



New Mexico DEPARTMENT OF
TRANSPORTATION
MOBILITY FOR EVERYONE

DISADVANTAGED BUSINESS ENTERPRISE PROGRAM MANUAL

NEW MEXICO DEPARTMENT OF TRANSPORTATION
CONSTRUCTION AND CIVIL RIGHTS BUREAU

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CHAPTER I – GENERAL

Section 1: Objectives

The New Mexico Department of Transportation (NMDOT) Disadvantaged Business Enterprise (DBE) Program implements the provisions of 49 CFR Part 26, other pertinent regulations, and source legislation. NMDOT seeks to achieve the following:

- A. To ensure nondiscrimination in the award and administration of DOT-assisted contracts in DOT's highway, transit, and airport financial assistance programs;
- B. To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
- C. To ensure that NMDOT's DBE program is narrowly tailored in accordance with applicable law;
- D. To ensure that only firms that fully meet the DBE Program eligibility standards specified in 49 CFR Part 26 are permitted to participate as DBEs;
- E. To help remove barriers to the participation of DBEs in DOT-assisted contracts;
- F. To promote the use of DBEs in all types of DOT-assisted contracts and procurement activities conducted by recipients;
- G. To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and
- H. To provide appropriate flexibility in establishing and providing opportunities for DBEs.

Ref: 49 CFR §26.1

Section 2: Application

- A. As a recipient of Federal funds NMDOT is required to administer a DBE program in compliance with all laws, regulations, Executive Orders, and guidance.
- B. The New Mexico DBE Program applies to NMDOT and any recipient of any of the following types of funds:
 - 1) Federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, 105 Stat. 1914, or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, 112 Stat. 107. Titles I, III, and V of the Safe Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, 119 Stat. 1144; and Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405; Titles I, II, III and IV of the Fixing America's Surface Transportation Act (FAST Act) Public Law 114-94; and Divisions A and C of the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act (IIJA), Public Law 117-58.

- 2) Federal transit funds authorized by Titles I, III, V and VI of ISTEA, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA-21, Pub. L. 105-178. Titles I, III, and V of the Safe Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, 119 Stat. 1144; and Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405; Titles I, II, III, and IV of the Fixing America's Surface Transportation Act (FAST Act) Public Law 114-94; and Divisions A and C of the Bipartisan Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117-58).
- 3) Airport funds authorized by 49 U.S.C. 47101, et seq.

C. The DBE Program does not apply to the following types of contracts:

- 1) Any contract that is to be performed entirely outside the United States, its territories and possessions, Puerto Rico, Guam, or the Northern Marianas Islands.

C. If NMDOT lets a contract in which DOT financial assistance does not participate, 49 CFR Part 26 does not apply to the contract.

Ref: 49 CFR §26.3

Section 3: Definitions and Terms

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

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

- (i) One concern controls or has the power to control the other; or
- (ii) A third party or parties controls or has the power to control both; or
- (iii) An identity of interest between or among parties exists such that affiliation may be found.

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

B. **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 Metlakatla 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.

C. **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.).

D. **Assets** mean all the property of a person available for paying debts or for distribution, including one's respective share of jointly held assets. This includes, but is not limited to, cash on hand and

in banks, savings accounts, IRA or other retirement accounts, accounts receivable, life insurance, stocks and bonds, real estate, and personal property.

- E. **Business, business concern or business enterprise** means an entity organized for profit with a place of business located in the United States, and which operates primarily within the United States, or which makes a significant contribution to the United States economy through payment of taxes or use of American products, materials, or labor.
- F. **Compliance** means that a recipient has correctly implemented the requirements of this part.
- G. **Contingent Liability** means a liability that depends on the occurrence of a future and uncertain event. This includes, but is not limited to, guaranty for debts owed by the applicant concern, legal claims and judgments, and provisions for federal income tax.
- H. **Contract** means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them. For purposes of this part, a lease is considered to be a contract.
- I. **Contractor** means one who participates, through a contract or subcontract (at any tier), in a DOT-assisted highway, transit, or airport program.
- J. **Days** mean calendar days. In computing any period of time described in this part, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, in circumstances where the recipient's offices are closed for all or part of the last day, the period extends to the next day on which the agency is open.
- K. **Department or DOT** means the U.S. Department of Transportation, including the Office of the Secretary, the Departmental Office of Civil Rights, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).
- L. **Disadvantaged Business Enterprise or DBE** means a for-profit small business concern—
 - (1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged; and
 - (2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.
- M. **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.
- N. **FTA Tier I recipient** means an FTA recipient to whom this part applies that will award prime contracts (excluding transit vehicle purchases) the cumulative total value of which exceeds \$670,000 in FTA funds in a Federal fiscal year.
- O. **FTA Tier II recipient** means an FTA recipient to whom this part applies who will award prime contracts (excluding transit vehicle purchases) the cumulative total value of which does not exceed \$670,000 in FTA funds in a Federal fiscal year.
- P. **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.
- Q. **Immediate family member** means father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, father-in-law, mother-in-law, sister-in-law, brother-in-law, and domestic partner and civil unions recognized under State law.

- R. **Indian Tribe or Native American Tribe** means any federally or State-recognized Tribe, band, nation, or other organized group of Indians (Native Americans), or an ANC.
- S. **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.
- T. **Liabilities** mean financial or pecuniary obligations. This includes, but is not limited to, accounts payable, notes payable to bank or others, installment accounts, mortgages on real estate, and unpaid taxes.
- U. **Native Hawaiian** means any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.
- V. **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.
- W. **Noncompliance** means that a recipient has not correctly implemented the requirements of this part.
- X. **Notice of decision or NOD** means determination that denies a firm's application or decertifies a DBE.
- Y. **Notice of intent or NOI** means recipients letter informing a DBE of a suspension or proposed decertification.
- Z. **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.
- AA. **Personal net worth or PNW** means the net value of an individual's reportable assets and liabilities, per the calculation rules in [§ 26.68](#).
- BB. **Primary industry classification** means the most current North American Industry Classification System (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the North American Industry Classification Manual—United States, which is available online on the U.S. Census Bureau website: www.census.gov/naics/.
- CC. **Primary recipient** means a recipient which receives DOT financial assistance and passes some or all of it on to another recipient.
- DD. **Principal place of business** means the business location where the individuals who manage the firm's day-to-day operations spend most working hours. If the offices from which management is directed and where the business records are kept are in different locations, the recipient will determine the principal place of business. The term does not include construction trailers or other temporary construction sites.
- EE. **Program** means any undertaking on a recipient's part to use DOT financial assistance, authorized by the laws to which this part applies.
- FF. **Race-conscious** measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

- GG. ***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.
- HH. ***Recipient*** means 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 that has applied for such assistance.
- II. ***Secretary*** means DOT's Secretary of Transportation or the Secretary's designee.
- JJ. ***Set-aside*** means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.
- KK. ***Small Business Administration or SBA*** means the United States Small Business Administration.
- LL. ***SBA certified firm*** refers to firms that have a current, valid certification from or recognized by the SBA under the 8(a) BD or SDB programs.
- MM. ***Small business concern*** means, with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it ([13 CFR part 121](#)) that also does not exceed the cap on average annual gross receipts specified in [§ 26.65\(b\)](#).
- NN. ***Socially and economically disadvantaged individual*** means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a member of a group and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual's control.
- (1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis. An individual must demonstrate that he or she has held himself or herself out, as a member of a designated group if you require it.
 - (2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
 - (i) “Black Americans,” which includes persons having origins in any of the Black racial groups of Africa;
 - (ii) “Hispanic Americans,” which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
 - (iii) “Native Americans,” which includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians;
 - (iv) “Asian-Pacific Americans,” which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Mariana Islands, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;
 - (v) “Subcontinent Asian Americans,” which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, Maldives, Nepal or Sri Lanka;

- (vi) Women;
 - (vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.
- (3) Being born in a particular country does not, standing alone, mean that a person is necessarily a member of one of the groups listed in this definition.
- OO. **Spouse** means a married person, including a person in a domestic partnership or a civil union recognized under State law.
- PP. **Transit vehicle manufacturer (TVM)** means any manufacturer whose primary business purpose is to manufacture vehicles built for mass transportation. Such vehicles include, but are not limited to buses, rail cars, trolleys, ferries, and vehicles manufactured specifically for paratransit purposes. Businesses that perform retrofitting or post-production alterations to vehicles so that such vehicles may be used for public transportation purposes are also considered TVMs. Businesses that manufacture, mass-produce, or distribute vehicles primarily for personal use are not considered TVMs.
- QQ. **Tribally-owned concern** means any concern at least 51 percent owned by an Indian tribe as defined in this section.
- RR. **Unsworn declaration** means an unsworn statement, dated and in writing, subscribed as true under penalty of perjury.
- SS. **You** refers to a recipient, unless a statement in the text of this part or the context requires otherwise (i.e., ‘You must do XYZ’ means that recipients must do XYZ)

Ref: 49 CFR §26.5

NMDOT Definitions and Terms

- A. **B2Gnow** (Business to Government now) is a web-based software program used to collect, verify and manage payment information for prime contractors and subcontractors working on federal-aid projects. Additionally, the software is used to collect and report Disadvantaged Business Enterprise (DBE) participation and utilization on federal-aid projects.
- B. **CCRB** means the Construction and Civil Rights Bureau of the New Mexico Department of Transportation.
- C. **Contract Goal** means the percentage of DBE participation established by NMDOT, if required, for a DOT-Assisted Contract.
- D. **Design Consultant** (or other Consultants) means:
 - 1) An individual, firm or partnership that contracts with NMDOT to provide services for engineering, surveying, environmental, hazardous materials, subsurface utility engineering, and other services which require a rigorous logical, science-based approach for data acquisition to be used in the development of NMDOT highway construction plans.
 - 2) Other consultants include other providers of professional services receiving FHWA funding and FTA and FAA recipients receiving grants of \$250,000 or more in aggregate.
- E. **Disadvantaged Business Enterprise or DBE** means a for-profit small business concern:
 - 1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged; and

- 2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.
- F. **Joint Check** means a two-party check; between a prime contractor and the regular dealer of material/supplies.
- G. **NAICS (North American Industry Classification System)** replaces the Standard Industrial Classification Code (SIC) designation which best describes the primary business of a firm.
- H. **NMDOT** means the New Mexico Department of Transportation.
- I. **Overall DBE Goal** means NMDOT's determination, calculated tri-annually, as a percentage of the level of DBE participation on New Mexico DOT-assisted contracts that NMDOT expects absent the effects of discrimination.
- J. **Overconcentration** means a condition in which DBE firms are being utilized in certain types of work to the extent that non-DBEs are unduly burdened from participating in the same type of work.
- K. **Professional Services** means a Subcontractor that provides a specialized service requiring professional licensure by the State of New Mexico, e.g. Professional Engineers, Professional Surveyors, and Attorneys.
- L. **Responsible Bidder** means a bidder who submits a responsive bid and who has furnished, when required, information and data to prove that the bidder's financial resources, production or service facilities, personnel, service reputations and experience are adequate to make satisfactory delivery of the services, construction or items of tangible personal property described in the invitation for bids.
- M. **Responsible Offeror** means an offeror who submits a responsive proposal and who has furnished, when required, information and data to prove that the offeror's financial resources, production or service facilities, personnel, service reputations and experience are adequate to make satisfactory delivery of the services or items of tangible personal property described in the proposal.
- N. **Responsive Bid** means a bid which conforms in all material respects to the requirements set forth in the invitation for bids and the contract documents, including notice to contractors, special provisions, supplemental specifications, and addenda and which has not been rejected. Material respects of a bid include but are not limited to price, quality, quantity or delivery requirements. DBE related bid requirements, including accurate and timely submission of required forms, is a material component of a bid. Failure to comply with DBE related bid requirements shall render a bid non-responsive.
- O. **Responsive Offer** means an offer which conforms in all material respects to the requirements set forth in the request for proposals. Material respects of a request for a proposal include, but are not limited to price, quality, quantity, or delivery requirements. DBE related RFP requirements, including accurate and timely submission of required forms, is a material component of an offer. Failure to comply with DBE related RFP requirements shall render an offer non-responsive.
- P. **SEDO** means Socially and Economically Disadvantaged Owner(s).
- Q. **Unified Certification Program (UCP)** means applicants are allowed to apply only once for a DBE certification that will be honored by all recipients in all states.

Section 4: Nondiscrimination

- A. NMDOT and all recipients of DOT-assisted contracts shall not discriminate on the basis of race, color, national origin or sex in the award and performance of any DOT assisted contract or in the administration of its DBE Program or the requirements of 49 CFR Part 26. NMDOT and all recipients will further ensure that NMDOT and/or all recipients of DOT-assisted contracts shall not discriminate in the development, implementation and administration of the DBE Program. Implementation of the DBE Program by NMDOT is a legal obligation and failure to carry out its terms shall be treated as a violation whereby sanctions may be imposed as provided under 49 CFR Part 26. The DBE Program is accorded the same priority as compliance with all other legal obligations incurred by NMDOT in its financial assistance agreements with DOT.
- B. No person shall be excluded from participation in or denied the benefits of or otherwise discriminated against in connection with the award and performance of any contract covered by this DBE Program or 49 CFR Part 26 on the basis of race, color, sex or national origin.
- C. In administering the DBE Program, NMDOT shall not use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex, or national origin.

Ref: 49 CFR §26.7, 49 CFR §26.1

Section 5: DOT Guidance and Interpretations

- A. Only guidance and interpretations (including interpretations set forth in certification appeal decisions) consistent with 49 CFR Part 26 and issued after March 4, 1999, have definitive, binding effect in implementing the provisions of NMDOT's DBE Program and constitute the official position of the DOT.
- B. The Secretary of the DOT, the Office of the Secretary of Transportation, FHWA, FTA, and FAA may issue written interpretations of or written guidance concerning 49 CFR Part 26. Written interpretations and guidance are valid and express the official positions and views of the DOT or any of its operating administrations, only if they are issued over the signature of the Secretary of Transportation or if they contain the following statement: *The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR Part 26.*

Ref: 49 CFR §26.9

Section 6: Recordkeeping and Reports

- A. NMDOT will submit a report on DBE participation to the concerned Operating Administrations containing all the information described in the Uniform Report to this part. The report will be submitted at the intervals required by, and in the format acceptable to the Operating Administrations concerned.
- B. The prime contractor, consultant or subrecipient shall keep such records as required by the NMDOT and as necessary, including all records set forth in this manual, to demonstrate compliance with its DBE utilization obligations.

- C. NMDOT will provide data about NMDOT's DBE program to the DOT and will provide DOT updates of any significant changes in NMDOT's DBE Program as directed by DOT Operating Administrations.
- D. As requested, the prime contractor, consultant or subrecipient will submit all subcontracts and other financial transaction documentation executed with DBEs in such form, manner and content as prescribed by NMDOT.
- E. All such records must be retained by the prime contractor or consultant for the applicable record retention period in the NMDOT's financial assistance agreement or at least three (3) years after project acceptance by FHWA following the completion of the contract whichever is longer. These records shall be available for inspection by NMDOT, FHWA, FAA, FTA, DOT or other appropriately sanctioned New Mexico State Agencies or Federal Agencies or Departments.
- F. NMDOT must indefinitely keep a complete application package for each for each certified firm and all Declarations of Eligibility (DOE), change notices, and on-site reviews. Other records must be retained for a minimum of seven (7) years unless otherwise provided by applicable record retention requirements for NMDOT's financial assistance agreement, whichever is longer.
- G. NMDOT shall create and maintain:
- 1) A bidders list to provide NMDOT as accurate data as possible about the universe of DBE and non-DBE contractors and subcontractors who seek to work on NMDOT's Federally assisted contracts for use in helping NMDOT set the New Mexico overall DBE goal and to provide the DOT with data for evaluating the extent to which the objectives of the DBE program are being achieved.
 - 2) A Participating Contractor or Consultant Annual Profile Registration list consisting of all firms bidding on prime construction and prime consultant design contracts and bidding or quoting as subcontractors or subconsultants on DOT-assisted projects. For every firm, NMDOT shall annually collect and maintain the following information:
 - a. Firm name;
 - b. Firm address including zip code;
 - c. Firm's status as a DBE or non-DBE;
 - d. Race and gender information for the firm's majority owner;
 - e. NAICS code applicable to each scope of work the firm sought to perform in its bid;
 - f. Age of the firm; and,
 - g. The annual gross receipts of the firm. NMDOT will obtain this information by asking each firm to indicate what gross receipts bracket it fits (e.g., less than \$500,000; \$500,000 - \$1 million; \$1-2 million; \$2-5 million; etc.) rather than requesting the exact figure from the firm.
 - 3) NMDOT will use the Notice to Construction Contractors Bidders List of Quoters and Design or Other Consultant Offerors List of Quotes to determine the availability of DBE and non-DBE firms; and therefore, the relative availability of ready, willing and able DBEs, for the purpose of establishing and monitoring NMDOT's overall goal.

- 4) NMDOT shall require all construction bidders to include the Bidders List of Quoters (Form: BL-DBE) that includes the above information in their bid package at the time of bid submittal. Failure to submit this form accurately and completely will render the bid non-responsive and the bid shall be rejected.
- 5) NMDOT shall require all design or other consultant offerors to submit the Design or Other consultant Offerors List of Quoters form No. A-1013 that includes the above information at the time of submittal of offeror or other consultant proposal. Failure to submit this form accurately and completely will render the offerors or other consultant's proposal non-responsive.
- 6) NMDOT shall enter this data into the DOT's designated system no later than December 1 following the fiscal year in which the relevant contract was awarded.

For design-build contracts, this information will be entered no later than December 1 following the fiscal year in which the design-build contractor awards the relevant subcontract(s).

- 7) NMDOT will report to the DOT's Office of Civil Rights on or before January 1 of each year, the following information:
 - a. the number and percentage of in-state and out-of-state DBE certifications by gender and ethnicity (Black American, Asian-Pacific American, Native American Hispanic American, Subcontinent-Asian American, and non-minority);
 - b. the number of DBE certification applications received from in-state and out-of-state firms and the number found eligible and ineligible;
 - c. The number of decertified firms:
 - i. The total number of decertified firms;
 - ii. Total in-state and out-of-state firms decertified;
 - iii. Names of in-state and out-of-state firms decertified because SEDO exceeded the personal net worth cap;
 - iv. Names of in-state and out-of-state firms decertified for excess gross receipts beyond the relevant size standard
 - v. The number of in-state and out-of-state firms summarily suspended;
 - vi. The number of in-state and out-of-state applications received for an individualized determination of social and economic disadvantaged status;
 - vii. The number of in-state and out-of-state firms certified whose owner(s) made an individualized showing of social and economic disadvantaged status.

- 8) NMDOT requires Contractors and Subcontractors at all tiers working on federal-aid projects shall use B2Gnow to report DBE information as required by the contract. Use of the B2Gnow software program is required and shall be considered incidental to the contract. Failure of a contractor, subcontractor, or other recipient to use the software program will result in NMDOT withholding a portion of future progress payments as a Non-Conformance until such time as compliance with these requirements is achieved.
- 9) NMDOT shall withhold monthly progress estimates when any recipient fails to submit any other required recordkeeping documents.

Section 7: Assurance Statements

- A. Each financial assistance agreement NMDOT signs with a DOT OA (or a primary recipient) will include the following assurance:

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

- B. Each contract NMDOT signs with a contractor (and each subcontract the prime contractor signs with a subcontractor) will include the following assurance:

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

- 1) Withholding of monthly progress payments;
- 2) Assessing sanctions;
- 3) Liquidated damages; and/or
- 4) Disqualifying the contractor from future bidding as non- responsible.

