

STATE OF DELAWARE



DELAWARE DEPARTMENT OF TRANSPORTATION DISADVANTAGED BUSINESS ENTERPRISE

PROGRAM PLAN

October 2011



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DELAWARE DEPARTMENT OF TRANSPORTATION

DBE Program

49 CFR Part 26

I. INTRODUCTION

The US Department of Transportation (USDOT) has had in effect for more than 20 years a policy of helping small businesses owned and controlled by socially and economically disadvantaged individuals, including minorities and women, in participating in contracting opportunities created by USDOT financial assistance programs. The USDOT, through its Operating Administrations, distributes billions annually to help finance thousands of projects across the country. Approximately 85 percent of the assistance dollars is for construction. The major portion of the construction funds is allocated to State highway and transportation agencies for highway construction. The balance is provided to local public transit and airport authorities for mass transit and airport facilities.

In 1983, Congress enacted the first Disadvantaged Business Enterprise (DBE) statutory provision. This provision required the Department to ensure that at least ten percent of the funds authorized for the highway and transit Federal financial assistance programs be expended with DBEs. In 1987, Congress re-authorized and amended the statutory DBE program. In the transportation legislation of that year, Congress, among other changes, added women to the groups presumed to be disadvantaged. Since 1987 the USDOT has established a single DBE goal, encompassing firms owned by women and minority group members.

USDOT DBE regulations require recipients of DOT Federal financial assistance to establish goals for the participation of disadvantaged businesses and to certify the eligibility of DBE firms to participate in their DOT-assisted contracts. Each State transportation agency is required to establish narrowly-tailored DBE goals. DelDOT evaluates each of their USDOT-assisted contracts and establishes contract specific DBE subcontracting goals to ensure nondiscrimination in federally-assisted procurements.

In order for small businesses owned by minorities and women to participate in DOT-assisted DelDOT contracts, they must apply for and receive certification as a DBE. To be certified as a DBE, a firm must be a small business, at least 51% owned and controlled by socially and economically disadvantaged individuals.

The major objectives of the DBE Program are:

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

The USDOT has enacted strict guidelines for which recipients of federal financial aid must follow to involve small business enterprises in transportation projects. In order to qualify for continued financial assistance, each state Department of Transportation, including its operating elements, must, enact and carry out a Disadvantaged Business Enterprise Program. Following is the program, which has been developed by DelDOT.

In addition to this plan, all firms wishing to participate in DelDOT contracts must comply with all provisions of the rules and regulations adopted by the USDOT for DBE participation in Federal financially assisted contracts (49 CFR Part 26).

In order to remain within the confines of 49 CFR Part 26 and the State's bidding statutes, those sections of the program dealing with contract clauses, overall and contract goals, certification requirements, and awarded selection procedures, shall pertain only to United States Department of Transportation financially assisted contracts.


II. OBJECTIVES/POLICY STATEMENT (§§26.1, 26.23)

The Delaware Department of Transportation (DelDOT) has established a Disadvantaged Business Enterprise (DBE) program in accordance with the regulations of the U.S. Department of Transportation (USDOT), 49 CFR Part 26. As a condition of receiving Federal financial assistance from USDOT, DelDOT has signed an assurance that it will comply with 49 CFR Part 26. It is the policy of DelDOT to ensure that DBEs, as defined in Part 26, have an equal opportunity to participate in the award of USDOT-assisted contracts. It is also our policy:

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

The Civil Rights Administrator has been designated as the DBE Liaison Officer for DelDOT and will serve as the responsible contact for the DelDOT plan, and will work in conjunction with the appointed DBE Liaison Officer for the Delaware Transit Corporation; that person currently being the Fiscal Manager. It is the responsibility of this position to implement all aspects of the DBE program for the FHWA portion of the program. The Delaware Transit Corporation (DTC) appointed DBE Liaison Officer will implement the FTA portion of the program. Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by DelDOT in its financial assistance agreements with the U.S. Department of Transportation.

DelDOT has disseminated this policy statement to the Directors of each division within DelDOT and all the components of our organization. We have distributed this statement to the DBE and non-DBE business communities that perform work on DOT-assisted contracts via advertisement in the Delaware Capitol Review, by sending direct mail notifications to those vendors, contractors, consultants, and suppliers registered with DelDOT and by posting on the Delaware Transit Corporation website.



Carolann D. Wicks, Secretary
Delaware Department of Transportation

Date: 8/16/10

III. **DEFINITIONS OF TERMS (§26.5)**

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

- Except as otherwise provided in 13 CFR Part 121, concerns are affiliates of each other when, either directly or indirectly:
 - One concern controls or has the power to control the other; or
 - A third party or parties controls or has the power to control both; or
 - An identity of interest between or among parties exists such that affiliation may be found.
- In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

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

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

Broker is an individual or firm that acts as an agent in arranging a deal, sale, or contract. A broker serves as a mediator between a buyer and seller by arranging or expediting a supply of materials for another firm to use.

Compliance means that a recipient has correctly implemented the requirements of this part.

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

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

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

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

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

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

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

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

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

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

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

Manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials or supplies obtained by the contractor. If materials or supplies are obtained from a DBE Manufacturer, 100% of the cost of the material or supplies is counted toward the project goal.

Manufacturer’s Representative/Agent is a person or organization with the authority to act for a manufacturer in obtaining sales with a third party. They are normally a commissioned agent, who carries complementary products from several manufacturers, for distribution along the same channels or to the same customers. Manufacturer’s agents and representatives are commonly used in the sale of after-market automotive parts and industrial parts, and are normally confined to specific sales territories

NAICS The North American Industry Classification System (NAICS) is used by business and government to classify business establishments according to type of economic activity (process of production) in Canada, Mexico and the United States. Within the official NAICS classification system, U.S. industries are defined at the 6-digit level. The next revised NAICS Manual will be released in 2012.

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

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

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

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

Packager is an individual or firm who expedites transactions by bundling or preparing material, services, or supplies in order to facilitate distribution. A packager may serve to transport packages via mail or vehicles owned or leased by their customers.

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

Primary industry classification means the North American Industrial Classification System (NAICS) designation that best describes the primary business of a firm. The NAICS is described in the *North American Industry Classification Manual – United States, 2007*, and is available in print and on CD ROM from the National Technical Information Service, by calling (NTIS) at (800) 553-6847 or (703) 605-6000.

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

Principal place of business means the business location where the individuals who manage the firm’s day-to-day operations spend most working hours and where top management’s business records are kept. If the offices from which management is

directed and where business records are kept are in different locations, the recipient will determine the principal place of business for DBE program purposes.

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

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

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

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

Regular Dealer is a firm that owns, operates, or maintains a store, warehouse or establishment in which the materials or supplies required by the contract are purchased, kept in stock, and regularly sold or leased to the public in the usual course of business. To qualify as a regular dealer, the firm must be an established, regular business that engages, as its principle business and under its own name, in the purchase and sale or lease of the products required by the contract. A firm which deals in bulk items such as steel, cement, gravel, stone, asphalt and petroleum is not required to keep such products in stock to be a designated as a regular dealer; however the firm must both own and operate the distribution equipment used to deliver the bulk products from the manufacturer to the end user. Any supplementing of a DBE regular dealers' distribution equipment must be by a long-term lease agreement. A lease for trucks or other distribution equipment cannot be an ad hoc deal specific to the particular contract or distribution task. Leased equipment should be used over an extended period of time to serve a variety of customers and/or contracts.

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

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

Small business concern means, with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to section three 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 section 26.65 (b).

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

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

- Any individual in the following groups, members of which are presumed to be socially and economically disadvantaged:
 - “Black Americans,” which includes persons having origins in any of the Black racial groups of Africa;
 - “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;
 - “Native Americans,” which includes persons who are American Indians, Eskimos,
 - Aleuts, or Native Hawaiians;
 - “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;
 - “Subcontinent Asian Americans,” which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
 - Women

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

Trucking Company is a firm that transports materials or supplies by commercial vehicle to the end user. A DBE trucking firm must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract. There cannot be a contrived arrangement created for the purpose of meeting DBE goals. The DBE must own and operate at least one fully licensed, insured, and operational truck used on the contract.

IV. GENERAL PROVISIONS

Throughout this plan, where DeIDOT is stated, it means that provision applies to both the FHWA portion of the program and the FTA portion of the program. In the instance where Delaware Transit Corporation (DTC) is stated, the provision applies to DTC solely.

Nondiscrimination (§26.7)

DeIDOT will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR Part 26 on the basis of race, color, sex, or national origin.

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

DBE Program Updates (§26.21)

DelDOT will continue to carry out this program until all funds from the Federal financial assistance have been expended. DelDOT will provide updates to FHWA representing significant changes in the program.

Non-Compliance Complaint Process (§26.103)

Should any person believe this recipient has failed to comply with its obligations under 49 CFR Part 26, they may file a written non-compliance complaint with USDOT Office of Civil Rights within 180 days after the date of alleged violation in accordance with the provisions of 49 CFR Section 26.103.

