

# MISSOURI DEPARTMENT OF TRANSPORTATION

## DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

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External Civil Rights Division

2016



**MISSOURI DEPARTMENT OF TRANSPORTATION**

**EXTERNAL CIVIL RIGHTS DIVISION**

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## **DEFINITIONS (26.5)**

**Affiliation** - 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** - 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)** - any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, et seq.). "Compliance" means that a recipient has correctly implemented the requirements of this part.

**Certifying Partner (Agency of Record)** – The MRCC recognizes that each Certifying Partner conducts certification reviews for DBE certification. The MRCC also recognizes that some Certifying Partners, in addition to administering a DBE Program, administer a local MBE/WBE Program that is separate from the DBE Program. Any firm certified under the local MBE/WBE program will not be included in Missouri's UCP unless qualified and certified under 49 CFR Part 26. When a Certifying Partner obtains a firm's records and reviews that firm for certification eligibility (regardless of the firm's disposition), it then becomes the Agency of Record. Any future eligibility requests, reapplication, inquiries, etc., must be handled by the Agency of Record -- the MRCC Certifying Partner with whom the certification records reside.

**Concession** - a for-profit business enterprise, located on an airport subject to this subpart that is engaged in the sale of consumer goods or services to the public under an agreement with the sponsor, another concessionaire, or the owner of a terminal, if other than the sponsor. Businesses that conduct an aeronautical activity are not considered concessionaires for purposes of this subpart. Aeronautical activities include scheduled and nonscheduled air carriers, air taxis, air charters, and air couriers, in their normal passenger or freight carrying capacities; fixed base operators, flight schools; and sky-diving, parachute-jumping, flying guide services, and helicopter or other air tours.

- (1) Appendix A to 49 CFR Part 23 contains a listing of the types of businesses that are frequently operated as concessions.
- (2) Examples of entities that do not meet the definition of a concession include suppliers, flight kitchens and in-flight caterers servicing air carriers, government agencies, industrial plants, farm leases, individuals leasing hangar space, custodial and security contracts, individual taxis with permits, telephone and electric utilities, skycap services under contract with an air carrier, and management contracts.
- (3) Concessions may be operated under the following types of agreements:
  - a. Leases.
  - b. Subleases.
  - c. Permits.
  - d. Contracts.
  - e. Other instruments or arrangements.

**Concessionaire** - one who operates a concession.

**Contract** - a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them. For purposes of this part, a lease is considered to be a contract.

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

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

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

**Economic Disadvantage** - Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business that are not socially disadvantaged.

**Good Faith Efforts** - 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** - father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, or father-in-law.

**Indian Tribe** - 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** - 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.

**Material Amendment** - a substantial change to the basic rights or obligations of the parties to a concession agreement. Examples of material amendments include an extension to the term not provided for in the original agreement or a substantial increase in the scope, of the concession privilege. Examples of nonmaterial amendments include a change in the name of the concessionaire or a change to the payment due dates.

**MoDOT**-Missouri Department of Transportation

**MRCC**-Missouri Regional Certification Committee

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

**Native Hawaiian Organization** - 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** - that a recipient has not correctly implemented the requirements of this part.

**Operating Administration or OA** - 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** - 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 Airport** - a commercial service airport, which is determined by the Secretary to have more than 10,000 passengers enplaned annually.

**Primary Industry Classification** - the North American Industrial Classification System (NAICS) designation, which best describes the primary business of a firm. The NAICS is described in the North American Industry Classification Manual - United States, 1977 which is available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161: by calling 1(800) 553-6847; or via the Internet at: <http://www.ntis.gov/product/naics.htm>.

**Primary Recipient** - a recipient, which receives DOT financial assistance and passes some or all of it on to another recipient.

**Principal Place Of Business** - 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** - 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** - focused specifically on assisting only DBEs, including women-owned DBEs.

**Race-Neutral Measure Or Program** - is, or can be, used to assist all small businesses. For the purposes of this part, race-neutral includes gender-neutrality.

**Recipient** - 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.

**Regular Dealer**- a firm that owns, operates, or maintains a store, warehouse or other establishment in which the material or supplies required for the performance of the contract are kept in stock, and regularly sold to the public in the usual course of business. To be a regular dealer, the firm must engage in, as its principal business, and in its own name, the purchase and sale of the products in question. A regular dealer in such bulk items as steel, cement, stone, gravel, and petroleum products need not keep such product in stock, if it owns or operates distribution equipment. Brokers and packagers shall not be regarded as manufacturers or regular dealers.

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

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



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

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

**Small Business Concern** means, with respect to firms seeking to participate as DBEs in 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).

**Small Business Concern - Concessionaire** - a firm, including all its domestic and foreign affiliates, that qualifies under the applicable size standard set forth in appendix A to this subpart. In making a size determination, all affiliates, regardless of whether organized for profit, must be included. A firm qualifying under this definition that exceeds the size standard after entering a concession agreement, but that otherwise remains eligible, may continue to be counted as DBE participation until the current agreement, including the exercise of options, expires.

- (1) The Secretary may periodically adjust the size standards in appendix A to this subpart for inflation.
- (2) A firm that was certified as a minority/woman/or disadvantaged business enterprise (MBE/WBE/DBE) prior to the effective date of this subpart, pursuant to a requirement in Sec. 23.43(d) or FAA guidance implementing section 511(a)(17) of the Airport and Airway Improvement Act of 1982, as amended, that has exceeded the size standard, may be counted as DBE participation until the current agreement, including the exercise of options, expires, provided that the firm remains otherwise eligible.

**Socially Disadvantage** - 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. Socially disadvantage must stem from circumstances beyond their control. Evidence of individual socially disadvantage must include the following elements:

- (1) At least one objective distinguishing feature that has contributed to socially 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;
- (2) Personal experiences of substantial and chronic socially disadvantage in American society, not in other countries; and
- (3) 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 into or advancing in the business world.
  - a. 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.

- b. 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.
- c. 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.

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

- (1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis.
- (2) Any individual in the following groups, members of which are rebuttals presumed to be socially and economically disadvantaged:
  - a. "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;
  - b. "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;
  - c. "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
  - d. "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;
  - e. "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
  - f. Women;
  - g. Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

**Sponsor** - the recipient of an FAA grant.

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

**UCP** – Unified Certification Program

**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).

## I. DBE PROGRAM ADMINISTRATION

### Program Implementation and Staff (26.25)

The External Civil Rights (ECR) Director is responsible for the implementation of all aspects of the Disadvantage Business Enterprise (DBE) program objectives contained in the policy statement, in compliance with all state and federal laws. The ECR Director reports to the Chief Engineer and Assistant Chief Engineer and has independent and direct access to the Director and all other members of the Director's staff. The ECR Director has also been identified as the DBE Liaison Officer.

In May of 2009, the ECR section became its own division within MoDOT. The ECR Director develops, manages, and administers the DBE program, including defining processes, procedures, and operation policies. The ECR Director works closely with the Chief Counsel's Office to review DBE special provisions periodically to ensure they conform to the state and federal laws and reviews program administration with the attorney assigned responsibility for external civil rights issues.

The ECR Director's duties include supervision of one External Civil Rights Manager, six Civil Rights Specialist, two Senior Administrative Technicians, one Executive Assistant including a specialist and technician remotely assigned to Kansas City and two specialists and one technician assigned to St. Louis, and any other staff temporarily or permanently assigned to the External Civil Rights division. The Specialists are responsible for the day to day duties required to implement all requirements of external civil rights, including daily contact with DBE firms, DBE applicants, contractors, community based organizations, government agencies, and MoDOT personnel. (Organizational Charts, Attachment 1)

The External Civil Rights Division is also responsible for setting and approving DBE goals on federal aid construction projects, including projects administered by local public agencies, aviation and transit authorities, or any other sub-recipient. The Director is also responsible for ensuring that the goals are monitored to verify compliance at the time of bid, the contract award stage, during project construction, and upon project acceptance. The External Civil Rights division and MoDOT field staff monitor DBE performance for commercially useful function and any other requirements as set forth in 49 CFR Part 26. The Director also oversees all support services provided to DBE's certified by MoDOT. Other responsibilities of the Director include:

- ❖ Gathers and reports statistical data and other information as required by USDOT.
- ❖ Reviews third party contracts and purchase requisitions for compliance with the program.
- ❖ Works with all departments to set overall annual goals and project by project goals.
- ❖ Ensures that bid notices and requests for proposals are available to DBEs in a timely manner.
- ❖ Identifies contracts and procurements so that DBE goals are included in solicitations (both race-neutral methods and contract specific goals) and monitors results.
- ❖ Analyzes MoDOT's progress toward goal attainment and identifies ways to improve progress.
- ❖ Participates in pre-bid meetings.

- ❖ Advises the Director and Commission on DBE matters and achievement.
- ❖ Provides DBEs with information and assistance in preparing bids, obtaining bonding and insurance.
- ❖ Plans and participates in DBE training seminars.
- ❖ Provides outreach to DBEs and community organizations to advise of opportunities.
- ❖ Maintains the MoDOT DBE Directory and updates.

### **Federal Transit Authority & Federal Aviation Administration**

As part of the unified program administration, MoDOT has submitted one program to incorporate all modes and agencies within the USDOT, including the Federal Transit Authority (FTA) and Federal Aviation Administration (FAA) programs. The External Civil Rights Division will work closely with the FTA and FAA program administrators to maintain uniform certification and reporting processes.

The External Civil Rights Division is responsible for the administration of the DBE program for all USDOT agency requirements. Program administration includes goal setting, concurrence, participation verification, reporting, and DBE certification.

The Missouri unified certification process, known as Missouri Regional Certification Committee, was approved by USDOT in January 2005; therefore, all recipients and sub-recipients are required to accept only those firms certified under the UCP agreement. Any federal aid sub-recipients, with the exception of Lambert Airport Authority, Bi-State Development Agency, and Kansas City International Airport are required to incorporate and comply with MoDOT's DBE program, assurances, and compliance requirements, including the use of DBE firms certified by MoDOT or the UCP. All Block Grant recipients will continue to be required to comply with leasing goals established by the sponsoring agency.

## DBE Program Policy Statement (26.1, 26.23)

The Missouri Department of Transportation (MoDOT) has established a DBE program in accordance with regulations of the USDOT, 49 CFR Part 26. MoDOT has received Federal financial assistance from the Department of Transportation, and as a condition of receiving this assistance, MoDOT has signed an assurance that it will comply with 49 CFR Part 26.

It is the policy and commitment of MoDOT that disadvantaged businesses, as defined in 49 CFR Part 26, shall have a level playing field to participate in the performance of contracts financed in whole or in part with federal funds. It is also the policy of MoDOT to:

- ❖ Ensure nondiscrimination in the award and administration of USDOT assisted contracts in highway, transit and airport programs;
- ❖ Create a level playing field on which DBE firms can compete fairly for USDOT assisted contracts;
- ❖ Ensure that the DBE Program is narrowly tailored in accordance with applicable law;
- ❖ Ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBE firms;
- ❖ Assist in the removal of barriers to the participation of DBE firms in USDOT assisted contracts;
- ❖ Assist in the development of firms to enhance the ability to compete successfully in the market place outside the DBE Program; and
- ❖ Assist in promoting the use of DBE's in all types of federally-assisted contracts and procurement activities.

The External Civil Rights Director has been designated as the DBE Liaison Officer. In that capacity, the External Civil Rights Director is responsible for the implementation of all aspects of the DBE program. Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by the MoDOT in its financial assistance agreements with the USDOT.

MoDOT will advise each contractor, through contract specifications, that failure to carry out these requirements shall constitute a breach of contract and may result in termination of the contract, or any such remedy that MoDOT deems appropriate. MoDOT will require all employees and agents to adhere to the provisions of 49 CFR Part 26.

MoDOT has disseminated this policy statement to the Missouri Highways and Transportation Commission and all of the components of our organization. We have distributed this statement to DBE and non-DBE business communities that perform work for MoDOT on DOT-assisted contracts via email, website posting and public meetings.

MoDOT shall submit to the Federal Highway Administration (FHWA) overall goals for the participation of DBE firms every three years. The goal shall be analyzed, and adjusted if necessary, at the end of each federal fiscal year.

  
Patrick K. McKenna, Director

7-12-16  
Date

## **Nondiscrimination (26.7)**

MoDOT will not exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against any person in connection with the award and performance of any contract covered by 49 CFR Part 26 on the basis of race, color, sex, or national origin.

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

All requirements of 49 CFR Part 26 are incorporated by reference.

## **Records and Reports (26.11)**

(A) Semi-annually, June 1 and December 1, the ECR division prepares the Uniform Report of DBE Commitments/Awards and Payments, which contains information about DBE commitments and DBE actual payments for the reporting period. FHWA activity is reported manually and FTA activity is reported on-line through TrAMS (Transit Award Management System). See Attachment 2.

(B) MoDOT will continue to provide data about the DBE Program as directed by the operating administrations of the USDOT.

MoDOT will report all DBE participation, including block grants for FAA and FTA programs, to USDOT. MoDOT will submit the annual Uniform Report of DBE Commitments/Awards and Payments (USDOT Form 4630), as modified for use by FAA recipients, USDOT Form 4630 on a quarterly basis for use by FTA recipients, and Form 4630 for FHWA recipients on a quarterly basis. These reports will reflect payments actually made to DBE's on DOT-assisted contracts.

(C) MoDOT will create a bidders list, consisting of information about all DBE and non-DBE firms that bid or quote on USDOT assisted contracts. The purpose of this requirement is to allow use of the bidders list approach in calculating overall goals and adjusting the overall goal on a yearly basis. The bidders list will include the name, address, DBE/non-DBE status, age of firm, and annual gross receipts of firms.

MoDOT will collect this data in the following manner:

- All contractors, subcontractors, suppliers, and truckers will be required to be registered and obtain a vendor number prior to authorization to commence work on a project.
- The registration form will gather the name, address, DBE/non-DBE status, age of firm, annual gross receipts, geographical preference, and type of work performed, for each firm.
- The registration will be mailed to all contractors, subcontractors, DBE firms, material suppliers, and any other firm contained in MoDOT records.

- The firms will receive a vendor number and the information will be entered into a database.
- The firms will be required to update their filing on a yearly basis.
- The listing will be mailed at least semiannually to all firms, requesting that they provide the names of any firms they received quotes from that may not be listed.
- The listing will be available on the MoDOT internet site.
- Project office personnel will check all subcontractors, suppliers, and haulers on a project to verify they have been registered. If a firm is not registered, they must do so prior to commencement of work.
- The project office personnel will have the forms available to complete and submit. Once the form has been submitted, the firm can commence work even though they have not received formal notice of registration.

MoDOT feels that by sending out lists to all firms requesting updates and by requiring registration prior to working, any firm that quotes work will eventually be collected. In addition, this protects the privacy of gross receipts.

MoDOT and its UCP partners will report to the USDOT by January 1<sup>st</sup> of each year, the percentage of certified DBE firms in the UCP Directory controlled by the following:

- (1) Women;
- (2) Socially and economically disadvantaged individuals (other than women); and
- (3) Individuals who are women and are otherwise socially and economically disadvantaged individuals.

### **Status and Updates (26.21)**

MoDOT will continue to carry out the DBE program until all funds from USDOT financial assistance have been expended. MoDOT will provide updates to USDOT whenever it makes significant changes in the DBE program. DBE Program updates are the responsibility of the DBE liaison officer in the External Civil Rights Division. MoDOT will assure that the sub recipients of FHWA funds will comply with this DBE Program plan.

### **Quotas or Set Asides (26.43)**

MoDOT does not use quotas or set asides in any way in the administration of the DBE program.

### **Federal Financial Assistance Assurance (26.13)**

(A) MoDOT agrees to and incorporates the following assurance into the day-to-day operations and the administration of all USDOT assisted contracts:

***“MoDOT shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any USDOT assisted contract or in the administration of its DBE Program or the requirements of 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49***



**CFR part 26 to ensure nondiscrimination in the award and administration of USDOT assisted contracts. The recipient's DBE Program, as required by 49 CFR part 26 and as approved by USDOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to MoDOT 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) MoDOT ensures that all recipients of USDOT assisted contracts, funds, or grants incorporates agrees to and complies with the assurance statement and the language will appear in financial agreements with sub-recipients. All consultant, off-system, enhancement, FTA, or FAA projects must be reviewed by the External Civil Rights Division in order set the appropriate DBE goal. In addition, the division must review and concur with the local agencies recommendation for award.

Failure by the contractor to carry out these requirements is a material breach of the contract which may result in termination of the contract or such other remedy as MoDOT deems appropriate, which may include, but is not limited to:

- (1) Withholding monthly progress payments;
- (2) Assessing sanctions; and/or
- (3) Liquidated damages.

MoDOT will ensure that the following clause is placed in every USDOT assisted contract and subcontract:

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

MoDOT also reviews the project to ensure a commercially useful function is performed by the DBE firms and final verification of payment in order to ensure compliance with the contractual DBE goal. Any instances of non-compliance will be administered as set out below for MoDOT let projects

### **Use of DBE Owned Financial Institutions (26.27)**

MoDOT will thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged persons in Missouri and make reasonable efforts to use these institutions, within state law. In addition, MoDOT will

conduct internet research aimed at locating articles, websites, or any other information that may assist in locating such firms.

Once MoDOT has located DBE owned financial institutions, MoDOT will provide the names and addresses to all contractors, subcontractors, and DBE firms. In addition, MoDOT will contact these institutions in order determine services available and discuss innovative cooperative efforts to encourage contractors to use the services of the institutions.

### **Prompt Payment (26.29)**

(a) MoDOT requires all contractors to pay all subcontractors and suppliers for satisfactory performance of services in compliance with the prompt payment statute, Revised Statutes of Missouri, Section 34.057. (Attachment 4) MoDOT also requires the prompt, as defined in Section 34.057. For purposes of implementation of 49 CFR Part 26 satisfactory completion is determined by MoDOT personnel. This requirement is also contained in the contract specifications Section 109.13, thus is a contractual requirement. The Missouri statute contains clear penalties for non-compliance.