CHAPTER II – ADMINISTRATIVE REQUIREMENTS

Section 1: Who must have a DBE Program

- A. As NMDOT receives funds from the following operating administrations and lets DOT-assisted contracts, NMDOT must have a DBE program meeting the requirements of 49 CFR Part 26.21.
 - 1) FHWA primary recipients receiving funds authorized by a statute to which this part applies;
 - 2) FTA recipients receiving planning, capital and/or operating assistance who will award prime contracts (excluding transit vehicle purchases) the cumulative total value of which exceeds \$250,000 in FTA funds in a Federal fiscal year; or
 - 3) FAA recipients receiving grants for airport planning or development that will award prime contracts the cumulative total value of which exceeds \$250,000 in FAA funds in a Federal fiscal year.
- B. NMDOT has submitted a DBE program plan to the Operating Administration (OA) that has been approved. NMDOT is eligible to receive DOT financial assistance because DOT has approved NMDOT's DBE Program. NMDOT is in compliance. NMDOT will continue to carry out its DBE Program until all funds from DOT financial assistance have been expended. NMDOT will submit significant changes in the program to the operating administration for approval.
- C. All subrecipients must comply with NMDOT's DBE program plan and may not have a plan independent from NMDOT.

49 CFR §26.21

Section 2: Policy Statement

- A. NMDOT issued a Policy Statement, which complies with the requirements of 49 CFR §26.23.
- B. A copy the Policy Statement is found in Appendix "A" of this Manual.
- C. NMDOT circulates the Policy Statement throughout the organization and to the DBE and non-DBE business communities that perform work on DOT-assisted contracts. The Policy Statement also resides on the NMDOT external website at: <https://www.dot.nm.gov/highway-operations-program/operations-support-division-director/construction-civil-rights-bureau/disadvantaged-business-enterprise-program-dbe/>

Ref: 49 CFR §26.23

Section 3: DBE Liaison Officer

- A. The DBE Liaison Officer is responsible for implementing all aspects of the DBE program and ensuring that NMDOT complies with all provisions of 49 CFR Part 26. The DBE Liaison Officer has direct, independent access to the Secretary of NMDOT concerning DBE program matters. NMDOT's DBE Liaison is:

Name: Renee Roybal
Phone: (505) 795-4922
Address: 1570 Pacheco St. Suite A-10, Santa Fe, NM 87505

- B. The duties and responsibilities of the DBE Liaison Officer include the following:

- 1) Gather and report statistical data and other information required by DOT;
- 2) Review third party contracts and purchase requisitions for compliance with the DBE program;
- 3) Work with appropriate internal and external entities to set overall DBE goals;
- 4) Ensure that bid notices and requests for proposals are available to DBEs in a timely manner;
- 5) Identify contracts and procurements so that DBE goals are included in solicitations (both race-neutral methods and contract specific goals attainment) and identify ways to improve progress;
- 6) Analyze NMDOT progress toward goal attainment and identify ways to improve progress;
- 7) Participate in pre-bid meetings;
- 8) Advise the NMDOT Cabinet Secretary and State Transportation Commission on DBE matters and achievements;
- 9) Provide DBEs with information and assistance in preparing bids, obtaining bonding and obtaining insurance;
- 10) Plan and participate in DBE training seminars;
- 11) Provide outreach to DBEs and community organizations to advise them of opportunities; and
- 12) Maintain the NMDOT's updated directory of certified DBEs.

Ref: 49 CFR §26.25

Section 4: DBE Financial Institutions

- A. NMDOT investigates the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community.
- B. NMDOT annually updates, through the assistance of the New Mexico Department of Regulation and Licensing (Financial Institution Division), a listing of financial institutions owned and controlled by socially and economically disadvantaged individuals.

- C. The listing of financial institutions owned and controlled by socially and economically disadvantaged individuals and the services those institutions provide are displayed on the NMDOT external website
- D. NMDOT makes every reasonable effort to identify and encourage prime contractors to use such institutions where possible.

Ref: 49 CFR §26.27

Section 5: Prompt Payment and Retainage

- A. NMDOT requires prime contractors to pay subcontractors for satisfactory performance of their contracts no later than seven (30) Days from receipt of each payment NMDOT makes to the prime contractor (New Mexico State Department of Transportation Standard Specifications for Highway and Bridge Construction, Section 108.1). Monitoring of prompt payment is done through the B2Gnow payment reporting and confirmation function. The following describes the Prompt Payment monitoring process:
 - 1) Each month, NMDOT Project Office staff review payment dates in B2Gnow, entered by the prime contractors.
 - 2) If a subcontractor indicates in B2Gnow they were not paid within thirty (30) Days, NMDOT Project Office staff shall review and verify the payment dates in B2Gnow both from NMDOT to the Prime Contractor and the Prime Contractor to the subcontractor are compliant with Prompt Payment provisions.
 - 3) If the Prime Contractor's payment to the subcontractor is more than thirty (30) Days, the NMDOT Project Office staff requests the Prime Contractor to provide evidence the Prime Contractor paid the subcontractor within thirty (30) Days or provide justification as to why the Prime Contractor did not pay the Subcontractor within the required the required time period.
 - 4) If the Prime Contractor does not submit to the NMDOT verification of Prompt Payment or justification for late or nonpayment to the Subcontractor, or if the Prime Contractor's submission does not demonstrate compliance or justification for noncompliance; the NMDOT shall notify the Prime Contractor they are in nonconformance with their NMDOT contract. This nonconformance may affect the Prime Contractor's Prequalification Performance Factor.
- B. NMDOT ensures prompt and full payment of retainage from the prime contractor to the subcontractor within 30 Days after the subcontractor's work is satisfactorily completed and accepted by the NMDOT. To comply with this requirement, NMDOT uses the third option provided by 49 CFR §26.29 which allows NMDOT to hold retainage from prime contractors and provide for prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract clause obligating the prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within 30 days after NMDOT makes payment to the prime contractor.
- C. For purposes of this section, a subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished, accepted and documented as required by the recipient. When a recipient has made an incremental acceptance of a portion of a prime contract, the work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed.

- D. Any delay or postponement of payment among the parties may take place only for good cause, with the prior written approval of NMDOT. Noncompliance with this section shall be handled in accordance with the compliance procedures found in Chapter III, Section 10 of this Manual.
- E. Prompt pay and return of retainage requirements also apply to lower-tier subcontractors.

Ref: 49 CFR §26.29

Section 6: DBE Directory

- A. NMDOT maintains and makes available to interested persons a real-time directory identifying all firms eligible to participate as DBEs and/or ACDBEs in the NMDOT DBE Program and includes the firm's name, business address, business telephone number, firm's website(s) and the type(s) of work by NAICS code that the firm is certified to perform as a DBE and/or ACDE.
- B. The directory is available online at: <https://nmdot.dbesystem.com>
- C. The online directory can be searched and/or filtered for DBEs by:
 - a. Physical location;
 - b. NAICS code(s);
 - c. Work descriptions; and
 - d. Other optional information
- D. The online directory includes a disclaimer in large, bold type that states the information in the directory is not a guarantee of the DBE's capacity and ability to perform work.

Ref: 49 CFR §26.31

Section 7: Overconcentration

- A. If NMDOT deems overconcentration in a type of work to exist, NMDOT will devise measures to address the overconcentration. These measures may include the use of incentives, technical assistance, business development programs, mentor-protégé programs and other appropriate measures.
- B. If NMDOT determines that DBE firms are so over concentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in that type of work, such determination, and the proposed measures to address the determination, shall be approved by FHWA prior to implementation of the proposed remedial measures.

Ref: 49 CFR §26.33

Section 8: Business Development Programs

- A. NMDOT follows the requirement of 49 CFR §26.35 which requires establishing a DBE business development program (BDP) to assist firms in gaining the ability to compete successfully in the marketplace outside the DBE program. A DBE firm, as a condition of receiving assistance through the BDP, to agree to terminate its participation in the DBE program after a certain time has passed or a certain objective have been reached. Refer to Appendix “H” for guidance on administering BDP programs.
- B. As part of the BDP or separately, NMDOT may establish a “mentor-protégé” program, in which another DBE or non-DBE firm is the principal source of business development assistance to a DBE firm,
 - 1) Only firms you have certified as DBEs before they are proposed for participation in a mentor-protégé program are eligible to participate in the mentor-protégé program.
 - 2) During the mentor-protégé relationship, NMDOT must:
 - a. Not award DBE credit to a non-DBE mentor firm for using its own protégé firm for more than one half of its goal on any Contract performed by the protégé firm.
 - b. Not award DBE credit to a non-DBE mentor form for using its own protégé firm for more than every other Contract performed by the protégé firm.
 - 3) For purposes of making determinations of business size under this part, NMDOT must not treat protégé firms as affiliates of mentor firms, when both firms are participating under an approved mentor-protégé program. See Appendix H of this Program Manual for guidance concerning the operation of mentor-protégé programs.

Ref: 49 CFR §26.35

Section 9: Monitoring and Enforcement Mechanisms

- A. NMDOT follows the requirements of 49 CFR Part 26 and requires inclusion of the DBE clauses in all agreements and contracts with recipients of the Federally assisted agreements. NMDOT shall enter into an agreement with all recipients which will bind such recipients to the requirements of the DBE Program. Appropriate NMDOT personnel shall coordinate the monitoring and enforcement of the DBE Program with all recipients including contractors, consultants, municipalities, airports or other program areas.
- B. NMDOT will bring to the attention of DOT any false, fraudulent, or dishonest conduct in connection with the program so that DOT can take the steps (e.g. referral to the Department of Justice for criminal prosecution, referral to the DOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in 49 CFR §26.109.
- C. NMDOT will consider similar action under its own legal authorities, including responsibility determinations in future contracts and any other legal and contract remedies available to NMDOT in the event of non-compliance with the DBE regulation and related provisions by a participant in NMDOT procurement activities. NMDOT monitors work sites and cross references observations by

reviewing contract documents to certify DBE firms are performing the work they were contracted to complete.

- D. NMDOT utilizes a Commercially Useful Function interview to review contracting records and monitor project worksites, to certify that work subcontracted to DBEs at contract award or subsequently is actually performed by DBEs. (See Appendix “B” of this Manual.)
- E. B2Gnow provides a running tally of actual DBE attainments (e.g., payments actually made to DBE firms), including a means of comparing these attainments to commitments. B2Gnow also provides reports that display both commitments and attainments. NMDOT tracks the federal share contribution through B2GNow for highway construction projects and verifies the federal share contribution through NMDOT’s Project Oversight Division (POD). Transit & Rail and Aviation Divisions follow a similar process for direct and subrecipient contracting.

Ref: 49 CFR §26.37

Section 10: Fostering Small Business Participation

- A. NMDOT develops projects through the STIP process with the understanding that (1) the majority of New Mexico contractors are smaller companies, (2) the volume of Federal funds appropriated to New Mexico is not immense, and (3) the size of the state and the number of entities sharing the funds is considerable. For these reasons, NMDOT projects are generally developed with smaller scopes and, therefore, are considered unbundled. Accordingly, the NMDOT Highway and Bridge Construction Project Letting Program lets the majority of its FHWA funded contracts of a size that facilitates small business participation. This program will continue to develop and let projects in this way.
- B. NMDOT includes the following in invitations to bid on federal-aid projects, “regardless of whether a DBE goal is set on a contract, and in accordance with NMSA 1978 Section 13-1-184, ‘Assistance to Small Business Policy,’ NMDOT encourages Contractors to use small businesses, including DBEs, on its projects.” Information on contract opportunities is widely available through postings on the NMDOT website, and outreach activities to further communicate contract opportunities include newsletters, email marketing, and individual counseling. NMDOT made a policy decision to unbundle contracts, and the vast majority of work NMDOT awards are performed by small businesses.
- C. The NMDOT Transit and Rail Project Letting Program lets the majority of its FTA funding that has contracting opportunities to subrecipients that are nonprofits, cities, counties, and municipalities, most of which do not award contracts. For those that do award contracts, the majority are of a size under \$100,000 that small businesses can reasonably perform.
- D. The NMDOT Airport Construction and Maintenance Letting Program lets the majority of its FAA funded contracts of a size that small businesses can reasonably perform at its two, small state-owned general aviation airports, Conchas Lake and Navajo Lake, each of which has one runway.
- E. NMDOT annually obtains information required in 49 CFR 26.11 through an Annual Profile Registration form that is mailed every year to all prior year bidders and quoters on NMDOT contracts. The returned form includes business size (annual gross receipts) information for bidders and quoters, which is in turn used to both identify small businesses as noted in Paragraph B of this section and to verify small business participation on federally assisted contracts.

- F. NMDOT will annually review and revise, as appropriate, its DBE Program should participation of small businesses fall below 50% for subcontracts or 20% for prime contracts in any operating administration area.

CHAPTER III – GOALS, GOOD FAITH EFFORTS, AND COUNTING

Section 1: Role of Statutory 10% Goal

- A. The Federal statutes authorizing the DBE Program provide that, except to the extent the DOT Secretary determines otherwise, not less than 10 percent of the authorized funds are to be expended with DBEs.
- B. This 10 percent goal is an aspirational goal at the national level, which DOT uses as a tool in evaluating and monitoring DBEs' opportunities to participate in contracts.
- C. The national 10 percent goal does not authorize or require NMDOT to set overall or contract goals at the 10 percent level, or any other level, or to take any special administrative steps if their goals are above or below 10 percent.

Ref: 49 CFR §26.41

Section 2: Use of Set-Asides or Quotas

- A. NMDOT does not use quotas in any way in the administration of the DBE program.
- B. NMDOT does not set aside contracts for DBEs except in limited and extreme circumstances when no other method can reasonably be expected to redress egregious instances of discrimination.

Ref: 49 CFR §26.43

Section 3: Setting Overall State Goals

- A. NMDOT, in three-year intervals on August 1, must submit to the relevant FHWA, FTA, and FAA (Primary Airports due October 1) for approval, the overall DBE goal for the upcoming three years and the methodology used to establish the overall DBE goal.
- B. If NMDOT does not anticipate awarding (excluding transit vehicle purchases) \$670,000 or less in FTA or \$250,000 or less in FAA funds in prime contracts in a Federal fiscal year, NMDOT is not required to develop overall goals for FTA or FAA respectively for that year.
- C. NMDOT, as a recipient of DOT funds, is mandated by DOT to establish an overall state goal for the utilization of DBEs on DOT-assisted contracts. The state goal is expressed as a percentage of funds paid to DBE contractors, subcontractors or consultants versus payment of Federal-aid funds on NMDOT projects. The state goal is based on demonstrable evidence of the availability of ready,

willing, and able DBEs relative to all businesses ready, willing, and able to participate on New Mexico DOT-assisted contracts.

- D. DOT requires a two-step process for setting the state DBE goal. The first step is to establish a base figure or the relative availability of DBEs. The second step is to determine what adjustment, if any, is needed to the base figure to arrive at the overall goal.
- E. In setting the base figure, NMDOT will gather information with respect to the relative number of bids, quotes or offers submitted by DBEs on past DOT-assisted prime contracts or subcontracts in one or more recent years. DBEs with current certification and “potential” DBEs will be counted as available DBEs. NMDOT uses a bidders list to determine the number of DBEs that have bid or quoted (successful and unsuccessful) on DOT-assisted prime contracts or subcontracts in the past three years. Potential DBEs are identified through reviewing the Small Business Administration 8(a) firms. Any firms which are not currently DBEs and perform highway related work are identified as potential DBEs. This number determines the number of businesses that have bid or quoted (successful and unsuccessful) on prime or subcontracts in the same time period. The number of DBE bidders and quoters is divided by the number of all businesses to derive a base figure of the relative availability of DBEs in the market. An overall base figure will be determined by weighting DBE availability in these work segments by the amount of contract dollars going to each segment on past DOT-assisted contracts.
- F. After calculating a base figure, NMDOT will examine all the evidence available in the jurisdiction to determine what adjustment, if any, is needed to the base figure in order to arrive at the overall goal.
 - 1) Types of evidence that must be considered when adjusting the base figure include:
 - a. The current capacity of DBEs to perform work in the New Mexico DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years;
 - b. Evidence from disparity studies conducted within the jurisdiction, to the extent it is not already accounted for in the base figure.
 - 2) If available, NMDOT will consider evidence from related fields that affect the opportunities for DBEs to form, grow and compete. These include, but are not limited to:
 - a. Statistical disparities in the ability of DBEs to get the financing, bonding and insurance required to participate in the NMDOT contracting program;
 - b. Data on employment, self-employment, education, training and union apprenticeship programs, to the extent NMDOT can relate it to the opportunities for DBEs to perform in the NMDOT contracting program.
- G. NMDOT will provide consultation and publication in establishing the overall DBE goal. This includes:
 - 1) Consultation with minority, women and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, and the effects of discrimination on opportunities for DBEs. The consultation must include a scheduled, direct, interactive exchange (e.g. a face-to-face meeting, video conference, teleconference) with as many interested stakeholders as possible focused on obtaining information relevant to the goal setting process. This exchange

must occur before the submission of the proposed DBE goal and methodology to the relevant Operating Administration for review. NMDOT must document the consultative process and feedback received in the DBE goal and methodology submission.

- 2) NMDOT publishes a notice announcing the proposed overall goal and methodology are available for inspection. The notice shall be posted on NMDOT's website (<http://dot.state.nm.us/>). If the proposed DBE goal changes following review, the revised DBE goal must be posted again at NMDOT's website. In addition, NMDOT shall make the proposed DBE goal and methodology available for inspection during normal business hours at the Construction and Civil Rights Bureau for a 30-day comment period. The notice of the comment period includes addresses to which comments may be sent. The public comment period will not extend the August 1 deadline in the year goal submission is due.

Ref: 49 CFR §26.45

Section 4: Failure to Meet Overall State Goal

- A. NMDOT will exercise good faith efforts to achieve the state goal in compliance with 49 CFR Part 26. Whenever NMDOT cannot achieve its goal, NMDOT will not be penalized or treated by DOT as being in noncompliance with 49 CFR Part 26 so long as NMDOT administers an approved DBE Program in good faith.
- B. If NMDOT does not meet or exceed the overall goal applicable to a fiscal year, it will analyze in detail the reasons for the difference between the overall goal and its awards and commitments in that fiscal year and establish specific steps and milestones to correct the problems identified in its analysis to enable it to meet fully its goal for the new fiscal year.
- C. NMDOT will submit to FHWA, FTA or FAA within 90 days of the end of the fiscal year, the analysis and corrective actions developed under this section for approval. If FHWA, FTA or FAA approves the report, the NMDOT will be regarded as complying with the requirements of this section for the remainder of the fiscal year.

Ref: 49 CFR §26.47

Section 5: Means to Meet Overall State Goals

- A. NMDOT meets the maximum feasible portion of the overall state goal by using race-neutral means of facilitating DBE participation. Race neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures, is awarded a subcontract on a prime contract that does not carry a DBE contract goal or is awarded a subcontract in excess of the established DBE goal. Race-neutral measures may include arranging solicitations, times for presentations of bids, quantities, specification, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses by means such as those provided by 49 CFR §26.39. NMDOT is currently not setting project goals, or Race-Conscious measures to attain the overall state goal, as NMDOT is currently exceeding the overall state goal through Race Neutral means alone.