Quotas (§26.43)

DelDOT does not use quotas in any way in the administration of this DBE program.

DBE Liaison Officer (§26.45)

The Secretary has designated a Civil Rights Administrator as the DBE Liaison Officer for DelDOT. The DBE Liaison Officer will serve as the responsible contact for the DelDOT plan and will work in conjunction with the appointed DBE Liaison Officer for DTC. The Civil Rights Administrator will oversee and be responsible for the implementation of all aspects of the DBE program and ensure that DelDOT complies with all provisions of 49 CFR Part 26 for the FHWA portion of the program. The DTC DBE Liaison Officer, being the Fiscal Manager, is responsible for implementing the DBE program for the FTA portion of the program. The Civil Rights Administrator has direct, independent access to the Secretary of DelDOT concerning DBE program matters. The Civil Rights Administrator oversees the Civil Rights Section which has a staff including the DBE Program Manager, two DBE/EO Specialists assigned to the DBE program on a full-time basis, and one full-time support position. An organization chart displaying the DBE Program Manager's position in the organization is found attached to this document.

The DBE Program Manager is responsible for developing, implementing and monitoring the DBE program; in coordination with the Civil Rights Administrator and other appropriate DelDOT officials. Duties and responsibilities include the following:

- Gathers and reports statistical data and other information as required by DOT.
- Reviews third party contracts and purchase requisitions for compliance with this program.

- Ensures that bid notices and requests for proposals are available to DBEs in a timely manner.
- Reviews DOT-assisted contracts and procurements so that DBE goals are included in solicitations (both race-neutral methods and contract specific goals) and monitors results.
- Analyzes DelDOT's progress toward goal attainment and identifies ways to improve progress.
- Advises DelDOT Secretary/governing body on DBE matters and achievement.
- Participates with the legal counsel and/or Civil Right Administrator to determine contractor compliance with good faith efforts.
- Provides DBEs with information and assistance in preparing bids, obtaining bonding and insurance, when requested.
- Plans, coordinates and participates in DBE training seminars.
- Certifies DBEs according to the criteria set by USDOT.
- Provides outreach to DBEs and community organizations to advise them of contract opportunities.
- Maintains DelDOT's updated directory of certified DBEs.

The DTC DBE liaison officer (Fiscal Manager) has the responsibility of items one through eight above. The primary duties of the DelDOT DBE/EO Specialist consists of providing technical assistance to any DBE firm certified with DelDOT, monitoring the work performed on the various DelDOT projects, collecting statistical information to support the FHWA reports, and collaborating with the Civil Rights Administrator and DBE Program Manager in the certification process of DBE firms.

The Civil Rights Section has the responsibility of monitoring payments to DBE firms submitted to meet goals on a contract. The prime contractor is required to submit proof of payments to DBE firms along with all other subcontractors and suppliers on a monthly basis. These payments must be on a contract-by-contract basis; individual checks for each contract are mandatory, regardless if the same DBE firm is contracted on several jobs for the same prime contractor. DelDOT utilizes project management records, contractor reports of payment made (Certification of Payment Form CN91) and other electronic data gathering to verify prompt payment until the contract has been completed and accepted by DelDOT.

Federal Financial Assistance Agreement Assurance (§26.13)

Each financial assistance agreement that either DelDOT or a DelDOT subrecipient has signed with a USDOT operating administration (FHWA, FTA or FAA) will include the following assurance:

“DelDOT 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. DelDOT 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 DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to DelDOT 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.)."

DBE Financial Institutions (§26.27)

DelDOT has identified that many banks offer Community Reinvestment Act (CRA) loans to individuals and businesses. DBE firms should contact a bank of their choice to investigate this program. For other information, firms may contact the Small Business Administration, 1007 North Orange Street, Suite 1120, Wilmington, DE 19801, (302) 573-6294 or the USDOT Office of Small and Disadvantaged Utilization (OSDBU), 1200 New Jersey Avenue, SE, W56-485, Washington, DC 20590, (202) 366-1930. Information on the OSDBU Regional Center (whose geographic area includes Delaware) and the services they provide, can be viewed at <http://www.osdbu.dot.gov/regional/midatlantic.cfm>

Directory (§26.31)

DelDOT maintains a directory of certified DBE firms which identifies all firms eligible to participate as DBEs on contracts funded by the Federal Highway Administration, the Federal Transit Administration, and the Federal Aviation Administration. The DBE Directory is available to provide a reference source to assist bidders/proposers in meeting DBE contract goals. The directory alphabetically lists the firm's name, address, and telephone number, the firm's specialty area of work and corresponding NAICS code(s). It is the responsibility of the prime contractor/consultant to make his/her own determination regarding the capability of a DBE firm. Only those firms certified as of the letting date/bid opening may be utilized in meeting a DBE contract goal. The Delaware Directory of Certified DBE Firms is available in paper and electronic format. The Delaware Directory of Certified DBE Firms is updated quarterly and available on DelDOT's website at <http://www.deldot.gov/>. Interested parties may also write to: Department of Transportation, DBE Office, P.O. Box 778, Dover, DE 19903 or call the DBE Office at (302) 760-2035 to obtain a copy.

DelDOT is currently the only certification office responsible for maintaining a Directory of Certified DBE Firms to participate on Federal Aid Transportation Projects in the state of Delaware.

Overconcentration (§26.33)

At this time DelDOT has not identified an overconcentration in any one element. This area will be continually monitored to determine if an issue exists, and if so, DelDOT will develop a strategy to resolve the issue.

Business Development Programs (§26.35) – Mentor-Protégé

DelDOT includes its mentor protégé program as an option that may be suggested or used if the appropriate circumstances arise.

The mentor/protégé program is an approach available to assist the Department and contractors or consultants to meet the requirements of 49 CFR Part 26 and this Program. It affords the opportunity to gain information and experience in a productive work situation to established DBEs working to expand their present capacity and to less experienced DBEs needing training and assistance.

- The requirements for the establishment of the mentor/protégé relationship are as follows:
 - It is the responsibility of the mentor to establish that the DBE protégé meets the certification requirements of the DBE program and is, therefore, eligible for participation in the mentor/protégé program. Approval of the DBE application for certification may be made concurrently with the approval of a mentor/protégé relationship.
 - The DBE firm must be an independent organization, the ownership and control by the disadvantaged individual(s) must be real as outlined by 49 CFR Part 26.
 - The mentor/protégé program is intended to provide DBE firms with advice and assistance and/or training. The program is not intended to provide DBEs with a means to avoid management and operational responsibilities. The mentor cannot be responsible for the management of the DBE at facilities or locations under the control of the DBE. Such facilities or locations may be provided by the mentor; however, a separate written lease agreement covering such arrangements should be utilized and submitted for approval. The mentor and the DBE must remain separate and independent business entities.
 - Part ownership in a DBE firm by a non-disadvantaged entity is permitted. However, the eligible woman or minority owner shall not hold less than 51% of its own stock. Any property, equipment, supplies, or other services which are sold, rented, or donated to the DBE as well as any investment by non-disadvantaged individuals must be reported to DelDOT in the mentor/protégé development plan and should further be documented by bills of sale, lease agreements, etc. No financial investment by the

mentor may create a situation in which the mentor may assume control over the protégé.

- The mentor/protégé relationship may include, when not in conflict with State law, an arrangement by mutual consent in which an independent third party, such as a bank or an accountant, is designated as an agent for the DBE. Such agents would receive progress payments for work accomplished by the DBE, and make payments, on behalf of the DBE, to material suppliers or for Federal and State payroll taxes, etc.
- All mentor/protégé relationships must be evidenced by a written development plan and be approved by the DBE Program Manager. Copies of the plan must be retained by DelDOT and all concerned parties. The plan should clearly set forth:
 - The objective of the parties and their respective roles.
 - The length of time the relationship is to exist, e.g., or for the duration of a specified contract or series of contracts.
 - Measurable goals to be reached by the DBE at successive stages of the plan.
 - Whether resources of the mentor are utilized by the DBE 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 to the mentor. If the plan provides for the extensive use of the mentor's resources by the DBE, the arrangement will be examined.
 - The training to be provided by the mentor to the DBE may include:
 - Business Planning and Financial Counseling
 - Capital Formation and Loan Packaging
 - Bidding and Record Keeping
 - Equipment Utilization
 - A provision that the relationship may be terminated by mutual consent or by the Department, upon a determination that:
 - The protégé firm no longer meets the eligibility standards for certification as a DBE.
 - Either party has failed or is unable to meet its obligations under the development plan.
 - The DBE is not progressing or is not likely to progress in accordance with the development plan.
 - The DBE has reached a satisfactory level of self-sufficiency to compete without resorting to special treatment provided in the development plan.

- The plan or provisions thereof are contrary to the requirements of Federal, State, or local laws or regulations, or otherwise inimical to public policy.
- A provision that either party may dissolve the arrangement at will by notifying the Department.

Required Contract Clauses (§26.13, §26.29)

DelDOT will ensure that the following clause is placed in every DOT-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 DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy, as the recipient deems appropriate.

