 23.43(d)" and add the words "§ 23.43(d) in effect prior to March 4, 1999 (See 49 CFR Parts 1 to 99 revised as of October 1, 1998.)".

c. I" the definition of "socially and economically disadvantaged individuals." remove the words "§ 23.61 of subpart D of this part" and add "49 CFR part 26".

§ 23.93 [Amended]

5. Amend § 23.93(a) introductory text by removing the words "§ 23.7" and adding the words "§ 26.7".

$23.95 [Amended]

6. Amend § 23.95(a)(1) by removing the words "based on the factors listed in § 23.45(g)(5)" and adding the words "consistent with the process for setting overall goals set forth in 49 CFR 26.45".

7. In addition, amend § 23.95 as follows:

a. In paragraph (f)(1), remove the words "§ 23.51" and add the words "49 CFR part 26. subpart E";

b. In paragraph (f) (2), remove the words "Except as provided in § 23.51(c), each" and add "Each";

c. Remove paragraph (f) (5) ;

d. In paragraph (g)(l), remove the words "§ 23.53" and add the words "49 CFR part 26. subpart D".

§ 23.97 [Amended]

8. Amend §_23.97 by removing the words "§ 23.55" and adding the-words "49 CFR 26.89".

523.11 [Removed]

9. Remove § 23.1 I 1.

10. Add a new 49 CFR part 26. to read as follows:

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

Subpart A—General

Sec.
26.I What are the objectives of this part?
26.3 To whom does this part apply?
26.5 What do the terms used in this part mean?
26.7 What discriminatory actions are forbidden?
26.9 How does the Department issue guidance and interpretations under this part?
26.1 1 What records do recipients keep and report?
26.13 What assurances must recipients and contractors make?
26.15 How can recipients apply for exemptions or waivers?

Subpart B-Administrative Requirements for DBE programs for Federally-Assisted Contracting

26.21 Who must have a DBE program?
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?
26.3, What requirements pertain to the DBE directory?
26.33 What steps must a recipient take to address overconcentration of DBEs in certain types of work?
26.35 What role do business development and mentor-protégé programs have in the DBE program?
26.37 What are a recipient's responsibilities for monitoring the performance of other program participants?

Subpart C--Goals, Good Faith Efforts, and Counting

26.4, What is the role of the statutory 1" percent goal in this program?
26.43 Can recipients use set-aides or quotas as part of this program?
26.45 How do recipients set overall goals?
26.47 Can recipients be penalized for failing to meet overall goals?
26.49 How arc overall goals established for transit vehicle manufacturers?
26.51 What means do recipients use to meet overall goals?
26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?
26.55 How is DBE participation counted toward goals?

Subpart D--Certification Standards

26.6, How arc burdens of proof allocated in the certification process?
26.63 What rules govern group membership determinations?
26.65 What rules govern business size determinations?
26.67 What rules govern determinations of social and economic disadvantage?
26.69 What rules govern determinations of ownership?
26.7, What rules govern determinations concerning control?
26.73 What are other rules affecting certification?

Subpart E-Certification Procedures

26.8, What are the requirements for Unified Certification Programs?
26.83 What procedures do recipients follow in making certification decisions?
26.85 What rules govern recipients' denials of initial requests for certification?
26.87 What procedures does a recipient use to remove a DBE's eligibility?
26.89 What is the process far certification appeals to the Department of Transportation?
26.9, What actions do recipients take following DOT certification appeal decisions?

Subpart F-Compliance and Enforcement

26.101 What compliance procedures apply to recipients?
26.103 What enforcement actions apply in FHWA and FTA programs?
26.105 What enforcement actions apply in FAA Programs?
26.107 What enforcement actions apply to firms participating in the DBE program?
26.109 What are the rules governing information, confidentiality, cooperation, and intimidation or retaliation?
Appendix A to part 26—Guidance Concerning Good Faith Efforts
Appendix B to part 26—Forms [Reserved]
Appendix C to part 26—DBE Business Development Program Guidelines
Appendix D to part 26—Mentor-Protégé Program Guidelines
Appendix E to part 26—Individual Determinations of Social and Economic Disadvantage

Authority: 23 U.S.C. 324: 42 U.S.C. 2000d *et seq.*); 49 U.S.C 1615, 47107, 47113, 47123:

Sec. 1101(b), Pub. L. 105–178, 112 Stat. 107, 113.

Subpart A-General

§ 26.1 What are the objectives **of this part?**

This part 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 create a level playing field on which DBEs can compete fairly for DOT-assisted contracts:

(c) To ensure that the Department's DBE program is narrowly tailored *in* accordance with applicable law:

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

(e) To help remove barriers to the participation of DBEs in DOT-assisted contracts:

(f) To assist the development of firms that can compete successfully in the marketplace outside the DBE program: and

(g) To provide appropriate flexibility to 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:

(I) Federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102–240, 105 Stat. 1914. or Titles I, III. and V of the Transportation Equity Act for the 21st Century (TEA–21), Pub. L. 105–178, 112 stat. 107.

(2) Federal transit funds authorized by Titles I, III, V and VI of ISTEA, Pub. L. 102–240 or by Federal transit laws in Title 49. U.S. Code, or Titles I, III, and V of the TEA-21. Pub. L. 105–178.

(3) Airport funds authorized by 49 U.S.C. 47101. etseq.

(b) [Reserved]

(c) If you are letting a contract. and that contract is to be performed entirely outside the United States, its territories and 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, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

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

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

Compliance means that a recipient has 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, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).

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

(1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation. in which 51 percent of the stock is owned by one or more such individuals: and

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

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

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.

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

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

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

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

Native Hawaiian Organization means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians

Noncompliance means that a recipient has not correctly implemented the requirements of this part.

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: The individual's ownership interest in an applicant or participating DBE firm; or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

Primary industry classification means the four digit Standard Industrial Classification (SIC) code designation which best describes the primary business of a firm. The SIC code designations are described in the Standard Industry Classification Manual. As the North American Industrial Classification System (NAICS) replaces the SIC system, references to SIC codes and the SIC Manual are deemed to refer to the NAICS manual and applicable codes. The SIC Manual and the NAICS Manual are available through the National Technical Information Service (NTIS) of the U.S. Department of Commerce (Springfield, VA, 22261). NTIS also makes materials available through its web site (www.ntis.gov/naics).

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

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

Program means any undertaking on a recipient's part to use DOT financial assistance, authorized by the laws to which this part applies.

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

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

Recipient is any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA. FHWA. or FTA. or who has 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 § 26.65(b).

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

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

(2) Any individual in the following groups, members of which are 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. Dominican, Central or South American, or other Spanish or Portuguese culture or origin. regardless of race:

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

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

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

You refers to a recipient. unless a statement in the text of this part or the context requires otherwise (i.e.. 'You must do XYZ' means that recipients must do XYZ).

§ 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 part 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.

§ 26.9 How does the Department issue guidance and interpretations under this part?