- B. Upon developing the overall state goal for DBE utilization on DOT-assisted contracts, NMDOT will project, using the median of three (3) years DBE participation, the portion of the overall state goal that can be met by race-neutral measures. NMDOT will submit this projection and the basis for the projection to the relevant Operating Administration for approval.
- C. If NMDOT projects that DBE utilization will fall substantially short of meeting the overall state goal through race-neutral means alone, or if NMDOT monitoring of actual DBE utilization indicates that utilization will fall substantially short of the overall state goal, and good faith efforts have not been fulfilled, NMDOT may consider use of race-conscious measures.
- D. NMDOT will include the following factors in its consideration of whether race-conscious measures are needed: whether DBE utilization falls short of the overall state goal because of levels or types of DOT-assisted contracts that were not anticipated when setting the overall state goal and, whether utilization falls short of the overall state goal because of clearly correctable deficiencies in the race-neutral measures implemented.
- E. Under 49 CFR Part 26, the principal race-conscious tool available for recipients is setting individual contract goals. Under 49 CFR Part 26, NMDOT may not institute a race-conscious quota program for DOT-assisted contracts. NMDOT may implement a set-aside program, but only in those limited and extreme circumstances when no other method could be reasonably expected to redress egregious instances of discrimination.
- F. If, after race-conscious measures have been implemented, an analysis of DBE participation data indicates that NMDOT will meet the overall state goal, NMDOT will reduce or eliminate the use of contract goals as necessary to avoid exceeding the overall goal.

Ref: 49 CFR §26.51

Section 6: Project Goal Setting

- A. If NMDOT deems that race-conscious measures are required for a particular DOT-assisted contract, NMDOT will establish a DBE goal for that contract. Contract goals will only be used for contracts that have subcontracting opportunities. Items to be considered in establishing the contract goal will include, but not be limited to, the type of work involved, the location of the work and the availability of the DBEs to perform that particular work.
- B. To be responsive, prime construction contractors bidding or prime design or other consultants submitting proposals on NMDOT invitations for bid or requests for proposals for which DBE contract goals have been set must either meet or exceed the goal or show good faith efforts to meet the goal.
- C. If NMDOT lets a master contract for “design build” or “turnkey” contract or similar legally binding instrument to a contractor or consultant, who in turn lets subsequent subcontracts for the work of the project, NMDOT may establish a DBE goal for the project. The master contractor or consultant then establishes DBE contract goals, as appropriate, for the subcontracts it lets. NMDOT shall maintain oversight of the master contractor’s or consultant’s activities to ensure that they are conducted consistent with the requirements of the NMDOT’s DBE Program and 49 CFR Part 26.

Ref: 49 CFR §26.51, 49 CFR §26.53

Section 7: Procedures to Meet Contract Goals

- A. NMDOT has a race neutral DBE program as the overall DBE goal has been exceeded for many years. Therefore, DBE contract goals are generally not established. When no DBE contract goal has been established, bidders are not required to submit the following documentation (see letter D.).
- B. In very rare circumstances, NMDOT may establish DBE contract goals. Some circumstances include, but are not limited to, when EPA funding is included in a NMDOT federal aid contract, when a large design-build contract is let, and when NMDOT does not anticipate meeting its overall DBE goal for a year.
- C. When NMDOT has established a DBE contract goal, the contract shall be awarded only to a bidder/offeree that makes good faith efforts to meet it. NMDOT will determine that a bidder/offeree has made good faith efforts if the bidder/offeree does either of the following:
 - 1) Documents that it has obtained enough DBE participation to meet the goal; or
 - 2) Documents that it made adequate good faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so. If the bidder/offeree does document adequate good faith efforts, the award must not be denied on the basis that the bidder/offeree failed to meet the goal. See Appendix “C” of this Manual for guidance in determining the adequacy of the bidder/offeree’s good faith efforts.
- D. In solicitations for DOT-assisted contracts for which a DBE contract goal has been established, the following are required:
 - 1) Award of the contract is conditioned on meeting the requirements of this section and failure to do so will render the bid non-responsive;
 - 2) All bidders/offerees are required to submit the following information at the time provided in paragraph G (3) of this section as a matter of responsiveness;
 - a. The names and addresses of DBE firms that will participate in the contract;
 - b. A description of the work, including the NAICS codes, that each DBE will perform. To count toward meeting a goal, the DBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the contract;
 - c. The dollar amount of the participation of each DBE firm participating;
 - d. Written documentation of the bidder/offeree’s commitment to use a DBE subcontractor whose participation it submits to meet a contract goal; and
 - e. Written confirmation from the DBE that it is participating in the contract in the kind and amount of work provided in the prime contractor’s commitment. Each DBE listed to perform work as a regular dealer or distributor must confirm its participation. In a negotiated procurement, such as a procurement for professional services, the bidder may make a contractually binding commitment to meet the goal at the time of bid submission or the

presentation of initial proposals but provide the required information before the final selection for the contract.

- f. NMDOT will make a fair and reasonable determination whether a bidder has made a good faith effort to meet the goal.
 - g. In design-build contracting, if a DBE contracting goal has been established, proposers must submit a DBE Open-Ended DBE Performance Plan (OEPP) with the proposal. This replaces the information required in B(2)(a) through (d). The OEPP must include a commitment to meet the goal and provide details of the types of subcontracting work or services (with the projected dollar amount) that the proposer will solicit DBEs to perform.
 - h. If the contract goal is not met, evidence of good faith efforts (see Appendix C” of this Manual). The documentation of good faith efforts must include copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract.
- 3) The bidder/offeror must provide the information required by paragraph B (2) of this section as follows:
- a. The information required by paragraphs B(2)(a) through (d) shall be provided through submission of Form A-585A as part of the bid packet at the time the bid is submitted. Submissions should be made to the CCRB by:
 - Mail: 1570 Pacheco St. Suite A10
Santa Fe, NM 87505
 - Or;
 - Email: DBE.BID-FORMS@dot.nm.us
 - b. The information required by paragraph B(2)(e) shall be provided through submission of Form A-644 to the Construction and Civil Rights Bureau by 4:00 p.m. of the fifth (5th) calendar day after the bid opening. Submissions should be made to CCRB by:
 - Mail: 1570 Pacheco St. Suite A10
Santa Fe, NM 87505
 - Or;
 - Email: DBE.BID-FORMS@dot.nm.us
 - c. The information required by paragraph B(2)(f), if necessary, shall be provided to the Construction and Civil Rights Bureau by 4:00 p.m. of the fifth calendar day after the bid opening.
 - d. NMDOT shall make sure all information is complete and accurate and adequately documents the bidder/offeror’s good faith efforts before committing itself to the performance of the contract by the bidder/offeror. This assurance shall be documented through a compliance notification issued by the Construction and Civil Rights Bureau. Such documents may include, but are not limited to:
 - Quotes or estimates from DBE and non-DBE firms, especially if the bidder is citing cost as a reason to not use a DBE.
 - Written notices or emails to DBE firms in the surrounding area that specialize in the work desired. Also, evidence of contact and negotiation with DBE including phone

logs, names, addresses and telephone numbers of DBEs considered should be submitted as well as any evidence as to why an agreement with these DBEs could not be reached.

- Documentation demonstrating DBEs were provided adequate information regarding the plans, specifications and requirements of the contract.

4) If NMDOT determines that the apparent low bidder/offeror has failed to meet the requirements of paragraph A of this section, NMDOT will, before an award of the contract is made, provide the bidder/offeror, in writing, an opportunity for administrative reconsideration.

- a. As part of this reconsideration, the bidder/offeror will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so.
- b. The NMDOT decision on reconsideration will be made by following the process defined in Section 103.3 of the New Mexico State Department of Transportation Standard Specifications for Highway and Bridge Construction.
- c. The bidder/offeror will be given the opportunity to meet in person with the NMDOT reconsideration official to discuss the issue of whether it met the goal or made adequate good faith to do so.
- d. NMDOT will send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so.
- e. The result of the reconsideration process is not administratively appealable to DOT.

Ref: 49 CFR §26.53

Section 8: Termination/Substitution/Replacement of DBE Firms for Projects having Race-Conscious Measures

- A. The prime contractor shall not terminate for convenience a DBE subcontractor listed on Form A-585A and A-644 (or an approved substitute DBE firm) without the prior written consent of NMDOT. 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, or with a non-DBE firm, or with a substitute DBE firm. If NMDOT causes the termination or reduction, the contractor is not required to seek consent. A termination includes any reduction or underrun in work listed for a DBE not caused by a material change to the prime contract by NMDOT.
- B. NMDOT includes in each Contract a provision stating:
 - 1) The contractor shall utilize the specific DBEs listed to perform the work and supply the materials for which each is listed unless the contractor obtains NMDOT's written consent as provided in Section 8 Paragraph A; and

- 2) Unless the NMDOT grants consent provided in Section 8 Paragraph A, the contractor shall not be entitled to payment for work or material unless it is performed or supplied by the listed DBE.
- C. The NMDOT DBE Liaison will provide written consent to the termination request only if the DBE Liaison agrees, for reasons stated in its concurrence document, that the prime contractor has good cause to terminate the DBE firm. Good cause does not exist if the prime contractor seeks to terminate a DBE it relied on to obtain the contract so that the prime contractor can self-perform the work for which the DBE subcontractor was engaged or so that the prime contractor can substitute another DBE or non-DBE contractor after contract award. For purposes of this paragraph, good cause includes the following circumstances:
- 1) The listed DBE subcontractor fails or refuses to execute a written contract;
 - 2) The listed DBE subcontractor fails or refuses to perform the work consistent with normal industry standards, provided, however, that good cause does not exist if the failure or refusal to perform results from the bad faith or discriminatory action of the prime contractor;
 - 3) The listed DBE subcontractor fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond requirements;
 - 4) The listed DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;
 - 5) The listed DBE subcontractor is ineligible to work on public works projects because of suspension or debarment proceedings pursuant to 26 CFR Parts 180, 215 or 1200 or applicable state law;
 - 6) NMDOT has determined the listed DBE subcontractor is not a responsible contractor;
 - 7) The listed DBE subcontractor voluntarily withdraws from the project and provides to NMDOT written notice of its withdrawal;
 - 8) The listed DBE subcontractor is ineligible to receive DBE credit for the type of work required;
 - 9) A DBE owner dies or becomes disabled with the result that the listed DBE subcontractor is unable to complete its work on the project; or
 - 10) Other documented good cause that NMDOT determines compels the termination of the DBE subcontractor.
- D. The prime contractor shall, before transmitting to NMDOT its request to terminate or substitute a DBE subcontractor, give notice in writing to the DBE subcontractor, with a copy to NMDOT, of its intent to terminate and/or substitute, and the reason for the request.
- E. The prime contractor must give the DBE subcontractor 5 working days to respond to the prime contractor's notice and advise the prime contractor and NMDOT of the reasons, if any, why it objects to the proposed termination of its subcontract and why NMDOT should not approve the prime contractor's request. If required in a case of public necessity, the prime contractor may require less than 5 days.
- F. As soon as possible, after receipt and review of the DBE subcontractor's response, or after the expiration of the 5 working day response period, NMDOT shall provide a written response to the

prime contractor's request. NMDOT may seek additional information as necessary to formulate its response. NMDOT's decision is not appealable to DOT.

- G. In addition to post-award terminations, the termination provisions also apply to pre-award deletions or changes to DBEs, or their listed work put forward by offerors on negotiated/design build procurements.
- H. If termination of the DBE subcontractor does not result in a DBE contract goal shortfall, NMDOT strongly encourages the prime contractor to make good faith efforts to subcontract with a substitute DBE firm which can perform the same type of work on the project as the terminated DBE firm or to subcontract with a replacement DBE firm which can perform other types of work remaining on the project.
- I. If termination of the DBE subcontractor results in a DBE contract goal shortfall, the prime contractor shall either:
 - 1) Make good faith efforts to obtain sufficient DBE participation to meet the contract goal by subcontracting with a substitute DBE firm which can perform the same type of work on the project as the terminated DBE firm; or
 - 2) Make good faith efforts to obtain sufficient DBE participation to meet the contract goal by subcontracting with a replacement DBE firm which can perform other types of work remaining on the project.
- J. The prime contractor shall document its good faith efforts to find another certified DBE subcontractor to substitute for or replace the terminated DBE firm. See Appendix "C" of this Manual for guidance in determining the types of good faith efforts. These good faith efforts shall be directed at finding another DBE firm to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal. The good faith efforts shall be documented by the prime contractor. If NMDOT requests the documentation of the prime contractor's good faith efforts, the prime contractor shall submit the documentation within seven days, which may be extended for an additional seven days, if necessary, at the request of the contractor.
- K. The prime contractor shall, in writing, request approval from NMDOT to utilize a substitute or replacement DBE firm to meet the contract goal. In its request, the prime contractor shall detail the work items to be performed and the estimated dollar amount to be subcontracted. The prime contractor shall also include a notice, signed by the replacement DBE, of its intended participation or an amended A-644 form.
- L. As soon as possible, after receipt and review of the prime contractor's request, NMDOT shall provide a written response to the prime contractor regarding whether or not good faith efforts have been documented. NMDOT may seek additional information as necessary to formulate its response. NMDOT's decision is not appealable to DOT.
- M. If the prime contractor is unable to secure a substitute or replacement DBE subcontractor to perform the work to meet the contract goal, the prime contractor shall immediately notify NMDOT in writing, and request to be relieved of meeting the contract goal. The prime contractor shall include with this request a justification, including the documented good faith efforts made to find another certified DBE firm.

- N. As soon as possible, after receipt and review of the prime contractor's request, NMDOT shall provide a written response to the prime contractor. NMDOT may seek additional information as necessary to formulate its response. NMDOT may allow a DBE contract goal waiver, adjust the DBE goal, or assess construction contract liquidated damages or design contract liquidated damages as may be appropriate, depending on the individual project's overall circumstances. NMDOT's decision to waive or adjust the contract goal is not appealable to DOT.
- O. Failure of any contractor to abide by the provisions of this Section is a material breach of the contract and may result in the termination of the contract and the contractor shall be subject to the compliance procedures provided in Chapter III, Section 10 of this Manual.

Ref 49 CFR §26.53

Section 9: Compliance Procedures

Whenever NMDOT believes the construction contractor or any subcontractor or supplier on a DOT-assisted contract may not be operating in compliance with the terms, conditions or requirements of this DBE Program, NMDOT will conduct an investigation. NMDOT verifies DBE compliance during a construction contract through Commercially Useful Function (CUF) reviews. If it is found that the construction contractor or any subcontractor or supplier is not in compliance with the DBE Program, NMDOT will notify the non-compliant party in writing. NMDOT may conduct a compliance conference with the non-compliant party or parties to discuss the area(s) of non-compliance. In the event that the non-compliant party or parties fails or refuses to perform in compliance with the DBE Program or the Selected DBE Program Provisions, NMDOT will send the non-compliant party or parties a "Notice of Non-Compliance". If the non-compliant party or parties corrects the deficiencies, NMDOT will rescind the "Notice of Non-Compliance" and notify the party or parties. If the deficiencies are not corrected, NMDOT will initiate administrative action against the non-compliant party or parties, which may include but not be limited to:

- A. Termination of the contract.
- B. For construction, withholding an appropriate percentage of partial payments pursuant to the Non-Conformance provisions of the NMDOT Standard Specifications for Highway and Bridge construction. This appropriate percentage may be the amount of any proposed monetary sanction.
- C. Initiation of appropriate suspension or debarment or decertification proceedings.
- D. Referral of any unlawful actions to the appropriate enforcement agencies.
- E. Other actions as appropriate, at the discretion of NMDOT.

Ref 49 CFR §26.53

Section 10: Counting DBE Participation Toward Goals

- A. When a DBE is awarded a contract as the prime construction contractor, the DBE is credited the entire amount of a construction contract or design or other consultant contract that is performed by the DBE's own forces will be credited. Included are the cost of supplies and materials obtained by the

DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor or subconsultant purchases or leases from the prime contractor or its affiliate). The amount of the contract awarded to non-DBE subcontractors will be extracted from the total counted toward the DBE race-neutral goal.

B. When a DBE participates in a contract, only the value of the work actually performed by the DBE will be credited toward DBE goals.

- 1) The entire amount of the portion of a construction contract or design or other consultant contract that is performed by the DBE's own forces will be credited. Included are the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor or subconsultant purchases or leases from the prime contractor or its affiliate).
- 2) Credit will be allowed for the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract. Credit will be allowed for fees considered reasonable and not excessive as compared with fees customarily allowed for similar services.
- 3) When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted only if the DBE subcontractor or subconsultant is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward meeting the DBE goal.

C. When a DBE performs as a participant in a joint venture, only credit for a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces will be allowed.

D. Credit to a DBE contractor will be allowed only if the DBE is performing a commercially useful function on the contract.

- 1) A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, NMDOT will evaluate the amount of work subcontracted, industry practices, whether that amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work and other relevant factors.
- 2) A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed on in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, NMDOT will perform an examination of similar transactions, particularly those in which DBEs do not participate.
- 3) If a DBE does not perform or exercise responsibility for at least 30% of the total cost of its contract with its own forces, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, it will be presumed that the DBE is not performing a commercially useful function.

- 4) When a DBE is presumed not to be performing a commercially useful function as provided above, the DBE may present evidence to NMDOT to rebut this presumption. It may be determined that the firm is performing a commercially useful function given the type of work involved and normal industry practices.
 - 5) Decisions concerning commercially useful function matters are not administratively appealable to DOT but are subject to review by the concerned operating administration.
- E. To determine whether a DBE trucking firm is performing a commercially useful function, NMDOT shall evaluate the amount of work subcontracted, industry practices and other relevant factors.
- 1) The DBE must be responsible for management and supervision of the entire trucking operation for which it is responsible on a particular contract and there cannot be a contrived arrangement for the purpose of counting DBE participation.
 - 2) The DBE must, itself, own and operate at least one fully licensed, insured and operational truck used on the contract. The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures and operates using drivers it employs.
 - 3) 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.
 - 4) The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE that leases trucks equipped with drivers from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE leased trucks equipped with drivers not to exceed the value of transportation services on the contract provided by DBE-owned trucks or leased trucks with DBE employee drivers. Additional participation by non-DBE owned trucks equipped with drivers receives credit only for the fee or commission it receives because of the lease arrangement.
 - 5) The DBE may lease trucks without drivers from a non-DBE truck leasing company. If the DBE leases trucks from a non-DBE truck leasing company and uses its own employees as drivers, it is entitled to credit for the total value of these hauling services.
- E. Count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:
- 1) If the materials or supplies are obtained from a DBE manufacturer, 100 percent of the cost of the materials or supplies can be counted.
 - a. A manufacturer is a firm that owns (or leases) and operates 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. Manufacturing includes blending and modifying raw materials or assembling components to create the product to meet contract specifications. When a DBE makes minor modifications to the materials, supplies, articles or equipment, the DBE is not a manufacturer. Minor modifications are additional changes to a manufactured product that are small in scope and add minimal value to the final product.