V. MONITORING, ENFORCEMENT AND SANCTIONS

Prompt Payment (§26.29)

DelDOT will include the following clause in all prime contracts:

The prime contractor/consultant receiving payments shall, within 30 days of receipt of any payment, file a statement with the Department on a form to be determined by the Department that all subcontractors furnishing labor or material have been paid the full sum due them at the stage of the contract, except any funds withheld under the terms of the contract as required by Chapter 8, Title 17 of the Delaware Code annotated and as amended. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of DelDOT. This clause applies to both DBE and non-DBE subcontractors.

Retainage

DelDOT will include the following clause in all prime contracts:

The Department does not withhold retainage from regular payments made to the contractors. In accordance with Del Code Title 17 Chapter 8, contractors are not permitted to withhold retainage from subcontractors on contracts that do not include retainage for the contractor.

Administrative Resolution for Prompt Payment Issues

If a prime contractor/consultant is identified as having potentially violated this section, the Civil Rights Administrator for FHWA assisted projects or the DTC DBE Liaison Officer for FTA assisted projects, in coordination with the appropriate personnel, will conduct a full investigation of the facts. Findings of fact will be reported to the DelDOT Director of Technology and Support Services and the appropriate Section head for FHWA-assisted projects or the Chief Financial Officer and Executive Director of DTC. Sanctions applied to the violations are as follows:

First Violation – The prime contractor/consultant will be closely monitored by the DBE staff for three months following the finding to note any improvements. Should this situation not occur again, the prime will remain in good standing.

Second Violation – (on the same project or on a different project) – A meeting will be held with the appropriate department representatives and the prime's representative to fully discuss the matter and develop a written course of action to be followed. This action could consist of:

- Monitoring by region or maintenance district only to identify improvement; report to the DelDOT Director of Technology and Support Services or Chief Financial Officer of DTC as appropriate.
- A notice to monitor sent to all appropriate Department Personnel where this prime has an active contract. Progress to be tracked and reported monthly to the DelDOT Director of Technology and Support Services.
- If no improvement is made, future participation on new projects will be suspended for six months.

Third Violation – Suspension of participation in future projects for one year, and DelDOT will not approve any subcontracts for the suspended firm for the same time period.

Fourth Violation – Should it be determined by DelDOT that a prime has violated this clause and the Delaware Code, the matter will be turned over to the Office of the Attorney General for action. The firm's privileges will be suspended until the Office of the Attorney General has reached a determination.

Monitoring and Enforcement Mechanisms (§26.37, §26.107)

Project Monitoring

The DelDOT DBE program includes a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award or subsequently (*e.g.*, as the result of modification to the contract) is actually performed by the DBEs to which the work was committed. The monitoring of this work will be accomplished in coordination with Construction Inspectors and Project Managers on the project. This mechanism includes a

written certification, to be completed at project close-out, that states that contracting records and work sites in Delaware have been monitored for this purpose.

For competitively bid projects, the lowest apparent bidder will have ten calendar days from the date of bid to submit for approval a list of the DBE firms to be used and an original subcontract agreement executed by each DBE firm and the lowest apparent bidder. Each subcontract must identify the specific contracted items for each DBE firm, the per-item value, and the total quantity value. These agreements will be reviewed for compliance with the State and Federal laws and with the DBE Program plan.

For quality-based selection projects, such as consultant services, consultants will submit a list of DBE firms intended for use on the project with their Expression of Interest. Upon completion of the selection process the successful consultant will have ten calendar days from the notice of selection to submit executed subcontract agreements identifying the type work and its value. These agreements will also be reviewed for compliance with the State and Federal laws and with the DBE Program plan.

Upon approval of the prime contractor's and/or prime consultant's submittal, the appropriate District personnel and/or project manager will be provided copies of the agreements for their subcontract tracking purposes.

For each DOT-assisted project, a Civil Rights Section representative will endeavor to attend the preconstruction meeting or initial consultant kick off meeting to discuss the DBE monitoring procedures. When warranted, Civil Rights Section representatives will provide written information and instructions for the prime contractor regarding compliance requirements, which will be incorporated in pre-construction meeting minutes. A DelDOT DBE/EO Specialist will make efforts to visit each federal construction project monthly to observe the DBE firm's performance, review payrolls and receipts, and assist the DBE firm with issues and concerns on the project.

Payment Monitoring

DelDOT's Civil Rights Section shall monitor all aspects of the contractual relationship between primes and DBEs. Part of this monitoring shall include monthly review of the payment to said DBEs and all other subcontractors on the project. The forms for reporting shall be mailed to the prime's office and will request specific information on all payments made to DBE firms contracted for goals. Electronically captured project data will be cross-matched against the General Contractor's Certification of Payment form (CN-91) to verify payments. Should a discrepancy develop in ascertaining payment or amounts paid, DelDOT's Civil Rights Section shall enlist the aid of the DelDOT internal audit department to audit the prime's financial records.

Allowable Sanctions as a Result of Non-Compliance

If the Department uncovers any willful non-compliance by a prime or DBE subcontractor as it applies to the requirements of this program, the DBE Program may initiate sanctions as set out below.

- **Sanctions against DBE:** If a DBE is found to be willfully non-compliant, the Department will notify the DBE of the sanctions to be imposed, which may include suspension, decertification or debarment. The sanction notice will inform the DBE that it may notify the Department within fifteen (15) days to request a hearing to show proof that the determination was incorrect. If no request is made within fifteen (15) days, the penalty becomes final. If a hearing is requested, the penalty does not become final until the Department renders its decision. The Department's decision will set forth the reasons relied upon in making the decision to the U.S. Department of Transportation. If DelDOT chooses to proceed in the removal of DBE certification eligibility, the Department will follow the steps outlined in 49 CFR Part 26.87.

DelDOT will refer to the U.S. Department of Transportation any firm that attempts to participate or participates in a DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations, or under circumstances indicating a serious lack of business integrity or honesty. The U.S. Department of Transportation may initiate suspension and/or debarment proceedings against such firm under 2 CFR parts 180 and 1200.

- **Sanctions against Prime Contractor/Consultant:** Prime Contractors and Consultants are advised that failure to meet the contract DBE goals due to circumstances within their control will subject them to sanctions which may include financial assessments, probation, suspension, disqualification, debarment and criminal prosecution, or a combination thereof. Circumstances are within the control of the Prime Contractor or Consultant if the reason failure to meet the DBE goals is intentional or willful on the part of the Prime Contractor or Consultant. Examples of circumstances out of the control of the Prime Contractor or Consultant include DelDOT-imposed elimination of contract items or reduction of quantities, abandonment of the work by the DBE firm, etc. If a Prime Contractor or Consultant fails to meet the stated DBE goal on a contract due to circumstances within his or her control, DelDOT may calculate the value of the work that would have been performed by the DBE in the absence of the willful violation of the contract. The Prime Contractor or Consultant may be required to reimburse the DBE for the calculated value of the lost work.

DelDOT will refer to the U.S. Department of Transportation any firm that attempts to meet DBE contract goals or other DBE program requirements, through the use or attempted use of false, fraudulent, or deceitful statements or representations, or under circumstances indicating a serious lack of business integrity or honesty. The U.S. Department of Transportation may initiate suspension and/or debarment proceedings against such firm in accordance with 2 CFR parts 180 and 1200.

In addition to the administrative remedies listed above, willful violators of the DBE Program shall also be subject to the following actions:

- Withholding progress payments
- Cancellation of the contract
- Removal of the prime contractor or consultant from the pre-qualified list for a specified period of time, as determined by DeIDOT
- Suspension and debarment of the prime contractor or consultant for egregious or repeated violations of the DBE regulations, falsifications, or misrepresentations
- Referral for criminal prosecution

VI. DBE GOALS

Overall Goals (§26.45)

DeIDOT uses the requirements of 49 CFR Part 26.45 to develop and establish the annual goals and to determine percentages of race-neutral and race-conscious participation. DeIDOT will use the following process triennially to determine its overall goals:

- In April, the DBE Program Office will consult with minority, women's, and contractor groups, community organizations, and other organizations or officials to obtain information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and DeIDOT's efforts to establish a level playing field for the participation of DBEs. Concerns and comments will be considered in developing the goals.
- On or about June 1, DeIDOT will publish a notice in a major Delaware newspaper, minority-focused media (where possible), and the DeIDOT website advising the public of the proposed overall goal. The rationale for goal development will be available for inspection during normal business hours in the DBE Program Office, Delaware Department of Transportation, 800 Bay Road, Dover, DE 19901 for 30 calendar days following its publication. Comments regarding the proposed overall goal will be received for 45 calendar days from the date of publication at the above address.
- DeIDOT will submit proposed goals and a summary of public comments to FHWA by August 1 of the first triennial year. Included with the goals are descriptions of the methodologies used, the base figures, and the evidence relied on for adjustments.
- Unless otherwise directed by FHWA or FTA, the new goals take effect on October 1 of the first triennial year. The goals provide for participation by all certified DBEs and are not subdivided into group-specific goals.