(a) This part applies instead of subparts A and C through E of 49 CFR part 23 in effect prior to March 4. 1999. (See 49 CFR Parts 1 to 99, revised as of October 1, 1998.) Only guidance and interpretations (including interpretations set forth in certification appeal decisions) consistent with this part 26 and issued after March 4. 1999 have definitive, binding effect in implementing the provisions of this part and constitute the official position of the Department of Transportation

(b) The Secretary of Transportation, Office of the Secretary of Transportation, FHWA. FTA. and FAA may issue written interpretations of or written guidance concerning this part. Written interpretations and guidance are valid and binding, and constitute the official position of the Department of Transportation, only if they are issued over the signature of the Secretary of Transportation or if they contain the following statement:

The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR part 7.6.

§ 26.11 What records do recipients keep and report?

(a) [Reserved]

(b) You must continue to provide data about your DBE program to the Department as directed by DOT operating administrations.

(c) You must create and maintain a bidders list, consisting of all firms bidding on prime contracts and bidding or quoting subcontracts on DOT-assisted projects. For every firm, the following information must be included:

(1) Firm name:

(2) Firm address;

(3) Firm's status as a DBE or non-DBE;

(4) The age of the firm; and

(5) The annual gross receipts of the firm.

§ Section 26.13 What assurances must recipients and contractors make?

(a) 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 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program. as 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) Each contract you sign with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance:

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 contractor shall carry out applicable requirements of 49 CFR part 26 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.

526.15 How can recipients apply for exemptions or waivers?

(a) You can apply for an exemption from any provision of this part. To apply, you must request the exemption in writing from the Office of the Secretary of Transportation. FHWA. FTA. or FAA. The Secretary will grant the request only if it documents special or exceptional circumstances, not likely to be generally applicable, and not contemplated in connection with the rulemaking that established this part, that make your compliance with a specific provision of this part impractical. You must agree to take any steps that the Department specifies to comply with the intent of the provision from which an exemption is granted. The Secretary will issue a written response to all exemption requests.

(b) You can apply for a waiver of any provision of Subpart B or C of this part including, but not limited to, any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts. Program waivers are for the purpose of authorizing you to operate a DBE program that achieves the objectives of this part by means that may differ from one or more of the requirements of Subpart B or C of this part. To receive a program waiver. 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 (b)(2) of this section. Before submitting your 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 part using different or innovative means other than those that are provided in subpart B or C of this part:

(ii) Conditions in yourjurisdiction 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 applicable law and program requirements of the concerned operating administration's financial assistance program.

(3) The Secretary has the authority to approve 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:

(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 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 part's provisions. The Secretary may also extend the waiver, if he or she determines that all requirements of paragraphs (b)(2) and (3) of this section continue to be met. Any such extension shall be for no longer than period originally set for the duration of the program.

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 this part:

(1) All FHWA recipients receiving funds authorized by a statute to which this part applies:

(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)(l) You must submit a DBE program conforming to this part by August 31, 1999 to the concerned operating administration (OA). Once the OA has approved your program. the approval counts for all of your DOT-assisted programs (except that goals are reviewed and approved by the particular operating administration that provides funding for your DOT-assisted contracts).

(2) You do not 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 that 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.

25.27 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 your 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 must recipients have?

(a) You must establish, as part of your DBE program, a contract clause to require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than a specific number of days from receipt of each payment you make to the prime contractor. This clause must also require the prompt return of retainage payments from the prime contractor to the subcontractor within a specific number of days after the subcontractor's work is satisfactorily completed.

(1) This clause may provide for appropriate penalties for failure to comply. the terms and conditions of which you set.

(2) This clause may also provide that any delay or postponement of payment among the parties may take place only for good cause. with your prior written a p roval.

(b) You may also establish, as part of your DBE program, any of the following additional mechanisms t" ensure prompt payment:

(1) A contract clause that requires prime contractors to include in their subcontracts language providing that prime contractors and subcontractors will "se appropriate alternative dispute resolution mechanisms to resolve payment disputes. You may specify the nature of such mechanisms.

(2) A contract clause providing that the prime contractor will not be reimbursed for work performed by subcontractors unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have performed.

(3) Other mechanisms. consistent with this part and applicable state and local law. to ensure that DBEs and other contractors are fully and promptly paid.

§ 26.31 What requirements pertain to the DBE directory?

You must maintain and make available to interested persons a directory identifying all firms eligible to participate as DBEs in your program. 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. 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 address overconcentration of DBEs in certain types of work?

(a) If you determine that DBE firms are so overconcentrated in a certain type of work as t" unduly burden the opportunity of non-DBE firms to participate in this type of work. you must devise appropriate measures to address this overconcentration.

(b) These measures may include the use of incentives. technical assistance. business development programs. mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which you have determined that non-DBEs are unduly burdened. You may also consider varying your use of contract goals, to the extent consistent with § 26.51, to unsure that non-DBEs are not unfairly prevented from competing for subcontracts.

(c) You must obtain the approval of the concerned DOT operating administration for your determination of overconcentration and the measures you devise to address it. Once approved, the measures become part of your DBE program.

§ 26.35 What role do business development and mentor-protégé programs have in the DBE program?

(a) You may or, if a" operating administration directs you to, you must establish a DBE business development program (BDP) to assist firms in gaining the ability to compete successfully in the marketplace outside the DBE program. You may require a DBE firm, as a condition of receiving assistance through the BDP, t" agree to terminate its participation in the DBE program after a certain time has passed or certain objectives have been reached. See Appendix C of this part for guidance on administering BDP programs.

(b) As part of a BDP or separately, you may establish a "mentor-protégé" program, in which another DBE or non-DBE firm is the principal source of business development assistance to a DBE firm.

(1) Only firms you have certified as DBEs before they are proposed for participation in a mentor-protégé program are eligible to participate in the mentor-protege program.

(2) During the course of the mentor-protégé relationship, you must:

(i) Not award DBE credit to a non-DBE mentor firm for using its own protégé firm for more than one half of its goal on any contract let by the recipient: and

(ii) Not award DBE credit to a non-DBE mentor firm for using its own protégé firm for more than every other contract performed by the protege firm.

(3) 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. See Appendix D of this part for guidance concerning the operation of mentor-protege programs.

(c) Your BDPs and mentor-protégé programs must be approved by the concerned operating administration before you implement them Once approved, they become part of your DBE program.

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

(a) You must implement appropriate mechanisms to ensure compliance with the part's requirements by all program participants (e.g.. applying legal and contract remedies available under Federal. state and local law). You must set forth these mechanisms in your DBE program.

(b) Your DBE, program must also in&de a monitoring and enforcement mechanism to verify that the work committed to DBEs at contract award is

actually performed by the DBEs. This mechanism must provide for a running tally of actual DBE attainments (e.g.. payments actually made to DBE firms) and include a provision ensuring that DBE participation is credited toward overall or contract goals only when payments are actually made to DBE firms.