(b) MoDOT has eliminated the withholding of “retainage” for general or prime contractors in an effort to alleviate the impact of the prompt payment requirements.

In addition, MoDOT has and will continue the complaint process for any subcontractor that feels they have not been paid in a timely manner. Once the complaint is received, MoDOT project office personnel conduct a review of the work status, payments made to the prime contractor, payments made to the subcontractor, document compliance, and the allegations put forth by the complainant. A written response is prepared and provided to the prime and the subcontractor. The project office will continue to monitor the situation. When the prime submits final payment documentation, if the payment remains outstanding, the justification must be noted as an amendment to the assurance of satisfaction of all claims. If there is no amendment and the claim remains outstanding, the prime will not receive final payment until satisfactory justification has been submitted as an amendment to the final assurance.

All contractors and subcontractors must retain records of all payments, made or received, for 3 years from the date of final payment and must be available for inspection, upon request, by any authorized representative of MoDOT or USDOT. MoDOT will maintain records of actual payments to DBE firms for work committed to at the time of contract award.

(d) In addition, MoDOT will perform random audits of contract payments to firms. The audits will review payments to all subcontractors to ensure that payment was made in compliance with RsMO Section 34.057 and that the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts stated in the schedule of DBE participation.

### **DBE Directory (26.31)**

MoDOT posts the MRCC DBE Directory on the website at [http://www.modot.mo.gov/business/contractor\\_resources/External\\_Civil\\_Rights/DBE\\_program.htm](http://www.modot.mo.gov/business/contractor_resources/External_Civil_Rights/DBE_program.htm).

The firms contained in the Directory are certified as meeting the certification eligibility requirements as outlined in 49 CFR Part 26. The directory contains the DBE firm name, address, phone, fax, owner name and certified work categories (NAICS codes). The DBE directory is updated as changes occur with DBE certification events, i.e. new certifications, denials and graduations.

### **Over Concentration (26.33)**

MoDOT has not identified any areas of over-concentration. MoDOT will continue to monitor DBE participation and usage, and will take appropriate action to address any identified over-concentration.

### **Monitoring and Enforcement (26.37, 26.55)**

MoDOT will notify the FHWA of any false or fraudulent conduct concerning the DBE Program. Prosecution and debarment for fraud are the responsibility of the USDOT Inspector General and the US Attorney for Missouri.

Non-compliance with the DBE Program by a participant will be handled under the provisions of DBE Contract Provisions (Attachment 3). Monitoring and enforcement are joint efforts of the ECR and Construction and Materials staff. In the event of a violation, the ECR divisions will conduct an investigation of the issue and take necessary corrective action including, but not limited to liquidated damages, disallowing the DBE participation credit and/or removal from the DBE program.

#### Commercially Useful Function

One of the key requirements of the DBE Program is that a **commercially useful function** be performed. This is defined as:

***"Being responsible for execution of a contract or a distinct element of the work by actually performing, managing, and supervising the work involved."***

MoDOT field personnel and ECR staff monitor the performance of work to be performed by all DBE firms on all federal aid projects, including those of sub-recipients. MoDOT personnel review all elements of the work to be performed, including supervision of employees, employee payroll, and equipment used by the DBE firm. Contractors, DBEs, local public agencies, and all employees are required to cooperate with MoDOT personnel conducting investigations.

Failure of a DBE firm to perform a commercially useful function will result in the dollar amount of the work not being credited toward the sub-recipient's or prime contractor's DBE goal on the project. This can result in MoDOT withholding payment from the prime contractor, or agency, for that amount, or could result in removal of eligibility of the DBE. In cases of deliberate attempts to circumvent the intent of the DBE program, or fraud, these actions may lead to criminal prosecution of both the prime contractor and the DBE firm.

Red Flag situations which may result in an investigation include, but are not limited to, shared employees, supervision of DBE employees by another contractor, use of the prime's equipment, use of other equipment by the DBE without a long-term lease, materials for the DBE ordered, or paid for, by the prime contractor, or an item of work being done jointly by the DBE firm and another contractor.

### Management

The DBE must manage the work that has been contracted. Management includes, but is not limited to, scheduling work operations, ordering equipment and materials, preparing and submitting certified payrolls, and hiring and firing employees. The DBE owner must supervise daily operations, either personally or with a full time, skilled, and knowledgeable superintendent. The superintendent must be under the DBE owner's direct supervision. The DBE owner must make all operational and managerial decisions of the firm. Mere performance of administrative duties is not supervision of daily operations.

### Materials

The DBE shall negotiate the cost, arrange delivery, and pay for the materials and supplies for the project. MoDOT will review invoices to verify billing and payment. The DBE must prepare the estimate, quantity of material, and be responsible for the quality of materials.

Two-party checks for payment may be made to the DBE and the supplier **only** if approved by MoDOT in advance. **No** credit toward the DBE goal will be given for the cost of materials or supplies paid directly by the prime for the DBE firm.

### Employees

In order to be considered an independent business, DBE firms must keep a regular workforce. DBE firms cannot "share" employees with non-DBE contractors, particularly the prime contractor. All work must be performed with a workforce the DBE firm controls, with a minimum of 30% of the work to be performed by the DBE firm's regular employees, or those hired by the DBE firm for the project from a source **other** than the prime contractor.

If a DBE firm does not perform or exercise responsibility for at least thirty (30) percent of the total cost of its contract or subcontract with its own work force, or the DBE subcontracts a greater portion of the work of a contract or subcontract than would be expected on the basis of normal industry practice for the type of work involved, MoDOT shall presume that the DBE is not performing a commercially useful function.

### Sanctions

The failure of a DBE firm to perform a commercially useful function (CUF) will result in the dollar value of that DBE firm's work not being credited toward the contractor's DBE goal for that contract. This may result in MoDOT withholding payment from the prime contractor of the entire amount not credited, if this results in the contractor's failure to achieve the DBE participation goal for that contract.

Deliberate conduct or indifference to the CUF requirements can also lead to the DBE firm's removal of eligibility. In any and all cases of deliberate attempts by the contractor, a DBE firm, or other firms to circumvent the requirements of the USDOT or MoDOT DBE Program, or their

related contract requirements, or fraud of any kind, these actions may lead to suspension or debarment of the firms and their affiliates by MoDOT and may result in criminal prosecution and sanctions, plus civil and contractual liability, of any firm or person involved.

### Fraud

MoDOT will notify the USDOT of any suspected false, fraudulent, or dishonest conduct in connection with the DBE program, in order for the USDOT to take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the USDOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in §26.109. MoDOT will also consider similar action under Missouri legal authorities, including responsibility determinations in future contracts.

### Training

MoDOT provides annual training to the MoDOT Project Office staff as it relates to CUF processes, including investigations and red flags. The LPAs are also provided training on performing CUF reviews.

(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, MoDOT will not count the firm's participation toward any DBE goals, except as provided for in §26.87(i)).

(g) MoDOT will not count the dollar value of work performed under a contract if a firm after it has ceased to be certified toward MoDOT's overall goal.

(h) MoDOT will not count the participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE.

## **Business Development Program**

The Office of External Civil Rights' Disadvantaged Business Enterprise (DBE) Program has experienced a measure of success in providing opportunities for disadvantaged businesses. However, there are groups within the DBE Program that are experiencing under-utilization. There is an urgent need to address this under-utilization so all firms may experience success within the DBE Program.

One method of addressing this under-utilization is providing targeted and comprehensive business development assistance for firms falling into this category. These firms tend to be either in the developmental or transitional stage. Firms in the developmental stage typically lack the highway contracting expertise and business structure to compete effectively in the market. Conversely, firms in the transitional phase possess technical competence and a sound business structure, but lack the capacity to compete for larger highway contracts due to the lack of necessary working capital, bonding, resources, and management expertise to bid on the larger projects capable of providing continued growth for the firm.

The business development assistance needed by these firms must be targeted, specific, and comprehensive in nature. This type of assistance will address the complete needs of the firm and create the possibility for sustained growth and success.

The Office of External Civil Rights has devised a two-step process to accomplish these objectives. First, a *Needs Assessment* to identify the type of assistance needed. Second, the implementation of the *DBE Supportive Services Pilot Partnership and Business Assistance Center*, which provides the assistance needed.

### Needs Assessment

Periodically, MoDOT Supportive Services initiates the assessment of DBE needs. The purpose of this evaluation is to identify skills sought by DBE firms and the tools needed to build DBE firm capacity. The DBE needs assessment is also useful to identifying barriers to doing business with prime contractors and with MoDOT. MoDOT Supportive Services re-evaluates its programs based on the DBE needs assessment in order to effectively address the needs of DBE firms as well as MoDOT.

### Business Assistance Centers

MoDOT Supportive Services provides resources for DBE firms to engage with others in the construction community. These resources include making available to the DBE community industry-specific professional and trade reference material, as well as MoDOT bid guidelines and technical material. MoDOT is able to provide work areas including computer stations for those without such resources. MoDOT Supportive Services staff is always available to provide business assistance support, and to suggest other MoDOT Supportive Services programs, such as entrepreneurship training or business coaching which may be of interest to DBE firms.

### Entrepreneurship Training Program

The MoDOT Supportive Services Entrepreneurship Training Program assists MoDOT certified DBE firm owners in increasing their business skills in specific and measurable areas. The

program utilizes a cutting-edge learning program emphasizing development of a successful business plan, collaborative engagement of participants, and guest speakers from MoDOT and the construction community. Those who complete the program are positioned for improved readiness in their field and to successfully compete for contracts in the construction industry. Currently, MoDOT Supportive Services conducts this program regularly in the St. Louis and Kansas City metro areas. MoDOT DBE Supportive Services has plans to expand the program to outstate Missouri in the future.

Particular areas of focus for the Entrepreneurship Training Program include: *your business environment; making strategic financial decisions; strengthening the product/service; developing and evaluating your business strategy; marketing strategies; charting financial performance; and systems, processes and controls for growing the organization.*

Guest speaker topics include: *entrepreneurship; doing business with MODOT; funding sources; teaming; sub-contracting; bonding; bid preparation; estimating; project management; and compliance.*

### Business Coaching Program

A Business Coaching Program has been developed by MoDOT DBE Supportive Services to facilitate assistance in specific areas expressed by DBE firms that will enhance skills needed to compete for and work on MoDOT projects. The Business Coaching program focuses on collegial insight and advice, in contrast to specific training. The Business Coaching program utilizes coaches from industry, including DBE firms with successful MoDOT contracting experience, and retired professionals. The program fosters collaboration and “giveback” among the entire construction community. A Business Coaching Program brochure is available from MoDOT DBE Supportive Services.

Business coaching program assistance categories include: *accounting; bidding; bonding; business law; business plan; collaboration/teaming; estimating; financial information; information technology; marketing; project management (including compliance); safety.*

### Seminars and Programs

MoDOT DBE Supportive Services schedules a variety of seminars and programs for the DBE community, utilizing the resources of MoDOT staff and other industry professionals. These programs provide opportunities for learning for DBE firms, opportunities for prime contractor participation, and opportunities for relationship-building. Topics selected support DBE growth and capacity expansion, and successful marketing endeavors. MoDOT DBE Supportive Services provides opportunities for DBE firm principals to benefit from one-on-one engagement with seminar and program participants.

Lastly, a new DBE Needs Assessment will be performed in the new future and various Community Outreach initiatives are currently being planned.

## **Mentor-Protégé Program (26.35)**

### Objective and Purpose

The Missouri Department of Transportation is committed to strengthening its program of encouraging Disadvantaged Business Enterprise (DBE) businesses to participate in transportation related contracts. The purpose of MoDOT's Mentor-Protégé Program is for mentoring firms to provide assistance and training to protégé DBE firms to enhance those firms' business and technical capabilities, and achieve increased capacity. The ultimate objective of MoDOT's Mentor-Protégé Program is to develop DBE firms that are capable of participating in the highway construction industry.

### Eligibility Requirements

DBE firms participating in the Mentor-Protégé Program must be independent business entities which meet the requirements for DBE eligibility as described in the Code of Federal Regulations (CFR) Section 49 Part 26.

Applications from mentor and protégé firms will be evaluated on a variety of factors including:

- Experience generally and in federal transportation funded projects;
- Quality and timeliness of past performance;
- Financial capability;
- Reliability and responsibility;
- Safety record;
- Licensing in the trade, where applicable;
- Certifications under state and federal programs;
- Record of compliance with wage, hour and state and federal labor laws;
- Integrity of key persons, affiliates, current and past owners and principals;

### Mentor:

- The Mentor firm must have at least seven (7) years of experience as a contractor/consultant (preferably, but not necessarily as a prime contractor/ consultant) of MoDOT highway construction contracts.
- The Mentor firm must agree to devote a minimum of fifteen (15) hours per month to working with the Protégé.
- Mentors must be on MoDOT's approved contractors/ consultants list.
- Mentors must specify the lead individual responsible for implementing the plan as identified in the Mentor application.

### Protégé:

- The Protégé firm and/or the firm's CEO/President/Managing Member must have at least three (3) years of experience in the highway construction or consulting industry, be MoDOT or other UCP certified DBE, and remain an eligible DBE firm, in good standing, throughout the duration of program participation.
- Protégés must be on MoDOT's approved contractors/ consultant list.



- Protégés must specify the lead individual responsible for implementing the plan as identified in the Protégé application.
- The Protégé firm must agree to devote a minimum of fifteen (15) hours per month to working with the mentor.

### Enrollment in the Program

MoDOT will maintain such listings and will be available upon request from MoDOT External Civil Rights Division. All parties wishing to participate in the **MoDOT Mentor-Protégé Program** shall complete the appropriate applications (either Mentor or Protégé Application) provided by MoDOT. Assistance will be provided pertaining to non-English application process in accordance with the LEP Plan, if requested. The process for becoming a mentor-protégé team is twofold:

- Be approved by MoDOT as a potential mentor or protégé based on **eligibility requirements**.
- As a Mentor-Protégé team, have its **Mentor-Protégé Development Plan** approved by the MoDOT **Mentor- Protégé Oversight Committee**.

### Mentor/Protégé Oversight Committee

Oversight of the Mentor-Protégé Program shall be performed by the Mentor-Protégé Oversight Committee. The Committee shall be the "working arm" of the Mentor-Protégé Program. The Committee shall consist of MoDOT staff plus others recommended by the External Civil Rights Director, as well as an advisory FHWA ex-officio representative.

Measurable objectives for Oversight Committee management of the Mentor-Protégé Program include:

- Higher than average survival rate for Program Protégés;
- Improvement in the financial strength and bonding capacity of those firms;
- Consistent success in meeting the objectives identified by all parties.

The essential document that will govern the Program is the written **Mentor-Protégé Development Plan** (signed by both parties) that outlines the parties' goals and expectations. The plan shall describe measurable benchmarks and milestones to be reached (by the DBE Protégé) at successive stages of the plan. The Mentor-Protégé Oversight Committee should give input to both parties' regarding the Development Plan.

The Committee will annually evaluate the Mentor-Protégé relationship, including the following criteria:

- Satisfactory progress toward the stated goals of the Development Plan;
- Improved competency of the protégé in specific aspects of highway contracting or design;
- Decreased reliance on the Mentor by the Protégé for equipment, personnel, capital;
- Protégé's increased capital and/or financial/bonding capacity; and
- Increased numbers of projects by Protégé with contractors/ consultants including other than the Mentor.
- Bids submitted by Protégé as a prime contractor or selection as a prime consultant.

The Committee shall require the parties to submit **Quarterly Progress Reports**, indicating the status of their progress toward each of the Plan's stated goals.

The success of the Mentor-Protégé Program will be measured quarterly (Quarterly Progress Reports) by a system of metrics designed to coincide with milestones outlined in the Development Plan. Quarterly Progress Reports will include review of measurable progress (milestones) on the following:

- Identification of specific assistance provided by Mentor to Protégé during quarter.
- Listing of initiatives accomplished – consistent with goals outlined in the Mentor-Protégé Development Plan.
- Listing of milestones reached to date, as well as milestones behind schedule (and reasons).
- Listing of regularly scheduled Mentor-Protégé meetings and outcomes.
- Listing of targets set for improvement.

If at any time the Committee determines that the **Program Guidelines** or the spirit thereof are not being adhered to by the parties, or that satisfactory progress is not being made, the Committee reserves the right to revoke its approval of the mentor-protégé relationship - thereby invalidating the Plan, and/or any individual participant's enrollment in the Program. Reasonable progress will be expected, though this will vary according to each Plan.

Program participants agree that interpretation of the Guidelines or regulations shall rest with the Mentor-Protégé Oversight Committee. Parties may feel free (and in fact are encouraged) to seek interpretation of any provision they find ambiguous or confusing. If both Participants so desire, they may jointly appeal any adverse Committee decisions to the MoDOT External Civil Rights Director. These requests shall be in writing. The Director's determination shall be final.

#### Appeals Process for Mentor-Protégé Development Plan Denials

Program participants agree that interpretation of the Guidelines and/or Regulations shall rest with the Mentor-Protégé Oversight Committee. Parties may feel free (and in fact are encouraged) to seek interpretation of any provision they find ambiguous or confusing. If both Participants so desire, they may jointly appeal any perceived adverse decisions by the Mentor-Protégé Oversight Committee to the Missouri Regional Certification Committee. This right to appeal shall include an appeal of a decision by the Mentor-Protégé Oversight Committee that the Mentor-Protégé is not approved for participation in MoDOT's Mentor-Protégé program. A request for appeal shall be in writing and addressed to Mr. Lester Woods, at the address noted below. The Missouri Regional Certification Committee's determination shall be final.

If Participants (Mentor and Protégé) are not in agreement with the initial determination of the Mentor-Protégé Oversight Committee, Parties may appeal the Mentor-Protégé Oversight Committee's determination within 15 days of this notice. The appeal may be an informal hearing in person, or a written submission. A written request for the appeal must be sent to:

Mr. Lester Woods  
External Civil Rights Director  
Missouri Department of Transportation  
P.O. Box 270  
Jefferson City, MO 65102

The appeal process provides you the opportunity to respond to the determination of the Mentor-Protégé Committee. You may present information, evidence, and arguments addressing the Mentor-Protégé Committee's findings at that time. The review will take place before the Missouri Regional Certification Committee, with sworn testimony. MoDOT will maintain a record of the hearing and any evidence presented at the hearing. You may elect to waive the appeal in person and present information, evidence and arguments supporting the Parties' Mentor-Protégé Plan to the Missouri Regional Certification Committee. The applicant must wait for one (1) year before re-applying for the MoDOT Mentor-Protégé Program, if the final decision of the Missouri Regional Certification Committee is a denial.