DeIDOT will adjust the estimated breakout of race-neutral and race-conscious participation to reflect actual DBE participation and will track and report race-neutral and

race-conscious participation separately. (Note: DTC will be responsible for tracking and reporting DBE participation in FTA funded programs.) For reporting purposes, race-neutral DBE participation includes, but is not limited to:

- DBE participation through a prime contract that a DBE obtains through customary competitive procurement procedures.
- DBE participation through a subcontract on a prime contract that does not have a DBE goal.
- DBE participation through a subcontract to a prime contract that exceeds a contract goal.

Contract Goals (§26.51)

Contract goals are established on both construction and professional services projects so that, over the period to which the overall goal applies, they will cumulatively result in meeting any portion of our overall goal that is not projected to be met through the use of race-neutral means.

The DBE regulations are specific on the issue of DBE goal setting. A DBE goal may only be issued on DOT-assisted contracts that have subcontracting possibilities (49 CFR Part 26.51). Therefore, if the contract is not diverse enough to create subcontracting opportunities, a DBE goal cannot be set. If the contract has a variety of bid items, specific consideration can be made to establish a goal.

DelDOT will establish contract goals only on those DOT-assisted contracts that have subcontracting possibilities. We need not establish a contract goal on every such contract, and the size of contract goals will be adapted to the circumstances of each such contract (e.g., type and location of work, availability of DBEs to perform the particular type of work).

DelDOT has determined that there are three general categories of expertise in highway construction – excavation, hot-mix, and concrete. With this in mind, it is reasonable to say that prime contractors that specialize in one of the three areas will subcontract bid items in the other two categories.

The goal setting methodology must be narrowly tailored so as to not create an overconcentration of DBE participation in any one industry (26.33). So, there must be enough flexibility in the bid items to justify setting a goal. Additionally, the goal must provide for participation by all certified DBE firms and cannot be subdivided into group specific goals.

Considering these requirements, the project/contract goal setting methodology establishes the goal by identifying bid items that can be performed by our certified DBE firms,

designating those items into three non-specific groups, and averaging the total dollar value of each group. The process is as follows:

- Review each bid item or task listed in the engineer's estimate and compare them with the DBE Directory to see if there are at least two DelDOT DBE firms available to perform the specific item(s).
- If an item is determined to present a subcontracting opportunity to a DBE firm, and there are two or more certified DelDOT DBEs that are qualified to perform the work, designate the item with the numbers 1, 2 or 3 under the column labeled DBE Categories.

DelDOT will express our contract goals as a percentage of the total amount of a DOT-assisted contract. DelDOT goal setting on all projects will be done in accordance with DelDOT's Civil Rights Sections DBE Goal Setting procedures.

Good Faith Efforts (§26.53)

- Information to be Submitted At Time of Bid

When a DBE Goal has been established for a proposed contract, the bidding contractor or consultant shall demonstrate a good faith effort to meet the DBE goal before DelDOT will accept their bid or proposal. Evidence of a good faith effort must be submitted by a bidding contractor at or before the time of the bid opening. Evidence of a good faith effort must be submitted by a proposing consultant upon submission of their Expression of Interest or Proposal.

Each solicitation for which a contract goal has been established will require the bidder or proposer to submit the name, address, work description and contract amount of each DBE that the bidder or proposer plans to subcontract.

- Pre Award Demonstration of Good Faith Efforts

The obligation of the bidder/proposer is to make a good faith effort to meet the contract goal. The bidder/proposer can demonstrate that it has done so by either stating that they will meet contract goal or by providing documentation that all necessary and reasonable steps were taken to employ DBEs to meet the goal.

DelDOT will ensure that all good faith effort information supplied by each bidder/proposer is complete, accurate and adequately documented before the award of any contract.

The following personnel are responsible for determining whether a bidder/proposer who has indicated that they will be unable to meet the contract goal has made sufficient good faith efforts: the DBE Program Manager and the Civil Rights Administrator for DelDOT

for FHWA assisted projects or the DTC DBE Officer and the Fiscal Manager for DTC projects.

- Requirements For Pre Award Good Faith Effort

The bidder/proposer is expected to demonstrate good faith efforts by actively and aggressively seeking out DBE project participation to the maximum extent, given all relevant circumstances. DelDOT will consider all factors and types of efforts that may be relevant. Following are examples of the kinds of efforts that may be taken:

- Efforts made to select portions of work proposed to be performed by DBEs in order to increase the likelihood of achieving the stated goal. Selection of portions of work is required to at least equal the goal for DBE utilization specified in the contract.
- Written notification to DBE firms at least ten calendar days prior to the opening of a bid soliciting DBE interest in participating in the contract as a subcontractor or supplier and for specific items of work.
- Efforts made to obtain and negotiate with DBE firms for specific items of work:
 - Description of the means by which firms were solicited (i.e., by telephone, e-mail, written notice, advertisement).
 - The names, addresses, telephone numbers of DBEs contacted; the dates of initial contact; and whether initial solicitations of interest were followed-up by contacting the DBEs to determine with certainty whether the DBEs were interested.
 - A description of the information provided to DBE firms regarding the plans, specifications, and estimated quantities for portions of the work to be performed.
 - A statement of why additional agreements with DBEs were not reached in order to meet the project goal.
 - Listing of each DBE contacted but not contracted and the reasons for not entering a contract.
- Efforts made to assist DBEs that need assistance in obtaining bonding, insurance, or lines of credit required by the contractor.
- Efforts to effectively use the services of available disadvantaged community organizations, disadvantaged contractor's groups, local, state, and federal DBE assistance offices, and other organizations that provide assistance in recruitment and placement of DBEs.

The following are examples of actions that may not be used as justification by the contractor/consultant for failure to meet DBE contract goals:

- Failure to contract with a DBE solely because the DBE was unable to provide performance and/or payment bonds.

- Rejection of a DBE bid or quotation based on price alone.
- Rejection of a DBE because of its union or non-union status.
- Failure to contract with a DBE because the contractor normally would perform all or most of the work in the contract.

Administrative Reconsideration

Within five days of being informed by DelDOT that it has not documented sufficient good faith efforts, a bidder/proposer may request administrative reconsideration. The bidder/proposer should make this request in writing to the following reconsideration official: a) for FHWA assisted projects, contact the Civil Rights Administrator, DelDOT, P.O. Box 778, Dover, Delaware 19903; or b) for FTA assisted projects, contact the Chief Financial Officer, DTC, 119 Lower Beech Street, Wilmington, Delaware 19805. The reconsideration official must not have played any role in the original good faith effort review or determination.

As part of this reconsideration, the bidder/proposer will have the opportunity to meet in person with their respective reconsideration official, and be allowed the time to explain why their firm did or did not meet the goal or make adequate good faith efforts to do so. The final decision made by the reconsideration official will be communicated to the bidder/proposer in writing. The result of the reconsideration process is not administratively appealable to the U.S. Department of Transportation.

- Post Award Demonstration of Good Faith Efforts

The post-award good faith efforts requirements of section 26.53(f) apply only to contracts in which a contract DBE goal has been set.

These requirements (1) prohibit prime contractors from terminating a DBE for convenience and then substituting the prime contractor's own forces, and (2) require the prime contractor to make good faith efforts to replace a DBE firm that could not complete its contract with another DBE firm, to the extent needed to meet the contract goal.

These provisions are based on the premise that the prime contractor has committed itself to make good faith efforts to meet a contract goal. When there is a contract goal, the provisions of section 26.53(f) are necessary to prevent a prime contractor from circumventing its good faith efforts obligation after the contract has been awarded.

Where there is no contract goal (i.e., a race-neutral procurement), these provisions are not relevant.

- Pre-Award or Post-Award Termination of a DBE subcontractor

In addition to post-award terminations, the provisions of the following section apply to pre-award deletions of or substitutions for DBE firms put forward by bidders/proposers in

negotiated procurements. DelDOT will require a contractor/consultant to make good faith efforts to replace a DBE that is terminated or has otherwise failed to complete its work on a contract with another certified DBE, to the extent needed to meet the contract goal. The prime contractor/prime consultant will be required to notify the DBE Program Manager for FHWA assisted projects or the DTC Fiscal Manager for FTA assisted projects immediately upon learning of the DBE's inability or unwillingness to perform.

The prime contractor/consultant may not remove any DBE subcontractor (or an approved substitute DBE firm) that was submitted toward the DBE goal without prior written consent from the DBE Program. This includes, but is not limited to, instances in which a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm. Before making a request to terminate and/or substitute a DBE subcontractor, the prime contractor must give notice in writing to the DelDOT Project Manager the DBE subcontractor, and the DBE Program Manager of its intent to request to terminate and/or substitute, and the reason for the request. The Prime Contractor must give the DBE five (5) days to respond to the prime contractor's notice. During this time, the DBE must advise the DelDOT DBE Program and the Prime Contractor of the reasons, if any, why it objects to the proposed termination of its subcontract. If required in a particular case as a matter of public necessity (e.g., safety), the DBE Program may allow for a response period less than five days. After the five days have passed, the DBE Program will provide written consent only if it is agreed that the prime contractor has good cause to terminate the DBE firm.