Subpart C-Goals, Good Faith Efforts, and Counting

§ 26.41 What is the role of the statutory 10 percent goal in this program?

(a) The statutes authorizing this program provide that, except to the extent the Secretary determines otherwise, not less than IO percent of the authorized funds are to be expended with DBEs.

(b) This 10 percent goal is an aspirational goal at the national level, which the Department uses as a tool in evaluating and monitoring DBEs' opportunities to participate in DOT-assisted contracts.

(c) The national 10 percent goal does not authorize or require recipients to set overall or contract goals at the IO percent level, or any other particular level. or to take any special administrative steps if their goals are above or below 10 percent.

§ 26.43 Can recipients use set-asides or quotas as part of this program?

(a) You are not permitted to use quotas for DBEs on DOT-assisted contracts subject to this part.

(b) You may not set-aside contracts for DBEs on DOT-assisted contracts subject to this part, except that, in limited and extreme circumstances. you may use set-asides when no other method could be reasonably expected to redress egregious instances of discrimination.

§ 26.45 How do recipients set overall goals?

(a) You must set **an overall goal** for DBE participation in your DOT-assisted contracts.

(b) Your overall goal must be based on demonstrable evidence of the availability of ready. willing and able DBEs relative to all businesses ready, willing and able to participate on your DOT-assisted contracts (hereafter, the "relative availability of DBEs''). The goal must reflect your determination of the level of DBE participation you would expect absent the effects of discrimination. You cannot simply rely on either the IO percent national goal. your previous overall goal or past DBE participation rates in your program without reference to the relative availability of DBEs in your market.

(c) *Step 1. You* must begin your goal setting process by determining a base figure for the relative availability of DBEs. The following are examples of approaches that you may take toward determining a base figure. These examples are provided as a starting point for your goal setting process. Any percentage figure derived from one of these examples should be considered a basis from which you begin when examining all evidence available in your jurisdiction. These examples are not intended as an exhaustive list. Other methods or combinations of methods to determine a base figure may be used. subject to approval by the concerned operating administration.

(1) Use *DBE* Directories and Census Bureau *Data*. Determine the number of ready, willing and able DBEs in your market from your DBE directory. Using the Census Bureau's County Business Pattern (CBP) data base, determine the number of all ready. willing and able businesses available in your market that perform work in the same SIC codes. (Information about the CBP data base may be obtained from the Census Bureau at their web site, www.census.gov/epcd/cbp/view/cbpview.html.) Divide the number of DBEs by the number of all businesses to derive a base figure for the relative availability of DBEs in your market.

(2) Use a bidders list. Determine the number of DBEs that have bid or quoted on your DOT-assisted prime contracts or subcontracts in the previous year. Determine the number of all businesses that have bid or quoted on prime or subcontracts in the same time period. Divide the number of DBE bidders and quoters by the number for all businesses to derive a base figure for the relative availability of DBEs in your market.

(3) Use data from a disparity study. Use a percentage figure derived from data in a valid, applicable disparity study.

(4) Use the goal of another DOT recipient. If another DOT recipient in the same. or substantially similar, market has set an overall goal in compliance with this rule. you may use that goal as a base figure for your goal.

(5) Alternative methods. Subject to the approval of the DOT operating administration. you may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market.

(d) *Step* 2. Once you have calculated a base figure, you must examine all of the evidence available in your jurisdiction to determine what adjustment, if any, is needed to the base figure in order t" arrive at your overall goal.

(1) There are many types of evidence that must be considered when adjusting the base figure. These include:

(i) The current capacity of DBEs to perform work in your DOT-assisted contracting program. as measured by the volume of work DBEs have performed in recent years;

(ii) Evidence from disparity studies conducted anywhere within your jurisdiction, to the extent it is not already accounted for in your base figure; and

(iii) If your base figure is the goal of another recipient, you must adjust it for differences in your local market and your contracting program.

(2) You may also consider available evidence from related fields that affect the opportunities for DBEs to form. grow and compete. These include. but are not limited tb:

(i) Statistical disparities in the ability of DBEs to get the financing, bonding and insurance required to participate in your program:

(ii) Data on employment. self-employment, education, training and union apprenticeship programs. to the extent you can relate it to the opportunities for DBEs to perform in your program.

(3) If you attempt to make an adjustment to your base figure to account for the continuing effects of past discrimination (often called the "but for" factor) or the effects of an ongoing DBE program. the adjustment must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought.

(e) Once you have determined a percentage figure in accordance with paragraphs (c) and (d) of this section, you should express your overall goal 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.

(f)(1) If you set overall goals on a fiscal year basis, you must submit them to the applicable DOT operating administration for review on August 1 of each year. unless the Administrator of the concerned operating administration establishes a different submission date.

(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, including your base figure and the evidence with which it was calculated, and the adjustments you made to the base figure and the evidence relied on for the adjustments. You should also include a summary listing of the relevant available evidence in yourjurisdiction and, where applicable. an explanation of why you did not use that evidence to adjust your base figure. You must also include your projection of the portions of the overall goal you expect to meet through race-neutral and race-conscious measures, respectively (see § 26.5 1 (c)).

(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 your method for calculating goals is inadequate. the operating administration may, after consulting with you. adjust your overall goal or require that you do so. The adjusted overall goal is binding on you.

(5) If you need additional time to collect data or take other steps to develop an approach to setting overall goals. you may request the approval of the concerned operating administration for an interim goal and/or go&setting mechanism. Such a mechanism must:

(i) Reflect the relative availability of DBEs in your local market to the maximum extent feasible given the data available to you: and

(ii) Avoid imposing undue burdens on non-DBEs.

(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 and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and your efforts to establish a level playing field for 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-focused media and trade association publications.

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

§ 26.47 Can recipients be penalized for failing to meet overall goals?

(a) You cannot be penalized. or treated by the Department as being in noncompliance with this rule, because your DBE participation falls short of your overall goal, unless you have failed to administer your program in good faith.

(b) If you do not have an approved DBE program or overall goal, or if you fail to implement your program in good faith, you are in noncompliance with this part.

§ 26.49 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 or propose 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 establish and submit for FTA's approval an annual overall percentage goal. In setting your overall goal. you should be guided, to the extent applicable, by the principles underlying § 26.45. The base from which you calculate this goal is the amount of FTA financial assistance included in transit vehicle contracts you will perform during the fiscal year in question. You must exclude from this base funds attributable to work performed outside the United States and its territories, possessions, and commonwealths. The requirements and procedures of this part with respect to submission and approval of overall goals apply to you as they do to recipients.

(c) As a transit vehicle manufacturer, you may make the certification required by this section if you have submitted the goal this section requires and FTA has approved it or not disapproved it.

(d) As a recipient. you may. with FTA approval. establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of complying through the procedures of this section.