### Types of Assistance

The types of assistance that a mentor may provide a DBE Protégé may include but is not limited to the following:

- Business Planning
- Record Keeping
- Technical Assistance
- Capital Formation
- Financial Counseling
- Bonding
- Equipment Utilization
- Submitting Quotations
- Employee Management

### General Program Guidelines

DBE firms participating in the Mentor-Protégé Program must be independent business entities which meet the requirements for certification as outlined in the Code of Federal Regulations (CFR) Part 26.

DBE Protégés are required to perform all administrative functions at a facility under their control. The mentor may provide such facilities or locations to the DBE protégé on a limited term basis (for example, no longer than twelve months) if a separate written lease documenting the arrangement is executed.

Personnel: The Mentor may provide, in limited instances, skilled personnel if the personnel are on the payroll and under the direct supervision of the DBE protégé.

Equipment: The Mentor may provide, in limited instances, equipment if a written lease or rental agreement covers the equipment. Any property, equipment, supplies or other services that are sold, rented, or donated to the Protégé must be detailed in the Development Plan and approved by MoDOT and should be further covered by bills of sale, lease agreements, etc. Any financial investment by the mentor cannot provide the mentor with control over the protégé.

Working Capital: A mentor may provide a protégé with working capital. Time notes, loans and stocks are acceptable methods of assuring payment in exchange for working capital. Demand notes are not acceptable. In no case can the day-to-day control of the firm be relinquished by the DBE as a requirement of the loan. Any financial investment and security arrangements by

the Mentor for the Protégé are subject to approval by MoDOT, and must not permit the Mentor to assume control of the Protégé.

Bonding: The mentor may provide the protégé with assistance by bonding the entire job and either charging on a pro rata basis or not charging the DBE for the bond. It is expected that after gaining experience through federally-funded projects, the DBE will develop the ability to bond projects independent of the mentor.

Technical Assistance (construction): The mentor may provide guidance on project management and construction techniques, training in plan interpretation, or estimating and cost accounting. However, the DBE must retain final decision-making authority.

Technical Assistance (design): The mentor may provide guidance on project management, structural design, roadway design, surveying, geotechnical analysis, and construction inspection. However, the DBE must retain final decision-making authority.

Technical assistance may take “substantive status” *consistent with applicable law and current regulations* and may include:

Exclusive Arrangements: An area of special concern is exclusive arrangements. Any relationship in which a contractor requires a subcontractor to have an exclusive bidding agreement may violate federal laws. During the course of the relationship, the subcontractor must have the right to quote bids to other prime contractors.

Generally Unacceptable Practices: Any subcontracting agreement contrived to subvert the DBE program is not acceptable.

### Mentor-Protégé Development Plan

The active involvement of the Mentor and Protégé is key to the success of the Mentor-Protégé Program. The Mentor must have the knowledge and experience to help DBE firms refine and implement sound operating plans.

Mentors should help their protégés accomplish the following:

- Set targets for improvement;
- Set time table for meeting those targets;
- Assist with protégé’s business strategies;
- Assist in evaluating the outcomes;
- Maintain confidentiality with protégé’s financial and other proprietary information.

The responsibilities of the protégé include, but are not limited to:

- Identify operational weaknesses;
- Attend scheduled meetings with mentor;
- Share financial and other proprietary information with mentor;
- Provide mentor with company’s business profile (accomplishments, certifications, current work-in-progress, current capacity and location);
- Make every reasonable effort to implement the business decisions that the meetings produce;

- Take the initiative to request whatever additional assistance they may need to address significant business issues.

The Mentor-Protégé relationship shall be based on the written Mentor-Protégé Development Plan, approved by the MoDOT Mentor-Protégé Oversight Committee, 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 Development Plan should include the following:

- The Development Plan should clearly set forth the objective of the parties and their respective roles.
- The Development Plan should describe measurable benchmarks to be reached by the DBE Protégé at successive stages of the plan.
- The Development Plan should provide that if resources of the mentor are utilized by the DBE Protégé in the performance of contracts or subcontracts for the mentor or for another contractor/ consultant, the resources must be separately identified, accounted for, and compensated directly by the DBE protégé to the mentor. If the plan provides for extensive use of the mentor's resources by the DBE Protégé, the arrangement will be closely scrutinized.
- The Development Plan should also include training to be provided by the mentor to the DBE Protégé.
- The Development Plan should contain a provision that it may be terminated by mutual consent of the parties or by MoDOT upon determination that:
  - The DBE Protégé no longer meets the eligibility standards for certification as a DBE;
  - Either party desires to be removed from the relationship;
  - Either party has failed or is unable to meet its obligations under the Development Plan;
  - The DBE Protégé is not progressing or is not likely to progress in accordance with the Development Plan;
  - The DBE Protégé has reached a satisfactory level of self-sufficiency to compete without resort to the Development Plan;
  - The Plan or provisions thereof are contrary to the requirements of federal, state, or local law or regulation, or otherwise inimical to public policy.
- The Development Plan should include a provision that either party for any reason may dissolve the arrangement by notifying MoDOT, at least 30 days in advance.

#### Reimbursement

During the review process of the Mentor Protégé Development plan, a proposed lump sum stipend must be reviewed and approved by MoDOT. *Then* Upon successful completion of the Mentor-Protégé program, MoDOT may provide a lump sum stipend to the Mentor firm. The following key components of the program should be completed before MoDOT may approve payment of the stipend:

- Approved Development plan
- Submission of quarterly reports.
- Submission of annual update(s)
- Satisfactory end of program review

### Term of Relationship

The Mentor-Protégé relationship may not exceed thirty-six (36) months in duration.

### DBE Goals

MoDOT desires that all projects be completed with accompanying DBE participation goals attained. On certain projects involving a Mentor-Protégé relationship, as the greater benefit warrants, MoDOT may approve the protégé's participation in the North American Industry Classification System (NAICS) Expansion Initiative. (See attached program description.)

### Recognition of Other Mentor-Protégé Programs

The Mentor-Protégé Oversight Committee may acknowledge mentor-protégé programs which are developed and established officially by other organizations. If a DBE firm is already participating in a mentor-protégé relationship which meets the guidelines established in this document, then the firm should submit their plan for review by the Mentor-Protégé Oversight Committee. If the Oversight Committee finds the program adheres to the guidelines of MoDOT's Mentor-Protégé Program, then the Mentor- Protégé Oversight Committee may acknowledge and recognize that program. Additionally, a letter of recognition may be forwarded from the Oversight Committee to recognize this program and the specific participants in the Mentor-Protégé relationship. This acknowledgment represents the recognition of an existing Mentor-protégé relationship involving a DBE firm in good standing and is not considered a substitute for MoDOT's own FHWA-approved Mentor-Protégé program. However, if the relationship does meet the MoDOT FHA-approved Mentor-Protégé program requirements, then the Mentor-Protégé program Oversight Committee may accept the other program as a MoDOT approved Mentor-Protégé program.

### DBE Supportive Services NAICS Expansion Initiative

If a minority or woman-owned firm is currently certified as a DBE under the United States Department of Transportation's (USDOT) Code of Federal Regulations 49 CFR Part 26, the DBE certification allows prime contractors to obtain DBE participation for dollars incurred on contracts that have DBE goals for the 'scope of work' the DBE is certified.

However, DBEs have the opportunity just as any other business or corporation to expand, grow and develop their business and DBE certification 'scope of work.' MoDOT encourages and support NAICS expansion initiatives. Therefore, MoDOT is establishing a pilot "DBE Supportive Services NAICS Expansion Program," which proposes to allow DBE contractors to perform work outside of their DBE certification codes but within their abilities to gain experience, expertise, and foster skills necessary for certification expansion.

If a DBE performs the additional 'scope of work' successfully on several contracts, the Missouri Regional Certification Committee (MRCC) members, which includes the Missouri Department of Transportation, St. Louis Lambert, the City of Kansas City, the Kansas City Transportation Authority and METRO, will review and upgrade the certification 'scope of work' to include the additional 'scope of work;' thereby allowing DBE participation for additional work provided.

Until certification 'scope of work' is approved and expanded by the MRCC, DBE participation 'scope of work' performed **cannot** be counted; however, out of support and encouragement to

grow DBEs, if this program is utilized by the contractors and DBE goals are not met with currently certified DBEs for approved 'scope of work,' MoDOT will count the additional 'scope of work' participation by the certified DBE as Good Faith Efforts (GFE) for the prime contractor and Liquidated Damages (LD) will not be assessed for the amount of outside the scope DBE work.

### **Noncompliance Complaints (26.103)**

Any person who believes that MoDOT or any MoDOT sub-recipient has failed to comply with the obligations of 49 CFR Part 26, may file a written complaint with the applicable Operating Administration. The written complaint must be filed within 180 days after the occurrence of the alleged violation or the date on which the person learned of an ongoing violation. The person may also request an extension of time to file beyond the 180 days by stating a reason in the interest of justice for so doing.

## II. GOALS, GOOD FAITH AND COUNTING (26.45)

MoDOT will set the goal as a percentage of all federal aid highway funds. Effective March 5, 2010, FHWA amended to change how often State DOT's are required to submit an overall goal request. Previously, the goal was required to be submitted to USDOT by August 1 of each year. The amended rules require the submissions be made at three year intervals.

The current DBE Availability Study has been submitted, and its conclusions form the basis of MoDOT's 2012-2014 goal to establish the overall Disadvantaged Business Enterprise (DBE) goal mandated by 49 CFR Part 26 for its federally-assisted highway contracts.

49 CFR §26.45 requires a two-step process for setting the overall DBE goal that reflects the level of DBE participation on MoDOT's contracts expected in the absence of discrimination. The first step is the calculation of a base figure for the relative availability of DBEs. The second step requires consideration of a possible adjustment of the base figure to reflect the effects of the DBE Program and the level of participation that would be expected "but for" the effects of past and current discrimination against DBEs. As further required by § 26.51(c), MoDOT submits a projection of the portion of the overall goal that it expects to meet through race-neutral means and the basis for the projection.

To meet the requirements of § 26.45, MoDOT commissioned the Study from National Economic Research Associates, Inc. (NERA), an internationally recognized economics consulting firm (Attachment 11). The Study provides a statistical analysis of baseline DBE availability, and examines econometric evidence of disparities between DBEs and non-DBEs in factors impacting entrepreneurial success on MoDOT's contracts and subcontracts. In particular, for Step 1 the Study estimated statewide DBE availability using data on MoDOT's expenditures for highway construction, consulting and "off systems" contracts and subcontracts, and carefully constructed databases of firms in those industries. To address Step 2, the Study reviewed existing qualitative and quantitative evidence of discrimination and assessed the likelihood that statewide DBE availability would be different if the relevant markets in which MoDOT operates were race-neutral; it then estimates the magnitude of this difference. The Study's results are summarized below.

Recent favorable developments in the courts as well as USDOT's approval of other recipients' goals based upon NERA studies give MoDOT confidence in the Study's methodology, constitutional validity and narrowly tailored results. This approach has been upheld by the Eighth Circuit Court of Appeals in the challenge to the Minnesota Department of Transportation's DBE Program, and by the Tenth Circuit Court of Appeals in holding that the City and County of Denver's local Minority and Women Business Enterprise Program meets strict constitutional scrutiny.<sup>1</sup> It provides a statistically sound and detailed basis to meet the requirements of Part 26, and fully addresses the remedial purpose of the DBE Program and Congressional intent. The Study's data will also assist MoDOT in setting contract goals to reach its overall DBE goal for federally-assisted contracts.

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<sup>1</sup> *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 124 S.Ct. 2158 (2004); *Concrete Works of Colorado Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), *cert. denied*, 124 S.Ct. 556 (2003). See also *Builders Association of Greater Chicago v. City of Chicago*, 298 F.Supp.2d 725 (N. D. Ill. 2003).



## **STEP ONE BASE FIGURE**

### **Definition of MoDOT's contracting market**

The first element in estimating DBE availability was to determine empirically the relevant product and geographic markets for MoDOT's federally-assisted contracts. Based upon over 5 years of MoDOT's contract and subcontract expenditure data, the Study determined that MoDOT's product market includes firms in 100 different North American Industrial Classification System (NAICS) industry groups. In construction, three NAICS groups collectively accounted for more than three-fourths of contract and subcontracted spending. Thirteen groups accounted for 95 percent of spending and 20 groups accounted for 99 percent. The remaining one percent was distributed among another 72 groups. In consulting, one NAICS group accounted for almost 95 percent of contract and subcontract spending and 7 groups accounted for 99 percent. The remaining one percent was distributed among another 26 groups. These codes constituted the local product market area.

The Study defined the geographic market area as that region which accounted for at least 75 percent of overall contract dollars awarded. More than 75 percent of MoDOT's spending occurred in the State of Missouri, the Kansas portion of the Kansas City, MO-KS Metropolitan Statistical Area ("MSA"), and the Illinois portion of the St. Louis, MO-IL MSA. The Study therefore used this as the local geographic market area.

### **Counting establishments in MoDOT's relevant markets**

The Study next examined the availability of DBEs in MoDOT's relevant markets. It used Dun & Bradstreet's Marketplace database, an independent and established data source routinely relied upon by courts, to identify the total number of Missouri businesses in each four-digit SIC code, weighted by that code's share of MoDOT's product market. It next identified the number of firms owned by minorities and women, based upon the information in Marketplace, MoDOT's DBE directory and other regional listings. As noted by USDOT's guidance, supplementing the DBE Directory with other information on minority-and women-owned firms may provide a more complete picture of the availability of firms to work on MoDOT's contracts than reliance solely upon the number of MoDOT certified DBEs. Because of the possible misclassification and non-classification of firms from these sources, additional scientifically accepted safeguards were taken to verify listed DBEs and estimate unlisted DBEs.

### **Estimating baseline DBE availability**

Using empirical market definitions, business establishment data and statistical verification surveys, the Study estimated 20.51% as the base DBE availability figure for Step 1, expressed as the percentage of ready, willing and able DBE's as a portion of all ready, willing and able firms. The Study accounted for potential DBEs by including firm that were owned by minorities and women but were not certified as DBEs by the Missouri Unified Certification Program. Expressed as a fraction of the number of firms, the study found the following:

4,970 DBEs (Ready, Willing, and Able DBEs)/24,233 (All Firms Ready, Willing and Able (DBEs and Non-DBEs) = 20.51% (Base Figure)

## Step Two Adjustment

Once the base figure has been calculated, MoDOT must examine all of the evidence available in its jurisdiction to determine if an adjustment is necessary to the base figure to reflect the level of DBE participation expected absent the effects of discrimination. Included among the types of evidence that must be considered are the current capacity of DBEs to perform work on MoDOT's federally-assisted contracts, as measured by the volume of work DBEs have performed in recent years, and evidence from disparity studies conducted anywhere within MoDOT's jurisdiction, to the extent not already accounted for in the base figure. If available, MoDOT must also consider available evidence from related fields that affect the opportunities for DBEs to form, grow and compete, including statistical disparities in the ability of DBEs to obtain the financing, bonding and insurance required to participate in the Program, and data on employment, self-employment, education, training and union apprenticeship programs, to the extent relevant to the opportunities for DBEs to perform in the Program. The regulations caution that any adjustment to the base figure to account for the continuing effects of past discrimination or the effects of an ongoing DBE program must be based on "demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought." §26.45(d)(3).

### Past DBE utilization

MoDOT considered the current capacity of DBEs to perform work in Missouri, as measured by the amount of work performed by certified DBE's on federal-aid projects over the past three years. The median for MoDOT's participation for FFY 2009 through FFY 2013 is 10.25%.

Calculation:

DBE Participation FFY 2009	9.38%
DBE Participation FFY 2010	<b>10.25%</b>
DBE Participation FFY 2011	9.92%
DBE Participation FFY 2012	12.07%
DBE Participation FFY 2013	10.80%

The MoDOT Past Median FFY2009 - 2013 DBE participation is 10.25%

### Step 2 Adjustment Evaluation

While the evidence in the Study of economy-wide disparities might be used to make a step two adjustment, in our view, this does not provide evidence that is sufficiently directly related to an adjustment to reflect the level of participation that would be expected "but for" discrimination.

4 The Study examined disparities in business formation and earnings. Minorities and women earn

Moreover, MoDOT's anticipated construction and design budget will be vastly reduced from earlier years, including those analyzed in the Study. In state fiscal year 2009 (July 1, 2008- June 30, 2009), MoDOT's construction budget was approximately \$1.3 billion. Since that time, MoDOT has cut 20% of its workforce, sold over 130 buildings and auctioned hundreds of pieces of equipment. Despite these cost savings, MoDOT's budget for state fiscal year 2017 (July 1, 2016- June 30, 2017) is projected to be \$325 million. The construction budget will decrease further without new state funding. These drastic funding cuts will result in fewer opportunities for

DBE participation because projects will be limited to overlays, shoulder widening and bridge repair, which will typically have few scopes of work. Large bridge or new road construction projects, where DBES often provide liquid asphalt supply, hauling, traffic control and erosion control and that have more varied opportunities for work, will be very limited.

MoDOT therefore determined that past participation was the appropriate adjustment factor, given the nature of future projects. It then averaged the median past participation with the step 1 base figure estimate.

Calculation:	
Baseline DBE Availability	20.51%
Median Participation	10.25%
Average	15.38%

The resulting Overall 2014 -2017 DBE goal is 15.38%  
(17.32% + 9.66% = 26.98% ÷ 2).