- 2) If the materials or supplies are purchased from a DBE regular dealer, 60 percent of the cost of the materials or supplies, including transportation costs, will be credited toward the DBE goal.
- a. A regular dealer is a firm that owns (or leases), and operates, 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 sufficient quantities and regularly sold or leased to the public in the usual course of business.
 - b. Items kept and regularly sold by the DBE are of the “general character” when they share the same material characteristics and application as the items specified in the contract.
 - c. NMDOT will establish a system to determine that a DBE regular dealer with the requirements above, over a reasonable period of time, keep sufficient quantities and regularly sells the items in question. This system ensures that a regular dealer of bulk items owns/leases and operates distribution equipment for the products it sells. NMDOT may use questionnaires, inventory records reviews, or other methods to determine whether each DBE supplier has the demonstrated capacity to perform a commercially useful function (CUF) as a regular dealer prior to its participation. The system will be used to identify all DBE suppliers with the capacity to be eligible for 60 percent credit, contingent upon the performance of a CUF.
- b. A regular dealer must be an established, regular business that engages, as its principal business and under its own name, the purchase and sale or lease of the products in question. A DBE supplier performs a CUF as a regular dealer for 60 percent credit of cost of the materials or supplies (including transportation cost) when all, or at least 51 percent of, the items under a purchase order or subcontract are provided from the DBE’s inventory and when necessary, any minor quantities delivered from and by other sources are of the general character of those provided from the DBE’s inventory.
 - c. A person may be a regular dealer in such bulk items as petroleum, products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in this paragraph if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers’ own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.
 - d. A DBE supplier of items that are not typically stocked due to their unique characteristics (e.g., limited shelf life or items ordered to specification) must be considered in the same manner as a regular dealer of bulk items as stated above. If the DBE supplier of these items does not own or lease distribution equipment, as described above, it is not a regular dealer.
 - e. Packagers, brokers, manufacturers’ representatives, or other persons who arrange for expenditure transactions are not regular dealers within the meaning of this section.
 - f. If materials or supplies are purchased from a DBE distributor that neither maintains sufficient inventory nor uses its own distribution equipment for the products in question, NMDOT will count 40 percent of the cost of materials or supplies (including transportation costs). A DBE distributor is an established business that engages in the regular sale or lease of the items specified in the contract. A DBE distributor assumes responsibility for the items it purchases once they leave the point of origin (e.g., manufacturer’s facility), making it liable for any loss or damage not covered by the carrier’s insurance. A DBE distributor performs a CUF when it demonstrates ownership of the items in question and assumes all risk for the loss of damage

during transportation, evidenced by the terms of the purchase order or a bill of lading (BOL) from a third party, indicating Free of Board (FOB) at the point of origin or similar terms that transfer responsibility of the items in question to the DBE distributor. If these conditions are met, DBE distributors may receive 40 percent of drop-shipped items. Terms that transfer liability to the distributor at the delivery destination (e.g., FOB destination), or deliveries made or arranged by the manufacturer or another seller do not satisfy this requirement.

- 3) With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, NMDOT will count the entire amount of fees or commission charged that are determined to be reasonable including transportation charges for the delivery of materials or supplies. No portion of the cost of the materials or supplies themselves may be counted. NMDOT will determine the amount of credit awarded to a firm for provisions of materials and supplies on a contract-by-contract basis.
 - 4) If the firm is not currently certified as a DBE in accordance with the standards at the time of the execution of the subcontract, the firm's participation will not count towards the DBE goal, except as provided for in 49 CFR §26.87(i).
 - 5) NMDOT will not count toward the state goal the dollar value of work performed under a contract with a firm that has ceased to be certified.
 - 6) NMDOT will not count the participation of a DBE subcontractor or subconsultant toward the prime contractor's or consultant's DBE achievement or NMDOT's state goal until the amount being counted toward the goal has actually been paid to the DBE.
- F. A DBE subcontractor and a material supplier may request permission from NMDOT for the use of joint checks for payment from the prime contractor to the DBE subcontractor and the supplier. The NMDOT will seek guidance from FHWA for the use of joint checks, and may only be used if the following requirements are met:
- 1) The prime contractor acts solely as the guarantor;
 - 2) The DBE must release the check to the supplier;
 - 3) The use of the joint checks is a commonly recognized business practice of the industry;
 - 4) NMDOT approves the use of a joint check(s) before it is used; and
 - 5) The prime contractor/DBE firm must furnish the cancelled check used for payment of materials/supplies under the contract.

Ref 49 CFR §26.55

CHAPTER IV – DBE CERTIFICATION STANDARDS

Section 1: Burdens of Proof

- A. In determining whether to certify a firm as eligible to participate as a DBE, NMDOT will apply the standards of 49 CFR §26.61.
- 1) NMDOT must apply the standards of this section. Unless the context indicates otherwise, singular terms include their plural forms and vice versa.
 - 2) The firm seeking certification has the burden of demonstrating to NMDOT, by a preponderance of the evidence, i.e., more likely than not, that it satisfies all the requirements of this Chapter. In determining whether the firm has met its burden, NMDOT must consider all the information in the record, viewed as a whole.
 - a. Exception 1. In a decertification proceeding the NMDOT bears the burden of proving, by a preponderance of the evidence, that the firm is no longer eligible for certification under the rules of this part.
 - b. Exception 2. If the NMDOT has a reasonable basis to believe that an individual who is a member of a socially and economically disadvantage group is not, in fact, socially and/or economically disadvantaged, NMDOT bears the burden of proving, by a preponderance of the evidence, that the individual is not socially and/or economically disadvantaged.

Ref: 49 CFR §26.61

Section 2: General Certification Rules

- A. General Rules. Except as otherwise provided:
- 1) The firm must be for-profit and engaged in business activities.
 - 2) In making eligibility decisions, NMDOT must not consider whether a firm performs a commercially useful function (CUF), or the potential effect on goals or counting.
 - 3) NMDOT cannot condition eligibility on State prequalification requirement for bidding on contracts.
 - 4) Certification is not a warranty of competence or suitability.
 - 5) NMDOT determines eligibility based on the evidence it has at the time of its decision, not on the basis of historical or outdated information, giving full effect to the “curative measures” provision of this chapter.
 - 6) Entering into a fraudulent transaction or presenting false information to obtain or maintain DBE certification is disqualifying.

B. Indirect Ownership. A subsidiary (S) that SEDOs own, and control indirectly is eligible, if it satisfied the other requirements of this chapter and only under the following circumstances.

- 1) Look through. SEDOs own at least 51 percent of S through their ownership of P (the parent firm) as show in the following examples.
- 2) Control. SEDOs control P, and P controls S.
- 3) One tier of separation. The SEDOs indirectly own S though P and no other intermediary. That is, no applicant or DBE may be more than on entity (P).
- 4) Examples. The following examples assume that S and its SEDOs satisfy all other requirements of this chapter:
 - a. Example 1: SEDOs own 100 percent of P, and P owns 100 percent of S. S. is eligible for certification.
 - b. Example 2: Same facts as Example 1, except P owns 51 percent of S. S is eligible
 - c. Example 3: SEDOs own 80 percent of P, and P owns 70 percent of S. S is eligible because SEDOs indirectly own 56 percent of S. The calculation is 80 percent of 70 percent or $.8 \times .7 = .56$
 - d. Example 4: SEDOs own and control P, and they own 52 percent of S by operation. However, a non-SEDO controls S. S is ineligible.
 - e. Example 5: SEDOs own 60 percent of P, and P owns 51 percent of S. S is ineligible because SEDOs own just 31 percent of S.
 - f. Example 6: P indirectly owns and controls S and has other affiliates. S is eligible only if its gross receipts, plus those of all of its affiliates, do not exceed the applicable small business size cap of 49 CFR 26.65. Note that all of P's affiliates are affiliates of S by virtue of P's ownership and/or control of S.

C. Indian Tribes, NHOs, and ANCs.

- 1) Indian Tribes and NHOs. A firm that is owned by an Indian Tribe or Native Hawaiian organization (NHO), rather than by Indians or Native Hawaiians as individuals, is eligible if it meets all other certification requirements in this part.
- 2) Alaska Native Corporations (ANCs). Notwithstanding any other provisions of this chapter, a subsidiary corporation, joint venture, or partnership of an ANC is eligible for certification if it meets all of the following requirements:
 - a. The Settlement Common Stock of the underlying ANC and other stock of the ANC held by holders of the Settlement Common Stock and by Natives and descendants of Natives represents a majority of both the total equity of the ANC and the total voting power of the corporation for purposes of electing directors;
 - b.
 - c. The shares of stock of other units of common ownership interest in the subsidiary, joint venture, or partnership entity held by the ANC and by holders of its Settlement Common Stock represent a majority of both the total equity of the entity and the total

- voting power of the entity for the purposes of electing directors, the general partner, of principal officers; and
 - d. The subsidiary, joint venture, or partnership entity has been certified by the Small Business Administration under the 8(a) or small disadvantaged business program.
- 3) As a certified to whom an ANC-related entity applies for certification, a NMDOT may not use the Uniform Certification Application. The certified must obtain from the firm documentation sufficient to demonstrate that the entity meets the requirements of C(2)(i) of this section. The NMDOT must also obtain sufficient information about the firm to allow the NMDOT to administer its program (e.g., information that would appear in a UCP directory).
 - 4) If an ANC-related firm does not meet all the conditions of C(2)(i) of this section, that it must meet the requirements of C (1) of this section in order to be certified.

Ref: 49 CFR §26.63

Section 3: Business Size Determinations

- A. By NAICS Code. A firm (including its affiliates) must be a small business, as defined by the Small Business Administration (SBA). The NMDOT must apply the SBA business size limit in 13 CFR 121 which corresponds to the applicable primary industry classifications (NAICS codes). The firm is ineligible when its affiliated “receipts” (computed on a cash basis), as defined by 13 CFR 121.104(a) and averaged over the firm’s preceding five fiscal years, exceed the applicable SBA cap.
- B. Statutory Cap. Even if a firm is a small business under A of this section, it is ineligible to perform DBE work on FHWA or FTA assisted contracts if its affiliated annual gross receipts, as defined in 13 CFR 121.104, over the firm’s previous three fiscal years exceed \$30.40 million (as of March 1, 2023). The Department will adjust this amount annually and post the adjusted amount on its website available at <http://www.transportation.gov/DBEsizestandards>.

Ref: 49 CFR §26.65

Section 4: Social and Economic Disadvantage

A. Group membership

- 1) Group rule. Citizens of the United States (or lawfully admitted permanent residents) who are Women, Black American, Hispanic American, Native American, Asia Pacific Americans, Subcontinent Asian American, or other minorities found to be disadvantaged by the SBA, are rebuttably presumed to be socially and economically disadvantaged individuals. A firm owner claiming to presumption must specify which groups in this paragraph she or he is a member on the Declaration of Eligibility (DOE).
- 2) Native American Group Membership. An owner claiming Native American group membership must submit a signed DOE as well as proof of enrollment in a federally or State-recognized Indian Tribe. An owner claiming Native Hawaiian or Alaska Native group membership must submit documentation legally recognized under State or Federal law attesting to the individual’s status as a member of that group.
- 3) Questioning group membership.

- a. NMDOT may not question claims of group membership as a matter of course. NMDOT must not impose a disproportionate burden on members of any particular group. Imposing a disproportionate burden on members of a particular group could violate Title VI of the Civil Rights Act of 1964, paragraph B of this section, and/or 49 CFR part 21.
 - i. If a NMDOT has a well-founded reason(s) to question an owner's claim of membership in a group described above, it must provide the individual with a written explanation of its reason(s), using the most recent email address provided. The firm bears the burden of proving, by a preponderance of the evidence, that the owner is a member of the group in question.
 - ii. NMDOT's written explanation must instruct the individual to submit evidence demonstrating that the individual has held herself/himself/themselves out publicly as a member of the group for a long period of time prior to applying for DBE certification, and that the relevant community considers the individual a member. NMDOT may not require the individual to provide evidence beyond that related to group membership.
 - iii. The owner must email the NMDOT evidence described above no later than 20 days after the written explanation. NMDOT must email the owner a decision no later than 30 days after receiving timely submitted evidence.
 - iv. If NMDOT determines that an individual has not demonstrated group membership, NMDOT's decision must specifically reference the evidence in the record that formed the basis for the conclusion and give a detailed explanation of why the evidence submitted was insufficient. It must also inform the individual the right to appeal as provided in [§ 26.89\(a\)](#), and of the right to reapply at any time under paragraph (d) of this section
- b. Rebuttable of economic disadvantage.
 - i. Personal net worth, if NMDOT has a reasonable basis to believe that an individual who submits a PNM Statement that is below the currently applicable PNW cap is not economically disadvantaged, NMDOT may rebut the individual's presumption of economic disadvantage.
 - ii. NMDOT must not attempt to rebut presumed economic disadvantage as a matter of course and it must avoid imposing unnecessary burdens on individual owners or disproportionately impose them on members of a particular group.
 - iii. NMDOT must proceed as provided in [§ 26.87](#).
- c. Economic disadvantage in fact.
 - i. To rebut the presumption, NMDOT must prove that a reasonable person would not consider the individual economically disadvantaged. NMDOT may consider assets and income, free use of them or ready access to their benefits, and any other trappings of wealth that NMDOT considered relevant. There are no assets (including retirement assets), income, equity, or other exclusions and no limitations on exclusions. A broad and general analysis suffices in most cases: the owner has, or enjoys the benefits of, income of X; two homes worth approximately Y; substantial interests in outside businesses Q, R, and S; four rental properties of aggregate value Z; etc. NMDOT need only demonstrate "ballpark" values based on available evidence. The reasonable person is not

party to detailed financial information. S/he considers the owner's overall circumstances and lifestyle.

- ii. NMDOT must proceed as provided in [§ 26.87](#).
- d. Non-presumptive disadvantage. An owner who is not presumed to be SED under paragraph a. of this section may demonstrate that he is SED based on his own experiences and circumstances that occurred within American society.
 - i. To attempt to prove individual SED, the owner provides NMDOT a Personal Narrative (PN) that describes in details specific acts or omissions by others, which impeded his progress or success in education, employment and/or business, including obtaining financing on terms available to similarly situated, non-disadvantaged persons.
 - ii. The PN must identify at least one objective basis for detrimental discrimination. The basis may be any identifiable status or condition. The PN must describe this objecting distinguishing feature(s) (ODF) in sufficient detail to justify the owner's conclusion that it promoted prejudicial acts or omissions.
 - iii. The PN must state how and to what extent the discrimination caused the owner harm, including a full description of type and magnitude.
 - iv. The owner must establish that he is economically disadvantaged in fact and economically disadvantaged relative to similarly situated non-disadvantaged individuals.
 - v. The owner must attach to the PN a current PNW statement and any other financial information he considered relevant.
 - vi. This section does not prescribe how the owner must satisfy his burden of proving disadvantage. He need not, for example, have filed any formal complaint, or prove any discrimination under a particular statute.

Example: A White male claiming to have experienced employment discrimination must provide evidence that his employment status and/or limited opportunities to earn income result from specific prejudicial acts directed at him personally because of an ODF, and not, *e.g.* an economic recession that caused widespread unemployment.

Section 5. Personal Net Worth

- A. General. An owner whose PNW exceeds the regulation's currently applicable PNW limit is not presumed economically disadvantaged.
- B. Required documents. Each owner on whom the firm relies on for certification must submit a DOE and a corroborating personal net worth (PNW) statement, including required attachments. The owner must report PNW on the form, available at <http://www.Transportation.gov/DBEFORMS>. NMDOT may require an owner to provide additional information on a case-by-case basis to verify the accuracy

and completeness of the PNW statement. NMDOT must have a legitimate and demonstrable need for additional information.

- C. Reporting. The following rules apply without regard to State community property, equitable distribution, or similar rules. The owner reports assets and liabilities that she owns or is deemed to own. Ownership tracks title to the asset or obligor status on the liability except where otherwise provided or when the transaction results in evasion or abuse.

- a. The owner excludes her ownership interest in the applicant or DBE;
- b. The owner excludes her share of the equity in her primary residence. There is no exclusion when the SEDO does not own the home.

Example: The owner and her spouse hold joint title to their primary residence, for which they paid \$300,000 and are coequal debtors on a bank mortgage and a home equity line of credit with current combined balances of \$150,000. The owner may exclude her \$75,000 share of the \$150,000 of total equity.

- c. The owner includes the full value of the contents of her primary residence unless she cohabits with a spouse or domestic partner, in which case she excludes only 50 percent of those assets.
- d. The owner includes the value of all motor vehicles, including watercraft and ATVs titled in her name or of which she is the principal operator.
- e. The owner excludes the liabilities of any other party and those contingent of a future event or of undetermined value as of the date of the PNW Statement.
- f. The owner includes her proportional share of the balance of a debt on which she has joint and severable liability with other primary debtors.

Example: When the owner co-signs a debt instrument with two other individuals, the rule considers her liable for one-third of the current loan balance.

- g. The owner includes assets transferred to relatives or related entities within two years preceding any UCA or DOE, when the assets transferred during the period have an aggregate value of more than \$20,000. Relatives include the owner's spouse or domestic partner, children (whether biological, adopted, or stepchildren), siblings (including stepsiblings and those of the spouse or domestic partner), and parents (including stepparents and those of the spouse or domestic partner). Related entities include for-profit privately held companies of which any relative is an owner, officer, director or equivalent; and family or other trusts of which the owner or any relative is grantor, trustee, or beneficiary, except when the transfer is irrevocable.
- h. The owner excludes direct payments, on behalf of immediate family members or their children, to unrelated providers of healthcare, education, or legal services.
- i. The owner excludes direct payments to providers of goods and services directly related to a celebration of an immediate family member's or that family member's child's significant normally non-recurring life event.

- j. The owner excludes from net worth all assets in qualified retirement accounts but must report the value of assets in them, and any significant terms and restrictions concerning the assets' use, to NMDOT.
- D. Regulatory adjustments.
- a. The Department will adjust the PNW cap by May 9, 2024 by multiplying \$1,600,000 by the growth in the total household net worth since 2019 as described "Financial Accounts of the United States: Balance Sheet of Households (Supplementary Table B.101.h) produced by the Board of Governors of the Federal Reserves (<http://www.federalreserves.gov/releases/z1/>), and normalized by the total number of households as collected by the Census in "Families and Living Arrangements" (<http://www.census.gov/topics/families/families-and-households.html>) to account for population growth. The Department will adjust the PNW cap every 3 years on the anniversary of the initial adjustment date described in this section. The Department will post the adjustments on the Departmental Office of Civil Rights' web page, available at <https://www.Transportation.gov/DBEPNW>. Each such adjustment will become the currently applicable PNW limit for the purposes of these regulations.
 - b. The Department will use the following formula to adjust the PNW limit:
- E. Confidentiality. Notwithstanding any provision of Federal or State Law, NMDOT must not release an individual's PNW statement nor any documents pertaining to it to any third party without the written consent of the submitter. Provided that you must transmit this information to DOT in any certification appeal proceeding under 26.89 or any other State of which the individual has applied for certification under 26.85.

Ref: 49 CFR §26.68

Section 6: Ownership

- A. General Rule. A SEDO must own at least 51 percent of each class of ownership of the firm. Each SEDO, whose ownership is necessary to the firm's eligibility must demonstrate that her ownership satisfies the requirements of this section. If not, the firm is ineligible.
- B. Overall Requirements. A SEDO's acquisition and maintenance of an ownership interest meets the requirements of this section only if the SEDO demonstrates the following:
 - 1) Acquisition. The SEDO acquires ownership at fair value and by one or more "investments" as defined in paragraph C of this section.
 - 2) Proportion. No owner derives benefits or bears burdens that are clearly disproportionate to their ownership shares.
 - a. Maintenance. This section's requirement continues to apply after the SEDO's acquisition and the firm's certification. That is, the SEDO must maintain its investment and its proportion relative to those of other owners.

- b. The SEDO may not withdraw or revoke her investment.
- c. When an existing co-owner contributes significant, additional, post-acquisition cash or property to the firm, the SEDO must increase her own investment to a level not clearly disproportionate to the non-SEDO investment.