DelDOT will consider the following circumstances as good cause to terminate a DBE firm:

- The listed DBE subcontractor fails or refuses to execute a written contract;
- The listed DBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor;
- The listed DBE subcontractor fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond requirements.
- The listed DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;
- The listed DBE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant 2 CFR Parts 180, 215 and 1,200 or applicable state law;
- You have determined that the listed DBE subcontractor is not a responsible contractor;
- The listed DBE subcontractor voluntarily withdraws from the project and provides to you written notice of its withdrawal;
- The listed DBE is ineligible to receive DBE credit for the type of work required;
- A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract;

- Other documented good cause that you determine compels the termination of the DBE subcontractor. Provided, that good cause does not exist if the prime contractor seeks to terminate a DBE it relied upon to obtain the contract so that the prime contractor can self-perform the work for which the DBE contractor was engaged or so that the prime contractor can substitute another DBE or non-DBE contractor after contract award.

In the event that a substitute DBE subcontractor cannot be found, the prime will be asked to submit evidence that a Good Faith Effort was made to substitute a DBE subcontractor for the item(s) of work.

In the event that a substitute DBE subcontractor is found, the prime will be asked to furnish the Department with a copy of the new subcontract agreement for approval by the DBE Program.

Good Faith Efforts and Change Orders (§26.53)

As a condition of the privilege to bid, DelDOT requires adequately documented Good Faith Efforts to be made by all bidding contractors/consultants. As a condition of the privilege of award, DelDOT requires the apparent lowest bidder to submit contractual commitment to its use of the DBEs named, at the dollar amount quoted, and for the work identified at bid. If there is any change during the life of the contract resulting in less or more work, the prime contractor, in consultation with and subject to the consent of DelDOT, must undertake a Good Faith Effort to meet its commitment. If a federally-funded change order is made to a contract on which there is a DBE goal, then the goal (as a percentage) applies to the sum of the change order amount and the original contract. This is true regardless of who initiates the change order. If the change order causes a reduction in the original contract on which there is a DBE goal, then the goal (as a percentage) applies to the revised contract amount. This is true regardless of the work items reduced or who initiated the change order. Prime contractors are required to use all means necessary to meet the DBE goal by securing DBE contracts for the remaining subcontractable elements of a project in order to show a good faith effort was made. The DBE contract goal itself will not change, regardless of a change order.

DelDOT will consider, on a case-by-case basis, what constitutes a good faith effort in the context of each individual change order.

Counting DBE Participation (§26.55)

The rules under §26.55 apply when calculating the participation of a DBE firm for credit towards meeting a goal. In order to be eligible to participate in meeting any DBE goals, a firm must be certified as a DBE in accordance with the standards of 49 CFR Part 26 before the contract is executed. DBE participation is counted only when the DBE firm actually performs the work themselves. A DBE may subcontract part of the work of its contract to another firm, however the value of the subcontracted work will be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE

subcontracts to a non-DBE firm does not count toward DBE goals.

Counting DBE Temporary Traffic Control Firms Previous to Award

Subcontracts for Temporary Traffic Control (a/k/a, flagging) which are offered to meet an established DBE goal, in whole or in part, will be accepted towards meeting the goal at a rate of 70% of the estimated regular flagging hours at award. DelDOT will accept no more than 70% of its estimated regular flagging hours toward the DBE contract goal as submitted by an apparent lowest bidder. In conjunction, DelDOT will not accept any portion of its estimated overtime flagging hours toward a DBE goal as a condition of the award of a federal contract. These rules apply to any apparent lowest bidder previous to the award of a federal-aid contract. After a contract has been awarded, all payments made to DBE flaggers for regular or overtime flagging hours will be credited towards the DBE contract goal, including any payments that exceed 70% of the original flagging estimate. *Example:*

DelDOT bid documents show an estimated 1,000 regular flagging hours and 100 overtime flagging hours on an upcoming contract. All bidders on the contract submit written acknowledgement that they will meet the advertised DBE goal on the contract. After the bid opening, the lowest bidder submits signed subcontracts which indicate that all estimated flagging hours will be subcontracted to a DelDOT-certified DBE. DelDOT will apply the subcontracted value of 700 (or, 70% of 1,000) regular hours toward the goal. If this value meets the DBE goal, approval is given to Contract Administration to proceed with award. If the DBE goal is not met, the contractor must provide additional subcontracts to meet the DBE goal within the required timeframe.

Commercially Useful Function

A DBE performs a commercially useful function (CUF) 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. With respect to materials and supplies used on the contract, the DBE must be responsible for negotiating price, determining quality and quantity, ordering, installing (where applicable) and paying for the material itself. A DBE does not perform a CUF 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.

It is the primary responsibility of the prime contractor to ensure that a DBE firm is performing a CUF. DelDOT, as the contracting agency, has a further oversight responsibility to ensure that the prime contractor has effectively met this responsibility under his/her contract. Periodic site visits will be made by Civil Rights Section personnel to verify that any DBE work is being fulfilled according to contract documents.

The USDOT gives the following key factors in its DBE regulations to help determine whether a CUF is being performed:

- The work subcontracted must be consistent with normal industry practices. The general rule of thumb to be considered is whether a DBE firm would be performing in the manner it is if there was no DBE program;
- The amount that the DBE firm is paid under the contract must be commensurate with the work that is actually being performed to be credited towards the goal;
- When the DBE contractor furnishes materials, the DBE must be responsible for negotiating the price, for determining the quality and quantity of the material, ordering the material and paying for it. As a contractor, a DBE firm would typically be contracted to furnish and install or just to install an item in the contract.
- The DBE's role must not be limited to that of an extra participant in a transaction, contract, or project through which funds are passed through in order to obtain the appearance of DBE participation. In essence, was the role merely a contrived arrangement for the purpose of meeting the DBE contract goal?

In determining whether a DBE is such an extra participant, DelDOT will examine similar transactions, particularly those in which DBEs do not participate. A DBE must have a necessary and useful role in the transaction, of a kind for which there is a market outside the context of the program. The firm's role must not be a superfluous step added in an attempt to obtain credit towards the goal.

Both the prime contractor and DelDOT receive credit toward their DBE goal (contract and overall, respectively) only when a DBE working on a contract performs a CUF. **DBEs generally perform work on a DelDOT contract either as a contractor, a trucker, a regular dealer or a manufacturer.** Each of these roles are evaluated differently when determining whether the DBE has or will perform a CUF. The following identifies the manner in which DelDOT will evaluate CUF and count participation toward a DBE goal in conjunction with each category:

- If a DBE firm will be serving as a **contractor**, five (5) distinct operations will be reviewed to determine CUF: management, workforce, equipment, materials and performance.
 - The DBE must manage the work that has been contracted to his/her firm. 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 employed by and paid wages by the DBE. 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.

- In order to be considered an independent business, a DBE firm must keep a regular workforce. DBE firms cannot "share" employees with non-DBE contractors, particularly the prime contractor. The DBE shall perform its work

with employees normally employed by and under the DBE's control. 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. The DBE, in all instances, must have direct supervision of all employees.

The DBE firm must be responsible for all payroll and labor compliance requirements for all employees performing on the contract and is expected to prepare and finance the payrolls. Direct or indirect payments by any other contractor are not allowed.

- A DBE firm may lease specialized equipment from a contractor, excluding the prime, if it is consistent with normal industry practices and at rates competitive for Delaware. A rental agreement must specify the terms of the agreement. The lease must be for a short period of time and involve a specialized piece of equipment readily available at the job site. The operation of the equipment must be subject to the full control of the DBE. The DBE is expected to provide the operator for non-specialized equipment used on the DBE contract.
- The DBE must assume the actual and contractual responsibility for the provision of the material to be incorporated into the item of work being performed by the DBE. The DBE must negotiate the cost, arrange delivery, and pay for the materials and supplies for the project. The DBE must prepare the estimate, quantity of material, and be responsible for the quality of materials. Invoices for material should show the payee as the DBE.
- The DBE must be responsible for the performance, management and supervision of a distinct element of the work, in accordance with normal industry practice (except where such practices are inconsistent with the DBE regulations).
- If a DBE firm is a **trucking firm**, 100% of the total value of the transportation services it provides on the contract, using trucks it owns, insures, and operates and using drivers it employs, will be credited toward the project goal.

To be certified in the DBE program as a trucking firm, the DBE firm is only required to own and operate at least one fully licensed, insured, and operational truck used on the contract. To perform a CUF, a DBE firm must also be responsible for the management and supervision of the entire trucking operation on a contract-by-contract basis. There cannot be a contrived arrangement for the purpose of meeting DBE goals.

A DBE can lease a truck(s) from an established equipment leasing business open to the general public. The lease must indicate that the DBE has exclusive use of and control over the truck. This requirement 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. Otherwise, the DBE will not receive full credit for DBE participation.