### **Projection of Race-Neutral vs. Race-Conscious Goal Attainment**

The regulations require that MoDOT must meet the maximum feasible portion of its overall goal by using race-neutral measures to facilitate DBE participation. Ongoing and new initiatives seek to reduce discriminatory barriers, increase capacity and level the playing field for the participation of DBEs and other small contractors. They are also designed to assist MoDOT in meeting the increased goal for DBE participation as prime contractors and subcontractors.

### **Past DBE race-neutral participation**

To estimate the portions of the goal to be met through race-neutral and race-conscious measures, MoDOT evaluated past race-neutral DBE participation as defined in §26.51(a). MoDOT's median percentage achieved of 2.59% on federal-aid contracts through race-neutral means for FFY 2009-2013.

Therefore, MoDOT projects that it will meet 2.59% of its overall goal of 15.38% through race-neutral measures and 12.79% of its overall goal through race-conscious contract goals. MoDOT will monitor DBE participation throughout the year to adjust its use of contract goals to ensure that their use does not exceed the overall goal.

### **Race-neutral measures to achieve DBE participation**

To achieve the maximum feasible portion of the goal through remedies other than subcontracting goals, MoDOT implements the following measures:

- Vendor communication and outreach.
- Certification outreach and resources.
- Increased contract "unbundling."
- Review of surety bonding, insurance and experience requirements.
- Enforcement of prompt payment requirements.

In addition, the Department is in the process of implementing the following additional race-neutral approaches to increase DBE participation:

- Enforcement of bidder non-discrimination and fairly priced subcontractor quotations, whereby prime contractors would be required to maintain information on all subcontractor quotes received to permit MoDOT to audit any claims that subcontractor quotes were being shopped or that DBEs unfairly inflate prices.
- Enhancement of the small business element of the DBE Program, which was approved by the Federal Highway Administration on August 22, 2012,
  - Implementation of a bonding and financing program for SBEs to increase firms' access to bonding and working capital.
  - Adoption of a SBE Set-aside Element, whereby only certified SBEs can submit bids or proposals on certain smaller jobs.
  - The requirement that SBEs be Economically Disadvantaged, as defined in Part 26.
- Improved contract and subcontract data collection and retention procedures. MoDOT has been using the American Association of State Highway and Transportation Official's Civil Rights Labor Management System for almost a year to capture project information.

## **Public Participation**

### Consultation

MoDOT held three statewide DBE goal public meetings with industry stakeholders, general contractor trade associations, minority and women trade associations, as well as community based organizations, where the DBE availability and methodology was presented (sign-in and comment sheets attached.).

- **October 7, 2014 at 3:00 p.m. – 5:00 p.m.**, The Library Center, 4653 S. Campbell Ave.- Meeting Room A, Springfield, MO 65810;
- **October 21, 2014 at 2:00 p.m. – 4:00 p.m.**, Transportation Management Center, 14301 South Outer 40 Road, Room 209, St. Louis, MO 63017;
- **October 24, 2014 at 1:00 p.m. – 3:00 p.m.**, Bruce R. Watkins Center, 3700 Blue Pkwy., Kansas City, MO 64130.

The comments received from the public meetings included the acknowledgement that the presentation was “good, comprehensive and brief”. Additionally, another commentator requested MoDOT consider a “rolling 5 year average rather than just the previous 5 years when establishing the baseline,” referring to the disparity study’s use of 5 years of contract data to estimate baseline availability. It is not possible to “roll” the Study’s results into future years; MoDOT will consider new data should it undertake a Study at some future date. MoDOT took note of these comments; however,

### Published Notice

MoDOT will publish in major minority and non-minority newspapers throughout the State of Missouri a notice of the proposed overall DBE Program goal, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at the General Headquarters Office for 30 days following the date of the notice.

## Summary

MoDOT received approval from U.S. Department of Transportation for an overall goal of 15.38%, with 2.59% to be achieved through race-neutral means.

### **Short Fall Analysis (26.47)(c)**

MoDOT will submit a short fall analysis if the awards and commitments shown on MoDOT's Uniform Report of Awards or Commitments and Payments at the end of the federal fiscal year are less than the overall goal for the fiscal year.

## **Project Goals (26.51)**

MoDOT will use contract goals to meet any portion of the overall goal MoDOT does not project being able to be met using race-neutral means. MoDOT will establish contract goals **only** on those USDOT assisted contracts with subcontracting possibilities.

The External Civil Rights Division is responsible for setting all DBE goals on MoDOT let projects. The division is also responsible for review and concurrence on all off-system, aviation, transit, enhancement, consultant, and any other sub-recipient project DBE goal. One Civil Rights Specialist has been designated to set the goals, verify compliance, review “good faith efforts”, and investigate “commercially useful function” questions. The specialist works closely with the Design and Bridge Divisions, Chief Counsel’s Office, Construction personnel, and Planning personnel to ensure all requirements are met.

The project goal is set by reviewing the type of project, elements of work to be performed, time frame, geographical location, history of DBE and Non-DBE usage, and available DBE firms. The project goal is expressed as a percentage of the total amount of a USDOT assisted contract.

## **Good Faith Efforts (26.53)**

### Bid Requirements

Award of federal aid contracts with DBE goals require submission of a completed MoDOT DBE Identification Submittal (Attachment 5) with all DBE firms to be utilized including suppliers, haulers or truckers, service providers, and subcontractors by the low and second low bidder. The contractor is required the DBE identification Submittal and/or good faith effort documentation by 4:00 p.m. on the third working day after the bid opening. If the low bidder does not indicate the full DBE goal will be met, they will have the opportunity to document good faith efforts. However, they will **not** be given the opportunity to submit additional DBE participation. MoDOT treats bidder’s compliance with good faith efforts requirements as a matter of responsiveness.

The DBE Identification Submittal form must include the following at the time of bid submission:

1. The names and addresses of DBE firms that will participate in the contract;
2. The line or bid items that each DBE will perform;
3. The dollar amount of the participation of each DBE firm participation, and;
4. If the contract goal is not met, evidence of good faith efforts.

MoDOT will notify and secure the following for each DBE firm included on the DBE Participation form;

1. Written and signed documentation of the commitment to use the DBE subcontractor whose participation has been submitted to meet the contract goal;
2. Written and signed confirmation from the DBE that it is participating in the contract as provided in the prime contractor’s commitment.

(a) When MoDOT establishes a DBE contract goal, MoDOT will award the contract only to a bidder/offeror who makes good faith efforts to meet it. MoDOT will determine that a bidder/offeror has made good faith efforts if the 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.

(b) MoDOT will require the following for DOT-assisted contracts for which a contract goal has been established:

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

(2) All bidders or 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. To count toward meeting a goal, each DBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the contract;
- (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; and
- (v) Written confirmation from each listed DBE firm that it is participating in the contract in the kind and amount of work provided in the prime contractor's commitment.
- (vi) If the contract goal is not met, evidence of good faith efforts. The documentation of good faith efforts must include copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract; and

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

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

(B) No later than 3 days after bid opening.

- (ii) In a design-build procurement, the bidder/offeror may make a contractually binding commitment to meet the goal at the time of bid submission or the presentation of initial proposals but provide the information required by paragraph (b)(2) of this section before the final selection for the contract is made by the recipient.

### Administrative Reconsideration

(c)(d) The bidder must make a written request for administrative reconsideration within the specified date included in the notification for lack of good faith efforts. That notice may be faxed or emailed to:

**Lester Woods, Jr.**  
**External Civil Rights Director**  
**P.O. Box 270**  
**Jefferson City, MO 65102**  
**Telephone: (573) 751-2859**  
**Fax: (573) 526-0558**  
**E-Mail: [dbemodot@modot.mo.gov](mailto:dbemodot@modot.mo.gov)**

The Administrative Reconsideration Committee will include 3 individuals MoDOT deems appropriate and the members will be familiar with the DBE program, bidding, construction, and/or contracting matters. (NOTE: The Federal Highway Administration Missouri Division staff may attend the Administrative Reconsideration Hearing as a resource, but will not participate as a committee member.) The External Civil Rights Division will process the request, including providing documentation of the determination, and notify the Administrative Reconsideration Committee of the request for review, however, the Director, nor any member of MoDOT that had a part in the initial determination will be a part of the reconsideration determination.

As part of this reconsideration, the bidder will 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 to the committee. The bidder may choose to meet in person with the Administrative Reconsideration committee to discuss the finding. MoDOT will notify the bidder, in writing of the decision on reconsideration, explaining the basis for finding that the bidder did or did not make adequate good faith efforts to meet the goal. The result of the reconsideration process is not administratively appealable to the USDOT.

### (f)(g) Termination, Removal, Or Substitution Of DBE Firm

A contractor cannot terminate, release, or substitute any DBE firm without the written consent of MoDOT. The contractor must provide documentation to Resident Engineer that the DBE firm is **unwilling or unable to perform** within 5 working days of notice of the inability to perform by the DBE firm. The Resident Engineer will forward the notice to the External Civil Rights Director for approval. If removal of a DBE firm is approved, or a DBE firm withdraws, the contractor must make a good faith effort to find a replacement DBE firm. The contractor must make efforts to replace the dollar value of work to be performed not merely finding a replacement for the work that was to be performed by the DBE firm being replaced. If substitution of a DBE firm is approved, the prime contractor must provide the Resident Engineer and External Civil Rights Director copies of new or amended subcontracts.

If the contractor fails or refuses to comply in the time specified, MoDOT will issue an order stopping all or part of payment until satisfactory action has been taken. If the contractor remains in non-compliance MoDOT may issue a termination for default proceeding. If MoDOT



finds the contractor did not make a good faith effort, the contractor is entitled to the administrative reconsideration.

If the Administrative Reconsideration Committee concurs in the original finding of no good faith efforts, the contractor is subject to administrative remedies upon final verification of DBE participation. The contractor will not be given credit for the amount applicable to the determination of a failure to make a good faith effort to replace the DBE firm.

MoDOT may assess monetary damages for the difference between the amount the contractor is given credit for and the contract DBE goal. In addition, MoDOT may impose any other administrative remedies available at law or provided in the contract. If the failure to comply with the contractual DBE requirements is intentional or fraudulent in any respect, the contractor, and any other firms or persons acting with the contractor, are subject to suspension or debarment by MoDOT.

(j) All prime contractors shall make available all DBE subcontracts upon request of the ECR.

### **DBE Participation (26.55)**

(A) DBE credit will count toward the contractual goal only for work actually performed by the DBE firm and within the NAICS code approved for that firm.

#### (B) Joint Ventures

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) The credit will be counted in the following manner:

- (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, MoDOT will 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 MoDOT 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, MoDOT will 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. MoDOT will determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.

#### Manufacturer

Credit is given for 100 percent of the value paid for materials furnished which becomes a permanent part of the project. A manufacturer is a firm that owns and operates the facilities to produce a product required by the project and purchased by the contractor.

#### Supplier

Credit is given for 60 percent of the value paid for materials furnished which becomes a permanent part of the project. A supplier sells goods to the general public and maintains an inventory at an owned or leased warehouse or store. Bulk items such as steel, petroleum products, or rock do not have to be maintained in an on-site inventory. Credit will not be given for the cost of the materials and separate credit for the hauling of those same materials. Transportation of the materials is deemed part of the total cost.

#### Broker

Credit is given for 100 percent of the **fees** or **commission** received by the DBE firm for materials purchased, services provided, or equipment secured and resold to the contractor. Fees or commissions are defined as the difference between what the DBE firm paid for the materials purchased, services provided, or equipment secured and the price paid by the contractor to the DBE firm for those items. A broker does not manufacture or supply on a regular basis.

#### (d) Trucker

MoDOT uses 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 and fully licensed, insured, and operate all trucks 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) 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.

Credit is given for 100 percent of the amount paid to the DBE trucker if the all of the trucking is performed by the DBE, with employees of the DBE, using equipment owned by the DBE.

Full credit will not be given for leased trucks unless they are leased from another DBE firm, DBE owner operators. Lease of trucks from the prime contractor will not be credited toward the DBE goal. This type of relationship will be subject to strict scrutiny.

All trucks used must be labeled clearly and visibly with a sign indicating the firm owning or leasing the vehicle. MoDOT will require submittal of a truck roster report, including ownership and vehicle identification information, on a regular basis. MoDOT project office personnel will review the rosters for verification and will monitor the trucks operating on the project. MoDOT will conduct random verification and report any irregularities to the External Civil Rights Division for review.

In order for the use of a DBE trucker to be credited for the delivered price of materials/ supplies, the trucker must be certified as a supplier or manufacturer of the material, responsible for the quality standards of the material, negotiating the material price, payment, and select the source.

#### Contractor and Payment Verification

Credit is given for 100 percent of the amount paid to a DBE contractor for labor and materials provided to perform a defined and clearly measurable portion of the contract.

MoDOT requires submittal of an affidavit of final payment for all DBE firms prior to release of final payment to the prime contractor. The final original items to be performed, change orders, final quantities, and payments are then reviewed to determine if the contractor has complied with the contractual DBE goal. If the prime does not comply with the goal, MoDOT withholds the amount the contractor failed to achieve as the administrative remedy for non-compliance.

The contractor is then given the opportunity for administrative reconsideration in the same manner as determinations of failure to perform a commercially useful function, set out under the section entitled Administrative Reconsideration & Appeals.

At the present time MoDOT maintains a database of contractual DBE commitments and compliance. In addition, MoDOT uses spreadsheets set up specifically to calculate compliance. MoDOT is examining civil rights oriented software that will provide enhanced tracking and verification abilities. MoDOT has also implemented the AASHTO Transport software which

includes the Sitemanager construction management module. This module does include Civil Rights and payment monitoring processes.

(e) Liquid Asphalt (Regular Dealer)

**Factors Used to Determine if a DBE Regular Dealer of Liquid Asphalt is Performing a CUF**

The DBE must be responsible with respect to materials and supplies used on a contract perform all of the following, pursuant to 49 CFR § 26.55(c)(1) and 7 CSR 10-8.131:

- (1) Negotiating price.
- (2) Determining quality and quantity.
- (3) Ordering the material.
- (4) Paying for the material itself.
- (5) 30% of the work must be performed by the DBE's permanent employees (which does not include owner-operators or leased employees) or those hired by the DBE firm for the project from an independent source other than the prime contractor, such as a union hall. For at least 30% of the work the DBE's owned (not leased) equipment shall be used and the DBE must provide documentation that this owned equipment was used on the project as required by this provision.
- (6) For up to 70% of the remaining work the equipment used by the DBE must be by long term lease (at least one year) with another DBE or non-DBE but not the prime contractor. The DBE must have absolute priority over other businesses or entities to use the long term leased equipment and must display the name and identification number of the DBE.
- (7) The Contractor shall require DBE subcontractors to provide documentation in one of the following formats: bills of lading, hauling tickets, shippers manifest, and/or paid invoices. Regardless of the document format, the document(s) shall include the following information: name of the carrier, full name of the driver, driver ID number(s), truck and tanker ID or VIN number, and reflect the contract number, job number, county and route.

The contract number, job number, county and route can be reported through a consignee number or lift number, as long as the DBE Subcontractor has provided the consignee number, or lift number, along with project specific information which shall include contract number, job number, county and route.

The documentation must be submitted and generated by the DBE Subcontractor and be printed on letterhead or other similar documentation outlining the contact information for the DBE Subcontractor. In addition the documentation shall indicate the quantity and amount invoiced to the prime contractor (Such as an invoice). "MoDOT's DBE Contractor/Subcontractor Project Trucker and Equipment List" (Form 1) will be provided by MoDOT and shall be completed and

submitted to MoDOT by the DBE Subcontractor or Liquid Asphalt Supplier before Asphalt Operations begin. The DBE Subcontractor shall report all trucks and tankers they currently own and all full time drivers that they employ, including all of the drivers numbers for each terminal the drivers pick up from. In addition the DBE Subcontractor shall include a list of "long term" leased equipment, along with drivers and drivers' numbers to the DBE Subcontractor Project Trucker and Equipment List. The DBE Subcontractor shall attach copies of all current long term lease agreements to the DBE Subcontractor Project Trucker and Equipment List.

DBE Trucking/Hauling regulations do not apply to regular dealers of liquid asphalt.

### III. DBE CERTIFICATION STANDARDS (SUBPART D)

#### UCP Policies And Procedures –

[http://www.modot.org/business/contractor\\_resources/External\\_Civil\\_Rights/UFC.htm](http://www.modot.org/business/contractor_resources/External_Civil_Rights/UFC.htm)

#### DBE Certification Determinations

Disadvantaged Business Enterprise (DBE) Certification is the process by which all firms seeking to participate in the Missouri Regional Certification Committee's (MRCC) DBE Program are determined to have met the requirements set forth in 49 CFR Part 26. This guidance provides the policies and procedures of the MRCC for certifying firms as DBE's. These policies and/or procedures are not all inclusive, and therefore, reference to 49 CFR Part 26 is required. The provisions of 49 CFR Part 26, or as amended, will control to the extent of any inconsistencies with these policies and/or procedures.

The MRCC shall review and make an eligibility determination on all firms applying for DBE certification. The weblink for the MRCC is located at:

[http://www.modot.org/business/contractor\\_resources/External\\_Civil\\_Rights/UFC.htm](http://www.modot.org/business/contractor_resources/External_Civil_Rights/UFC.htm)

The MRCC will not process an application for certification from a firm having its principal place of business outside the State of Missouri if the firm has not had an on-site visit conducted by either its "home state" UCP or the UCP in another state. A firm not having "home state" certification does not render that firm ineligible for certification; however, the firm must have had an on-site visit conducted, either by the "home state" UCP or by the UCP of another state.

The MRCC Partners in the St. Louis area shall review applicant firms that are located in the St. Louis Metropolitan Statistical Area (MSA), which includes St. Louis City, St. Louis County, Jefferson County, St. Charles County, Lincoln County, Warren County, and Franklin County.

The MRCC Partners in the Kansas City area shall review applicant firms that are located in the Kansas City MSA, which includes Kansas City, Jackson County, Cass County, Clay County, Platte County, and Ray County.

MoDOT will review applicant firms statewide. The MRCC Partners agree that after the geographical area has been ascertained, the applications would be divided by industry or primary market.