(e) If you are an FHWA or FAA recipient, you may. with FHWA or FAA approval, use the procedures of this section with respect to procurements of vehicles or specialized equipment. If you choose to do so, then the manufacturers of this equipment must meet the same requirements (including goal approval by FHWA or FAA) as transit vehicle manufacturers must meet in FTA-assisted procurements.

§ 26.51 What means do recipients use to meet overall goals?

(a) You must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures, is awarded a subcontract on a prime contract that does not carry a DBE goal, or even if there is a DBE goal. wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g.. a prime contractor that uses a strict low bid system to award subcontracts).

(b) Race-neutral means include. but are not limited to, the following:

(I) Arranging solicitations, times foi the presentation of bids, quantities. specifications and delivery schedules in ways that facilitate DBE. and other small businesses, participation (e.g.. unbundling large contracts to make them more accessible to small businesses. requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces); .

(2) Providing assistance 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, and other small businesses, 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, and other small businesses. on recipient mailing lists for bidders: ensuring the dissemination to bidders on prime contracts of lists of potential 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, record keeping. and financial and accounting capability for DBEs and other small businesses;

(6) Providing services to help DBEs, and other small businesses, 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 program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;

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

(9) Assisting DBEs, and other small businesses. to develop their capability to utilize emerging technology and conduct business through electronic media.

(c) Each time you submit your overall goal for review by the concerned operating administration. you must also submit your projection of the portion of the goal that you expect to meet through race-neutral means and your basis for that projection. This projection is subject to approval by the concerned operating administration, in conjunction with its review of your overall goal.

(d) You must establish contract goals to meet any portion of your overall goal you do not project being able to meet using race-neutral means.

(e) 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 are not required to set a contract goal on every DOT-assisted contract. 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 your overall goal, you must set contract goals so that they will cumulatively result in meeting any portion of your overall goal you do not project being able to meet through the use of race-neutral means.

(3) 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.

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

(f) To ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination, you must adjust your use of contract goals as follows:

(1) If your approved projection under paragraph (c) of this section estimates that you can meet your entire overall goal for a given year through race-neutral means. you must implement your program without setting contract goals during that year.

Example to Paragraph *(f)(1)*: Your overall goal for Year I is 12 percent. You estimate that you can obtain 12 percent or more DBE participation through the use of race-neutral measures, without any use of contract goals. In this case. you do not set any contract goals for the contracts that will be performed in Year I.

(2) If, during the course of any year in which you are using contract goals, you determine that you will exceed your overall goal. you must reduce or eliminate the use of contract goals to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal. If you determine that you will fall short of your overall goal, then you must make appropriate modifications in your use of race-neutral and/or race-conscious measures to allow you to meet the overall goal.

Example to Paragraph (f)(2): In Year II, your overall goal is 12 percent. You have estimated that you can obtain 5 percent DBE participation through use of race-neutral measures. You therefore plan to obtain the remaining 7 percent participation through use or DBE goals. By September. you have already obtained 11 percent DBE participation for the year. For contracts let during the remainder of the year, you use contract goals only to the extent necessary to obtain an additional one percent DBE participation. However. if you determine in September that your participation for the year is likely to be only 8 percent total. then you would increase your use of race-neutral and/or race-conscious means during the remainder of the year in order to achieve your overall goal.

(3) If the DBE participation you have obtained by race-neutral means alone meets or exceeds your overall goals for two consecutive years. you are not required to make a projection of the amount of your goal you can meet using such means in the next year. You do not set contract goals on any contracts in the next year. You continue using only race-neutral means to meet your overall goals unless and until you do not meet your overall goal for a year.

Example to Paragraph (f)(3): Your overall goal for Years I and Year II is 10 percent. The DBE participation you obtain through race-neutral measures alone is 10 percent or more in each year. (For this purpose, it does not matter whether you obtained additional DBE participation through using contract goals in these years.) In Year III and following years, you do not need to make a projection under paragraph (c) of this section of the portion of your overall goal you expect to meet using race-neutral means. You simply use race-neutral means to achieve your overall goals. However, if in Year VI your DBE participation falls short of your overall goal, then you must make a paragraph (c) projection for Year VII and, if necessary, resume use of contract goals in that year.

(4) If you obtain DBE participation that exceeds your overall goal in two consecutive years through the use of contract goals (i.e., not through the use of race-neutral means alone). you must reduce your use of contract goals proportionately in the following year.

Example to Paragraph (f)(4): In Years I and II, your overall goal is 12 percent, and you obtain 14 and 16 percent DBE participation, respectively. You have exceeded your goals over the two-year period by an average of 25 percent. In Year III, your overall goal is again 12 percent, and your paragraph (c) projection estimates that you will obtain 4 percent DBE participation through race-neutral means and 8 percent through contract goals. You then reduce the contract goal projection by 25 percent (i.e., from 8 to 6 percent) and set contract goals accordingly during the year. If in Year III you obtain 11 percent participation, you do not use this contract goal adjustment mechanism for Year IV, because there have not been two *consecutive* years of exceeding overall goals.

(g) In any year in which you project meeting part of your goal through race-neutral means and the remainder through contract goals, you must maintain data separately on DBE achievements in those contracts with and without contract goals, respectively. You must report this data to the concerned operating administration as provided in § 26.11.

§ 26.53 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 bidder/offeror who makes good faith efforts to meet it. You must determine that a bidder/offeror has made good faith efforts if thr bidder/

offeror does either of the following things:

(1) Documents that it has obtained enough DBE participation to meet the goal: or

(2) Documents that it made adequate good faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so. If the bidder/offeror does document adequate good faith efforts, you must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal. See Appendix A of this part for guidance in determining the adequacy of a bidder/offeror's good faith efforts.

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

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

(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 (see Appendix A of this part): and

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

(d) If you determine that the apparent successful bidder/offeror has failed to meet the requirements of paragraph (a) of this section, 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 met the goal or made adequate good faith efforts to do so.

(2) 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 meet the goal or make adequate good faith efforts to do so.

(3) The bidder/offeror must have the opportunity to meet in person with your reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so.

(4) You must send the bidder/offeror a written decision on reconsideration. explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so.

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

(e) In a "design-build" or "turnkey" contracting situation, in which the recipient lets a master contract to a contractor, who in turn lets subsequent subcontracts for the work of the project, a recipient may establish a goal for the project. The master contractor then establishes contract goals, as appropriate. for the subcontracts it lets. Recipients must maintain oversight of the master contractor's activities to ensure that they are conducted consistent with the requirements of this part.

(f)(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 you established for the procurement.

(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.

(g) You must apply the requirements of this section to DBE bidders/offerors for prime contracts. In determining whether a DBE bidder/offeror for a prime contract has met a contract goal, you count the work the DBE has committed to performing with its own forces as well as the work that it has committed to be performed by DBE subcontractors and DBE suppliers.

§ 26.55 How is DBE participation counted toward goals?

(a) When a DBE participates in a contract. you count only the value of the work actually performed by the DBE toward DBE goals.