Example 1: SEDO and non-SEDO own DBE 60/40, their respective investments are approximately \$600,000 to \$400,000. The DBE has operated its business under this ownership and with this capitalization for 2 years. In year 3, the non-SEDO contributes a \$2 million dollar asset to the business. The SEDO, as a result, owns 60 percent of a \$2 million asset without any additional outlay. Her ownership interest, assuming no other pertinent facts, is worth \$1.2 million more than it was before. Unless the SEDO increases her investment significantly, it is clearly disproportionate to the non-SEDO's investment and to her nominal 60 percent ownership. She has not maintained her investment.

Example 2: Same facts except that the DBE purchases the assets with a combination of 30 percent operating income and 70 percent proceeds of a bank loan. The SEDO maintains her investment because it remains in proportion to the non-SEDO's investment and to the value of her 60 percent ownership.

Example 3: Same Facts except that the non-SEDO, not a bank, is the DBE's creditor. The SEDO has not maintained her investment because the benefits and burdens of her ownership are clearly disproportionate to those of the non-SEDO. The transaction may also raise 26.71, control, concerns.

- d. An organic increase in the value of the business does not affect maintenance because the value of the owners' investments remains proportional. In Example 2, the SEDO and the non-SEDO own the new asset at 60 percent and 40 percent of its new value of \$60,000.
- C. Investments. A SEDO may acquire ownership by purchase, capital contribution, or gift. Subject to the other requirements of this section, each is considered an "investment" in the firm, as are additional purchases, contributions, and qualifying gifts.
- 1. Investments are unconditional and at full risk of loss.
 - 2. Investments include a significant outlay of the SEDO's own money.
 - 3. For purposes of this section, title determines ownership of assets used for investments and of ownership interests themselves. This rule applies regardless of the contrary community property, equitable distribution, banking, contract, or similar laws, rules or principles.
 - a. The person who has title to the asset owns it in proportion to her share of the title.
 - b. However, the title rule is deemed not to apply when it produces a certification result that is manifestly unjust.
 - 4. If the SEDO joint (50/50) owns an investment in cash or property, the SEDO may claim at least 51 percent ownership interest only if the other joint owner formally transfers to the SEDO enough of his ownership in the invested asset(s) to bring the SEDO's investment to at least 51 percent of all investments in the firm. Such transfers may be gifts described in paragraph E of this section.

D. Purchase and capital contributions.

1. A purchase of an ownership interest is an investment when the consideration is entirely monetary and not a trade of property or services.
2. Capital that the SEDO contributes directly to the company is an investment when the contribution is all cash or a combination of cash and tangible property and/or realty.
3. Contributions of time, labor, services, and the like are not investments or components of investments.
4. Loans are not investments. The proceeds of loans may be investments to the extent that they may finance the SEDO's qualifying purchase or capital contribution.
5. Debt-financed purchases or capital contributions are investments when they comply with the rules in this section and 26.70.
6. Guarantees are not investments.
7. The firm's purchases or sales of property, including ownership in itself or other companies, are not the SEDO's investments.
8. Other persons' or entities' purchase, or capital contributions are not the SEDO's investments.

E. Gifts. A gift to the SEDO is investment when it meets the requirements of this section. The gift rules apply to partial gifts, bequests, inheritances, trust distributions, and transfers for inadequate consideration. They apply to gifts of ownership interests and to gifts of cash or property that the SEDO invests in. The following requirements apply to gifts on which the SEDO relies for her investment.

1. The transferor/donor is or immediately becomes uninvolved with the firm in any capacity and in any other business that contracts with the firm other than as a lessor or provider of standard support services;
2. The transferor does not derive unique benefit; and
3. writing documents the gift. When the SEDO cannot reasonably produce better evidence, a receipt, cancelled check, or transfer confirmation suffices, if the writing identifies the transferor, transferee, amount or value, and date.

F. Curative measures. The rules of this section do not prohibit transactions that further the objectives of, and compliance with, the provisions of this part. A SEDO or firm may enter into legitimate transactions, alter the terms of ownership, make additional investments, or bolster underlying documentation in a good faith effort to remove, surmount, or correct defects in eligibility, as long as the actions are consistent with this part.

1. NMDOT may notify the firm of eligibility concerns and give the firm time, if the firm wishes, to attempt to remedy the impediments to certification.

2. The firm may, of its own volition, take curative action up to the time of NMDOT's decision. However, it must present evidence of curation before NMDOT's decision.
3. NMDOT may provide general assistance and guidance but not professional (legal, accounting, valuation, etc.) advice or opinions.
4. While NMDOT may not affirmatively impede attempts to cure, it may maintain its decision timeline and make its decision based on available evidence.
5. NMDOT must deny or remove certification when the firm's efforts or submissions violate the rules in paragraph G of this section.

G. Anti-abuse rules.

1. The substance and not form of the transactions drive the eligibility determination.
2. NMDOT must deny applications based on sham transactions or false representations, and it must decertify DBEs that engage in or make them. Transactions or representations designed to evade or materially mislead subject the firm to the same consequences.
3. Fraud renders the firm ineligible and subjects it to sanctions, suspension, debarment, criminal prosecution, civil litigation, and any other consequences or recourse not proscribed in this part.

Example 1. SEDO claims an investment consisting of a contribution of equipment and a significant amount of her own cash. She shows that she transferred title to the equipment and wrote a check from an account she alone owns. She does not disclose that her brother-in-law lent her the money, and she must repay him. The firm is ineligible under paragraphs G.1 and 2 of this section.

Ref: 49 CFR §26.69

Section 7. Debt-financed investments

- A. Subject to the other provisions of this section, a SEDO may borrow money to *finance* A 26.69 (C) investment entirely or partially if the SEDO has paid, on a net basis, at least 15 percent of the total value of the total value of the investment by the time the firm applies for certification.

Example 1: A SEDO who borrows \$9,000 of her \$10,000 cash investment in Applicant, Inc., must have repaid from her own funds, at least \$5000 of the loan's principal by the time Applicant, Inc, applies for certification.

Example 2: A SEDO who finances \$8,000 of \$10,000 investment in Applicant may apply for Applicant's certification at any time.

Example 3: A SEDO who contributes to the Applicant equipment worth \$40,000, which she purchased with \$10,000 of her own money and \$30,0000 seller financing may apply for Applicant's certification at any time.

1. The SEDO pays the net 15 percent portion of the investment to Seller or Applicant (as the case maybe) from her own, not borrowed money.
 2. Money that the SEDO receives as a 26.69 E gift is her own money.
 3. The firm, whether Applicant or DBE, does not finance any part of the investment, directly or indirectly.
- B. The loan is real, enforceable, not in default, not offset by another agreement, and on standard commercial, arm's length terms. The following conditions also apply.
1. The SEDO is the sole debtor.
 2. The firm is not party to the loan in any capacity, including as a guarantor.
 3. The SEDO does not rely on the company's credit or other resources to repay any part of the debt or otherwise to finance any part of her investment.
 4. The loan agreement requires level, regularly recurring payments of principal and interest, according to standard amortization schedule, at least until the SEDO satisfies the requirements in paragraph A of this section.
 5. The loan agreement permits prepayments, including refinancing.
- C. If the creditor forgives or cancels all or part of the debt, or the SEDO defaults, the entire debt-financed portion of the SEDO's purchase or capital contribution is no longer an investment.
Example 4: SEDO finances \$40,000 to a \$50,000 investment, and the firm becomes certified. When the SEDO has repaid half of the loan's principal and associated interest, the creditor forgives the remaining \$20,000 debt. The SEDO's investment is now \$10,000.
- D. Paragraph C of this section does not prohibit refinancing with debt that meets the requirements of this section or preclude prompt curations under 26.69.

Ref: 49 CFR §26.70

Section 8: Control

- A. General rules.
1. One or more of the SEDO's of the firm must control it.
 2. Control determinations must consider all pertinent facts, viewed together and in context.
 3. A firm must have operations in the business for which it seeks certification at the time it applies. NMDOT does not certify plans or intentions, or issue contingent or conditional certifications.
- B. SEDO as final decision maker. A SEDO must be the ultimate decision maker in fact, regardless of operational, policy or delegation arrangements.

- C. Governance. Governance provisions may not require that any SEDO obtain concurrence or consent from a non-SED0 to transact business on behalf of the firm.
1. Highest officer position. A SED0 must hold the highest officer positions in the company (*e.g.*, chief executive officer or president).
 2. Board of directors. Except as detailed in paragraph C.4. of the section, a SED0 must have present control of the firm's board of directors or other governing body, through the number of eligible votes.
 - a. Quorum requirements. Provisions for the establishment of a quorum must not block the SED0 from calling a meeting to vote and transact business on behalf of the firm.
 - b. Shareholder actions. A SED0's authority to change the firm's composition via shareholder action does not prove control within the meaning of paragraph C of this section.
 3. Partnerships. In a partnership, at least one SED0 must serve as general partner, with control over all partnership decisions.
 4. Exception. Bylaws or other governing provisions that require non-SED0 consent for extraordinary actions general do not contravene the rules in paragraph C of this section. Non-exclusive examples are the sale of the company or substantially all its assets, mergers, and a sudden wholesale change of type of business.
- D. Expertise. At least one SED0 must have an overall understanding of the business and its essential operations sufficient to make sound managerial decisions not primarily of an administrative nature. The requirements of this paragraph D vary with the type of business, degree of technological complexity, and scale.
- E. SED0 decisions. The firm must show that the SED0 critically analyzes information provided by non-SED0s and uses that analysis to make independent decisions.
- F. Delegation. A SED0 may delegate administrative activities of operational oversight to a non-SED individual as long as at least one SED0 retains unilateral power to fire the delegate(s), and the chain of command is evident to all participants in the company and to all persons and entities with whom the firm conducts business.
1. No non-SED participant may have power equal to or greater than that of a SED0, considering all the circumstances. Aggregate magnitude and significance govern; a numerical tally does not.
 2. Non-SED participants may not make non-routine purchases or disbursements, enter into substantial contracts, or make decisions that affect company viability without the SED0's consent.
 3. Written provisions or policies that specify the terms under which non-SED participants may sign or act on the SED0's behalf with respect to recurring matters generally do not violate this paragraph F, as long as they are consistent with the SED0 having ultimate responsibility for the action.
- G. Independent business.

If the firm receives from or shares personnel, facilities, equipment, financial support, or other essential resources, with another business (whether DBE or non-DBE firm) or individual on other than commercially reasonable terms, the firm must prove that it would be viable as a going concern without the arrangement.

2. The firm must not regularly use another firm's business-critical vehicles, equipment, machinery, or facilities to provide a product or service under contract to the same firm or one in a substantially similar business.

Exception 1: Paragraphs G.1 and 2 of this section do not preclude the firm from providing services to a single customer or to a small number of the, provided that the firm is not merely a conduit, captive, or unnecessary third party acting on behalf of another firm or individual. Similarly, providing a volume discount to such a customer does not impair viability unless the firm repeatedly provides the service at a significant and unsustainable loss.

Exception 2. A firm may share essential resources and deal exclusively with another firm if a SEDO controls and of which the SEDO owns at least 51 percent ownership.

- H. Franchise and license agreements. A business operating under a franchise or license agreement may be certified if it meets the standards in this Chapter and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, NMDOT will generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or incense, if the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

Ref: 49 CFR §26.71

Section 9: NAICS Codes

- A. NMDOT must grant certification only for specific types that the SEDO controls. To become certified in an additional type of work, the firm must demonstrate to NMDOT only its SEDO controls the firm with respect to that type of work. NMDOT must not require that the firm be recertified or submit a new application for certification but must verify the SEDO's control of the firm in the additional type of work.
- 1) A correct NAICS code is the one that describes, as specifically as possible, the principal goods or services which the firm would provide to DOT recipients. Multiple NAICS codes may be assigned where appropriate. Program participants must rely on, and not depart from, the plain meaning of NAICS code descriptions in determining the scope of a firm's certification.
 - 2) If there is not a NAICS code that fully, clearly, or sufficiently narrowly describes the type(s) of work for which the firm seeks certification, the certifier must supplement or limit the assigned NAICS code(s) with a clear, specific, and concise narrative description

of the type of work in which the firm is certified. A vague, general, or confusing description is insufficient.

- 3) Firms and certifiers must check carefully to make sure that the NAICS codes cited in a certification are kept up-to-date and accurately reflect work which the UCP has determined the firm's owners can control. The firm bears the burden of providing detailed company information the certifying agency needs to make an appropriate NAICS code designation.
- 4) A certifier may change a certification classification or description if there is a factual basis in the record, in which case it must notify the firm 30 days before making the change. Certifiers may not apply such changes retroactively.
- 5) In addition to applying the appropriate NAICS code, the certifier may apply a descriptor from a classification scheme of equivalent detail and specificity. Such a descriptor (*e.g.*, a “work code”) does not supersede or limit the types of work for which a DBE is eligible under an appropriate NAICS code.

Ref: 49 CFR §26.73

CHAPTER V – CERTIFICATION PROCEDURES

Section 1: Unified Certification Programs

- A. In accordance with the requirements of 49 CFR §26.81, DOT recipients in New Mexico adopted a Unified Certification Program. The New Mexico Unified Certification Program (NMUCP) was submitted to FHWA and DOT and was subsequently approved. It has been implemented with all DOT recipients in the State of New Mexico operating in accordance with its terms. Interested applicants apply for DBE certification only once to be determined eligible to participate as a DBE with any DOT recipient in the state.
- B. The Construction and Civil Rights Bureau administers the DBE Program and NMUCP on behalf of NMDOT and the State of New Mexico.
- C. The NMUCP agreement provides for the establishment of a UCP meeting all the requirements of this section. The agreement specifies that:
 - 1) The NMUCP shall cooperate fully with oversight, review and monitoring activities of DOT and its operating administrations; and
 - 2) The NMUCP shall implement DOT directives and guidance concerning certification matters.
- D. The NMUCP shall make all certifications on behalf of DOT recipients in New Mexico with respect to participation in the DOT DBE Program.
 - 1) Certification decisions by the NMUCP shall be binding on all DOT recipients within New Mexico.

- 2) The NMUCP shall provide “one-stop shopping” to applicants for certification, such that an applicant is required to apply only once for a DBE certification that will be honored by all recipients in New Mexico.
 - 3) All obligations of recipients with respect to certification and non-discrimination must be carried out by UCPs, and recipients may use only UCPs that comply with the certification and nondiscrimination requirements of 49 CFR Part 26.
- E. A DBE firm must be fully, finally and currently certified before the due date for bids or offers on an Invitation to Bid or Request for Proposal on which a firm seeks to participate as a DBE.
- F. The NMUCP is not required to process an application for certification from a firm having its principal place of business outside New Mexico if the firm is not certified by the UCP in the state in which it maintains its principal place of residence. The “home state” shall share its information and documents concerning the firm with other UCPs that are considering the firm’s application.
- G. Subject to DOT approval as provided in this section, the recipients in two or more states may form a regional UCP. UCPs may also enter into written reciprocity agreements with other UCPs. Such an agreement shall outline the specific responsibilities of each participant. A UCP may accept the certification of any other UCP or DOT recipient.
- H. NMDOT may enter into agreements with other recipients, on a regional or inter-jurisdictional basis, to perform the certification functions required by this part. NMDOT may also grant reciprocity to other recipient’s certification decisions.
- I. The NMUCP maintains and makes available to interested people a real-time directory identifying all firms certified by the NMUCP. The directory is available online at: nmdot.dbesystem.com.

Ref: 49 CFR §26.81

Section 2: Certification Application and Procedures

- A. NMDOT is not required to process an application for certification from a firm that does not provide transportation-related goods or services.
- B. NMDOT’s certification application form and documentation requirements can be found at <https://transportation.gov/DBEFORMS>
- C. For information about the certification process, firms may contact NMDOT’s CCRB at:
- Phone: 505-795-4922
- D. Certification Decisions:
- 1) NMDOT will ensure that only firms certified as eligible DBEs under this section participate as DBEs in NMDOT’s program.

- 2) NMDOT will determine the eligibility of firms as DBEs consistent with the standards of Chapter IV of this Manual.
- 3) NMDOT will take all the following steps in determining whether a DBE firm meets the earlier defined Certification Standards:
 - a. Perform an on-site visit to the offices of the firm's principal place of business. NMDOT will interview the principal officers of the firm and review their resumes and/or work histories. NMDOT will also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in NMDOT's jurisdiction New Mexico or adjacent local areas. NMDOT may rely upon the site visit report of any other recipient with respect to a firm applying for certification.
 - b. Analyze documentation related to legal structure, ownership, and control of the applicant firm. This includes, but is not limited to, Articles of Incorporation; corporate by-laws or operating agreements; organizational, annual and board/member meeting records; stock ledgers and certificates; and State-issued Certification of Good Standing.
 - c. Analyze the bonding and financial capacity of the firm; lease and loan agreements; bank accounts signature cards.
 - d. Determine the work history of the firm, including contracts it has received and work it has completed; and payroll records.
 - e. Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program and its preferred locations for performing the work, if any.
 - f. Obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the DBE program.
 - g. Obtain complete Federal tax returns (or request for extensions) filed by the firm, its affiliates, and the socially and economically disadvantaged owners for the last three years. A complete return includes all forms, schedules, and statements filed with the Internal Revenue Service.
 - h. Require potential DBEs to complete and submit an appropriate application form. See Appendix "F" of this Manual. NMDOT will make sure that the applicant attests to the accuracy and truthfulness of the information on the application form. This shall be done either in the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States. NMDOT will review all information on the form prior to making a decision about the eligibility of the firm. NMDOT may request clarification of information contained in the application at any time in the application process. NMDOT will prohibit the release of personal financial information associated with determining net worth and related certification eligibility issues.
- 4) When another recipient, in connection with its consideration of the eligibility of a firm, makes a written request for certification information NMDOT has obtained about that firm (e.g., including application materials or the report of a site visit, if NMDOT has made one to the firm), NMDOT must promptly make the information available to the other recipient.

- 5) Subject to the approval of the concerned operating administration, NMDOT may charge a reasonable application fee. NMDOT does not charge an application fee currently.
- 6) NMDOT will safeguard from disclosure to unauthorized persons information gathered as part of the certification process that may reasonably be regarded as proprietary or other confidential business information, consistent with applicable Federal, state, and local law.
- 7) Once NMDOT has certified a DBE, it shall remain certified unless and until its certification has been removed, in whole or in part, through the procedures of Chapter V, Section 4. NMDOT may not require DBEs to reapply for certification or require recertification of currently certified firms. However, NMDOT may conduct a certification review of a certified DBE firm, including a new on-site review, if appropriate, considering changed circumstances, a complaint, or other information concerning the firm's eligibility. If NMDOT has grounds to question the firm's eligibility, NMDOT may conduct an on-site review on an unannounced basis, at the firm's offices and jobsites.
- 8) All DBEs must inform NMDOT in writing of any change in circumstances affecting the DBE's ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material change in the information provided in NMDOT's application form.
 - a. Changes in management responsibility among members of a limited liability company are covered by this requirement.
 - b. The DBE must attach supporting documentation describing in detail the nature of such changes.
 - c. The notice must take the form of an affidavit sworn to by the owners of the firm before a person who is authorized by state law to administer oaths or of an unsworn declaration executed under penalty of perjury of the laws of the United States. The DBE must provide written notification within 30 days of the occurrence of the change. If the DBE fails to make timely notification of such a change, the DBE will be deemed to have failed to cooperate under 49 CFR §26.109(c).
- 9) A DBE must provide to NMDOT, every year on or before the anniversary of the date of the DBE's certification, an affidavit sworn to by the firm's owners before a person who is authorized by state law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material changes in the information provided in its application form, except for changes about which the DBE has notified NMDOT under paragraph (9) of this section. The affidavit shall specifically affirm that the DBE firm continues to meet SBA business size criteria and the overall gross receipts cap of 49 CFR Part 26, documenting this affirmation with supporting documentation of the DBE firm's size and gross receipts (e.g. submission of Federal tax returns). If the DBE fails to provide this information in a timely manner, the DBE will be deemed to have failed to cooperate under 49 CFR §26.109(c) and NMDOT will take steps to remove the DBE firm's eligibility.
- 10) NMDOT will make decisions on applications for certification within 90 days of receiving from the applicant firm all required information. NMDOT may extend this time period once, for no more than an additional 60 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension. NMDOT's failure to make a decision by the applicable deadline under this paragraph is deemed a constructive denial of the application, on the basis of which the firm may appeal to DOT under 49 CFR §26.89.