The decision of a MRCC Certifying Partner with regard to an eligibility determination on a firm applying for DBE certification shall be regarded as the decision of the MRCC. The MRCC Certifying Partners are Missouri Department of Transportation, City of St. Louis-Lambert, Metro, City of Kansas City, Missouri-Human Relations, East-West Gateway Council of Governments, and Kansas City Area Transportation Authority.

The MRCC recognizes that each Certifying Partner conducts certification reviews for DBE certification. The MRCC also recognizes that some Certifying Partners, in addition to administering a DBE Program, administer a local MBE/WBE Program that is separate from the DBE Program. Any firms certified under the local MBE/WBE program will not be included in Missouri's Unified Certification Program unless qualified and certified under 49 CFR Part 26.

When a Certifying Partner obtains a firm's records and reviews that firm for certification eligibility (regardless of the firm's disposition), it then becomes the Agency of Record. Any future eligibility requests, reapplication, inquiries, etc., must be handled by the Agency of Record -- the MRCC Certifying Partner with whom the certification records reside.

#### Airport Concession Disadvantaged Business Enterprise (ACDBE) Designation

The MRCC shall review and make an eligibility determination on applicant firms in accordance with 49 CFR Part 26 and Part 23 that are participating or seeking opportunities to participate as an ACDBE. The City of Kansas City and the City of St. Louis will perform the review of eligibility for ACDBE certification of applicant firms that are seeking airport concession opportunities or are participating in airport concession activities at their respective facilities. MoDOT will assist MRCC partners with application process on an as needed basis, for firms applying for certification outside of the St. Louis and Kansas City areas.

#### Industry or Market Designation

After the geographical area of the applying firm has been designated, the firm's primary type of work or industry will be ascertained by the agency reviewing the submission. The MRCC Partners agreed to divide the applicants in accordance with the firms' primary industry or market. Specifically the Partners agree to industry designations in the following manner:

- Metro & KCATA will review applicants that are primarily transit oriented services or products. These may include, but are not limited to, transit services, maintenance services, maintenance products or transportation services.

All MRCC Partners agree that there may be exceptions to assignments based upon familiarity with the firm, historical knowledge, or resources.

#### NAICS Codes

The MRCC agrees to certify all firms in compliance with 49 CFR Part 26, including designating specific work types. The Partners agree to use the NAICS codes for those designations. All firms will be informed of the specific codes and a short narrative description of that designation.

Any firm may request modification and/or additions to their approved codes by completing the "Request for NAICS Expansion" (Attachment 9) form to the certifying Partner. That request must include the equipment and experience indicating the firm's ability to perform the particular work type. In addition, the firm must submit documentation of past contracts on which the firm has performed the specific type of work.

#### Burdens of Proof (26.61, 26.63, 26.67, 26.69, 26.71)

In accordance with 49 CFR 26.61, the firm seeking certification has the burden of demonstrating to the MRCC, by a preponderance of the evidence, that it meets the requirements concerning group membership or individual disadvantage, business size, ownership and control.

- (1) The MRCC will rebuttably presume that members of the designated groups identified in 49 CFR 26.67 is socially disadvantaged. Where the presumption does not apply or has been rebutted, the individuals have the burden of proving, by a preponderance of the evidence, that they are socially disadvantaged. The applicant also has the burden of

proof to demonstrate economic disadvantaged status based upon the requirement for personal net worth contained in 49 CFR Part 26.

- (2) The MRCC will make determinations concerning whether individuals and firms have met the burden of demonstrating group membership, ownership, control, and social and economic disadvantage by considering all the facts in the record, viewed as a whole.

#### Group Membership Determinations

Pursuant to 49 CFR 26.63, if the MRCC has reason to question whether an individual is a member of a group presumed to be socially disadvantaged, the MRCC will require the individual to demonstrate, by a preponderance of the evidence, that he/she is a member of such group. In making that determination, the MRCC will consider whether or not the person has held himself/herself out to be a member of the group over a long period of time prior to application for certification and whether the relevant community regards the person as a member of the group.

The MRCC may require the applicant to produce appropriate documentation of group membership. If the MRCC determines an individual claiming to be a member of a group presumed disadvantaged is not a member of such group, the individual must demonstrate social and economic disadvantage on an individual basis. The MRCC's decision concerning membership in a designated group will be subject to the certification appeal procedures.

#### Socially Disadvantage

The MRCC will rebuttals 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 disadvantaged by the Small Business Administration are socially disadvantaged individuals. The definitions of those groups are set out in Appendix A, attached and incorporated by reference.

#### Economic Disadvantage

Economically disadvantaged individuals are those who have been determined to have an individual personal net worth below the \$1.32 million cap set out in 49 CFR 26.67. The MRCC requires submission of financial information from each individual claiming economic disadvantage. The MRCC may attribute to any individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member or a trust, a beneficiary of which is an immediate family member, for less than fair market value within the prior 2 years of the application.

Pursuant to 49 CFR 26.67, the MRCC will require each individual owner of a firm applying to participate as a DBE and whose ownership interest is relied upon for DBE certification to submit a signed, notarized statement or affidavit that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

Pursuant to 49 CFR 26.67, the MRCC will require each individual owner of a firm applying to participate as a DBE and whose ownership interest is relied upon for DBE certification to submit a signed, notarized Statement of Personal Net Worth with appropriate supporting documentation that each presumptively disadvantaged owner is, in fact, economically disadvantaged. In determining net worth, the MRCC will exclude an individual's ownership interest in the applicant firm and the individual's equity in his/her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm).



If an individual's Statement of Personal Net Worth shows the individual's personal net worth to exceed \$1.32 million, the individual's presumption of economic disadvantage will be rebutted. The MRCC is not required to have a proceeding in order to rebut the presumption of economic disadvantage.

If the MRCC has a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged the MRCC may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. The MRCC must follow the procedures set forth in 49 CFR 26.87. The MRCC may require the individual to produce additional information relevant to the determination of his/her disadvantage.

When an individual's presumption of social and/or economic disadvantage has been rebutted, his/her ownership and control of the firm cannot be used for purposes of DBE eligibility unless, and until, he/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 \$1.32 million, the individual is no longer eligible for participation in the DBE Program and cannot regain eligibility by making an individual showing of disadvantage.

#### Individual Determinations of Social and/or Economic Disadvantage (26.67)

Pursuant to 49 CFR 26.67, 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 be certified by the MRCC on a case-by-case basis. The MRCC will determine 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 must demonstrate, by a preponderance of the evidence, that each of the individuals who own and control it is socially and economically disadvantaged. An individual whose personal net worth exceeds \$1.32 million will not be determined to be economically disadvantaged. The MRCC will use guidance in Appendix E of 49 CFR Part 26.

MoDOT will require each individual who makes this certification to support it with a signed, notarized statement of personal net worth, with appropriate supporting documentation.

#### Business Size Determinations (26.65)

In accordance with 49 CFR 26.65, in order to be an eligible DBE, a firm (including its affiliates) must be an existing small business as defined by SBA standards. The MRCC will apply current SBA business size standards found in 13 CFR Part 121 appropriate to the type(s) of work the firm seeks to perform on federally funded contracts.

Although a firm may meet the SBA business size requirements, the firm may not be an eligible DBE. Any applicant, including its affiliates, may not have average annual gross receipts over the previous three fiscal years exceeding the current cap as defined by current SBA regulations. The Secretary of Transportation may adjust the cap for inflation from time to time. In any case the applicant firms' average annual gross receipts cannot exceed the lesser of either the SBA Size Standard for the work category or the current cap, as adjusted.

The above size standards do not apply to airport concessionaires, which are set forth in 49 CFR Part 23 subpart F.

### Ownership Determinations (26.69)

In accordance with 49 CFR 26.69, in determining whether the socially and economically disadvantaged participants in a firm own the firm, the MRCC will consider all the facts in the record, viewed as a whole at the time of application.

To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individual(s). The firm's ownership by socially and economically disadvantaged individual(s) must be real, substantial and continuing, going beyond pro forma ownership of the firm as reflected in the ownership documents. The disadvantaged owner(s) 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.

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

In the case of a partnership, at least 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged individual(s) and must be reflected in the firm's partnership agreement.

In the case of a limited liability company, a socially and economically disadvantaged individual(s) must own at least 51 percent of each class of member interest.

All securities that constitute ownership must be held directly by the disadvantaged person(s). Except as provided in 49 CFR 26.69(d), no securities or assets held in trust, or by any guardian for a minor, are considered as held by a disadvantaged person(s) in determining ownership of a firm.

### Capital Contribution

The contributions of capital or expertise by the socially and economically disadvantaged individual(s) to acquire ownership interests must be real and substantial. In addition, the individual whose expertise is relied upon must have a significant financial investment in the firm.

In a situation in which an individual's expertise is relied upon as part of the individual(s) contribution to acquire ownership, the expertise must meet the following requirements:

- In a specialized field
- Of outstanding quality
- In area(s) critical to the firm's operations
- Indispensable to the firm's potential success
- Specific to the type of work the firm performs
- Documented in the records of the firm.

For purposes of determining ownership, the MRCC will deem as held by a socially and economically disadvantaged individual all interests in a business or other assets obtained by the individual in the following manner(s):

- As the result of a final property settlement or court order in a divorce or legal separation

- Through inheritance or otherwise because of the death of the former owner

The MRCC will 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 which is:

- Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm
- Involved in the same or a similar line of business
- Engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification

To overcome the foregoing presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate by clear and convincing evidence that:

- The gift or transfer was made for reasons other than obtaining certification as a Disadvantaged Business Enterprise
- 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

The MRCC will apply all of the following rules in situations in which marital assets form a basis for ownership of a firm:

- 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 interests asserted by one spouse, the MRCC will deem ownership interest in the firm to have been acquired by that spouse with his/her individual resources
- The other spouse must irrevocably renounce and transfer all rights in the ownership interest in applicant firm in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled
- The MRCC will 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 individual(s) of the firm
- A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification

The MRCC may consider the following factors in determining the ownership of a firm, but will not regard a contribution of capital as failing to be real and substantial nor find a firm ineligible, solely because:

- A socially and economically disadvantaged individual acquired his or her ownership interests as the result of a gift or transfer without adequate consideration other than the types set forth above
- 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
- Ownership of the firm in question or its assets is transferred for inadequate consideration from a spouse who is not a socially and economically disadvantaged individual to a spouse who is such an individual. In this case, the MRCC will give particularly close and careful scrutiny to the ownership and control of the firm to ensure that it is owned and controlled, in substance as well as in form, by the socially and economically disadvantaged individual

### Control Determinations (26.71)

In accordance with 49 CFR 26.71, in determining whether socially and economically disadvantaged owners control a firm, the MRCC will consider all the facts in the record, viewed as a whole at the time of application.

Only an independent business may be certified as a DBE. An independent business is one in which viability does not depend on its relationship with another firm or firms. In determining whether a potential DBE is an independent business, the MRCC will scrutinize relationships with non-DBE firms in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources. The MRCC will consider present or recent employer/employee relationships, the firm's relationship with prime contractors, and other factors related to the independence of a potential DBE firm.

Further, the MRCC will consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.

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. 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.

In a corporation, disadvantaged owners must control the Board of Directors. In addition, the disadvantaged owner must hold the highest officer position in the company (e.g. chief executive officer or president). In a partnership, one or more disadvantaged individual must serve as general partner(s) with control over all partnership decisions.

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 possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm. The socially and economically disadvantaged owners may delegate various areas of 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 socially and economically disadvantaged individuals controlling a firm may use an employee leasing company. This does not preclude such individuals from controlling their firm if they continue to maintain an employer-employee relationship with the leased employees,

including responsibility for hiring, firing, training, assigning, and otherwise controlling on-the-job activities of the employees as well as ultimate responsibility for wage and tax obligations related to the employees.

The managerial role of the socially and economically disadvantaged owner(s) in the firm's overall affairs must be such that the MRCC can reasonably conclude that the socially and economically disadvantaged owner(s) actually exercise control over the firm's operations, management and policy.

The socially and economically disadvantaged owners must have an overall understanding of the business, as well as managerial and technical competence directly related to the type of business in which the firm is engaged, and the firm's operations.

If the state or local law requires the person(s) to have a particular license or other credential in order to own and/or control a certain type of firm, the socially and economically disadvantaged owner must possess the required license or credential.

The MRCC will consider differences in compensation between socially and economically disadvantaged owners and other participants in the firm, in the context of the duties involved, normal industry practices, and the firm's policies and practices.

In order to be viewed as controlling the firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests which conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm.

A socially and economically disadvantaged individual may control the 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. If the MRCC 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 owner(s) have failed to carry the burden of proof concerning control even though they may participate significantly in the firm's activities.

Where a firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member) and ownership and/or control were transferred to a socially and economically disadvantaged individual, and the non-disadvantaged individual remains involved with the firm in any capacity, the disadvantaged individual now owning the firm must demonstrate by clear and convincing evidence that the transfer of ownership and/or control was made for reasons other than obtaining certification as a DBE. The disadvantaged individual must actually control 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.

In determining whether a firm is controlled by its socially and economically disadvantaged owner(s), the MRCC will consider whether the firm owns equipment necessary to perform its work. The MRCC will not determine that a firm has failed to demonstrate that it is 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.

The MRCC will grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have demonstrated the ability to control the firm. To become certified in an additional type of work, the firm must demonstrate only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. The MRCC will not require that the firm be renewed or submit a new application for certification but will verify the disadvantaged owner's control of the firm and the additional type of work.

The MRCC may certify a business operating under a franchise or license agreement if it meets the standards in 49 CFR Part 26 Subpart D, and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the MRCC will generally not consider restraints relating to standardized quality, advertising, accounting format, and other provisions imposed by the franchise agreement or license, provided the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership.

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, to contractually bind the partnership or subject the partnership to contract or tort liability.

## **Other Considerations (26.73)**

### Certification-Other Rules

Except as provided below, the MRCC will not consider commercially useful function issues in making decisions about whether to certify a firm as a DBE. Consideration of whether a firm performs a commercially useful function or is a regular dealer pertains solely to counting toward DBE goals any participation of firms, which have already been certified as DBEs.

- Pattern of Conduct - In making certification decisions, the MRCC will consider 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.

CUF is not a certification issue and it not appealable to the USDOT. Certification will be made based upon looking at the standards as a whole.

### Present Circumstances

The MRCC will evaluate the eligibility of a firm on the basis of present circumstances and will not refuse to certify a firm based solely on historical information indicating lack of ownership or control by socially and economically disadvantaged individual(s) at some time in the past, if the firm currently meets ownership and control standards. The MRCC will not refuse to certify a firm solely on the basis that it is a newly formed firm.

### DBE Cooperation

The MRCC expects all participants in the MRCC's DBE Program, including DBE firms and firms seeking DBE certification, to cooperate fully with requests for information relevant to the certification process, as well as any other requests for information from the USDOT. Failure or

refusal to provide such information is grounds for denial, removal of certification or any other remedies as may be provided by 49 CFR 26.109 (c).

#### For-Profit Firms

Only firms organized for profit may be eligible as a DBE. Not-for-profit organizations, though controlled by socially and economically disadvantaged individuals, are not eligible to be certified as DBE's.

#### Subsidiaries and Affiliates

An eligible DBE firm must be owned by individuals who are socially and economically disadvantaged. Except as provided by this policy and in 49 CFR 26.73 (e), 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. If a socially and economically disadvantaged individual(s) owns and controls 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, holds and controls an operating subsidiary, the MRCC may certify the subsidiary if it otherwise meets all requirements of 49 CFR Part 26. This includes the requirement that there be cumulatively at least 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals. 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.

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.

#### Pre-qualification for Bidding

The MRCC will not require that a DBE firm be pre-qualified as a condition for certification unless the MRCC requires all firms that participate in its contracts and subcontracts, or in a particular contract or subcontract be pre-qualified.

#### Tribal Organizations

The MRCC recognizes that a firm 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 as long as such firm meets the size standards and is controlled by socially and economically disadvantaged individuals.

## **DBE Certification Procedures**

In accordance with 49 CFR 26.83, the MRCC will ensure that only firms certified as eligible DBEs participate in the DBE Program. The MRCC will determine the eligibility of firms as DBEs consistent with the standards of 49 CFR Part 26, Subpart D.

Applicants are evaluated on the basis of documentation in existence at the time of application. Any changes in ownership and control after the date of the application will not be considered. These changes include, but are not limited to, execution of new agreements, board or shareholders' resolutions, memoranda of understanding, consolidation, liquidation, reorganization, merger, election of new officers or directors, appointment of new principals or key personnel or the purchase or sale of shares or issuance of new shares.

The MRCC Certifying Partner will require potential DBEs to complete and submit an appropriate application form. The Certifying Partner will assure that the applicant attests to the accuracy and truthfulness of the information on the application form. This will be done either in the form of an affidavit sworn to by the applicant before a person 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. The Certifying Partner will review all information on the form prior to making a decision about the DBE eligibility of the firm.

The desk audit is that part of the certification procedure at which all of the applicant's submissions are reviewed for internal consistency, accuracy and conformity with the eligibility standards set forth in Federal Regulations, 49 CFR Part 26.

The Certifying Partner may request additional information if there is insufficient evidence upon which to base a determination. No action will be taken on an application until all items have been submitted. Applicants who fail or refuse to submit information deemed necessary for certification review will not be certified. If any information requested is not available or applicable, the applicant must provide a written explanation.

If additional information is required, the Certifying Partner will notify the applicant and will allow the applicant 10 days for submittal of the information. An extension of time may be granted if reasonable justification for delay is provided. If the complete information or justification is not received within 10 days, the Certifying Partner will issue a final request by certified mail, e-mail or fax. The final request will provide for submission of the information within 5 days. Failure to submit all of the requested information at the end of the 5 days will result in denial of the firm's DBE application. The firm may appeal this determination to the USDOT, as provided for in 49 CFR 26.89.

Any applicant who wishes to apply for certification whose file has been closed or denied must follow the procedures for initial application.