(I) Count the entire amount of that portion of a construction contract (or other contract not covered by paragraph (a)(Z) of this section) that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the contract. including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).

(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.

(3) When a DBE subcontracts part of the work of its contract to another firm. the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.

(b) 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 with its own forces toward DBE goals.

(c) 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) When a DBE is presumed not to be performing a commercially useful function as provided in paragraph (c)(3) 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.

(5) Your decisions on commercially useful function matters are subject to review by the concerned operating administration, but are not administratively appealable to DOT.

(d) Use the following factors in determining whether a DBE trucking company is performing a commercially useful function:

(1) The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract. and there cannot be a contrived arrangement for the purpose of meeting DBE goals.

(2) The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.

(3) The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns. insures. and operates using drivers it employs.

(4) The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.

(5) The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE does not receive credit for the total value of the transportation services provided by the lessee, since these services are not provided by a DBE.

(6) For purposes of this paragraph (d), a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.

(e) Count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:

(l)(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 (e)(l), 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 person may be a regular dealer in such bulk items as petroleum products, steel, cement. gravel, stone. or asphalt without owning. operating. or maintaining a place of business as provided in this paragraph (e)(2)(ii) if the person both owns and operates distribution equipment for the products. 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 (e)(Z).

(3) With respect to materials or supplies 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.

(f) If a firm is not currently certified as a DBE in accordance with the standards of subpart D of this part at the time of the execution of the contract. do not count the firm's participation toward any DBE goals. except as provided for in § 26.87(i)).

(g) Do not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward your overall goal.

(h) Do not count the participation of a DBE subcontractor toward the prime contractor's DBE achievements or your overall goal until the amount being counted toward the goal has been paid to the DBE.

Subpart D-Certification Standards

§ 26.61 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 or individual disadvantage. business size. ownership, and control.

(c) You must rebuttably presume that members of the designated groups

identified in § 26.67(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. However, applicants have the obligation to provide you information concerning their economic disadvantage (see § *26.67).*

(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. (See Appendix E of this part.)

(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.

$26.63 **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 or she 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 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 a designated disadvantaged 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 § 26.89.

§ 26.65 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 $16.6 million. The Secretary adjusts this amount for inflation from time to time.

§ 26.67 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 require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

(2)(i) You must require each individual owner of a firm applying to participate as a DBE whose ownership and control are relied upon for DBE certification to submit a signed, notarized statement of personal net worth, with appropriate supporting documentation.

(ii) In determining net worth, you must exclude an individual's ownership interest in the applicant firm and the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). A contingent liability does not reduce an individual's net worth. The personal net worth of an individual claiming to be an Alaska Native will include assets and income from sources other than an Alaska Native Corporation and exclude any of the following which the individual receives from any Alaska Native Corporation: cash (including cash dividends on stock received from an ANC) to the extent that it does not. in the aggregate, exceed $2.000 per individual per annum: stock (including stock issued or distributed by an ANC as a dividend or distribution on stock): a partnership interest: land or an interest in land (including land or an interest in land received from an ANC as a dividend or distribution on stock); and an interest in a settlement trust.

(b) *Rebuttal ofpresumption of disadvantage.* (1) If the statement of personal net worth that an individual submits under paragraph (a)(2) of this section shows that the individual's personal net worth exceeds $750.000, the individual's presumption of economic disadvantage is rebutted. You are not required to have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

(2) If you have a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged you may. at any time. start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. Your proceeding must follow the procedures of § 26.87.

(3) 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. You may require the individual to produce information relevant to the determination of his or her disadvantage.

(4) When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility under this subpart unless and until he or she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds $750.000, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage.

(c) *8(a) and SDB Firms.* If a firm applying for certification has a current. valid certification from or recognized by the SBA under the 8(a) or small and disadvantaged business (SDB) program (except an SDB certification based on the firm's self-certification as an SDB), you may accept the firm's 8(a) or SDB certification in lieu of conducting your own certification proceeding. just as you may accept the certification of another DOT recipient for this purpose. You are not required to do so, however.

(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 each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to you, by a preponderance of the evidence. that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds $750,000 shall not be deemed to be economically disadvantaged. In making these determinations, use the guidance found in Appendix E of this part. You must require that applicants provide sufficient information to permit determinations under the guidance of Appendix E of this part.

§ 26.69 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 a" eligible DBE. a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.

(1) In the case of a corporation. such individuals must own at least 51 percent of the each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding.

(2) In the case of a partnership. 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged individuals. Such ownership must be reflected in the firm's partnership agreement.

(3) In the case of a limited liability company. at least 51 percent of each class of member interest must be owned by socially and economically disadvantaged individuals.

(c) The firm's ownership by socially and economically disadvantaged individuals must be real, substantial, and continuing. going beyond pro forma ownership of the firm as reflected in ownership documents. The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance. not merely the form, of arrangements.

(d) All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Except as provided in this paragraph (d), no securities or assets held in trust. or by any guardian for a minor, are considered as held by disadvantaged persons in determining the ownership of a firm. However, securities or assets held in trust are regarded as held by a disadvantaged individual for purposes of determining ownership of the firm, if -

(1) The beneficial owner of securities or assets held in trust is a disadvantaged individual, and the trustee is the same or another such individual; or

(2) The beneficial owner of a trust is a disadvantaged individual who. rather than the trustee. exercises effective control over the management, policy-making, and daily operational activities of the firm. Assets held in a revocable living trust may be counted only in the situation where the same disadvantaged individual is the sole grantor. beneficiary. and trustee.

(e) The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, a" unsecured note payable to the firm or a" owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, eve" if the debtor's ownership interest is security for the loan.

(f) The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership:

(1) The owner's expertise must be-

(i) In a specialized field;

(ii) Of outstanding quality;

(iii) In areas critical to the firm's operations:

(iv) Indispensable to the firm's potential success:

(v) Specific to the type of work the firm performs; and

(vi) Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.

(2) The individual whose expertise is relied upon must have a significant financial investment in the firm.

(g) 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-

(l) As the result of a final 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)(l) 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 who is-

(i) Involved in the same firm for which the individual is seeking certification, or a" 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 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 bee" 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. You do not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.

(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 a" 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.

§ 26.71 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. There can be no restrictions through corporate charter provisions. by-law provisions. contracts or any other formal or informal devices (e.g.. cumulative voting rights, voting powers attached to different classes of stock, employment contracts. requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements. voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm. This paragraph does not preclude a spousal co-signature on documents as provided for in § 26.69(j)(2).

(d) The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.

(1) A disadvantaged owner must hold the highest officer position in the company (e.g.. chief executive officer or president).

(2) In a corporation, disadvantaged owners must control the board of directors.

(3) In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.

(e) Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals 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 and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations. or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners 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 thr 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, 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)(1) 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.

(2) 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. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However. an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.