Leased trucks must display the name and identification number of the DBE. The DBE trucker must also hold the necessary, where appropriate, license, hauling permit, etc., as required by the State of Delaware to transport material on public highways.

To count DBE trucks toward a contract goal, the following can occur:

- 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
- The DBE may also lease trucks from a non-DBE firm, including from a non-DBE owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE lessees not to exceed the value of transportation services provided by DBE-owned trucks on the contract. (*i.e., for each DBE-owned truck on the contract, the DBE trucking firm may count credit for one non-DBE owned truck which they have leased*)
- Additional DBE participation can be achieved from non-DBE trucks. However, the additional participation is only entitled to credit for the fee or commission it receives as a result of the lease arrangement.

Example: DBE Firm X uses two of its own trucks on a contract. It leases two trucks from DBE Firm Y and six trucks from non-DBE Firm Z. DBE credit would be awarded for the total value of transportation services provided by DBE Firm X and DBE Firm Y, and for the total value of transportation services provided by four of the six trucks provided by non-DBE Firm Z. In all, full credit would be allowed for the participation of eight trucks. With respect to the other two trucks provided by Firm Z, DBE credit could be awarded only for the fees or commissions pertaining to those trucks Firm X receives as a result of the lease with Firm Z.

In order for DelDOT to monitor the performance of a DBE trucking firm, the work to be performed must be covered by a subcontract or written agreement approved by the DBE Program prior to performing the work. If a DBE trucking firm will be leasing equipment, a valid lease agreement must be provided to the DBE Program for review. To be considered valid, the lease agreement must include such items as the lessor's name, list of trucks to be leased by Vehicle Identification Number, (VIN), the agreed upon amount of the cost, and the method of payment. It is the responsibility of the DBE to provide the operator's fuel, maintenance and insurance for all leased trucks.

- As described in 26.55(e)(1)(ii) a **manufacturer** is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character

described by the specifications. Examples of such items could be a concrete ready mix plant, a crushing operation, fabricating plant such as steel or concrete, etc.

- If a DBE firm will be functioning as a **regular dealer** (commonly referred to as a supplier) by supplying material or supplies for another firm to use, then 60% of the cost of the products provided is counted toward the DBE goal.

In order for a firm to be deemed a regular dealer, it must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. In addition, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. Examples of a regular dealer include a plumbing supply or lumber yard.

It is important to make a distinction between a regular dealer and a firm that supplies a product on an ad hoc basis in relation to a particular contract or contractor. The latter does not meet the requirements of a regular dealer because the firm supplies goods on an ad hoc basis or for only one or two contractors with supplier relationships. A regular dealer has a regular trade with a variety of customers. One of the key considerations of being a regular, established dealer is the presence of an inventory of materials and/or supplies. A regular dealer assumes the actual and contractual responsibility for the provision of the material and/or supply. A firm may qualify as a regular dealer of materials sold in bulk (such as fuel, gravel, or sand) if the DBE owns and operates the distribution equipment for said materials.

- If a DBE firm will be functioning as a **broker, packager, manufacturer's representative or agent**, or similar business that arranges or expedites transactions by supplying material or supplies for another firm to use, it is not a regular dealer. This includes firms that arrange the transfer of goods or purchase and supply materials on an ad hoc basis. In this case, 100% of the amount of fees or commissions charged for assistance in the procurement of the materials or supplies, and/or 100% of the fees or transportation charges for the delivery of the materials or supplies will be counted toward the project goal. A determination will be made to ensure that the fees are reasonable and not excessive as compared with fees customarily allowed for similar services. No portion of the cost of the materials and supplies themselves will be counted toward the project goal.

VII. CERTIFICATION (§26.61 – 26.91)

DelDOT uses the certification standards of Subparts D and E of 49 CFR Part 26 to determine the eligibility of firms wishing to participate as DBEs in its USDOT-assisted contracts. DelDOT will not refuse to certify a firm solely on the basis that it is a newly formed firm, has not yet realized profits from its activities, or has not demonstrated a

potential for success. Part 26.65 of the DBE program regulations, requires that an applicant firm be “existing” in order to qualify for the DBE program. The provisions of *SAFETEA-LU Section 1101(b) -- Authorization of Appropriations/Disadvantaged Business Enterprises (DBE)*, establishes the minimum uniform certification criteria to include, but not be limited to: a list of equipment, list of work completed, and analysis of bonding capacity. Therefore, applicants must be able to demonstrate that they are operational or otherwise capable of performing the work they will be doing while in the program. This capability includes having the necessary resources, workforce and equipment to perform the work. This does not imply that a firm must have received a contract in order to be an existing business, but it does mean that the business exists beyond simply being on paper. DeDOT will grant certification to a firm only for the specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm.

Size Standards for Small Businesses (§26.65(a))

To be an eligible DBE, a firm (including its affiliates) must be an existing, for-profit, small business, as defined by Small Business Administration (SBA) standards. An SBA size standard is the largest that a firm can be and still qualify as a small business for Federal Government programs. SBA size standards are expressed in either millions of dollars or number of employees. Size standards are determined by calculating the average annual receipts or the average employment of a firm. DeDOT applies the SBA business size standard correlating to the appropriate type of work that the applicant firm seeks to perform as a DBE.

In accordance with the standard listed in 13 CFR §121.104(c), DeDOT uses the previous three fiscal years as the period of measurement in determining the financial size of an applicant. Financial size is determined by calculating the average annual receipts of the firm over its most recently completed three fiscal years (or less if the firm has not been in business for three years).

13 CFR §121.104(a) states: “Receipts means “total income” (or in the case of a sole proprietorship, “gross income”) plus “cost of goods sold” as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; Form 1040, Schedule F for farms; Form 1040, Schedule C for other sole proprietorships). Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees; proceeds from transactions between a concern and its domestic or foreign affiliates; and amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker. For size determination purposes, the only exclusions from receipts are those specifically provided for in this paragraph. All other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, and employee-based costs such as payroll taxes, may not be excluded from receipts.”

Personal Net Worth

All owners claiming disadvantaged status submit must a statement of personal net worth (PNW) when applying for DelDOT DBE certification. The basic principle in counting assets in the personal net worth calculation is to count the present value of assets attributable to the individual applicants(s). If an asset is held as community property, or jointly (including a tenancy by the entireties) between two people, 50 percent of the value of the asset is normally attributed to each person. For example, suppose a woman owner of a firm applying for DBE certification has, with her husband, a \$100,000 joint savings account. Half of this asset -- \$50,000 -- would be counted toward her personal net worth. A legal instrument valid under state law can alter this normal attribution of assets between owners.

Control and Independence

When a firm's primary line of work requires a professional license in the state of Delaware, the applicant owner must hold said professional license as issued by his or her home state in order to show control of the firm. If the disadvantaged owner does not hold the professional license associated with the primary line of work, they are precluded from controlling the firm, which is a basis for denial of certification.

Only an independent business may be certified as a DBE. An independent business is one of which its viability does not depend on a relationship with another firm or firms. In order to be considered an independent business, a DBE firm must keep a regular workforce. A DBE firms cannot "share" employees with non-DBE contractors, particularly the prime contractor. To control a firm, a DBE must possess the power to make day-to-day decisions on matters of management, policy, and operations. In controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control.

Certification decisions are based on the facts as a whole. As such, all applicants bear the burden of proof to furnish all evidence as required by 49 CFR Part 26. For information about the certification process or to request an application via mail, interested firms should contact: DelDOT DBE Program, P.O. Box 778, Dover, DE 19903. Interested parties may also reach the program by calling (302) 760-2035, or via the internet at <http://www.deldot.gov/information/business/dbe/index.shtml>.

Certification Process (§26.81-26.83)

Delaware uses the standard Uniform Certification Application Form and the Affidavit of Certification (Appendix F of Part 26 in its entirety). All DBE Certification applications are assigned and processed by DBE Program staff in the order that the completed application and corresponding documents are received, with no exception.

Upon receipt of a DBE application packet, DelDOT will advise each applicant within thirty days whether the application is complete and suitable for evaluation or, if not, what additional information or action is required. Certification application reviews are assigned in the order received and are reviewed by a DBE Specialist or the Program Manager. Applicants for DBE certification may voluntarily withdraw their application before DelDOT has issued a decision on the application. In this case, the applicant may resubmit their application at any time. Resubmitted applications will be placed at the “end of the line,” behind other applications that have been submitted since the firm’s previous application was withdrawn. Firms that have established a pattern of frequently withdrawing applications before a decision is made will be required to wait the obligatory twelve month period before being allowed to reapply.

DelDOT has instituted a check-and-balance approach to all recommendations (approval or denial) of certification. Upon initial review, recommendations to approve certification are processed through the Program Manager for a second-level desk review. The Program Manager may concur or disagree with the recommendation, or ask for more information to add clarity to the final decision. In any case where the DBE Specialist or Program Manager recommends the denial of a new applicant, the recommendation letter, review form, and application packet are to be forwarded to the Civil Rights Administrator for a second-level review. The Civil Rights Administrator may concur or disagree with the recommendation, or ask for more information to add clarity to the final decision. Once DelDOT has certified a DBE, the firm shall remain certified until and unless its certification has been removed through the procedures of sec 26.87.