The Certifying Partner will take all of the following steps in determining whether a DBE firm meets the eligibility standards set forth in 49 CFR Part 26:

- Conduct an on-site visit to the office(s) of the firm, interview the principal(s) and review their resumes and/or work histories
- Conduct visits to job sites when possible



- In certain circumstances, may rely upon the site visit reports of any other USDOT funded agency or UCP
- Analyze the ownership of stock, partnership agreements, and/or operating agreements in the firm, as well as any other documents related to organizational structure
- Analyze the bonding and financial capacity of the firm
- Determine the work history of the firm, including contracts received, and work completed
- Determine the type of work for which the firm will receive DBE participation credit
- Verify the firm's preferred location(s) for performing the work
- Obtain a list of equipment owned by or available to the firm
- Obtain a copy of the firm's, and/or key personnel's, license(s) necessary to perform the work it seeks as part of the DBE Program

*When another USDOT funded agency or UCP makes a written request to the Certifying Partner for information related to an application for DBE certification, the Certifying Partner will make the information available within 7 days.*

When another USDOT funded agency or UCP has certified a firm, the Certifying Partner has the discretion to take any of the following actions:

- Accept another agency or UCP's certification decision and certify the firm, upon the Certifying Partner's approval as set forth in the UCP agreement
- Make a certification decision based on documentation provided by the other agency or UCP augmented by any additional information required by the Certifying Partner
- Require the applicant to go through the Certifying Partner's application process without regard to the action of other agencies or UCP's

The Certifying Partner may choose to take any of the above actions in relation to a certification decision made by a non-USDOT funded agency that certifies based upon 49 CFR Part 26, upon a majority vote of the MRCC.

The Certifying Partner will make decisions on applications for DBE certification within 90 days of receiving all required information from the applicant. The Certifying Partner may extend this time period once, for no more than an additional 60 days, upon written notice to the firm explaining the reasons for the extension.

The MRCC will not impose an application fee for firms to participate in the DBE certification process.

Once the Certifying Partner has certified a firm as a DBE, it shall remain certified until and unless you have removed its certification, in whole or in part, through the procedures of 49 CFR 26.87. Partners shall not require currently certified DBE firms to reapply for certification or require "recertification". However, partners may conduct a certification review of a certified DBE

firm, including a new on-site review, three years from the date of the firm's most recent certification, or sooner if appropriate in light of changed circumstances requiring notice under a complaint, or other information concerning the firm's eligibility. If a partner has grounds to question the firm's eligibility, the partner may conduct an on-site review on an unannounced basis, at the firm's offices and jobsite. All firms certified by the Certifying Partners under 49 CFR Part 26 will be included in the MRCC's DBE Directory and database.

The MRCC and its Certifying Partners shall safeguard from disclosure to unauthorized persons all information gathered as part of the certification process that may be regarded as proprietary or other confidential business information, consistent with applicable federal, state and local laws, unless applicant authorizes such disclosure.

#### Withdrawal of Applications

Pursuant to §26.83(m), except as otherwise provided in this paragraph, if an applicant for DBE certification withdraws its application before the Certifying Partner have issued a decision on the application, the applicant firm can resubmit the application at any time. Should the applicant firm choose to resubmit its application to the MRCC, it must resubmit its application to the same Certifying Partner (Agency of Record) that initially obtained the firm's records to review for certification eligibility. The Certifying Partner may not apply the twelve (12) month waiting period provided under § 26.86(c) before allowing the applicant firm to resubmit its application. However, the Certifying Partner may place the reapplication at the "end of the line," behind other applications that have been submitted to the Certifying Partner since the applicant firm's previous application was withdrawn. The Certifying Partner may also apply the twelve (12) month waiting period provided under §26.86(c) to a firm that has established a pattern of frequently withdrawing applications before the Certifying Partner makes a decision.

#### Interstate Certifications (26.85)

Pursuant to 49 CFR 26.85 (revised) a DBE firm that holds a current, valid certification from its home state may submit an application for certification to the MRCC and its Certifying Partners. The MRCC will not treat Interstate Certifications as new certifications.

The DBE firm must provide a copy of the home state's certification notice to the Certifying Partner along with an executed Authorization to Release Information form allowing the Certifying Partner to obtain any additional information if needed. The MRCC and the Certifying Partners may accept this information, and upon verification, may certify the DBE firm without any further procedures.

The Certifying Partner may request a copy of the DBE firm's certification application and additional information from the firm's home state and any other state where the firm is certified. The DBE firm is required to notify the Certifying Partner of any notices or correspondence pertaining to its certification status from all states, including certification denials and pending decertifications. If the home state's on-site report is more than three years old, the Certifying Partner may also request an affidavit from the firm that the facts in the on-site report remain true and correct. MoDOT will not treat Interstate Certification firms as new certifications.

The Certifying Partner must notify the firm of the certification determination within 60 days of receipt of all information requested.

If the Certifying Partner determines that there is good cause to show the firm has been erroneously certified and should not apply for certification with the MRCC, the Certifying Partner must notify the DBE firm, in writing, of its decision and state the specific reasons why the firm does not meet DBE eligibility. The DBE firm has 30 days to request, in writing, a meeting with the MRCC to discuss the objections. The DBE firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements of 49 CFR Part 26 with respect to the specific issues raised by the Certifying Partner. The MRCC shall review the information presented by the Certifying Partner and the DBE firm and make a determination on the certification decision within 30 days of the meeting. The MRCC must submit this information to the U.S. DOT Office of Civil Rights' Ineligibility Determination Online Database.

#### DBE Certification Continuing Eligibility

The MRCC agrees that it is the responsibility of the Certifying Partners to notify DBE firms of the due date of the annual update. In addition, the Certifying Partner will update all data related to the annual update in the database designated by the MRCC. All Certifying Partners are responsible for monitoring the compliance of DBE firms, however, it is the primary responsibility of the Certifying Partner to ensure firms give the necessary notification of any change in circumstances affecting the firm's ability to meet the size, disadvantaged status, ownership, or control requirements or any material change in the information provided in the application. All Certifying Partners, recipients and sub-recipients agree to certify all firms in compliance with 49 CFR Part 26, including designating specific work types. The Certifying Partners agree to use the NAICS codes for those designations.

Once certified, a DBE firm must inform the Certifying Partner, in writing, of any changes in circumstances affecting the firm's ability to meet size, disadvantaged status, ownership, or control requirements, or any material change in the information provided in the certification application process. The statement must include supporting documentation describing in detail the nature of such changes. Changes in management responsibility among members of a limited liability company are also covered by this requirement.

The notice of change from the DBE firm must take the form of an affidavit sworn to before a person authorized by state law to administer oaths, or of a declaration executed under penalty of perjury of the laws of the United States. The written notification must be provided by the DBE within 30 days of the date of the change(s). If the DBE fails to make timely notification of such change(s), it will be deemed to have failed to cooperate and certification may be removed as set forth in 49 CFR 26.109(c).

If a certified firm notifies the Certifying Partner of a change in its circumstances, and the Certifying Partner determines there is reasonable cause to believe the firm is ineligible, the Certifying Partner will provide written notice setting forth the reasons for the proposed determination. The findings must specifically reference the evidence in the record upon which the decision is based.

On the first and second anniversary dates of DBE certification, every firm must provide the Certifying Partner an affidavit sworn to by the firm's owners before a person who is authorized by state law to administer oaths or a declaration executed under penalty of perjury of the laws of the United States.

This affidavit must affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of 49 CFR Part

26 or any material changes to the information provided in its original application, except for changes about which it has notified the Certifying Partner. The affidavit will specifically affirm that the DBE continues to meet SBA business size criteria and the overall gross receipts cap set forth in 49 CFR Part 26. This affirmation must include supporting documentation of the DBE's size and gross receipts. In addition, the owner(s) whose interest is relied upon for DBE certification must affirm that their personal net worth has not exceeded \$1.32 million.

All participants in the DBE program are required to cooperate fully and promptly with DOT and Certifying Partner's 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 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). If a DBE firm fails to provide this information in a timely manner, the DBE firm will be deemed to have failed to cooperate and certification may be removed as set forth in 49 CFR 26.109(c).

## **Appeals/Hearing Processes**

### For Denial of Initial Certification (26.86 )

Pursuant to 49 CFR 26.86, when the Certifying Partner denies a request by a firm that is not currently certified, the denying Certifying Partner will provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason. All documents and other information on which the denial is based will be made available to the applicant firm upon request. When a firm is denied certification, it is required to wait 12 months before it may reapply for DBE certification with the MRCC Certifying Partner of record (agency of record). The time period for reapplication begins to run on the date the explanation for denial of certification is mailed to the applicant firm.

When the Certifying Partner notifies a firm that its initial application for certification is denied, the applicant firm must appeal the decision directly to the U.S. Department of Transportation within 90 days of the date of the final decision at:

U.S. Department of Transportation  
Office of Civil Rights  
1200 New Jersey Avenue, S.E. W-35  
Washington D.C. 20590

The grounds of the appeal are limited to the issues raised in the denial letter, and any new information submitted must be specifically in support of the applicant firm's appeal.

### For Removal of Eligibility (26.87)

In circumstances where a certified firm, or a new applicant firm, has submitted a personal net worth statement that shows that an individual's personal net worth exceeds \$1.32 million there will be no administrative re-consideration of the decision to decertify the firm.

In circumstances where a certified firm fails to cooperate fully and promptly as required in 49 CFR Part 26 would have certification removed. The MRCC will hold an administrative hearing to determine removal of eligibility. The MRCC decisions are appealable to the USDOT.

Pursuant to 49 CFR Part 26, when a Certifying Partner makes a preliminary determination to remove the eligibility of a firm currently certified, the Certifying Partner will provide the firm a written explanation of the reasons for the preliminary decision specifically referencing the evidence in the record that supports the decision. The denying Certifying Partner has the burden to show, by a preponderance of the evidence, that the firm does not meet the eligibility requirements set forth in 49 CFR Part 26. These procedures for removal of eligibility also apply to a firm which exceeds SBA business size standards as noted in 13 CFR Part 121, as determined by a Certifying Partner.

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

- Changes in the firm's circumstances since the certification
- Information or evidence not available at the time of certification
- Information that was concealed or misrepresented by the firm in previous certification actions
- Change in the certification standards or requirements of USDOT since the firm was certified
- A documented finding that the agency's determination to certify the firm was factually erroneous.
- Violation of any provision of 49 CFR Part 26 that specifically authorizes removal of eligibility

The Certifying Partner will provide the firm written notice of the decision and the reasons, including specific references to the evidence in the record that supports the decision. The notice will inform the firm of the consequences of the Certifying Partner's decision and of the availability of an appeal to the MRCC. The firm must exhaust all administrative avenues at the local level prior to appeal to the USDOT. Therefore, if the firm chooses to appeal to the MRCC they maintain the right to appeal to the USDOT, however, if the firm chooses not to appeal to the MRCC, they cannot appeal to the USDOT.

When a firm is decertified, it is required to wait one (1) year before it may reapply for DBE certification with the MRCC Certifying Partner of record (agency of record). The time period for reapplication begins to run on the date the explanation for decertification is mailed to the applicant firm. A firm remains an eligible DBE during any appeal to the MRCC. If the MRCC makes a final decision to remove the firm's eligibility, that firm is no longer eligible as a DBE firm. The effective date of the MRCC's decision, or expiration of the time period to appeal to the MRCC, is the date the firm's eligibility is removed.

The firm must submit a written request for appeal to the Decertifying Partner within 15 days of the preliminary decision. The letter must specify whether the firm wishes to appeal in writing or appear personally before the MRCC and if they intend to be accompanied by counsel. The MRCC will notify the appellant of the date of the next available MRCC hearing date and the deadline for submission of supporting documentation. Any firm requesting an appeal must submit all supporting documentation to be considered by the MRCC no later than 45 days prior to the scheduled MRCC hearing date. No appeal will be considered unless included on the agenda for the meeting and all agenda items must be finalized 30 days prior to the meeting.

The MRCC will consider written submissions by the applicant firm, including but not limited to, the certification application, the original denial letter, file memoranda prepared by the Certifying Partner, the appeal letter and any other relevant documentation. The information or documentation submitted is limited to the issues raised in the denial letter. No new or additional documentation or information shall be considered by the MRCC without a showing by the appellant that it was not available or, through due diligence, could not have been made available.

Legal counsel may accompany the firm during the MRCC hearing, however the controlling owner shall be prepared to speak on behalf of the firm, respond to questions or otherwise make a presentation. Reasonable accommodations will be made for those with disabilities.

A written decision by the MRCC setting forth the grounds and reasoning for the decision will be mailed to the applicant firm within a reasonable time from the date the MRCC considered the appeal. The decision by MRCC is final and no further appeals will be heard by the MRCC. The firm may appeal the decision of the MRCC to the Office of the Secretary of Transportation, U.S. Department of Transportation, Office of Civil Rights, 1200 New Jersey Avenue, S.E., W-35, Washington D.C., 20590 within 90 days after receipt of the original denial letter.

#### Suspension of Certification (26.88)

(a) MoDOT shall immediately suspend a DBE's certification without adhering to the requirements in §26.87(d) when an individual owner whose ownership and control of the firm are necessary to the firm's certification dies or is incarcerated.

(b) MoDOT may immediately suspend a DBE's certification without adhering to the requirements in §26.87(d) when there is adequate evidence to believe that there has been a material change in circumstances that may affect the eligibility of the DBE firm to remain certified, or when the DBE fails to notify the recipient or UCP in writing of any material change in circumstances as required by §26.83(i) of this part or fails to timely file an affidavit of no change under §26.83(j).

In determining the adequacy of the evidence to issue a suspension in the above paragraph of this section, MoDOT shall consider all relevant factors, including how much information is available, the credibility of the information and allegations given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result.

The concerned operating administration may direct the recipient to take action pursuant to paragraph listed above if it determines that information available to it is sufficient to warrant immediate suspension.

When a firm is suspended pursuant to paragraphs this section, the recipient shall immediately notify the DBE of the suspension by certified mail, return receipt requested, to the last known address of the owner(s) of the DBE.

Suspension is a temporary status of ineligibility pending an expedited show cause hearing/proceeding under §26.87 of this part to determine whether the DBE is eligible to participate in the program and consequently should be removed. The suspension takes effect when the DBE receives, or is deemed to have received, the Notice of Suspension.

While suspended, the DBE may not be considered to meet a contract goal on a new contract, and any work it does on a contract received during the suspension shall not be counted toward a recipient's overall goal. The DBE may continue to perform under an existing contract executed before the DBE received a Notice of Suspension and may be counted toward the contract goal during the period of suspension as long as the DBE is performing a commercially useful function under the existing contract.

Following receipt of the Notice of Suspension, if the DBE believes it is no longer eligible, it may voluntarily withdraw from the program, in which case no further action is required. If the DBE believes that its eligibility should be reinstated, it must provide to the recipient information demonstrating that the firm is eligible notwithstanding its changed circumstances. Within 30 days of receiving this information, the recipient must either lift the suspension and reinstate the firm's certification or commence a decertification action under §26.87 of this part. If the recipient commences a decertification proceeding, the suspension remains in effect during the proceeding.

The decision to immediately suspend a DBE under paragraph (a) or (b) of this section is not appealable to the US Department of Transportation. The failure of a recipient to either lift the suspension and reinstate the firm or commence a decertification proceeding, as required by paragraph (g) of this section, is appealable to the U.S. Department of Transportation under §26.89 of this part, as a constructive decertification.

### Third Party Challenge Ineligibility Complaints

Any person or agency may file a written complaint with the Certifying Partner with notice to the MRCC Partners challenging the eligibility status of a certified firm and specifying the alleged reasons why the firm is allegedly ineligible. The Certifying Partner is not required to accept a general allegation that a firm is ineligible, or an anonymous complaint. The complaint must include supporting information or documentation of the assertion that the firm is ineligible.

The Certifying Partner will make every effort to maintain the confidentiality of complainants' identities, however, in some cases, it may be necessary to divulge the identity of the complainant in order to continue review of the challenge. If the complainant does not wish to waive confidentiality, it may be necessary to close the case, review or investigation with no further action.

The Certifying Partner will review all records concerning the firm, any material provided by the firm and the complainant, and other available information. If the Certifying Partner determines, based on this review, there is reasonable cause to believe the firm is ineligible, the Certifying Partner will provide written notice to the challenged firm and the complainant of the preliminary decision to find the firm ineligible. The notice must include the reasons for the determination. If

the Certifying Partner finds reasonable cause does not exist for removal of eligibility, the Certifying Partner will notify the complainant and the challenged firm, in writing, of this determination and the basis for the decision. The Certifying Partner has the burden to show, by a preponderance of the evidence, that the firm does not meet the eligibility requirements set forth in 49 CFR Part 26. A Certifying Partner's recommendation to remove eligibility does not become final until the completion of the appeal to the MRCC or expiration of the 15-day period for requesting an appeal.

Either party may appeal the decision to the MRCC using the same process as set out in the section on Appeals or Hearing Process for Removal of Eligibility.

This process also includes internal MRCC Partner disputes.

### USDOT Initiated Challenge

If a USDOT agency determines that information in the certification records or other information available provides reasonable cause to believe that a firm certified by the MRCC does not meet eligibility criteria, the USDOT may direct the MRCC via the Certifying Partner to initiate a proceeding to remove the firm's certification pursuant to 49 CFR 26.87 (c).

### Appeals to USDOT

A firm, which has been denied initial certification, must appeal directly to the USDOT. Any certified firm who has been notified by an MRCC Certifying Partner of intent to remove eligibility must make an administrative appeal to the MRCC before appealing to the USDOT pursuant to 49 CFR 26.89.

A complainant in an ineligibility complaint to the MRCC may appeal to USDOT if the MRCC does not find reasonable cause to propose removing the firm's eligibility. Pending the USDOT decision, the MRCC's decision remains in effect. If a firm wants to file an appeal, it must send a letter to USDOT within 90 days of the date of the MRCC's final decision, including information concerning why the MRCC's decision should be reversed.

An appellant firm challenging certification denial or removal by the MRCC must submit a letter with the name and address of any other USDOT grantee that currently certifies the firm, of any other grantees that may have 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 of any other grantee with which an application for certification or action to remove eligibility is pending.