(k)(l) A socially and economically disadvantaged individual may control a firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager. employee, owner. or in another capacity. Except as otherwise provided in this paragraph, 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 you do in other situations, without regard to whether or not the other persons are immediate family members.

(2) 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.

(I) Whew a firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred t" 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:

(1) The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE: and

(2) The disadvantaged individual actually controls the management. policy. and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who formerly owned and/or controlled the firm.

(m) In determining whether 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

(n) You must grant certification t" 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 t" 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. but you must verify the disadvantaged owner's control of the firm in the additional type of work.

(o) 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.

(p) In order for a partnership to be controlled by socially and economically disadvantaged individuals. any non-disadvantaged partners must not have the power, without the specific written concurrence of the socially and economically disadvantaged partner(s), t" contractually bind the partnership or subject the partnership to contract or tort liability.

(q) The socially and economically disadvantaged individuals controlling a firm may use an employee leasing company. The use of such a company does not preclude the socially and economically disadvantaged individuals from controlling their firm if they continue to maintain an employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training. assigning. and otherwise controlling the on-the-job activities of the employees. as well as ultimate responsibility for wage and tax obligations related to the employees.

$26.73 What are other rules affecting certification?

(a)(l) 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) An eligible DBE firm must be owned by individuals who are socially and economically disadvantaged. Except as provided in this paragraph. a firm that is not owned by such individuals. but instead is owned by another firm-even a DBE firm-cannot be an eligible DBE.

(1) If socially and economically disadvantaged individuals own and control a firm through a parent or holding company. established for tax. capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, you may certify the subsidiary if it otherwise meets all requirements of this subpart. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.

(2) You may certify such a subsidiary only if there is cumulatively 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals. The following examples illustrate how this cumulative ownership provision works:

Example *1:* Socially and economically disadvantaged individuals own 100 percent of a holding company. which has a wholly-owned subsidiary. The subsidiary may be certified, if it meets all other requirements.

Example 2: Disadvantaged individuals own 100 percent of the holding company, which owns 5 1 percent of a subsidiary. The subsidiary may be certified. if all other requirements are met.

Example 3: Disadvantaged individuals own 80 percent of the holding company. which in turn owns 70 percent of a subsidiary. In this case. the cumulative ownership of the subsidiary by disadvantaged individuals is 56 percent (80 percent of the 70 percent). This is more than 51 percent. so you may certify the subsidiary. if all other requirements are met.

Example 4: Same as Example 2 or 3, but someone other than the socially and economically disadvantaged owners of the parent or holding company controls the subsidiary. Even though the subsidiary is owned by disadvantaged individuals. through the holding or parent company, you cannot certify it because it fails to meet control requirements.

Example 5: Disadvantaged individuals own 60 percent of the holding company. which in turn owns 51 percent of a subsidiary In this case, the cumulative ownership of the subsidiary by disadvantaged individuals is about 31 percent. This is less than 51 percent. so you cannot certify the subsidiary.

Example 6: The holding company, in addition to the subsidiary seeking certification. owns several other companies. The combined gross receipts of the holding companies and its subsidiaries are greater than the size standard for the subsidiary seeking certification and/or the gross receipts cap of § 26.65(b). Under the rules concerning affiliation, the subsidiary fails to meet the size standard and cannot be certified.

(f) Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is an independent business. owned and controlled by socially and economically disadvantaged individuals.

(g) 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.

(h) A firm that is owned by an Indian tribe, Alaska Native Corporation, or Native Hawaiian organization as an entity, rather than by Indians, Alaska Natives, or Native Hawaiians as individuals. may be eligible for certification. Such a firm must meet the size standards of § 26.65. Such a firm must be controlled by socially and economically disadvantaged individuals, as provided in § 26.71.

Subpart E-Certification Procedures

§ 26.81 What are the requirements for Unified Certification Programs?

(a) You and all other DOT recipients in your state must participate in a Unified Certification Program (UCP).

(1) Within three years of March 4, 1999, 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 for 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 you and the other recipients in your state fail to meet the deadlines set forth in this paragraph (a), 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 by a date 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) 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.

(I) Certification decisions by the UCP shall be binding on all DOT recipients within the state.

(2) 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.

(3) All obligations of recipients with respect to certification and nondiscrimination must be carried out by UCPs, and recipients may use only UCPs that comply with the certification and nondiscrimination requirements of this part.

(c) All certifications by UCPs shall be pre-certifications: i.e., certifications that have been made final before the due date for bids or offers on a contract on which a firm seeks to participate as a DBE.

(d) A LJCP 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. The "home state" UCP shall share its information and documents concerning the firm with other UCPs that are considering the firm's application.

(e) Subject to DOT approval as provided in this section, the recipients in two or more states may form a regional LJCP. 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.

(f) 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.

(g) Each UCP shall maintain a unified DBE directory containing, for all firms certified by the UCP (including those from other states certified under the provisions of this section). the information required by § 26.3 1. The UCP shall make the directory available to the public electronically. on the internet. as well as in print. The UCP shall update the electronic version of the directory by including additions, deletions. and other changes as soon as they are made.

(h) Except as otherwise specified in this section. all provisions of this subpart and subpart D of this part pertaining to recipients also apply to UCPs.

§ 26.83 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 your program.

(b) You must determine the eligibility of firms as DBEs consistent with the standards of subpart D of this part. When a UCP is formed, the UCP must meet all the requirements of subpart D of this part and this subpart that recipients are required to meet.

(c) You must take all the following steps in determining whether a DBE firm meets the standards of subpart D of this part:

(1) Perform an on-site visit to the offices of the firm. You must interview the principal officers of the firm and review their résumés 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;

(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) Rewire potential DBEs to complete and submit an appropriate application form.

(i) *Uniform form.* [Reserved)

(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) When another recipient, in connection with its consideration of the eligibility of a firm, makes a written request for certification information you have obtained about that firm (e.g.. including application materials or the report of a site visit, if you have made one to the firm), you must promptly make the information available to the other recipient.

(e) When another DOT recipient has certified a firm, you have discretion to take any of the following actions:

(1) Certify the firm in reliance on the certification decision of the other recipient;

(2) Make an independent certification decision based on documentation provided by the other recipient. augmented by any additional information you require the applicant to provide; or

(3) Require the applicant to go through your application process without regard to the action of the other recipient.

(f) Subject to the approval of the concerned operating-administration as part of your DBE program. you may impose a reasonable application fee for certification. Fee waivers shall be made in appropriate cases.

(g) 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.

(h) 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 § 26.87. You may not require DBEs to reapply for certification as a condition of continuing to participate in the program during this three-year period, unless the factual basis on which the certification was made changes.

(i) If you are a DBE, you must inform the recipient or UCP in writing of any change in circumstances affecting your ability to meet Size, disadvantaged status, ownership, or control requirements of this part or any material change in the information provided in your application form.

(1) Changes in management responsibility among members of a limited liability company arc covered by this requirement.