- 11) NMDOT will advise each applicant within 30 days of receipt of the application whether the application is complete and suitable for evaluation and, if not, what additional information or action is required.
- 12) Except as otherwise provided in this paragraph, if an applicant withdraws its application before NMDOT has issued a decision on the application, the applicant can resubmit the application at any time. NMDOT may not apply the waiting period provided in Section 3(C) below before allowing the applicant to resubmit its application. However, NMDOT may place the reapplication behind other applications that have been made since the firm's previous application that was withdrawn. NMDOT may also apply the waiting period provided in Section 3(C) below to a firm that has established a pattern of frequently withdrawing applications before a decision is made.

Ref: 49 CFR §26.83

Section 3: Interstate Certification

- A. This section applies to any firm that is currently certified in its home state.
- B. When a firm currently certified in its home state applies to NMDOT for DBE certification, NMDOT may, at its discretion, accept the home state's certification and certify the firm without further procedures.
 - 1) To obtain certification in this manner, the firm must produce to NMDOT a copy of its certification from its home state.
 - 2) Before certifying the firm, NMDOT must confirm that the firm has a current valid certification from its home state. NMDOT can do so by reviewing the home state's electronic directory or obtaining written confirmation from the home state.
- C. In any situation in which NMDOT chooses not to accept the home state's certification of a firm as in Section 3 B, the applicant firm must provide the information in paragraphs C (1) through (4) of this section to NMDOT.
 - 1) The applicant firm must provide to NMDOT a complete copy of the application form, all supporting documents and any other information the applicant submitted to its home state, or any other state related to the firm's certification. This includes affidavits of no change and any notices of changes that the applicant firm submitted to its home state, as well as any correspondence the applicant firm has had with its home state's UCP or any other recipient concerning the applicant firm's application or status as a DBE firm.
 - 2) The applicant firm must also provide to NMDOT any notices or correspondence from states other than the applicant firm's home state relating to the applicant firm's status as an applicant or certified DBE in those states. For example, if the applicant firm has been denied certification or decertified in another state, or subject to a decertification in another state, the applicant firm must inform NMDOT of this fact and provide to NMDOT all documentation concerning these actions.
 - 3) If the applicant firm has filed a certification appeal with DOT, the applicant firm must inform NMDOT of that fact and provide to NMDOT the firm's letter of appeal and DOT's response.

- 4) The applicant firm must submit an affidavit sworn to by the firm's owners before a person who is authorized by state law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States.
 - a. This affidavit must affirm that the applicant firm has submitted all the information required by paragraph C of this section (49 CFR §26.85(c)) and the information is complete and, in the case of the information required by paragraph C (1) of this section, is an identical copy of the information submitted to the applicant firm's home state.
 - b. If the on-site report from the applicant firm's home state supporting the certification in the home state is more than three years old, as of the date of application to NMDOT, NMDOT requires that the applicant firm's affidavit also affirms that the facts in the on-site report remain true and correct.
- D. When NMDOT receives from an applicant firm all the information required by paragraph C of this section, NMDOT will take the following actions:
- 1) NMDOT will contact the applicant firm's home state within seven days and request a copy of the site visit review report for the firm, any updates to the site visit review, and any evaluation of the firm based on the site visit. The home state must transmit this information to NMDOT within seven days of receiving the request. A pattern by NMDOT of not making such requests in a timely manner or by the home state or any other state of not complying with such requests in a timely manner is noncompliance with 49 CFR §26.85.
 - 2) NMDOT will determine whether there is good cause to believe that the home state's certification of the firm is erroneous or should not apply in New Mexico. Reasons for making such a determination may include the following:
 - a. Evidence that the home state's certification was obtained by fraud;
 - b. New information, not available to the home state at the time of its certification, showing that the firm does not meet eligibility criteria;
 - c. The home state's certification was factually erroneous or was inconsistent with the requirements of this section (49 CFR §26.85);
 - d. The state law of New Mexico requires a result different from the state law of the home state;
 - e. The information provided by the applicant firm did not meet the requirements of paragraph C of this section.
 - 3) Unless NMDOT has determined that there is good cause to believe that the home state's certification is erroneous or should not apply in New Mexico, NMDOT will, no later than 60 days from the date NMDOT received from the applicant firm all of the information required by paragraph C of this section, send to the applicant firm a notice that it is certified and place the firm on the NMDOT directory of certified DBE firms.
 - 4) If NMDOT determines that there is good cause to believe that the home state's certification is erroneous or should not apply in New Mexico, NMDOT will, no later than 60 days from the date NMDOT received from the applicant firm all the information required by paragraph C of this section, send to the applicant firm a notice stating the reasons for the determination.

- a. This notice will state with particularity the specific reasons why NMDOT believes that the firm does not meet the requirements for DBE eligibility and will offer the firm an opportunity to respond to NMDOT with respect to these reasons.
 - b. The firm may elect to respond in writing, to request an in-person meeting with NMDOT's decision maker to discuss NMDOT's objection to the firm's eligibility, or both. If the firm requests a meeting, NMDOT will schedule the meeting to take place within 30 days of receiving the firm's request.
 - c. The firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the eligibility requirements of 49 CFR Part 26 with respect to the issues raised by NMDOT's notice. The firm is not otherwise responsible for further demonstrating its eligibility to NMDOT.
 - d. The decision maker for NMDOT will be an individual who is thoroughly familiar with the provisions of 49 CFR Part 26 concerning certification.
 - e. NMDOT will issue a written decision within 30 days of the receipt of the written response from the firm or the meeting with the decision maker, whichever is later.
 - f. The firm's application for certification is to remain, pending the outcome of this process.
 - g. A decision under D (4) of this section may be appealed to the DOT Office of Civil Rights under 49 CFR §26.89.
- E. If NMDOT has not received from the applicant firm's home state a copy of the site visit review report by a date 14 days after NMDOT made a timely request for it, NMDOT may hold action required by paragraphs D (2) through D (4) of this section in abeyance pending receipt of the site visit review report. In this event, NMDOT will, no later than 30 days from the date on which NMDOT received from the applicant firm all the information required by paragraph C of this section, notify the firm in writing of the delay in the process and the reason for it.
- F. When NMDOT denies a firm's application, rejects the application of a firm certified in its home state or any other state in which the firm is certified, through the procedures of paragraph D (4) of this section, or decertifies a firm, in whole or in part, NMDOT will make an entry in B2Gnow. NMDOT will enter the following information:
- 1) The name of the firm;
 - 2) The name(s) of the firm's owner(s);
 - 3) The type and date of the action;
 - 4) The reason for the action.
- G. NMDOT will check B2GNow at least once every month to determine whether any firm that is applying to NMDOT for certification or that NMDOT has already certified is on the list.
- H. For any such firm that is on the list, NMDOT will promptly request a copy of the listed decision from the UCP that made it. The UCP receiving such a request must provide a copy of the decision within seven days of receiving the request. When NMDOT receives such a decision, NMDOT will consider

the information in the decision in determining what, if any, action to take with respect to the certified DBE firm or applicant.

Ref: 49 CFR §26.85

Section 4: Denials of Initial Requests for Certification

- A. When NMDOT denies a request by a firm which is not currently certified with New Mexico's DBE Program to be certified as a DBE, NMDOT will provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based will be made available to the applicant on written request.
- B. When a firm is denied certification, a period of twelve months must elapse before the firm may reapply for certification. The time period for reapplication begins to run on the date the explanation was received by the firm. An applicant's appeal of NMDOT's decision to DOT pursuant to 49 CFR §26.89 does not extend this period.
- C. When NMDOT makes an administrative final denial of certification concerning a firm, the firm may appeal the denial to DOT under 49 CFR §26.89.

Ref: 49 CFR §26.86

Section 5: Removing a DBE's Eligibility

A. Ineligibility complaints:

- 1) Any person may file with NMDOT a written complaint alleging that a currently certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. NMDOT is not required to accept a general allegation that a firm is ineligible or an anonymous complaint. The complaint may include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not continue to be certified. Confidentiality of the complainant's identity must be protected as provided in 49 CFR §26.109(b).
- 2) NMDOT will review its records concerning the firm, any material provided by the firm and the complainant, and any other available information. NMDOT may request additional information from the firm or conduct any other investigation that is necessary.
- 3) If NMDOT determines, based on this review, that there is reasonable cause to believe that the firm is ineligible, NMDOT must provide written notice to the firm that it proposes to find the firm ineligible, setting forth the reasons for the proposed determination. If NMDOT determines that such reasonable cause does not exist, NMDOT must notify the complainant and the firm in writing of this determination and the reasons for it. All statements of reasons for findings on the issue of reasonable cause must specifically reference the evidence in the record on which each reason is based.

B. NMDOT Initiated Proceedings:

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

C. DOT Directive to Initiate Proceeding:

- 1) If the concerned operating administration determines that information in NMDOT's certification records, or other information available to the concerned operating administration, provides reasonable cause to believe that a firm certified by NMDOT does not meet eligibility criteria, the concerned operating administration may direct NMDOT to initiate a proceeding to remove the firm's certification.
- 2) DOT (concerned operating administration) must provide NMDOT and the firm with a notice setting forth the reasons for the directive, including any relevant documentation or other information.
- 3) NMDOT must immediately commence and prosecute a proceeding to remove eligibility.

D. When NMDOT notifies a firm that there is a reasonable cause to remove its eligibility as provided above, NMDOT will give the firm an opportunity for an informal hearing, at which time the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.

- 1) In such a proceeding, NMDOT bears the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of 49 CFR Part 26.
- 2) NMDOT will maintain a complete record of the hearing by any means acceptable under state law for the retention of a verbatim record of an administrative hearing. If there is an appeal to DOT, NMDOT will provide a transcript of the hearing to DOT and, on request, to the firm. NMDOT will retain the original record of the hearing. NMDOT may charge the firm only for the cost of copying the record.
- 3) The firm may elect to present information and arguments in writing, without going to a hearing. The firm should forward such information and/or arguments to the NMDOT Certification Officer. In such a situation, NMDOT bears the same burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards, as would be the case during a hearing.

E. NMDOT will ensure that the decision in a proceeding to remove the firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions. NMDOT's methods of implementing this requirement are as follows:

- 1) The Hearing Officer shall be a designee of the Secretary of NMDOT who is not assigned to the CCRB.
- 2) The decision-maker shall be an individual who is knowledgeable about the certification requirements of the NMDOT DBE Program.

F. NMDOT may base a decision to remove a firm's eligibility only on one or more of the following grounds:

- 1) Changes in the firm's circumstances since the certification of the firm by NMDOT that renders the firm unable to meet the eligibility standards of this part;
- 2) Information or evidence not available to NMDOT at the time the firm was certified;
- 3) Information relevant to eligibility that was concealed or misrepresented by the firm;
- 4) A change in the certification standards or requirements by DOT;
- 5) NMDOT's decision to certify the firm was clearly erroneous;
- 6) The firm has failed to cooperate with NMDOT (see §26.109(c));
- 7) The firm has exhibited a pattern of conduct indicating its involvement in attempts to subvert the intent or requirements of the DBE program (see §26.73(a)(2)); or
- 8) The firm has been suspended or debarred for conduct related to the DBE program. The notice required by paragraph G of this section must include a copy of the suspension or debarment action. A decision to remove a firm for this reason shall not be subject to the hearing procedures in paragraph D of this section.

G. Regarding notice of decisions:

NMDOT will provide the firm with a written notice of the decision and the reason for it, including specific references to the evidence in the record that supports each reason for the decision. The notice will inform the firm of the consequences of NMDOT's decision and of the availability of an appeal to DOT. NMDOT must send copies of the notice to the complainant in an ineligibility complaint or to the DOT (concerned operating administration) that directed NMDOT to initiate proceedings. Provided that, when sending such notice to a complainant other than a DOT operating administration, NMDOT will not include information reasonably construed as confidential business information without the written consent of the firm that submitted the information.

H. Status of the Firm During Proceeding:

- 1) A firm remains an eligible DBE during the pendency of NMDOT's proceeding to remove its eligibility.
- 2) The firm does not become ineligible until the issuance of the notice of decision.

I. When NMDOT removes a firm's eligibility, the following action will be taken:

- 1) When a prime contractor has made a commitment to using the ineligible firm, or NMDOT has made a commitment to using a DBE prime contractor, but a subcontractor or contract has not been executed before NMDOT issues the decertification notice, the ineligible firm does not count toward any contract goal or the overall state goal. NMDOT must direct the prime contractor to meet any contract goal with an eligible DBE firm or demonstrate to NMDOT that it has made a good faith effort to do so.

- 2) If a prime contractor has executed a subcontract with the firm before NMDOT has notified the firm of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE goal for the firm's work. In this case, or in a case where NMDOT has let a prime contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after the ineligibility notice was issued shall not count toward NMDOT's overall goal but may count toward any contract goal.
- 3) Exception: If the DBE's ineligibility is caused solely by its having exceeded the size standards during the performance of the contract, NMDOT will continue to count its participation on that contract toward overall and any contract goals.

J. Availability of Appeal:

When NMDOT makes an administratively final removal of a firm's eligibility under this section, the firm may appeal the removal to DOT under 49 CFR §26.89. Please refer to Section 7 of this chapter for the procedures of this process.

Ref: 49 CFR §26.87

Section 6: Summary of Suspension Certification

- A. NMDOT shall immediately suspend a DBE's certification without adhering to the requirements in §26.87(d) of this part when an individual owner whose ownership and control of the firm are necessary to the firm's certification dies or is incarcerated.
- B. NMDOT may immediately suspend a DBE's certification without adhering to the requirements in 49 CFR §26.87(d) when there is adequate evidence to believe that there has been a material change in circumstance that may affect the eligibility of the DBE firm to remain certified, or when the DBE fails to notify NMDOT in writing of any material change in circumstances as required by 49 CFR §26.83(i) or fails to timely file an affidavit of no change under 49 CFR §26.83(j). In determining the adequacy of the evidence to issue a suspension, the NMDOT shall consider all relevant factors, including how much information is available, the credibility of the information and allegations given the circumstances, whether or not important allegations are corroborated, and what interferences can reasonably be drawn as a result.
- C. The concerned operating administration may direct NMDOT to take action pursuant to paragraph (A) and (B) of this section if it determines that information available to it is sufficient to warrant immediate suspension.
- D. When a firm is suspended pursuant to paragraph (A) and (B) of this section, NMDOT shall immediately notify the DBE of the suspension by certified mail, return receipt requested, to the last known address of the DBE.
- E. Suspension is a temporary status of ineligibility pending an expedited show cause hearing/proceeding under 49 CFR §26.87 to determine whether the DBE is eligible to participate in the program and consequently should be removed. The suspension takes effect when the DBE receives, or is deemed to have received, the Notice of Suspension.
- F. While suspended, the DBE may not be considered to meet a contract goal on a new contract, and any work it does on a contract received during the suspension shall not be counted towards NMDOT's

overall goal. The DBE may continue to perform under an existing contract executed before the DBE received a Notice of Suspension and may be counted toward the contract goal during the period of suspension as long as the DBE is performing a commercially useful function under the existing contract.

- G. Following the receipt of the Notice of Suspension, if the DBE believes it is no longer eligible, it may voluntarily withdraw from the program, in which case no further action is required. If the DBE believes its eligibility should be reinstated, it must provide NMDOT information demonstrating that the firm is eligible notwithstanding its changed circumstances. Within 30 days of receiving this information, NMDOT must either lift the suspension and reinstate the firm's certification or commence a decertification action under 49 CFR §26.87. If NMDOT commences a decertification proceeding, the suspension remains in effect during the proceeding.
- H. The decision to immediately suspend a DBE under paragraph (A) or (B) of this section is not appealable to DOT. The failure of NMDOT to either lift the suspension and reinstate the firm or commence a decertification proceeding, as required by paragraph (G) of this section, is appealable to DOT under 49 CFR §26.89, as a constructive decertification.

Ref: 49 CFR §26.88

Section 7: Appealing Certification Decisions to DOT

A. A Firm Denied Certification:

- 1) A firm that is denied certification, or whose eligibility is removed by NMDOT, including SBA-certified firms, may make an administrative appeal to DOT.
- 2) A complainant in an ineligibility complaint (including the concerned operating administration in the circumstances provided in 49 CFR §26.87(C)), may appeal to DOT if NMDOT does not find reasonable cause to propose removing the firm's eligibility or, following a removal of eligibility proceeding, determines that the firm is eligible.
- 3) Appeals should be sent to the following address:
U.S. Department of Transportation
Departmental Office of Civil Rights
1200 New Jersey Avenue, SE
Washington, DC 20590-0001

- B. Pending DOT's decision in the matter, NMDOT's decision remains in effect. DOT does not stay the effect of NMDOT's decision while it is considering the appeal.
- C. Such appeals must be in writing to DOT within 90 days of the date of NMDOT's final decision and must include information and arguments concerning why the recipient's decision was erroneous, what significant fact that the NMDOT failed to consider, or what provisions of this part the NMDOT did not properly apply. DOT may accept an appeal filed later than 90 days after the date of the decision if DOT determines that there was good cause for the late filing of the appeal.
- D. When it receives an appeal, DOT requests a copy of the recipient's complete administrative record in the matter. If NMDOT is the recipient, NMDOT must provide the administrative record within 20 days of DOT's request. DOT may extend this period on the basis of a recipient's showing of good

cause. To facilitate DOT's review of a recipient's decision, NMDOT must ensure that such administrative records are well organized, indexed, and paginated. Records that do not conform with these requirements are not acceptable and will be returned to NMDOT to be corrected immediately. If an appeal is brought concerning one recipient's certification decision concerning a firm, and that recipient relied on the decision and/or administrative record of another recipient, this requirement applies to both recipients involved.