The MRCC will maintain a complete verbatim record of the hearing. If there is an appeal to USDOT, the MRCC will provide a transcript of the hearing to USDOT and, on request, to the firm at a reasonable cost to cover MRCC's expenses. The MRCC will retain the original record of the hearing.

Any party that appeals the MRCC's decision to USDOT will be requested by USDOT to promptly provide all information requested. The MRCC agrees to provide to USDOT the complete administrative record within 20 days of its request unless USDOT extends this time period. USDOT will make its decision based solely on the entire administrative record without conducting a hearing. When the MRCC provides information to USDOT, the same information will be made available to the firm and to any third-party complainant involved, consistent with applicable law.



USDOT may affirm the MRCC's decision unless it determines, based on the entire administrative record, that the decision is not supported by substantial evidence or is inconsistent with the substantive or procedural provisions concerning certification. If USDOT determines that the MRCC's decision was unsupported, USDOT may reverse the MRCC's decision and direct the MRCC to certify the firm or to remove its eligibility. The MRCC will take the action directed by USDOT immediately upon receiving written notice. USDOT is not required to reverse the MRCC's decision if it determines a procedural error did not result in fundamental unfairness to the appellant or substantially prejudice the opportunity of the appellant to present its case.

If it appears that the record is incomplete or unclear, USDOT may remand the record to the MRCC with instructions seeking clarification or augmentation of the record before making a finding.

USDOT will not uphold the MRCC's decision based on grounds not specified in the MRCC's decision. USDOT's decision will be based on the status and circumstances of the firm on the date of the decision, which was appealed. USDOT will provide written notice of its decision to the MRCC, the firm, and the complainant in an ineligibility complaint. The notice will include the reasons for USDOT's decision. It is USDOT's policy to make a decision within one 180 days of receiving the complete administrative record. All decisions by USDOT are administratively final and are not subject to petitions for reconsideration.

#### MRCC Actions Following U.S. Department of Transportation Decision

Pursuant to 49 CFR 26.91, the decisions of USDOT is binding on all agencies within the MRCC.

If USDOT determines that the MRCC erroneously certified a firm, the MRCC must remove the firm's eligibility on receipt of the determination without further proceedings. If USDOT determines that the MRCC erred in a finding of no reasonable cause to remove the firm's eligibility, the USDOT will remand the case to the MRCC to determine whether the firm's eligibility should be removed.

If USDOT determines that the MRCC erroneously declined to certify or erroneously removed eligibility of the firm, the MRCC must certify the firm effective on the date of receipt of the written notice from USDOT. If USDOT affirms the MRCC's determination, no further action is necessary.

If the MRCC receives information on a firm's eligibility decision made by USDOT, related to any other USDOT agency, UCP or recipient, the MRCC will take the USDOT decision into account in any certification action involving the firm.

#### NAICS Code Removal

In circumstances where a Certifying Partner makes a preliminary determination to remove a NAICS code from a firm currently certified and holding NAICS code(s), the Certifying Partner will provide the firm a written explanation of the reasons for the preliminary decision specifically referencing the evidence in the record that supports the decision. The Certifying Partner who wishes to remove the NAICS code(s) has the burden to show, by a preponderance of the evidence, that the firm is no longer qualified to have a particular NAICS code(s). Removal of a NAICS code(s) shall follow the same procedures as removal of eligibility. Firms shall keep their respective NAICS codes from notice through appeal to MRCC and USDOT.

### **Confidentiality (26.109)**

MoDOT will safeguard from disclosure to third parties information that may reasonably be regarded as confidential business information, consistent with Federal, state, and local law [program should summarize applicable state and local law, such as state FOIA laws and how they apply]. Notwithstanding any contrary provisions of state or local law, MoDOT will not release personal financial information submitted in response to the personal net worth requirement to a third party (other than USDOT) without the written consent of the submitter.

MoDOT will also fully cooperate with USDOT, and OAs, in a complaint investigation, compliance review, or any inquiries in MoDOT's DBE Program.

## Small Business Participation (26.39)

Updated regulation, 49 CFR Part 26.39, required DOT's to submit a proposed plan to implement a Small Business Enterprise (SBE) Program by February 28, 2012. MoDOT received approval for the submitted plan on August 22, 2012. The following is MoDOT's approved plan:

**Title 7--DEPARTMENT OF TRANSPORTATION  
Division 10--Missouri Highways and Transportation Commission  
Chapter 8--Disadvantaged Business Enterprise and On-the-Job Training Programs**

### PROPOSED RULE

#### **7 CSR 10-8.160 - Small Business Enterprise Program.**

*PURPOSE: This rule describes the Small Business Enterprise Program.*

(1) In order to comply with Title 49 CFR section 26.39, the Department amends its current DBE program to create the following Small Business Enterprise (SBE) program:

(A) MoDOT creates a race-neutral SBE Program for MoDOT federal-aid projects. Such program is intended to foster small business participation and competition by small business concerns.

(B) The SBE program will not require SBE goal setting on MoDOT's federal-aid projects; however, certified SBE's will be encouraged to participate and certified SBE participation will be tracked, monitored and reported.

(C) The attached Small Business Program "Declaration of Certification" form will be utilized by MoDOT as a member of the Missouri Unified Certification Program, also known as the Missouri Regional Certification Committee (MRCC). The "Declaration of Certification" is the document to be utilized by MoDOT to verify interested small businesses' eligibility under Small Business Administration (SBA) regulations, contained in 13 CFR section 121.101- 201 and incorporated herein by reference, to participate in the SBE Program.

*AUTHORITY: section 226.150, RSMo 2000\*; 226.020, RSMo 1939; Title 49 Code of Federal Regulations part 26; Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 105-178, 112 Stat. 107, 113; and MoDOT's approved DBE Program submittals to the U.S. Department of Transportation. Original rule filed \_\_\_\_\_, 2012.*

*PUBLIC COST: This proposed rule will not cost state agencies or political subdivisions more than five hundred dollars (\$500) in the aggregate.*

*PRIVATE COST: This proposed rule will not cost private entities more than five hundred dollars (\$500) in the aggregate.*

*NOTICE TO SUBMIT COMMENTS: Anyone may file a statement in support of or in opposition to this proposed rule with the Missouri Department of Transportation, Pam Harlan, Secretary to the Commission, PO Box 270, Jefferson City, MO 65102. To be considered, comments must be received within thirty (30) days after publication of this notice in the **Missouri Register**. No public hearing is scheduled.*



**SMALL BUSINESS ENTERPRISE (SBE) PROGRAM**  
**“Declaration of Certification”**  
 Please Print Clearly

<b>I. BUSINESS PROFILE (attach additional sheets, if needed)</b>			
Business Name:			
Owner/Name:	Title:	Ownership Percentage:	
Owner/Name:	Title:	Ownership Percentage:	
Business Address:			
City:	State:	Zip:	
Mailing Address (if different):			
City:	State:	Zip:	
Business Telephone: (     )     )		Fax: (     )     )	
Email:		Website:	
Date Established:	State of Incorporation:	FEIN:	
Number of Current Employees:	Full Time:	Part-Time:	
Primary Activities of Business:			
NAICS Codes:			
Legal Business Structure (please check one)			
<input type="checkbox"/> Corporation	<input type="checkbox"/> Limited Liability Corporation (LLC)	<input type="checkbox"/> Partnership	<input type="checkbox"/> Sole Proprietor
Provide the firm's annual gross receipts, before deducting expenses for the last three (3) years:			
Year:	Gross Receipts:		
Year:	Gross Receipts:		
Year:	Gross Receipts:		

**I understand that the MRCC reserves the right to request U.S. Federal Corporate (or personal) income tax returns confirming gross receipts.**

Affiliates to your firm: An affiliate is an individual or concern that has the power to control the firm, or a concern over which the firm has power to exercise control, including indirectly or through a third-party, considering factors such as ownership, management, and previous relationships including contractual as further defined in U.S. Small Business Administration (SBA) 13 Code of Federal Regulations (CFR) Subsection(s) 121.103(1)-(6).

Is your firm co-located at any other business location? Yes No

Does your firm share a telephone number, P.O. Box, office space, yard or warehouse, facilities, equipment, or office staff with any other business? Yes No

Firm's Name	Nature of shared facilities

Do any of the owners have ownership or perform management and/or supervisory functions any other firm? Yes No

Firm's Name	Function/Title

**II. CAPACITY (attach additional sheets, if needed)**

List the three largest contracts completed by your firm in the past three years, if any:

Name of Owner/ Contractor	Name/ Location of Project	Type of Work Performed	Dollar Value of Contract

List the three largest active jobs on which your firm is currently working, if any:

Name of Prime Contractor	Location of Project	Type of Work	Project Start Date	Anticipated Complete Date	Dollar Value of Contract

Is your firm certified by any other agencies? (If Yes, check appropriate box(s).):	<input type="checkbox"/> SBE  <input type="checkbox"/> 8(a)	Name of Certifying Agency:
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**III. NOTARIZED ACKNOWLEDGEMENT AND AFFIRMATION**

Note: It is the responsibility of the signatory to submit an updated "Declaration of Certification" every three (3) years from their initial date of submission. All information provided in this declaration will be treated as confidential.

**I agree to update my registration as a *Small Business Enterprise (SBE)* within thirty (30) calendar days of changes such as: ownership, address, telephone number, fax number, e-mail address, point of contact, etc. Additionally, if any such changes occur, I will submit a revised "Declaration of Certification". I acknowledge and agree that any misrepresentations on this "Declaration of Certification" may be grounds for permanent removal from the program.**

The undersigned does hereby make the following acknowledgement:

I, \_\_\_\_\_ affirm that I am the

\_\_\_\_\_ (TITLE) and an authorized agent of

\_\_\_\_\_. I do solemnly declare, under the penalties of perjury, that the contents of this document are true and correct to the best of my knowledge.

**IV. NOTARY PUBLIC**

I,

\_\_\_\_\_, a Notary Public in the State of \_\_\_\_\_ do

hereby certify that \_\_\_\_\_, appeared

before me and is known to me (or satisfactorily proven) to be the person whose name is subscribed to within this document.

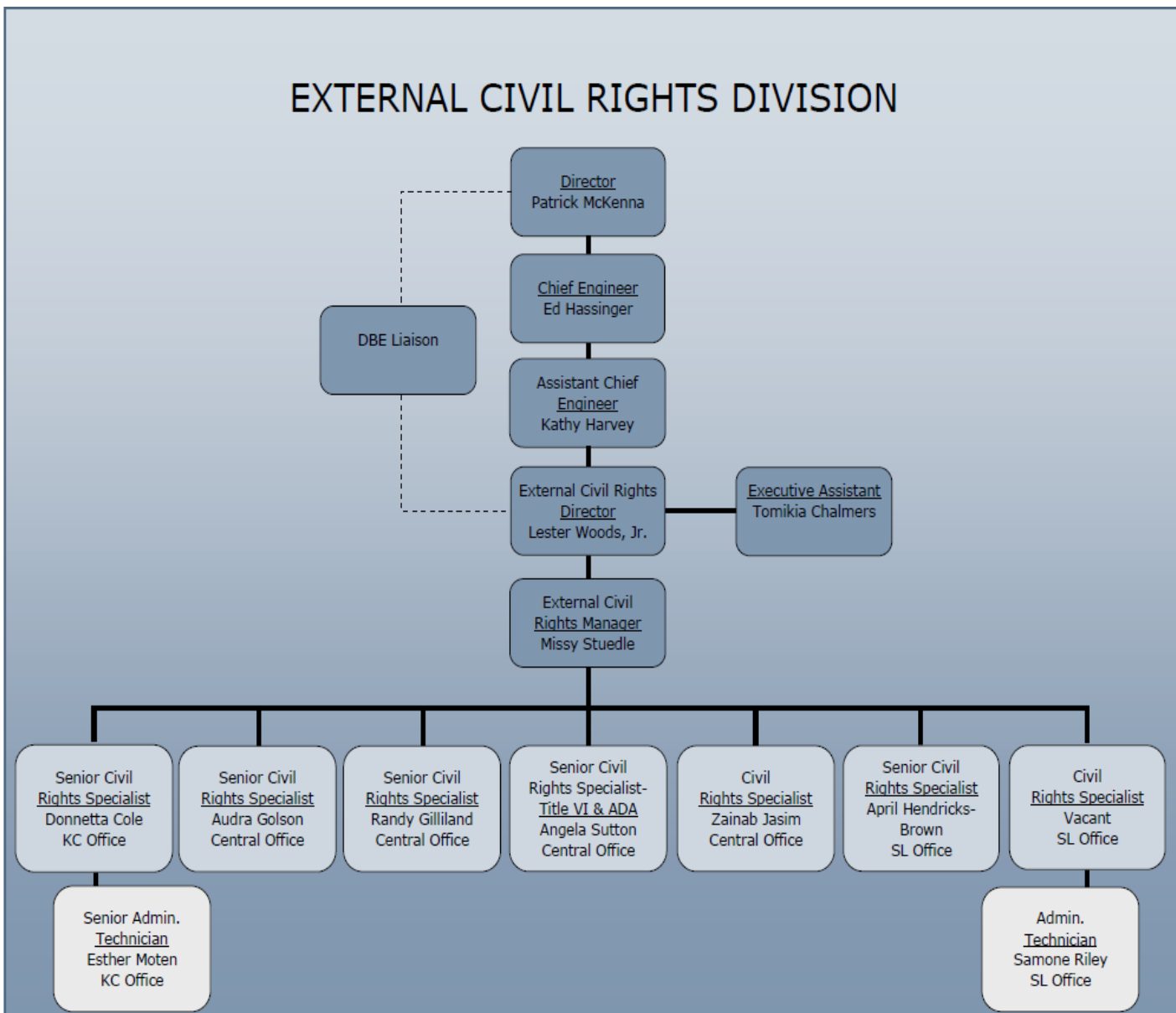
Subscribed and sworn before me on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

Notary Public \_\_\_\_\_ My Commission

Expires: \_\_\_\_\_ (Seal)

ATTACHMENT I

ECR Org Chart



## ATTACHMENT 2

### Uniform Report of DBE Commitments/Awards and Payments

UNIFORM REPORT OF DBE COMMITMENTS/AWARDS AND PAYMENTS										
**Please refer to the instruction sheet for directions on filling out this form**										
1	Submitted to (check only one)	<input checked="" type="checkbox"/> FHWA	<input type="checkbox"/> FAA	<input type="checkbox"/> FTA - Recipient ID Number						
2	AIP Numbers (FAA Recipients); Grant Number (FTA Recipients):									
3	Federal Fiscal year in which reporting period falls	FY 2015				4. Date This Report Submitted:				
5	Reporting Period	<input checked="" type="checkbox"/> Report due June 2 (for period Oct 1-Mar 31)			<input type="checkbox"/> Report due Dec 1 (for period April 1-Sep 30)			<input type="checkbox"/> FAA annual report due Dec 1		
6	Name and address of Recipient:									
7	Annual DBE Goal(s):	Race Conscious Projection:			Race Neutral Projection:			OVERALL Goal:		
Awards/Commitments this Reporting Period										
		A	B	C	D	E	F	G	H	I
A	<b>AWARDS/COMMITMENTS MADE DURING THIS REPORTING PERIOD</b> (Total contracts and subcontracts committed during this reporting period)	Total Dollars	Total Number	Total to DBEs (dollars)	Total to DBEs (number)	Total to DBEs/Race Conscious (dollars)	Total to DBEs/Race Conscious (number)	Total to DBEs/Race Neutral (dollars)	Total to DBEs/Race Neutral (number)	Percentage of total dollars to DBEs
8	Prime contracts awarded this period	\$ -	0	\$ -	0			\$ -	0	#DIV/0!
9	Subcontracts awarded/committed this period	\$ -	0	\$ -	0	\$ -	0	\$ -	0	#DIV/0!
10	<b>TOTAL</b>			\$ -	0	\$ -	0	\$ -	0	#DIV/0!
BREAKDOWN BY ETHNICITY & GENDER										
B		A	B	C	D	E	F			
		Total to DBE (dollar amount)			Total to DBE (number)					
		Women	Men	Total	Women	Men	Total			
11	Black American	\$ -	\$ -	\$ -	0	0	0			
12	Hispanic American	\$ -	\$ -	\$ -	0	0	0			
13	Native American	\$ -	\$ -	\$ -	0	0	0			
14	Asian-Pacific American	\$ -	\$ -	\$ -	0	0	0			
15	Subcontinent Asian Americans	\$ -	\$ -	\$ -	0	0	0			
16	Non-Minority	\$ -	\$ -	\$ -	0	0	0			
17	<b>TOTAL</b>	\$ -	\$ -	\$ -	0	0	0			
Payments Made this Period										
		A	B	C	D	E	F			
C	<b>PAYMENTS ON ONGOING CONTRACTS</b>	Total Number of Contracts	Total Dollars Paid	Total Number of Contracts with DBEs	Total Payments to DBE firms	Total Number of DBE firms Paid	Percent to DBEs			
18	Prime and subcontracts currently in	0	\$ -	0	\$ -	0	#DIV/0!			
TOTAL PAYMENTS ON CONTRACTS COMPLETED THIS REPORTING PERIOD										
		A	B	C	D	E				
D	<b>TOTAL PAYMENTS ON CONTRACTS COMPLETED THIS REPORTING PERIOD</b>	Number of Contracts Completed	Total Dollar Value of Contracts Completed	DBE Participation Needed to Meet Goal (Dollars)	Total DBE Participation (Dollars)	Percent to DBEs				
19	Race Conscious	0	\$ -	\$ -	\$ -	#DIV/0!				
20	Race Neutral	0	\$ -	\$ -	\$ -	#DIV/0!				
21	<b>Totals</b>	0	\$ -	\$ -	\$ -	#DIV/0!				
22	Submitted by:			23. Signature:			24. Phone Number:			



**ATTACHMENT 3**  
**DBE Contract Provisions**

See webpage below (page 870)