(2) You must attach supporting documentation describing in detail the nature of such changes.

(3) 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 30 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 § 26.109(c).

(j) If you are a DBE. you must provide to the recipient, every year on the anniversary of the date of your 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 (i) 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 § 26.109(c).

(k) If you are a recipient, you must 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 your 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 § 26.89.

§ 26.85 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 your DBE program, 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 § 26.89.

§ 26.87 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 must be protected as provided in § 26.109(b).

(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 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, as provided in 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 § 26.89, 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 copying the record.

(3) The firm may elect to present information and arguments in writing. without going to a hearing. In such a situation, you bear the same burden of proving. by a preponderance of the evidence. that the firm does not meet the certification standards. as you would during a hearing.

(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.

(1) Your method of implementing this requirement must be made part of your DBE program.

(2) The decisionmaker must be an individual who is knowledgeable about the certification requirements of your DBE program and this part.

(3) Before a UCP is operational in its state. a small airport or small transit authority (i.e.. an airport or transit authority serving an area with less than 250,000 population) is required to meet this requirement only to the extent feasible.

(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 the firm was certified;

(3) Information that was concealed or misrepresented bv 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 § 26.89. You must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed you to initiate the proceeding.

(h) *Status of firm during proceeding.* (1) 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.

(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 to you that it has made a good faith effort to do so.

(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 DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after you issued the notice of its ineligibility shall not count toward your overall goal, but may count toward the contract goal.

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

(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 § 26.89.

§ 26.89 What is **the process for** certification **appeals to the Department of Transportation?**

(a)(l) 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 § 26.87(c)), you may appeal to the Department if the recipient does not find reasonable cause to propose removing the firm's eligibility or, following a removal of eligibility proceeding. determines that the firm is eligible.

(3) Send appeals to the following address: Department of Transport&on. 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 final 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 for the late filing of the appeal.

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

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

(d) When it receives an appeal, the Department requests a copy of the recipient's complete administrative record in the matter. If you are the recipient. you must provide thr administrative record, including a hearing transcript, within 20 days of the Department's request. The Department may extend this time period on the basis of a recipient's showing of good cause. 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. If an appeal is brought concerning one recipient's certification decision concerning a firm, and that recipient relied on the decision and/or administrative record of another recipient. this requirement applies to both recipients involved.

(e) The Department makes its decision based solely on the entire administrative record. The Department does not make a de novo review of the matter and does not conduct a hearing. The Department may supplement the administrative record by adding relevant information made available by the DOT Office of Inspector General: Federal. state. or local law enforcement authorities: officials of a DOT operating administration or other appropriate DOT office; a recipient: or a firm or other private party.

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

(1) The Department affirms your decision unless it determines. based on the entire administrative record, that your decision is unsupported by

substantial evidence or inconsistent

to you, the firm, and the complainant in an ineligibility complaint. A copy of the notice is also sent to any other recipient whose administrative record or decision has been involved in the proceeding (see paragraph (d) of this section). The notice includes the reasons for the Department's decision, including specific references to the evidence in the record that supports each reason for the decision.

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

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

§ 26.91 What actions do recipients take following DOT certification appeal decisions?

(a) If you are the recipient from whose action an appeal under § 26.89 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 § 26.89 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 § 26.87(i) take effect.

(2) If the Department determines that you erroneously failed to find reasonable cause to remove the firm's eligibility, you must expeditiously commence a proceeding to determine whether the firm's eligibility should be removed, as provided in § 26.87.

(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 § 26.87. 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.

Subpart F-Compliance and Enforcement

526.101 What compliance procedures apply to recipients?

(a) If you fail to comply with any requirement of this part, you may be subject to formal enforcement action under 526.103 or § 26.105 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 49U.S.C. 47106(d), 47111(d). and 47122; and in the case of the FTA program. any actions permitted under 49 U.S.C. chapter 53 or applicable FTA program requirements.

(b) As provided in statute, you will not be subject to compliance actions or sanctions for failing to carry out any requirement of this part because you have been prevented from complying because a Federal court has issued a final order in which the court found that the requirement is unconstitutional.

§ 26.103 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 the concerned operating administration's Office of Civil Rights. If you want to file a complaint, you must do so no later than 180 days after the date of the alleged violation or the date on which you learned of a continuing course of conduct in violation of this part. In response to your written request. the Office of Civil Rights may extend the time for filing in the interest ofjustice. specifying in writing the reason for so doing. The Office of Civil Rights may protect the confidentiality of your identity as provided in § 26.109(b). Complaints under this part are limited to allegations of violation of the provisions of this part.

(b) *Compliance reviews.* The concerned operating administration may review the recipient's compliance with this part at any time, including reviews of paperwork and on-site reviews, as appropriate. The Office of Civil Rights may direct the operating administration to initiate a compliance review based on complaints received.

(c) Reasonable cause notice. If it appears. from the investigation of a complaint or the results of a compliance review. that 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**

(2) If

terms

(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.

§ 26.105 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 the 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 § 26.103(b) and this section 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.

§ 26.107 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 that 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 that, 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 of this part. 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, Program Fraud and Civil Remedies. against any participant in the DBE program whose conduct is subject to such action under 49 CFR 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.

526.109 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 (5 U.S.C. 552 and 552a). 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 16 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 and/or suspension and debarment; with respect to a complainant or appellant. dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment).

(d) *Intimidation and retaliation.* 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.

Appendix A to Part 26—Guidance Concerning Good Faith Efforts

1. When, as a recipient, you establish a contract goal on a DOT-assisted contract, a bidder must, in order to be responsible and/or responsive, make good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts. 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. could reasonably be expected to obtain sufficient DBE participation. even if they were not fully successful.

II. 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. As a recipient, it is up to you to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. It is important for you to consider the quality. quantity. and intensity of the different kinds of efforts that the bidder has made. 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. We emphasize. however, that your determination concerning the sufficiency of the firm's good faith efforts is a judgment call: meeting quantitative formulas is not required.

III. The Department also strongly cautions you against requiring that a bidder meet a contract goal (i.e.. obtain a specified amount of DBE participation) in order to be awarded a contract, even though the bidder makes a" adequate good faith efforts showing. This rule specifically prohibits you from ignoring bona fide good faith efforts.

I". 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 "at 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 al, 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 arc 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. even when the prime contractor might otherwise prefer to perform these work items with its own forces.

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. (1) 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.

(2) 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 fact that there may be some additional costs involved in finding and using 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. Also. the ability or desire of a prime contractor to perform the work of a contract with its awn organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not. however. required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

E. Not rejecting DBEs as being unqualified without sound reasons based a" a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations. or associations and political or social affiliations (for example union vs. non-union employee status) arc "at legitimate causes for the rejection or "on-solicitation of bids in the contractor's efforts to meet the project goal.

F. Making efforts to assist interested DBEs in obtaining bonding. lines of credit. or insurance as required by the recipient or contractor.