In-State Applicants: Applicants whose business home state is Delaware and who submit a completed DelDOT Uniform Certification application, Personal Financial Statement, and all required attachments and documentation will undergo both a desk review and an on-site interview (which will be held at the office of the applicant firm). In pre-certification decisions, the burden of proof lies with the applicant. The applicant must fully comply with all requirements of the application process. DelDOT is under no obligation to either accept or consider any application which is not complete. In any event, the applicant may elect to furnish a completed application or withdrawal the request for DBE certification until such time as a complete application can be presented. All determinations of certification are issued by DelDOT’s DBE Program. When an applicant is granted DelDOT certification, the firm will be notified in writing of such, will commence being listed in DelDOT’s DBE Directory, and will have full benefit of DelDOT’s DBE Program.

- **The On-Site Review:** According to 49 CFR 26.83(c)(1), DelDOT is not permitted to certify a firm as an eligible DBE unless there has been an on-site review that can be taken into account to verify its eligibility. DelDOT will visit each applicant firm that hold their primary place of business in Delaware. There are, however, some situations in which DelDOT may deny certification to a firm without an on-site review. These situations apply to In-State or Out-of-State applicants. Examples of these situations include:

- The personal financial statement of the owner of a firm exceeds the \$1.32 million limit.
- The firm exceeds the \$22.41 million cap on gross annual receipts, averaged over three years, or exceeds the applicable SBA business size standard.
- The applicant fails to cooperate with DelDOT's information requests.
- It is clear from the application that disadvantaged individuals do not own or control the firm (e.g., non-disadvantaged individuals own 51% percent or more of the stock, have the majority of experience in the firm's primary line of work, or make all of the day-to-day business decisions of the company).

Out-of-State Applicants:

- **Applicant Responsibilities for Interstate Certification**

Under §26.81(d), a UCP “is not required to process an application for certification from a firm having its principal place of business outside the state if the firm is not certified by the UCP in the state in which it maintains its principal place of business.” All out-of-state applicants must be granted certification by their home state Unified Certification Program before DelDOT will accept a DBE application for review. Out-of-state firms that were certified under 49 CFR Part 26 will be not given automatic certification without undergoing a DelDOT review.

In Out-of-State pre-certification decisions, the burden of proof continues to lie with the applicant. The applicant must fully comply with all requirements of the application process. Out-of-state applicants must submit a complete copy of their original home-state application form, all supporting documents, an Affidavit Of Certification for Out-Of-State Applicants form, a Personal Financial Statement form, and any other information submitted to their home state or any other related to the firm's certification. This includes affidavits of no change and notices of changes that the applicant submitted to the home state, as well as any correspondence between the applicant and their home state or any other concerning their application or status as a DBE firm. The DelDOT DBE office will make arrangements with the applicant's home state to acquire a copy of their on-site visit report.

Out-of-state applicants must also provide any notices or correspondence from states other than Delaware in relation to their status as an applicant or certified DBE in those states. For example, if an out-of-state firm has been denied certification, decertified, or subject to a decertification action in a state other than Delaware, the firm must inform DelDOT of this fact and provide them all documentation concerning this action. If an out-of-state applicant has filed a certification appeal with USDOT (see § 26.89), the applicant must inform DelDOT of the fact and provide the letter of appeal and USDOT's response. All out-of-state applicants must submit an affidavit sworn to by the firm's owners before a person who is authorized by State law to administer oaths or an unsworn declaration

executed under penalty of perjury of the laws of the United States. This affidavit must affirm that the applicant has submitted all the information required by 49 CFR 26.85(c), that the information is complete, and, in the case of the information required by § 26.85(c)(1), is an identical copy of the information submitted to the home state. If the home state on-site report is more than three years old, as of the date the application was received by DelDOT, the applicant will also be required to affirm via sworn affidavit that the facts in the on-site report remain true and correct.

In accordance with federal rules governing cooperation, failure of the applicant to provide any of the above documentation is grounds for denial of certification (see § 26.109). Out-of-state applicants are limited to the NAICS work code(s) for which they are certified to perform according to their home state DBE Program.

- **DelDOT Responsibilities for Interstate Certification**

Upon receipt of a copy of the original home-state application form, the Personal Financial Statement form, all supporting documents, and any other information submitted to their home state or any other related to the applicant's certification, DelDOT will:

- Within seven days contact the firm's home state and request a copy of the site visit review report, any updates to the site visit review, and any evaluation of the firm based on the site visit.
- Determine whether there is good cause to believe that the home state certification of the firm is erroneous or should not apply in Delaware. Reasons for making such a determination may include the following:
 - Evidence that the home state certification was obtained by fraud;
 - New information, not available to the home state at the time of its certification, showing that the firm does not meet all eligibility criteria;
 - The home state's certification was factually erroneous or was inconsistent with the requirements of 49 CFR § 26;
 - The State law of Delaware requires a result different from that of the State law of the home state.
 - The information provided by the applicant firm does not appear to be identical to the information by which the home state based its certification decision.
- Unless DelDOT has determined that there is good cause to believe that the home state's certification is erroneous or should not apply in Delaware, DelDOT will, no later than 60 days from the date on which it received all information required from the applicant firm, send to the applicant firm a notice that it is certified and place the firm in its directory of certified firms.
- If DelDOT has determined that there is good cause to believe that the home state's certification is erroneous or should not apply in Delaware, DelDOT will,

no later than 60 days from the date on which it received all information required from the applicant firm, send to the applicant firm a notice stating the reasons for its determination. This notice will state the specific reasons why DelDOT believes that the firm does not meet the requirements 49 CFR part 26 for DBE eligibility. This notice will offer the applicant firm 30 days to respond to DelDOT with respect to the reasons listed. The applicant firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements of 49 CFR part 26 with respect to each issue raised by the notice. Within 30 days of the receipt of the response from the firm, DelDOT will issue a written decision made by an individual who is thoroughly familiar with the provisions of 49 CFR Part 26. The applicant's DelDOT certification is stayed pending the outcome of the review process. DelDOT's decision to deny certification may be appealed to the Departmental Office of Civil Rights under § 26.89 of 49 CFR.

NAICS Codes

All DBE applicants that have been granted DelDOT DBE certification will be assigned specific NAICS codes which signify the type of work they are authorized to perform as a DelDOT DBE. A correct NAICS code is one that describes, as specifically as possible, the principal goods or services which the DBE firm will be providing on federally-aided DelDOT projects. For in-state firms, DelDOT will assign the NAICS code based on information gathered during the certification review process. For out-of-state, firms, DBE Program staff will review the codes authorized by the home state certifier and assign those that the applicant demonstrated they can perform. Out-of-state applicants are limited to the NAICS work code(s) for which they are certified to provide by their home state DBE Program.

The DBE firm bears the burden of providing the detailed company information the DelDOT needs to make an appropriate NAICS code designation. When describing the type(s) of work a firm can perform, whether on initial certification or when a new type of work is added, DelDOT will use terms of the most specific available NAICS code for that type of work. In addition to applying the appropriate NAICS code, DelDOT will also apply a descriptor to each NAICS code, giving even further detail and specificity to the approved work type(s). Multiple NAICS codes will be assigned where appropriate.

Expanding Certified NAICS Codes After Initial Certification:

DBE firms will be certified only for the specific work for which they can perform at the time of certification. For a current DBE to become certified to perform an additional type of work, the firm must demonstrate that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. The firm must apply in writing for the additional work items for which it is requesting to be certified. DelDOT will not require that the firm submit a new application for this process; however the applicant firm must provide any and all information requested by DelDOT to proceed with the update. DelDOT must verify that the disadvantaged owner has the expertise, experience, and equipment to do the additional work. Upon reviewing the requested

information, DeIDOT will notify the DBE, in writing, of the work codes for which the firm is eligible. The request must be fully processed before any credit can be made toward a DBE goal, and no credit will be received for new work items that are requested after a contract is awarded. In considering what constitutes a “specific type of work” for purposes of 26.71(n), the DeIDOT DBE Program will choose the NAICS code most applicable to the business, and will further list a specific description of work items for which the firm is eligible to perform as a DBE. If a DBE firm which has requested a NAICS code update has not undergone a certification review in the previous three years, one will be completed before the NAICS update is made. Out-of-state firms remain limited to the NAICS work code(s) for which they are certified to provide by their home state DBE Program.

For a prime contractor or consultant to receive DBE credit toward a contract goal, the sub-contractor/consultant DBE firm must be certified before the due date for bids or offers on the prime contract. No Contractor or Consultant will receive DBE credit for work done by any firm that has not been certified by DeIDOT prior to the prime contract bid date.