[http://www.modot.org/business/standards\\_and\\_specs/2016\\_MO\\_Std\\_Spec\\_Gen\\_Supp.pdf](http://www.modot.org/business/standards_and_specs/2016_MO_Std_Spec_Gen_Supp.pdf)

## ATTACHMENT 4

**Missouri Revised Statutes**  
**Chapter 34**  
**State Purchasing and Printing**  
**Section 34.057**

August 28, 1998

**Public works contracts--prompt payment by public owner to contractor--prompt payment by contractor to subcontractor-- progress payments--retainage--late payment charges-- withholding of payments.**

34.057. 1. Unless contrary to any federal funding requirements or unless funds from a state grant are not timely received by the contracting public municipality but notwithstanding any other law to the contrary, all public works contracts made and awarded by the appropriate officer, board or agency of the state or of a political subdivision of the state or of any district therein, including any municipality, county and any board referred to as the public owner, for construction, reconstruction or alteration of any public works project, shall provide for prompt payment by the public owner to the contractor and prompt payment by the contractor to the subcontractor and material supplier in accordance with the following:

- (1) A public owner shall make progress payments to the contractor on at least a monthly basis as the work progresses, or, on a lump sum basis according to the terms of the lump sum contract. Except in the case of lump sum contracts, payments shall be based upon estimates prepared at least monthly of work performed and material delivered, as determined by the project architect or engineer. Retainage withheld on public works projects shall not exceed five percent of the value of the contract or subcontract unless the public owner and the architect or engineer determine that a higher rate of retainage is required to ensure performance of the contract. Retainage, however, shall not exceed ten percent of the value of the contract or subcontract. Except as provided in subsection 4 of this section, the public owner shall pay the contractor the amount due, less a retainage not to exceed ten percent, within thirty days following the latter of the following:
  - (a) The date of delivery of materials or construction services purchased;
  - (b) The date, as designated by the public owner, upon which the invoice is duly delivered to the person or place designated by the public owner; or
  - (c) In those instances in which the contractor approves the public owner's estimate, the date upon which such notice of approval is duly delivered to the person or place designated by the public owner;
- (2) Payments shall be considered received within the context of this section when they are duly posted with the United States Postal Service or other agreed upon delivery service or when they are hand-delivered to an authorized person or place as agreed to by the contracting parties;
- (2) If, in the discretion of the owner and the project architect or engineer and the contractor, it is determined that a subcontractor's performance has been completed and the subcontractor can be released prior to substantial completion of the public works contract without risk to the public owner, the contractor shall request such adjustment in retainage, if any, from the public owner as necessary to enable the contractor to pay the subcontractor in full. The public owner may reduce or eliminate retainage on any contract payment if, in the public owner's opinion, the work is proceeding satisfactorily. If retainage is released and there are any remaining minor items to be completed, an

amount equal to two hundred percent of the value of each item as determined by the public owner's duly authorized representative shall be withheld until such item or items are completed;

- (4) The public owner shall pay the retainage, less any offsets or deductions authorized in the contract or otherwise authorized by law, to the contractor after substantial completion of the contract work and acceptance by the public owner's authorized contract representative, or as may otherwise be provided by the contract specifications for state highway, road or bridge projects administered by the state highways and transportation commission. Such payment shall be made within thirty days after acceptance, and the invoice and all other appropriate documentation and certifications in complete and acceptable form are provided, as may be required by the contract documents. If at that time there are any remaining minor items to be completed, an amount equal to two hundred percent of the value of each item as determined by the public owner's representative shall be withheld until such items are completed;
- (5) All estimates or invoices for supplies and services purchased, approved and processed, or final payments, shall be paid promptly and shall be subject to late payment charges provided in this section. Except as provided in subsection 4 of this section, if the contractor has not been paid within thirty days as set forth in subdivision (1) of subsection 1 of this section, the contracting agency shall pay the contractor, in addition to the payment due him, interest at the rate of one and one-half percent per month calculated from the expiration of the thirty-day period until fully paid;
- (6) When a contractor receives any payment, the contractor shall pay each subcontractor and material supplier in proportion to the work completed by each subcontractor and material supplier his application less any retention not to exceed ten percent. If the contractor receives less than the full payment due under the public construction contract, the contractor shall be obligated to disburse on a pro rata basis those funds received, with the contractor, subcontractors and material suppliers each receiving a prorated portion based on the amount of payment. When, however, the public owner does not release the full payment due under the contract because there are specific areas of work or materials he is rejecting or because he has otherwise determined such areas are not suitable for payment then those specific subcontractors or suppliers involved shall not be paid for that portion of the work rejected or deemed not suitable for payment and all other subcontractors and suppliers shall be paid in full;
- (7) If the contractor, without reasonable cause, fails to make any payment to his subcontractors and material suppliers within fifteen days after receipt of payment under the public construction contract, the contractor shall pay to his subcontractors and material suppliers, in addition to the payment due them, interest in the amount of one and one-half percent per month, calculated from the expiration of the fifteen-day period until fully paid. This subdivision shall also apply to any payments made by subcontractors and material suppliers to their subcontractors and material suppliers and to all payments made to lower tier subcontractors and material suppliers throughout the contracting chain;
- (8) The public owner shall make final payment of all moneys owed to the contractor, less any offsets or deductions authorized in the contract or otherwise authorized by law, within thirty days of the due date. Final payment shall be considered due upon the earliest of the following events:
  - (a) Completion of the project and filing with the owner of all required documentation and certifications, in complete and acceptable form, in accordance with the terms and conditions of the contract;
  - (b) The project is certified by the architect or engineer authorized to make such certification on behalf of the owner as having been completed, including the filing of all documentation and certifications required by the contract, in complete and acceptable form; or

- (c) The project is certified by the contracting authority as having been completed, including the filing of all documentation and certifications required by the contract, in complete and acceptable form.

2. Nothing in this section shall prevent the contractor or subcontractor, at the time of application or certification to the public owner or contractor, from withholding such applications or certifications to the owner or contractor for payment to the subcontractor or material supplier. Amounts intended to be withheld shall not be included in such applications or certifications to the public owner or contractor. Reasons for withholding such applications or certifications shall include, but not be limited to, the following: unsatisfactory job progress; defective construction work or material not remedied; disputed work; failure to comply with other material provisions of the contract; third party claims filed or reasonable evidence that a claim will be filed; failure of the subcontractor to make timely payments for labor, equipment and materials; damage to a contractor or another subcontractor or material supplier; reasonable evidence that the contract can not be completed for the unpaid balance of the subcontract sum or a reasonable amount for retention, not to exceed the initial percentage retained by the owner.

3. Should the contractor determine, after application or certification has been made and after payment has been received from the public owner, or after payment has been received by a contractor based upon the public owner's estimate of materials in place and work performed as provided by contract, that all or a portion of the moneys needs to be withheld from a specific subcontractor or material supplier for any of the reasons enumerated in this section, and such moneys are withheld from such subcontractor or material supplier, then such undistributed amounts shall be specifically identified in writing and deducted from the next application or certification made to the public owner or from the next estimate by the public owner of payment due the contractor, until a resolution of the matter has been achieved. Disputes shall be resolved in accordance with the terms of the contract documents. Upon such resolution the amounts withheld by the contractor from the subcontractor or material supplier shall be included in the next application or certification made to the public owner or the next estimate by the public owner and shall be paid promptly in accordance with the provisions of this section. This subsection shall also apply to applications or certifications made by subcontractors or material suppliers to the contractor and throughout the various tiers of the contracting chain.

4. The contracts which provide for payments to the contractor based upon the public owner's estimate of materials in place and work performed rather than applications or certifications submitted by the contractor, the public owner shall pay the contractor within thirty days following the date upon which the estimate is required by contract to be completed by the public owner, the amount due less a retainage not to exceed five percent. All such estimates by the public owner shall be paid promptly and shall be subject to late payment charges as provided in this subsection. After the thirtieth day following the date upon which the estimate is required by contract to be completed by the public owner, the contracting agency shall pay the contractor, in addition to the payment due him, interest at a rate of one and one-half percent per month calculated from the expiration of the thirty-day period until fully paid.

5. Nothing in this section shall prevent the owner from withholding payment or final payment from the contractor, or a subcontractor or material supplier. Reasons for withholding payment or final payment shall include, but not be limited to, the following: liquidated damages; unsatisfactory job progress; defective construction work or material not remedied; disputed work; failure to comply with any material provision of the contract; third party claims filed or reasonable evidence that a claim will be filed; failure to make timely payments for labor, equipment or materials; damage to a contractor, subcontractor or material supplier; reasonable evidence that a subcontractor or material supplier cannot be fully compensated under its contract with the contractor for the unpaid balance of the contract sum; or citation by the enforcing authority for acts of the contractor or subcontractor which do not comply with any material provision of the contract and which result in a violation of any federal, state or local law, regulation or ordinance applicable to that project causing additional costs or damages to the owner.

6. Notwithstanding any other provisions in this section to the contrary, no late payment interest shall be due and owing for payments which are withheld in good faith for reasonable cause pursuant to subsections 2 and 5 of this section. If it is determined by a court of competent jurisdiction that a payment which was withheld pursuant to subsections 2 and 5 of this section was not withheld in good faith for reasonable cause, the court may impose interest at the rate of one and one-half percent per month calculated from the date of the invoice and may, in its discretion, award reasonable attorney fees to the prevailing party. In any civil action or part of a civil action brought pursuant to this section, if a court determines after a hearing for such purpose that the cause was initiated, or a defense was asserted, or a motion was filed, or any proceeding therein was done frivolously and in bad faith, the court shall require the party who initiated such cause, asserted such defense, filed such motion, or caused such proceeding to be had to pay the other party named in such action the amount of the costs attributable thereto and reasonable expenses incurred by such party, including reasonable attorney fees.



				<b>DBE TOTAL</b>	<b>\$</b>
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	<b>BID ITEM LINE NO.</b>	<b>DOLLAR VALUE OF DBE WORK**</b> (Unit Price x Quantity of the Item in B, or Lump Sum)	<b>DOLLAR VALUE APPLICABLE TO DBE GOAL **</b> (100%, 60%)	<b>DOLLAR AMOUNT APPLICABLE TO DBE GOAL (C x D)</b>	<b>PERCENTAGE OF TOTAL CONTRACT AMOUNT FOR LINE ITEM</b>
Total DBE Participation (All Pages)					

By signing below, I certify that the subcontract agreement with the proposed subcontractor includes provisions to comply with all requirements of the contract identified above, and for Federal-aid projects, both Form FHWA-1273 and Required Federal Aid Provisions and Federal Wage Rates have been physically inserted into the subcontract agreement.

Respectfully submitted:

\_\_\_\_\_  
Company Name (Prime Contractor)

\_\_\_\_\_  
Name / Title

\_\_\_\_\_  
Signed (Prime Contractor)

\_\_\_\_\_  
Date

\*\* Cannot exceed contract amount for given item of work

Trucking services credited at 100% if the DBE owns the trucks or is leasing from a DBE firm

Trucks leased from a Non-DBE resources will only receive credit for fees.

Brokered services will only receive credit for fees.

## **Contractor's Instructions for Completing Form ECR-100 (DBE Identification Submittal Form)**

The 1<sup>st</sup> and 2<sup>nd</sup> low bidders must submit a DBE Identification Submittal Form for all projects that include a DBE by 4:00 p.m. on the third working day after the bid opening. Only DBE's listed on MoDOT's MRCC database may be used towards obtaining the DBE goal on the project. The MRCC is available here:  
[http://www.modot.org/business/contractor\\_resources/External\\_Civil\\_Rights/mrcc.htm](http://www.modot.org/business/contractor_resources/External_Civil_Rights/mrcc.htm)

Enter all required information in the header, including the proposed subcontractor name, vendor ID, and classification. The vendor ID is available on the MoDOT website.  
[http://www.modot.org/business/contractor\\_resources/External\\_Civil\\_Rights/mrcc.htm](http://www.modot.org/business/contractor_resources/External_Civil_Rights/mrcc.htm)

The Prime Contractor's name and signature is required on the bottom of the form for both 1<sup>st</sup> tier and 2<sup>nd</sup> tier requests. Signature by the subcontractor is not required.

- (A) Show the planned DBE work by entering the Bid Line Number of the appropriate pay items from the bid tabs, listing items in the same order as they appear in the contract.
- (B) Dollar Value of the DBE Work will be the unit price x the quantity listed in column A. A lump sum may also be listed.
- (C) Percentage of the Value Applicable to the DBE Goal. This will be the % of column B that you intend the DBE to perform. If a DBE is a supplier, you will only give 60% credit on the project. If the DBE is furnishing and installing the line item they will receive 100% credit.
- (D) The dollar amount applicable to the DBE goal will be calculated by taking column B x column C.
- (E) Percentage of Total Contract Amount for the Line Item will be the total amount in Column D.





Missouri Regional Certification Committee

Disadvantaged Business Enterprise

Personal Financial Statement

Complete this form for: each disadvantaged proprietor, or (2) each limited partner who owns 51% or more interest and each general partner, or (3) each stockholder owning 51% or more of voting stock, or (4) any person or entity providing a guaranty on the loan.

Name		Business Phone	
Residence Address		Residence Phone	
City, State and Zip Code			
Name of Business			

ASSETS		(Omit Cents)	LIABILITIES		(Omit Cents)
Cash on hand and in bank(s)	\$		Accounts Payable	\$	
Savings Accounts	\$		Notes Payable to Banks and Others:	\$	(Describe in Section 2)
IRA or Other Retirement Accounts	\$		Installment Account (Auto) Monthly Payments	\$	\$
Accounts & Notes Receivable	\$		Installment Account (Other) Monthly Payments	\$	\$
Life Insurance-Cash Surrender Value Only	\$	(Complete Section 8)	Loan on Life Insurance	\$	
Stocks and Bonds	\$	(Describe in Section 3)	Mortgages on Real Estate	\$	(Describe in Section 4)
Real Estate	\$	(Describe in Section 4)	Unpaid Taxes	\$	(Describe in Section 6)
Automobile(s)-Present Value	\$		Other Liabilities	\$	(Describe in Section 7)
Other Personal Property (RV's, boats, household goods, jewelry, art, etc.)	\$	(Describe in Section 5)			
Other Assets	\$	(Describe in Section 5)			
<b>Total Assets</b>	\$		<b>Total Liabilities</b>	\$	
			<b>TOTAL NET WORTH</b> (Assets – Liabilities)	\$	

Section 1. Source of Income		Contingent Liabilities	
Salary	\$	As Endorser or Co-Maker	\$
Net Investment Income	\$	Legal Claims and Judgments	\$
Real Estate Income	\$	Provision for Federal Income Tax	\$
Other Income (Describe below)	\$	Other Special Debt	\$

**Description of Other Income in Section 1.**

**Section 2. Notes Payable to Bank and Others.** (Use attachments if necessary. Each attachment must be identified as a part of this statement and signed.)

Name and Address of Noteholder(s)	Original Balance	Current Balance	Payment Amount	Frequency (monthly, etc.)	How Secured or Endorsed Type of Collateral

**Section 3. Stocks and Bonds.** (Use attachment if necessary. Each attachment must be identified as a part of this PNW Statement and must be signed.)

Number of Shares	Name of Securities	Cost	Market Value Quotation/ Exchange	Date of Quotation/ Exchange	Total Value

**Section 4. Real Estate Owned.** (List each parcel separately. Use attachments if necessary. Each attachment must be identified as a part of this PNW Statement and must be signed.)

	Property A	Property B	Property C
Type of Property			
Address			
Date Purchased			
Original Cost			
Present Market Value			
Name & Address of Mortgage Holder			

Mortgage Account Number			
Mortgage Balance			
Amount of Payment Per Month/Year (Specify)			
Status of Mortgage			

**Section 5. Other Personal Property and Other Assets.** (Describe, and if any is pledged as security, state name and address of lien holder, amount of lien, Terms of payment, and if delinquent, describe delinquency)

**Section 6. Unpaid Taxes.** (Describe in detail, as to type, to whom payable, when due, amount, and to what property, if any, a tax lien attaches).

**Section 7. Other Liabilities.** (Describe in detail).

**Section 8. Life Insurance Held.**

(Give face amount and cash surrender value of policies - name of insurance company and beneficiaries).

I hereby certify that no assets have been transferred to any beneficiary for less than fair market value in the last two years. I authorize the Missouri Regional Certification Committee (MRCC) to verify the accuracy of the statements made in order to determine whether I meet the standards of economic disadvantage for participation in the DBE Program in the MRCC. These statements are true and correct to the best of my belief.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Social Security Number

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Social Security Number

State of \_\_\_\_\_  
County of \_\_\_\_\_

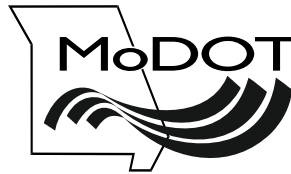
Notary Public  
Commission expires: \_\_\_\_\_

(Seal)

On this \_\_\_\_\_ of \_\_\_\_\_, 20\_\_\_\_.

**ATTACHMENT 7**

**Request for North American Industry Classification System (NAICS) Code Review**



**DISADVANTAGED BUSINESS ENTERPRISE**

**Request for North American Industry Classification System (NAICS) Code Review**

Name of Firm:		
Street Address:		
City:	State:	Zip:

Type of work requested for expansion:


List and attach documentation of the 5 largest contracts or supply invoices completed for the NAICS code requested.

Owner/Contractor	Phone	Contract Amount	Project Name/Location	Type of Work Performed

List all equipment you own or lease used to perform the work for the NAICS code requested. Copies of current lease agreements or proof of payment must be attached.

Type of Equipment	Make	Model	Year	Date Acquired	Present Value

Please attach any other documentation or information relevant to the review of the NAICS code your firm requested. This can include documentation of technical licenses, leases of property or facilities, training or expertise.

Signature	
Printed name	
Title	
Date	

## **ATTACHMENT 8**

### **State Regulations - CSR**

<http://www.sos.mo.gov/adrules/csr/current/7csr/7c10-8.pdf>

**ATTACHMENT 9**

**DBE Availability Study**

**Available upon request  
573-526-2978**