- E. DOT makes its decision based solely on the entire administrative record. DOT does not make a de novo review of the matter and does not conduct a hearing. DOT may supplement the administrative record by adding relevant information made available by the DOT Office of Inspector General; Federal, state, or local law enforcement authorities; officials of a DOT operating administration or other appropriate DOT office; a recipient; or a firm or other private party.
- F. As a recipient, when NMDOT provides supplementary information to DOT, NMDOT shall also make this information available to the firm and any third-party complainant involved, consistent with Federal or applicable state laws concerning freedom of information and privacy. DOT makes available, on request by the firm and any third-party complainant involved, any supplementary information it receives from any source.
 - 1) DOT affirms NMDOT's decision unless it determines, based on the entire administrative record, that NMDOT's decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provision of this part concerning certification.
 - 2) If DOT determines, after reviewing the entire administrative record, that NMDOT's decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification, DOT reverses NMDOT's decision and directs NMDOT to certify the firm or remove its eligibility, as appropriate. NMDOT must take the action directed by DOT's decision immediately upon receiving written notice of it.
 - 3) DOT is not required to reverse NMDOT's decision if DOT determines that a procedural error did not result in fundamental unfairness to the appellant or substantially prejudice the opportunity of the appellant to present its case.
 - 4) If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, DOT may remand the record to NMDOT with instructions seeking clarification or augmentation of the record before making a finding. DOT may also remand a case to NMDOT for further proceedings consistent with DOT instructions concerning the proper application of the provisions of 49 CFR Part 26.
 - 5) DOT does not uphold NMDOT's decision based on grounds not specified in NMDOT's decision.
 - 6) DOT's decision is based on the status and circumstances of the firm as of the date of the decision being appealed.
 - 7) DOT provides written notice of its decision to NMDOT, the firm, and the complainant in an ineligibility complaint. A copy of the notice is also sent to any other recipient whose administrative record or decision has been involved in the proceeding (See Paragraph D above). DOT will also notify the SBA in writing when it takes an action on an appeal that results in or confirms a loss of eligibility to any SBA-certified firm. The notice includes the reasons for DOT's decision, including specific references to the evidence in the record that supports each reason for the decision.

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

G. All decisions under this section are administratively final and are not subject to petitions for reconsideration.

Ref: 49 CFR §26.89

Section 8: Effect of DOT Certification Appeal Decisions

A. If NMDOT is a recipient from whose action an appeal under 49 CFR §26.89 is taken, the decision is binding. It is not binding on other recipients.

B. If NMDOT is a recipient to which a DOT determination under 49 CFR §26.89 is applicable, NMDOT will take the following action:

- 1) If DOT determines that NMDOT erroneously certified a firm, the firm's eligibility will be removed upon receipt of the determination, without further proceedings on NMDOT's part. Effective on the date of receipt of the DOT's determination, the consequences of a removal of eligibility set forth in §26.87(i) take effect.
- 2) If DOT determines that NMDOT erroneously failed to find reasonable cause to remove the firm's eligibility, NMDOT must expeditiously commence a proceeding to determine whether the firm's eligibility should be removed.
- 3) If DOT determines that NMDOT erroneously declined to certify or remove the eligibility of the firm, NMDOT must certify the firm as of the effective date of receipt of the written notice of DOT's determination.
- 4) If DOT determines that NMDOT erroneously determines that the presumption of social and economic disadvantage either should or should not be deemed rebutted, NMDOT must take appropriate corrective action as determined by DOT.
- 5) If DOT affirms NMDOT's determination, no further action is necessary.
 - a. Where DOT has upheld NMDOT's denial of certification to or removal of eligibility from a firm, or directed the removal of a firm's eligibility, other certifiers with whom the firm is certified may commence proceeding to remove the firm's eligibility under 49 CFR §26.87. Such NMDOT must not remove the firm's eligibility absent such a proceeding. Where DOT or the concerned operating agency has reversed NMDOT's denial of certification to or removal of eligibility from a firm, other recipients must take the concerned operating agency's action into account in any certification action involving the firm. However, other certifiers are not required to certify the form based on DOT's decision.

Ref: 49 CFR § 26.91

CHAPTER VI – COMPLIANCE AND ENFORCEMENT

Section 1: Compliance Procedures which apply to NMDOT

- A. If NMDOT fails to comply with any requirement of this part, NMDOT may be subject to formal enforcement action under 49 CFR §26.103 or §26.105 or appropriate program sanctions by the concerned OA, such as the suspension or termination of Federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied. Program sanctions may include, in the case of the FHWA program, actions provided for under 23 CFR §1.36; in the case of the FAA program, actions consistent with 49 U.S.C. 47106(d), 47111(d), and 47122; and in the case of the FTA program, any actions permitted under 49 U.S.C. chapter 53 or applicable FTA program requirements.
- B. As provided in federal statute, NMDOT will not be subject to compliance actions or sanctions for failing to carry out any requirement of 49 CFR Part 26 because NMDOT has been prevented from complying because a federal court has issued a final order in which the court found that the requirement is unconstitutional.

Ref: 49 CFR §26.101

Section 2: Enforcement Actions under FHWA and FTA

- A. Noncompliance complaints. Any person who believes that a recipient has failed to comply with its obligations under this part may file a written complaint with the concerned OA's Office of Civil Rights.
- B. A complaint must be filed no later than 180 days after the date of the alleged violation or the date on which the continuing course of conduct in violation of the DBE Program is discovered. In response to a written request, the DOT Office of Civil Rights may extend the time for filing in the interest of justice, specifying in writing the reason for so doing. The DOT Office of Civil Rights may protect the confidentiality of the complainant's identity as provided in 49 CFR §26.109. Complaints under 49 CFR Part 26 are limited to allegations of violations of the provisions of 49 CFR Part 26.
- C. Compliance reviews. The concerned OA may review the recipient's compliance with 49 CFR Part 26 at any time, including reviews of paperwork and on-site reviews, as appropriate. The DOT Office of Civil Rights may direct the OA to initiate a compliance review based on complaints received.
- D. Reasonable cause notice. If it appears, from the investigation of a complaint or the results of a compliance review, that NMDOT, as a recipient, is in noncompliance with 49 CFR Part 26, the appropriate DOT office promptly sends NMDOT, return receipt requested, a written notice advising NMDOT that there is reasonable cause to find NMDOT in noncompliance. The notice states the reasons for this finding and directs NMDOT to reply within 30 days concerning whether NMDOT wishes to begin conciliation.
- E. Conciliation:
 - 1) If NMDOT requests conciliation, the appropriate DOT office shall pursue conciliation for at least 30, but not more than 120, days from the date of NMDOT's request. The appropriate DOT office

may extend the conciliation period for up to 30 days for good cause, consistent with applicable statutes.

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

F. Enforcement actions.

- 1) Enforcement actions are taken as provided in 49 CFR Part 26.
- 2) Applicable findings in enforcement proceedings are binding on all DOT offices.

Ref: 49 CFR §26.103

Section 3: Enforcement Actions in FAA Programs

- A. Compliance with all requirements by airport sponsors and other recipients of FAA financial assistance is enforced through the procedures of Title 49 of the United States Code, including 49 U.S.C. 47106(d), 47111(d), and 47122, and regulations implementing them.
- B. The provisions of 49 CFR §26.103(b) and this section apply to enforcement actions in FAA programs.
- C. Any person who knows of a violation of this part by a recipient of FAA funds may file a complaint under 14 CFR Part 16 with the Federal Aviation Administration Office of Chief Counsel.

Ref: 49 CFR §26.105

Section 4: Enforcement Actions for Participants in the DBE Program

- A. If a firm that does not meet the eligibility criteria of Chapter IV of this Manual - DBE Certification Standards and attempts to participate in NMDOT's DBE Program as a DBE based on false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, DOT may initiate suspension or debarment proceedings against the firm under 2 CFR Parts 180 and 1200.
- B. If a firm, in order to meet DBE contract goals or other DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility

criteria of Chapter IV of this Manual, DOT may initiate suspension or debarment proceedings against that firm under 2 CFR Parts 180 and 1200.

- C. In a suspension or debarment proceeding brought under paragraph (A) or (B) of this section, the concerned OA may consider the fact that a purported DBE has been certified by a recipient. Such certification does not preclude DOT from determining that the purported DBE, or another firm that has used or attempted to use it to meet DBE goals, should be suspended or debarred.
- D. DOT may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the DBE program whose conduct is subject to such action under 49 CFR Part 31.
- E. DOT may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any program or otherwise violates applicable Federal statutes.

Ref: 49 CFR §26.107

Section 5: Confidentiality, Cooperation, and Intimidation or Retaliation

- A. NMDOT will safeguard from disclosure to third parties' information that may reasonably be regarded as confidential business information, consistent with Federal, state, and local law. The Inspection of Public Records Act, NMSA 1978, Chapter 14, Article 2, allows NMDOT to protect certain records from inspection or disclosure, including contractor records that are privileged or confidential information, etc. Notwithstanding any contrary provisions of state or local law, NMDOT will not release personal financial information submitted in response to the personal net worth requirement to a third party (other than DOT) without the written consent of the submitter.
- B. Availability of records.
 - 1) In responding to requests for information concerning any aspect of the DBE program, DOT complies with provisions of the Federal Freedom of Information (5 U.S.C. 552) and Privacy Acts (5 U.S.C. 552a). DOT may make available to the public any information concerning the DBE program release of which is not prohibited by Federal law.
 - 2) Notwithstanding any provisions of Federal or State law, NMDOT will not release information that may reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting documentation. However, NMDOT must transmit this information to DOT in any certification appeal proceeding under 49 CFR §26.89 or to any other state to which the individual's firm has applied for certification as a DBE.
- C. Confidentiality of information on complainants. Notwithstanding the provisions of paragraph A of this section, the identity of complainants shall be kept confidential at their election. If such confidentiality hinders the investigation, proceeding or hearing, or result in a denial of appropriate administrative due process to other parties, the complainant must be advised for the purpose of waiving the privilege. Complainants are advised that, in some circumstances, failure to waive the privilege may result in the

closure of the investigation or dismissal of the proceeding or hearing. FAA follows the procedures of 14 CFR Part 16 with respect to confidentiality of information in complaints.

- D. Cooperation. All participants in the DBE program (including, but not limited to, recipients, DBE firms and applicants for DBE certification, complainants and appellants, and contractors using DBE firms to meet contract goals) are required to cooperate fully and promptly with DOT and recipient compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so shall be a ground for appropriate action against the party involved (e.g., with respect to recipients, a finding of noncompliance; with respect to DBE firms, denial of certification or removal of eligibility and/or suspension and debarment; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment).
- E. Intimidation and retaliation. Recipients, contractors, or any other participants in the program must not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by 49 CFR Part 26, or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under 49 CFR §26.109. Violations of this prohibition constitute noncompliance with 49 CFR Part 26.

Ref: 49 CFR §26.109

APPENDIX A



NEW MEXICO DEPARTMENT OF TRANSPORTATION DISADVANTAGED BUSINESS ENTERPRISE PROGRAM POLICY STATEMENT

The New Mexico Department of Transportation (NMDOT) has established a Disadvantaged Business Enterprise (DBE) Program in accordance with regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 26. NMDOT has received Federal financial assistance from DOT, and as a condition of receiving this assistance, NMDOT has signed an assurance that it will comply with 49 CFR Part 26.

It is the policy of NMDOT to ensure that DBEs, as defined in 49 CFR Part 26, have an equal opportunity to receive and participate in DOT-assisted contracts. In furtherance of the spirit and intent of 49 CFR Part 26, NMDOT also adopts the following policies and objectives:

- 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 DOT-assisted contracts.
- 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 promote the use of DBEs in all types of federally assisted contracts and procurement activities; and
- To assist the development of firms that can compete successfully in the marketplace outside the DBE Program.

The Construction and Civil Rights Bureau's Compliance Manager is designated as NMDOT's DBE Liaison Officer. In that capacity, the Director is responsible for implementing all aspects of the DBE Program. Implementation of the DBE Program is accorded the same priority as compliance with all other legal obligations incurred by NMDOT in its financial assistance agreements with DOT.

This policy statement shall be disseminated throughout NMDOT and to DBE and non-DBE business communities that perform work on DOT-assisted contracts. This policy statement is also available on the NMDOT website.

DocuSigned by:

Ricky Serna

10/04/24

Ricky Serna
Cabinet Secretary

Date

Appendix B

Form A-1239
Rev. 04/15 CCRB



NMDOT DBE COMMERCIALLY USEFUL FUNCTION (CUF) INTERVIEW and ASSESSMENT

Part A (Completed by the Field Inspector) Project No./Control No.: Project Location/Termini:		Agency Staff Conducting Interview and Completing Form: Field Staff Member: Office Staff Member: Project Manager: District: Interview Date:	
DBE Subcontractor:			
Prime Contractor:			
Part B (Completed by the Field Inspector) DESCRIBE THE DBE SCOPE OF WORK:			
Describe Work Being Performed Today:		DBE Start Date: DBE Estimated Completion Date:	
Work Item Number: (Continue on Back of Form)	Work Item Description (Observed Work Performed)	Approximate % Complete as of This Date	Subcontracted Dollar Amount
Part C (Completed by the Field Inspector) REGARDING DBE'S FOREMAN/SUPT. Name of DBE's foreman/superintendent: _____ Is the foreman/superintendent exclusively employed by DBE? Yes No Who does the foreman/superintendent directly reports to: _____			
<u>REGARDING DBE'S EMPLOYEES</u>			
Name of the DBE employees working Today: _____			
Do the DBE's employees receive work assignments from DBE Foreman / Supt?		Yes No	
-----Below Completed by NMDOT or LPA Project or Office Manager Only -----			
Is the foreman exclusively employed by the DBE?		Yes No	
Is the foreman shown on the DBE's payroll?		Yes No	
Is the foreman shown on any other Firm's payroll?		Yes No	
Are the DBEs' employees shown on any other contractor's payroll on this contract?		Yes No	
If yes, whose? _____			
Are DBE's employees shown on the payrolls on this contract?		Yes No	

REGARDING DBE'S EQUIPMENT (Part C, continued, Completed by the Field Inspector)			
Listing of DBE Major Equipment On-Site Today: _____			
Does the equipment have the DBE's name or logo?	Yes	No	
If another firm's name or logo is shown, identify: _____			
Does the equipment belong to the DBE?	Yes,	No,	Leased
-----Below-Completed by -NMDOT or LPA Project or Office Manager Only -----			
If leased or rented, is there a copy of the lease or rental agreement in project file?	Yes	No	N/A
REGARDING DBE'S WORK PERFORMANCE (Completed by the Field Inspector)			
Has any other contractor performed work that was to be performed by the DBE? Yes No			
If yes, identify the contractor who performed the work: _____			
What work items did the identified contractor perform? _____			
Were these items on the DBE's subcontract?	Yes	No	
Has the DBE owner been present on the job site?	Yes	No	
Does the DBE appear to have control over the other contractor's employees and the work done?	Yes	No	
Part D PROJECT MANAGER DETERMINATION (Completed by the Project Manager only) Based on knowledge of the DBE work activities on the project and information contained herein, I believe the DBE firm listed above (circle one) is is not performing a Commercially Useful Function on this project. If it is believed the DBE Firm is not performing a CUF on this project, contact the CCRB section for further guidance. <div style="display: flex; justify-content: space-around; margin-top: 20px;"> <div style="text-align: center; width: 40%;"> _____ Project Manager </div> <div style="text-align: center; width: 40%;"> _____ Date </div> </div> <p>NOTE: Definition - Commercially Useful Function - A DBE subcontractor performs a Commercially Useful Function when it is responsible for execution of a distinct element of work on a contract or subcontract and carries out its responsibilities by actually performing, managing and supervising the work involved.</p>			
PM Comments:			
Part E Additional Field Inspector Comments:			
Comments:			
Distribution: Original to Project DBE File, Copy to Prime Contractor, (or District Local Governments Coordinator if LPA Project)			

COMMERCIALLY USEFUL FUNCTION (CUF) – FHWA 49CFR26.55

Department Form A-1239 Instructions:

The CUF Form A-1239 should be completed at least once for each DBE working on the project. Please refer to the following information for guidance in completing the Form.

A DBE SUBCONTRACTOR MUST PERFORM A CUF IN ORDER TO BE COUNTED TOWARDS THE DBE CONTRACT GOAL

The following provides guidance on the criteria for determination of Commercially Useful Function. Keep this in mind when interviewing the DBE Subcontractor and filling out the Form. A DBE Subcontractor must:

MANAGE:

Manage the work themselves.

- Schedule work operations, order equipment and materials, hire and fire employees, including supervisory employees.

SUPERVISE:

Supervise daily operations

- Can use a skilled superintendent or foreman employed by the DBE.

PERFORM:

Perform the work stated in the contract or subcontract with their own equipment.

- **Regular Equipment** is owned or leased and operated on a long term agreement and not on an *ad hoc* or contract by contract agreement.
 - a. The equipment would be used by the DBE firm on any other subcontract with any other contractor.
 - b. The equipment would be owned by the DBE firm. Or
The equipment would be leased/rented from traditional equipment lease/rental sources.
 - c. The DBE firm would have a rental/lease agreement for any rented or leased equipment.
 - d. The equipment **cannot** belong to:
 - (1.) Prime Contractor
 - (2.) Another subcontractor on the present project.
 - (3.) Supplier of materials being installed by the DBE firm.
 - e. The equipment **cannot** come from another contractor fully operated meaning equipment + operator

Perform the work with their own employees.

- **Regular Employee** is a person who:
 - a. Would be working for the DBE firm on any other subcontract with any other contractor.
 - b. Is a permanent employee of the DBE firm, or has been recruited through the traditional recruitment and/or employment centers.
 - c. Has not recently been employed by the prime contractor on the present project, another subcontractor on the present project, or the renter-lessor of equipment being used on the present project.
 - d. Is not a member of a construction crew, which regularly works for a non-DBE.
 - e. Is not a licensed contractor who is at the time “unemployed” or “between jobs.”

Subcontracting part of the work of the contract.

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

Trucks/Equipment must display name of DBE firm

- Printed name or logo

Instructions:

Much of the form can be completed by the field inspector with minimal interaction with the DBE Subcontractor. The field inspector will need to interview the DBE Subcontractor Foreman for specific questions regarding work activity, crew and equipment.

Field Inspector

- Part A - The field inspector or PM designee should complete Part A of the Form. Print your name as Field Staff Member and the date of the interview.
- Part B – Describe the general scope of the DBE subcontractor work. Use the backside of the form if more space is needed. Describe the work being performed on the date of the interview. DBE start date, estimated completion date and Subcontract Amount may need to be filled in by the office manager.
- Part C – Fill in the information requested. Interview the DBE foreman for any information needed to fill out this part.

Office Staff

- Complete remaining portions of the form that require payroll verification or subcontract information.

Project Manager

- Complete Part D
- Notify CCRB should there be any concerns regarding Commercially Useful Function

NMDOT DBE PROGRAM MANUAL

APPENDIX C – GUIDANCE CONCERNING GOOD FAITH EFFORTS

(Ref: Appendix A to 49 CFR Part 26—Guidance Concerning Good Faith Efforts)

I. When, as a recipient, you establish a contract goal on a DOT-assisted contract for procuring construction, equipment, services, or any other purpose, a bidder must, in order to be responsible and/or responsive, make good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.

II. In any situation in which you have established a contract goal, part 26 requires you to use the good faith efforts mechanism of this part. As a recipient, it is up to you to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. It is important for you to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made, based on the regulations and the guidance in this Appendix. The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere *pro forma* efforts are not good faith efforts to meet the DBE contract requirements. We emphasize, however, that your determination concerning the sufficiency of the firm's good faith efforts is a judgment call. Determinations should not be made using quantitative formulas.

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

IV. The following is a list of types of actions which you should consider as part of the bidder's good faith efforts to obtain DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

A. (1) Conducting market research to identify small business contractors and suppliers and soliciting through all reasonable and available means the interest of all certified DBE that have the capability to perform the work of the contract. This may include attendance at pre-bid and business matchmaking meetings and events, advertising and/or written notices, posting of Notices of Sources Sought and/or Requests for Proposals, written notices or emails to all DBEs listed in the State's directory of transportation firms that specialize in the areas of work desired (as noted in the DBE directory) and which are located in the area or surrounding areas of the project.