Post-Certification Review

DBE certification does not expire. Once certified as a DBE, the firm will remain so until its certification has been removed in a formal §26.87 decertification proceeding by any authorized agency. However, firms for which DeIDOT is their home state certifying agency will be reviewed for continuing eligibility no less than every three years from their original certification date. These reviews will include, and not be limited by, the following components: a new application; copies of the last three years business and personal tax filings; statements of personal net worth; and, if warranted, on-site review or home state certification. DeIDOT may choose to conduct a certification review, including a new onsite review, sooner than three years if there is evidence of changed circumstances, a complaint is filed, a NAICS code update is requested, or there are other concerns surrounding the firm’s eligibility. An on-site review or request for updated home state certification review may be required when significant changes to corporate structure, the primary objective of the business, a definitive expansion of the business and/or any other notable differences to the original DBE certification application are realized. In the event that DeIDOT is unable to perform a three year review, the DBE firm will remain certified unless proven otherwise.

The State of Delaware is unique in that most intra-state agencies use DeIDOT’s directory of certified DBE firms to meet their individual requirements. In the State of Delaware, recipients of FHWA, FTA, and FAA funds use the Directory of certified DBE firms to meet their individual DOT-assisted requirements and agree to follow the requirements in Section 26.81.

Notices of Change and No Change Affidavits (§26.83)

All DBE's for which DelDOT is their home state certifying agency must inform DelDOT within thirty days of any change in circumstances affecting their ability to meet size, disadvantaged status, ownership, or control requirements of Part 26, or any material change in the information provided with their application for certification. DBE's must attach supporting documentation describing in detail the nature of such changes. The declaration must be sworn in writing and is executed under penalty of perjury of the laws of the United States. If the DBE should fail to make timely notification of any such change, they will be deemed to have failed to cooperate under §26.109(c). Changes in management responsibility among members of company are covered by this requirement.

All DBE's for which DelDOT is their home state certifying agency must annually provide to DelDOT an affidavit sworn to by the firm's owners and executed under penalty of perjury of the laws of the United States. This "No Change" affidavit must affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, control requirements, or any material changes in the information provided in its application form, except for changes reported in the thirty day period as discussed in the paragraph above. This affidavit is to be submitted to DelDOT every year on the anniversary of the date of DelDOT DBE certification and shall specifically state that the firm continues to meet SBA business size criteria and the overall gross receipts cap, documenting this affirmation with supporting documentation of the firm's size and gross receipts. If a DBE should neglect to provide this affidavit in a timely manner, they will be deemed to have failed to cooperate under §26.109(c). If applicable, any NAICS which do not meet the SBA size criteria will be removed from the firm's listing in the DelDOT Certified Directory.

Procedures for Removal of DBE Eligibility (§26.87)

Any firm may voluntarily remove itself from the DelDOT DBE program at any time by submitting written notice, by failing to respond to requests for information, or by failing to respond to a DBE Program request before the reasonable due date.

In the event that DelDOT proposes to remove the certification eligibility of a DBE, we will follow procedures consistent with 26.87. Removal of eligibility proceedings may be instigated by an ineligibility complaint from any person, initiated by a recipient, or by DOT directive.

DelDOT has the authority to request to an updated Personal Net Worth form during any eligibility review. Under 26.67(b)(1), if an individual applicant's PNW shows that his or her PNW exceeds \$1.32 million, it is not necessary for DelDOT to have a proceeding under 26.87 to conclusively rebut his or her presumption of economic disadvantage. In this situation, no hearing or proceeding is called for to rebut the presumption of disadvantaged status. However, if there is dispute about the facts of a case (e.g., the individual owner challenges the DelDOT's determination that his or her PNW exceeds

\$1.32 million), then a 26.87 proceeding is necessary to remove the disadvantaged status of the individual.

A certified DBE may be decertified for any of the following reasons:

- The business has changed to the extent that it is no longer owned or controlled by the disadvantaged person(s).
- The DBE does not respond or submit information as required by the annual “no-change” Affidavit or triennial Three-Year Review.
- The DBE is no longer an on-going business entity.
- The DBE was decertified as an 8(a) firm by the U.S. Small Business Administration; the firm may apply for DelDOT certification but will be considered a decertified firm until it meets DelDOT Program Certification requirements.
- The DBE falsifies a sworn statement.
- The DBE violates the DBE Program or 49 CFR Part 26.
- The DBE fails to notify the DBE Office, within thirty (30) days, of change in the ownership, control, management, independence, address, or location or status as an on-going concern.
- The DBE review determines the firm no longer meets eligibility standards.

The DBE Program Manager, should one of the above situations arise, will perform an investigation of the facts surrounding the issue and determine if there exists factual support to proceed with the removal of eligibility. If the factual support exists, the DBE Program Manager will send notice to the firm, in writing, that the DBE program has begun procedures to remove eligibility, setting forth the reasons and specific findings upon which the action is based. The DelDOT DBE Program will offer the firm the opportunity for an informal hearing, at which time the DBE may respond to the reasons in the written notice to remove eligibility. Should the DBE wish to schedule an informal hearing, they shall notify the DBE Program within fifteen calendar days of such notification of their intent to be heard before DelDOT's Hearing Officer. If the DBE wishes to forgo an informal hearing, the firm may elect to present their arguments in writing to the DBE office no later than fifteen calendar days of such notification. If the firm chooses to forgo their right of a hearing or their right to submit written evidence to the contrary within the fifteen calendar day deadline, the firm's DBE certification status will be deemed ineligible effective immediately.

Once the Department is notified of a decertification appeal, the Department's Hearing Officer will schedule an informal hearing, to be recorded by a court reporter, or allow the firm the opportunity to present their arguments in writing. Upon completion of this process, the Hearing Officer will communicate the determination in writing to both the appealing firm and the DBE Program Manager. The Department's Hearing Officer will be an individual appointed from a separate division within the department who is not in direct contact with the operation of the DBE Program. During the pendency of the decision, the DBE will remain eligible to participate as a DBE. Once DelDOT has made its final eligibility decision, the determination goes into effect immediately. At all stages of the removal of eligibility process, DelDOT shall have the affirmative burden of proving that is

the firm is not qualified to be a DBE. If DelDOT denies a firm's application or removes the eligibility of a firm through decertification, the firm may not reapply for certification until twelve months have passed from the date of the final decision.

Any firm, which believes that it has been wrongly denied certification as a DBE with DelDOT may file an appeal to USDOT no later than 90 days after the date of denial of certification. Such appeals may be sent to:

External Civil Rights Programs Division (S-33)
Departmental Office of Civil Rights
U.S. Department of Transportation
1200 New Jersey Ave, S.E., W78-340
Washington, DC 20590

During the appeal process, the firm shall remain ineligible for consideration as a disadvantaged business with respect to DelDOT's DBE Program until and unless the USDOT finds that the firm is eligible as outlined in 49 CFR Part 26.

We will promptly implement any USDOT certification appeal decisions affecting the eligibility of DBEs on our USDOT-assisted contracts (e.g., certify a firm if USDOT has determined that our denial of its application was erroneous).

VIII. INFORMATION COLLECTION AND REPORTING

Bidders List

Using a Bidder Registration Form, DelDOT obtains and maintains a Bidders List of all successful and unsuccessful prime and subcontractors bidding on USDOT-assisted contracts. It contains the following information:

- Firm Name
- Firm Address
- Firm's Status as a DBE or Non-DBE
- Age of the Firm
- Annual Gross Receipts of the Firm

Monitoring Payments to DBEs

The DBE Office for federally assisted projects will:

- Maintain records showing awards to DBEs.

- Have the capacity to compile quarterly contract reports to track DBE obligations. These reports will show the value of work that each individual DBE has completed during the quarter.
- Require prime contractors to maintain records and documents of payments to DBEs for three years following the performance of the contract. These records will be made available for inspection upon request by any authorized representative of the DelDOT or DOT. This reporting requirement also extends to any certified DBE subcontractor.
- Keep a running tally of actual payments to DBE firms for work committed to them at the time of contract award.
- Perform interim audits of contract payments to DBEs. The audit will review payments to DBE subcontractors to ensure that the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts stated in the schedule of DBE participation.

The DTC DBE Office for FTA assisted projects will:

- Require prime contractors to maintain records and documents of payments to DBEs for three years following the performance of the contract. An authorized representative of DTC or FTA will make these records available for inspection upon request. This reporting requirement also extends to any certified DBE subcontractor.
- Keep a running tally of actual payments to DBE firms for work committed to them at the time of contract award.
- Perform interim audits of contract payments to DBEs. The audit will review payments to DBE subcontractors to ensure that the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts stated in the schedule of DBE participation.

Reporting to USDOT

DBE participation will be submitted to USDOT as required. DelDOT will use the required form for reporting DBE participation.

IX. CONFIDENTIALITY

DelDOT will safeguard from disclosure to third parties information that may reasonably be regarded as confidential business information, consistent with Federal, State, and Local law. Notwithstanding any contrary provisions of state or local law, DelDOT 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 applicant.

X. DeIDOT DBE Program Organizational Chart