G. Making efforts to assist interested DBEs in obtaining necessary equipment. supplies. materials, or related assistance or services.

H. 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.

V. I" determining whether a bidder has made good faith efforts. you may take into account the performance of other bidders in meeting the contract. For example, when the apparent successful bidder fails to meet the contract goal. but others meet it. you may reasonably raise the question of whether. with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders. you may view this. in conjunction with other factors, as evidence of the apparent successful bidder having made goad faith efforts.

Appendix B to **Part 26—Forms [Reserved]**

Appendix C to Part 26—DBE Business Development Program Guidelines

The purpose of this program element is to further the development of DBEs, including but not limited to assisting them to move into non-traditional areas of work and/or compete in the marketplace outside the DBE program. via the provision of training and assistance from the recipient.

(A) Each firm that participates in a recipient's business development program (BDP) program is subject to a program term determined by the recipient. The term should consist of two stages: a developmental stage and a transitional stage.

(B) I" order for a firm to remain eligible for program participation. it must continue to meet al, eligibility criteria contained in part 7.6.

(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 in non-traditional areas of work and/or work outside the DBE program.

(D) The business plan should contain at least the following:

(I) 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)(l) 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 should annually review its currently approved business plan with the recipient and modify the plan as may be appropriate to account far any changes in the firm's structure and redefined needs. The currently approved plan should be considered the applicable plan for a,, program purposes until the recipient approves in writing a modified plan. The recipient should establish a" anniversary date for review of the participant's business plan and contract forecasts.

(F) Each participant should 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 should be included in the participant's business plan. The forecast should 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 no, 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 should 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 rime other modifications are submitted pursuant to the annual review under paragraph (E) of this section. The plan should set forth rhe 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, 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, should 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 should notify the participant in writing of its intent to graduate the firm in a letter of notification. The letter of notification should 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 should also provide the participant 45 days from the date of service of the letter to submit in writing information that 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 should take such action if over a 2-year period a DBE firm exhibits such a pattern.

Appendix D to Part 26—Mentor-Protégé Program Guidelines

(A) The purpose of this program element is to further the development of DBEs, including but no, limited to assisting them to move into non-traditional areas of work and/ or compete in the marketplace outside the DBE program. via the provision of training and assistance from other firms. To operate a mentor-protégé program, a recipient must obtain the approval of the concerned operating administration.

(B)(I) Any mentor-protégé relationship shall be based on 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 services and resources to be provided by the mentor to the protégé. 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. Services provided by the mentor may be reimbursable under the FTA, FHWA, and FAA programs.

(2) To be eligible for reimbursement, 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.

(C) DBEs involved in a mentor-protégé agreement must be independent business entities which meet the requirements for certification as defined in subpart D of this pan. A protégé firm must be certified *before* it begins participation in a mentor-protégé arrangement. If the recipient chooses to recognize mentor/protégé agreements, if should establish formal general program guidelines. These guidelines must be submitted to the operating administration for approval prior to the recipient executing an individual contractor/ subcontractor mentor-protégé agreement.

Appendix E to Part 26—Individual Determinations of Social and Economic Disadvantage

The following guidance is adapted. with minor modifications. from SBA regulations concerning social and economic disadvantage determinations (see 13 CFR 124.103(c) and 124.104).

Social Disadvantage

I. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. Social disadvantage must stem from circumstances beyond their control. Evidence of individual social disadvantage must include the following elements:

(A) At least one objective distinguishing feature that has contributed to social disadvantage, such as race. ethnic origin. gender, disability. long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged:

(B) Personal experiences of substantial and chronic social disadvantage in American society, not in other countries: and

(C) Negative impact on entry into or advancement in the business world because of the disadvantage. Recipients will consider any relevant evidence in assessing this element. In every case. however. recipients will consider education. employment and business history. where applicable. to see if the totality of circumstances shows disadvantage in entering info or advancing in the business world.

(1) Education. Recipients will consider such factors as denial of equal access to institutions of higher education and vocational training. exclusion from social and professional association with students or teachers. denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.

(2) Employment. Recipients will consider such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits. and other terms and conditions of employment: retaliatory or discriminatory behavior by an employer or labor union: and social patterns or pressures which have channeled the individual into non-professional or non-business fields.

(3) Business history The recipient will consider such factors as unequal access to credit or capital. acquisition of credit or capital under commercially unfavorable circumstances. unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates. and exclusion from business or professional organizations.

II. With respect to paragraph I.(A) of this appendix, the Department notes that people with disabilities have disproportionately low incomes and high rates of unemployment. Many physical and attitudinal barriers remain to their full participation in education. employment, and business opportunities available to the general public. The Americans with Disabilities Act (ADA) was passed in recognition of the discrimination faced by people with disabilities. It is plausible that many individuals with disabilities-especially persons with severe disabilities (e.g., significant mobility, vision. or hearing impairments)-may be socially and economically disadvantaged.

iii. Under the laws concerning social and economic disadvantage. people with disabilities are not a group presumed to be disadvantaged. Nevertheless. recipients should look carefully at individual showings of disadvantage by individuals with disabilities. making a case-by-casejudgment about whether such an individual meets the criteria of this appendix. As public entities subject to Title Ii of the ADA. recipients must also ensure their DBE programs are accessible to individuals with disabilities. For example. physical barriers or the lack of application and information materials in accessible formats cannot be permitted to thwart the access of potential applicants to the certification process or other services made available to DBEs and applicants.

Economic Disadvantage

(A) Genera,. 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.

(B) *Submission of narrative* and financial *information.*

(1) Each individual claiming economic d&vantage must describe the conditions which are the basis for the claim in a narrative statement, and must submit personal financial information.

(2) When married. an Individual claiming economic disadvantage also must submit separate financial information for his or her spouse, unless the individual and the spouse are legally separated.

(C) *Factors to be considered.* in considering diminished capital and credit opportunities, recipients will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including personal income for the past two years (including bonuses and the value of company stock given in lieu of cash). personal net worth. and the fair market value of a,, assets. whether encumbered or not. Recipients will also consider the financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification. or, if not available, in similar lines of business. which are not owned and controlled by socially and economically disadvantaged individuals in evaluating the individual's access to credit and capital. The financial profiles that recipients will compare include total assets, net sales, pre-tax profit. sales/ working capital ratio, and net worth.

(D) Transfers within two years.

(I) Except as set forth in paragraph (D)(2) of this appendix, recipients will attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust, a beneficiary of which is an immediate family member. for less than fair market value, within two years prior to a concern's application for participation in the DBE program, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education. medical expenses. or some other form of essential support.

(7.) Recipients will not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions. such as birthdays. graduations, anniversaries, and retirements.

(3) in determining an individual's access to capital and credit. recipients may consider any assets that the individual transferred within such two-year period described by paragraph (D)(i) of this appendix that are not considered in evaluating the individual's assets and net worth (e.g., transfers to charities).

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