(2) The bidder should solicit this interest as early in the acquisition process as practicable to allow the DBEs to respond to the solicitation and submit a timely offer for the subcontract. The bidder should determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

B. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units (for example, smaller tasks or quantities) to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces. This may include, where possible, establishing flexible timeframes for performance and delivery schedules in a manner that encourages and facilitates DBE participation.

C. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation with their offer for the subcontract.

D. (1) Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.

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

E. (1) Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal. Another practice considered an insufficient good faith effort is the rejection of the DBE because its quotation for the work was not the lowest received. However, nothing in this paragraph shall be constructed to require the bidder or prime contractor to accept unreasonable quotes in order to satisfy contract goals.

(2) A prime contractor's inability to find a replacement DBE at the original price is not alone sufficient to support a finding that good faith efforts have been made to replace the original DBE. The fact that the contractor has the ability and/or desire to perform the contract work with its own forces does not relieve the contractor of the obligation to make good faith efforts to find a replacement DBE, and it is not a sound basis for rejecting a prospective replacement DBE's reasonable quote.

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


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

H. Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, state, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

V. In determining whether a bidder has made good faith efforts, it is essential to scrutinize its documented efforts. At a minimum, you may consider the performance of other bidders in meeting the contract. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts. As provided in §26.53(b)(2)(vi), you must also require the contractor to submit copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract to review whether DBE prices were substantially higher; and the contact the DBEs listed on a contractor's solicitation to inquire as to whether they were contacted by the prime. *Pro forma* mailings to DBEs requesting bids are not alone sufficient to satisfy good faith efforts under this rule.

VI. A promise to use DBEs after contract award is not considered to be responsive to the contract solicitation or to constitute good faith efforts.



Appendix D

	U.S. Department of Transportation	Personal Net Worth Statement For DBE/ACDBE Program Eligibility As of 	OMB APPROVAL NO: EXPIRATION DATE:		
<p>This form is used by all participants in the U.S. Department of Transportation's Disadvantaged Business Enterprise (DBE) Programs. Each individual owner of a firm applying to participate as a DBE or ACDBE, whose ownership and control are relied upon for DBE certification must complete this form. Each person signing this form authorizes the Unified Certification Program (UCP) recipient to make inquiries as necessary to verify the accuracy of the statements made. The agency you apply to will use the information provided to determine whether an owner is economically disadvantaged as defined in the DBE program regulations 49 C.F.R. Parts 23 and 26. Return form to appropriate UCP certifying member, not U.S. DOT.</p>					
Name		Business Phone			
Residence Address (As reported to the IRS) City, State and Zip Code		Residence Phone			
Business Name of Applicant Firm					
Spouse's Full Name (Marital Status: Single, Married, Divorced, Union)					
ASSETS	(Omit Cents)	LIABILITIES	(Omit Cents)		
Cash and Cash Equivalents	\$ 	Loan on Life Insurance (Complete Section 5)	\$ 		
Retirement Accounts (IRAs, 401Ks, 403Bs, Pensions, etc.) (Report full value minus tax and interest penalties that would apply if assets were distributed today) (Complete Section 3)	\$ 	Mortgages on Real Estate Excluding Primary Residence Debt (Complete Section 4)	\$ 		
Brokerage, Investment Accounts	\$ 	Notes, Obligations on Personal Property (Complete Section 6)	\$ 		
Assets Held in Trust	\$ 	Notes & Accounts Payable to Banks and Others (Complete Section 2)	\$ 		
Loans to Shareholders & Other Receivables (Complete section 6)	\$ 	Other Liabilities (Complete Section 8)	\$ 		
Real Estate Excluding Primary Residence (Complete Section 4)	\$ 	Unpaid Taxes (Complete Section 8)	\$ 		
Life Insurance (Cash Surrender Value Only) (Complete Section 5)	\$ 				
Other Personal Property and Assets (Complete Section 6)	\$ 				
Business Interests Other Than the Applicant Firm (Complete Section 7)	\$ 				
Total Assets	\$ 	Total Liabilities	\$ 		
		NET WORTH			
Section 2. Notes Payable to Banks and Others					
Name of Noteholder(s)	Original Balance	Current Balance	Payment Amount	Frequency (monthly, etc.)	How Secured or Endorsed Type of Collateral

Section 3. Brokerage and custodial accounts, stocks, bonds, retirement accounts. (Full Value) (Use attachments if necessary).				
Name of Security / Brokerage Account / Retirement Account	Cost	Market Value Quotation/Exchange	Date of Quotation/Exchange	Total Value

Section 4. Real Estate Owned (Including Primary Residence, Investment Properties, Personal Property Leased or Rented for Business Purposes, Farm Properties, or any Other Income Producing property). (List each parcel separately. Add additional sheets if necessary).			
	Primary Residence	Property B	Property C
Type of Property			
Address			
Date Acquired and Method of Acquisition (purchase, inherit, divorce, gift, etc.)			
Names on Deed			
Purchase Price			
Present Market Value			
Source of Market Valuation			
Name of all Mortgage Holders			
Mortgage Acc. # and balance (as of date of form)			
Equity line of credit balance			
Amount of Payment Per Month/Year (Specify)			

Section 5. Life Insurance Held (Give face amount and cash surrender value of policies, name of insurance company and beneficiaries).				
Insurance Company	Face Value	Cash Surrender Amount	Beneficiaries	Loan on Policy Information

Section 6. Other Personal Property and Assets (Use attachments as necessary)				
Type of Property or Asset	Total Present Value	Amount of Liability (Balance)	Is this asset insured?	Lien or Note amount and Terms of Payment
Automobiles and Vehicles (including recreation vehicles, motorcycles, boats, etc.) Include personally owned vehicles that are leased or rented to businesses or other individuals.				
Household Goods / Jewelry				
Other (List)				
Accounts and Notes Receivables				
Section 7. Value of Other Business Investments, Other Businesses Owned (excluding applicant firm) Sole Proprietorships, General Partners, Joint Ventures, Limited Liability Companies, Closely-held and Public Traded Corporations				
Section 8. Other Liabilities and Unpaid Taxes (Describe)				
Section 9. Transfer of Assets: Have you within 2 years of this personal net worth statement, transferred assets to a spouse, domestic partner, relative, or entity in which you have an ownership or beneficial interest including a trust? Yes <input type="checkbox"/> No <input type="checkbox"/> If yes, describe.				
<p>I declare under penalty of perjury that the information provided in this personal net worth statement and supporting documents is complete, true and correct. I certify that no assets have been transferred to any beneficiary for less than fair market value in the last two years. I recognize that the information submitted in this application is for the purpose of inducing certification approval by a government agency. I understand that a government agency may, by means it deems appropriate, determine the accuracy and truth of the statements in the application and this personal net worth statement, and I authorize such agency to contact any entity named in the application or this personal financial statement, including the names banking institutions, credit agencies, contractors, clients, and other certifying agencies for the purpose of verifying the information supplied and determining the named firm's eligibility. I acknowledge and agree that any misrepresentations in this application or in records pertaining to a contract or subcontract will be grounds for terminating any contract or subcontract which may be awarded; denial or revocation of certification; suspension and debarment; and for initiating action under federal and/or state law concerning false statement, fraud or other applicable offenses.</p>				
 Signature (DBE/ACDBE Owner)		 Date		
NOTARY CERTIFICATE: (Insert applicable state acknowledgment, affirmation, or oath)				
In collecting the information requested by this form, the Department of Transportation complies with Federal Freedom of Information and Privacy Act (5 U.S.C. 552 and 552a) provisions. The Privacy Act provides comprehensive protections for your personal information. This includes how information is collected, used, disclosed, stored, and discarded. Your information will not be disclosed to third parties without your consent. The information collected will be used solely to determine your firm's eligibility to participate in the Disadvantaged Business Enterprise (DBE) Program or Airport Concessionaire DBE Programs as defined in 49 C.F.R. Parts 23 and 26. You may review DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (65 FR 19477).				



General Instructions for Completing the Personal Net Worth Statement for DBE/ACDBE Program Eligibility

Please do not make adjustments to your figures pursuant to U.S. DOT regulations 49 C.F.R. Parts 23 and 26. The agency that you apply to will use the information provided on your completed Personal Net Worth (PNW) Statement to determine whether you meet the economic disadvantage requirements of 49 C.F.R. Parts 23 and 26. If there are discrepancies or questions regarding your form, it may be returned to you to correct and complete again.

An individual's personal net worth according to 49 C.F.R. Parts 23 and 26 includes only his or her own share of assets held separately, jointly, or as community property with the individual's spouse and excludes the following:

- Individual's ownership interest in the applicant firm;
- Individual's equity in his or her primary residence;
- Tax and interest penalties that would accrue if retirement savings or investments (e.g., pension plans, Individual Retirement Accounts, 401(k) accounts, etc.) were distributed at the present time.

Indicate on the form, if any items are jointly owned. If the personal net worth of the majority owner(s) of the firm exceeds \$1.32 million, as defined by 49 C.F.R. Parts 23 and 26, the firm is not eligible for DBE or ACDBE certification. If the personal net worth of the majority owner(s) exceeds the \$1.32 million cap at any time after your firm is certified, the firm is no longer eligible for certification. Should that occur, it is your responsibility to contact your certifying agency in writing to advise that your firm no longer qualifies as a DBE or ACDBE. You must fill out all line items on the Personal Net Worth Statement.

If necessary, use additional sheets of paper to report all information and details. If you have any questions about completing this form, please contact one of the UCP certifying agencies.

Assets

All assets must be reported at their current fair market values as of the date of your statement. *Assessor's assessed value for real estate, for example, is not acceptable.* Assets held in a trust should be included.

Cash and Cash Equivalents: On page 1, enter the total amount of cash or cash equivalents in bank accounts, including checking, savings, money market, certificates of deposit held domestic or foreign. Provide copies of the bank statement.

Retirement Accounts, IRA, 401Ks, 403Bs, Pensions: On page 1, enter the full value minus tax and interest penalties that would apply if assets were distributed as of the date of the form. Describe the number of shares, name of securities, cost market value, date of quotation, and total value in section 3 on page 2.

Brokerage and Custodial Accounts, Stocks, Bonds, Retirement Accounts: Report total value on page 1, and on page 2, section 3, enter the name of the security, brokerage account, retirement account, etc.; the cost; market value of the asset; the date of quotation; and total value as of the date of the PNW statement.

Assets Held in Trust: Enter the total value of the assets held in trust on page 1, and provide the names of beneficiaries and trustees, and other information in Section 6 on page 3.

Loans to Shareholders and Other Receivables not listed: Enter amounts loaned to you from your firm, from any other business entity in which you hold an ownership interest, and other receivables not listed above. Complete Section 6 on page 3.

Real Estate: The total value of real estate excluding your primary residence should be listed on page 1. In section 4 on page 2, please list your primary residence in column 1, including the address, method of acquisition, date of acquired, names of deed, purchase price, present fair market value, source of market valuation, names of all mortgage holders, mortgage account number and balance, equity line of credit balance, and amount of payment. List this information for all real estate held. Please ensure that this section contains all real estate owned, including rental properties, vacation properties, commercial properties, personal property leased or rented for business purposes, farm properties and any other income producing properties, etc. Attach additional sheets if needed.

Life Insurance: On page 1, enter the cash surrender value of this asset. In section 5 on page 2, enter the name of the insurance company, the face value of the policy, cash surrender value, beneficiary names, and loans on the policy.

Other Personal Property and Assets: Enter the total value of personal property and assets you own on page 1. Personal property includes motor vehicles, boats, trailers, jewelry, furniture, household goods, collectibles, clothing, and personally owned vehicles that are leased or rented to businesses or other individuals. In section 6 on page 3, list these assets and enter the present value, the balance of any liabilities, whether the asset is insured, and lien or note information and terms of payments. For accounts and notes receivable, enter the total value of all monies owed to you personally, if any. This should include shareholder loans to the applicant firm, if those exist. If the asset is insured, you may be asked to provide a copy of the policy. You may also be asked to provide a copy of any liens or notes on the property.

Other Business Interests Other than Applicant Firm: On page 1, enter the total value of your other business investments (excluding the applicant firm). In section 7 on page 3, enter information concerning the businesses you

hold an ownership interest in, such as sole proprietorships, partnerships, joint ventures, corporations, or limited liability corporations (other than the applicant firm). Do not reduce the value of these entries by any loans from the outside firm to the DBE/ACDBE applicant business.

Liabilities

Mortgages on Real Estate: Enter the total balance on all mortgages payable on real estate on page 1.

Loans on Life Insurance: Enter the total value of all loans due on life insurance policies on page 1, and complete section 5 on page 2.

Notes & Accounts Payable to Bank and Others: On page 1, section 2, enter details concerning any liability, including name of noteholders, original and current balances, payment terms, and security/collateral information. The entries should include automobile installment accounts. This should not, however, include any mortgage balances as this information is captured in section 4. Do not include loans for your business or mortgages for your properties in this section. You may be asked to submit copy of note/security agreement, and the most recent account statement.

Other Liabilities: On page 1, enter the total value due on all other liabilities not listed in the previous entries. In section 8, page 3, report the name of the individual obligated, names of co-signers, description of the liability, the name of the entity owed, the date of the obligation, payment amounts and terms. Note: Do not include contingent liabilities in this section. Contingent liabilities are liabilities that belong to you only if an event(s) should occur. For example, if you

have co-signed on a relative's loan, but you are not responsible for the debt until your relative defaults, that is a contingent liability. Contingent liabilities do not count toward your net worth until they become actual liabilities.

Unpaid Taxes: Enter the total amount of all taxes that are currently due, but are unpaid on page 1, and complete section 8 on page 3. Contingent tax liabilities or anticipated taxes for current year should not be included. Describe in detail the name of the individual obligated, names of co-signers, the type of unpaid tax, to whom the tax is payable, due date, amount, and to what property, if any, the tax lien attaches. If none, state "NONE." You must include documentation, such as tax liens, to support the amounts.

Transfers of Assets:

Transfers of Assets: If you checked the box indicating yes on page 3 in this category, provide details on all asset transfers (within 2 years of the date of this personal net worth statement) to a spouse, domestic partner, relative, or entity in which you have an ownership or beneficial interest including a trust. Include a description of the asset; names of individuals on the deed, title, note or other instrument indicating ownership rights; the names of individuals receiving the assets and their relation to the transferor; the date of the transfer; and the value or consideration received. Submit documentation requested on the form related to the transfer.

Affidavit

Be sure to sign and date the statement. The Personal Net Worth Statement must be notarized

NMDOT DBE PROGRAM MANUAL

APPENDIX E – OPERATION OF MENTOR-PROTÉGÉ PROGRAM GUIDELINES

(Ref: Appendix D to 49 CFR Part 26 –Mentor-Protégé Program Guidelines)

- A. The purpose of this program element is to further the development of DBEs, including but not limited to assisting them to move into non-traditional areas of work and/or compete in the marketplace outside the DBE program, via the provision of training and assistance from other firms. To operate a mentor-protégé program, a recipient must obtain the approval of the concerned operating administration.
- B. (1) Any mentor-protégé relationship shall be based on a written development plan, approved by the recipient, which clearly sets forth the objectives of the parties and their respective roles, the duration of the arrangements and the services and resources to be provided by the mentor to the protégé. The formal mentor-protégé agreement may be a fee schedule to cover the direct and indirect cost for such services rendered by the mentor for specific training and assistance to the protégé through the life of the agreement. Services provided by the mentor may be reimbursed under the FTA, FHWA, and FAA programs.

(2) To be eligible for reimbursement, the mentor services provided and associated must be directly attributable and properly allowable to specific individual contracts. The recipient may establish a line item for the mentor to quote the portion of the fee schedule expected to be provided during the life of the contract. The amount claimed shall be verified by the recipient and paid on an incremental basis representing the time the protégé is working on the contract. The total individual contract figures accumulated over the life of the agreement shall not exceed the amount stipulated in the original mentor/protégé agreement.
- C. DBEs involved in mentor-protégé agreement must be independent business entities which meet the requirements for certification as defined in subpart D of this part. A protégé firm must be certified *before* it begins participation in a mentor-protégé arrangement. If the recipient chooses to recognize mentor/protégé agreements, it should establish formal general program guidelines. These guidelines must be submitted to the operating administration for approval prior to the recipient executing an individual contractor/subcontractor mentor-protégé agreement.

Appendix F

New Mexico Department of Transportation ("NMDOT") Disadvantaged Business Enterprise ("DBE") Goal Form A-585

Control Number ("CN"): _____

BIDDER: _____ TELEPHONE: () _____
ADDRESS: _____

Contractor's DBE Liaison Officer: _____

Total Bid Amount \$ _____

Contractors DBE Participation _____

Dollar Estimate and Participation: \$ _____ or _____ % of line 3.

For this Project the DBE participation goal is in the Advertisement. If the Bidder can meet the DBE goal it shall complete this form and submit the same before Bid Opening. If the Bidder intends to meet the goal by self-performing the Work, it shall list itself and complete the input fields in the DBE Goal Form A-585.

If the Bidder is unable to meet the goal it shall submit evidence of its good faith efforts taken to meet the goal by 4:30 PM, local prevailing time, seven (7) Days after Bid Opening per 49 C.F.R. § 26.53 (b)(3) (2014). Bidders shall submit the same to the NMDOT Construction and Civil Rights Bureau located at 1570 Pacheco Street, Building A, Santa Fe, NM 87505.

Good faith efforts require that the Bidder show that it took all necessary and reasonable steps to achieve this Project's DBE goal. The necessary and reasonable steps are expected, by their scope, intensity, and appropriateness to the objective of meeting this Projects DBE goal, to obtain sufficient DBE participation. Good faith efforts include, but are not limited to, those described in the Federal Requirements Notice to Contractors and 49 C.F.R. Pt. 26, Appendix A (2014).

If the NMDOT determines that the Bidder has failed to make good faith efforts to meet the DBE goal the Bidder is entitled to seek administrative reconsideration per 49 C.F.R. § 26.53 (d).

Name of Certified DBE Contractor, Subcontractor or Supplier	Address	NAICS Code for DBE	Description of Work	Proposed Amount (round to nearest dollar)

Bidders shall use certified DBEs contained in the DBE directory required by 49 C.F.R. § 26.81(g) (2011). Bidders shall confirm that the DBE is certified at the following link:

<https://nmdot.dbesystem.com/FrontEnd/VendorSearchPublic.asp?TN=nmdot&XID=4599>

The submission of the Bid with the digital id is the Bidder's assurance that it will either meet the DBE goal or provide its good faith efforts. **Failure to comply with the requirements of the DBE Goal Form A-585 shall render the Bid non-responsive and the Bid shall be rejected.**

Form No. A-644
Rev 7.21.2010

Control No. _____

*IF ANY FIRM LISTED ABOVE IS A MATERIAL SUPPLIER, BUT NOT THE MANUFACTURER, THE CONTRACTOR MAY CREDIT ONLY 60% OF THE EXPENDITURE TO THE SUPPLIER, FOR FINAL PAYMENT. THE PRIME CONTRACTOR MAY CERTIFY THAT FINAL PAYMENT WILL BE MADE TO DBE UPON HIS RECEIPT OF PAYMENT.

Printed Name of Authorized DBE Representative

My Commission expires: _____

APPENDIX H

CONSTRUCTION and CIVIL RIGHTS BUREAU ORGANIZATIONAL CHART – ORG 3300

FY25 – August, 2024

CONSTRUCTION and CIVIL RIGHTS BUREAU ORGANIZATIONAL CHART – ORG 3300

