

**FEDERAL TRANSIT ADMINISTRATION  
DISADVANTAGED BUSINESS  
ENTERPRISE PROGRAM**

**49 CFR Part 26**

**TRANSIT PROGRAM ADMINISTRATION  
MANUAL**

**December 2021**

Prepared by

**NORTH DAKOTA DEPARTMENT OF TRANSPORTATION**

**DIRECTOR**

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**Local Government Division – Transit Section**

## Table of Contents

<a href="#"><u>POLICY STATEMENT (49 CFR §26.23)</u></a>	<b>4</b>
<a href="#"><u>SUBPART A – GENERAL REQUIREMENTS</u></a>	<b>6</b>
<a href="#"><u>Section 26.1 Objectives</u></a>	6
<a href="#"><u>Section 26.3 Applicability</u></a>	6
<a href="#"><u>Section 26.5 Definitions</u></a>	6
<a href="#"><u>Section 26.7 Non-discrimination Requirements</u></a>	11
<a href="#"><u>Section 26.11 Record Keeping Requirements</u></a>	11
<a href="#"><u>Section 26.13 Federal Financial Assistance Agreement</u></a>	12
<a href="#"><u>SUBPART B – ADMINISTRATIVE REQUIREMENTS</u></a>	<b>14</b>
<a href="#"><u>Section 26.21 DBE Program Updates</u></a>	14
<a href="#"><u>Section 26.23 Policy Statement</u></a>	14
<a href="#"><u>Section 26.25 DBE Liaison Officer (DBELO)</u></a>	14
<a href="#"><u>Section 26.27 DBE Financial Institutions</u></a>	15
<a href="#"><u>Section 26.29 Prompt Pay Mechanisms</u></a>	29
<a href="#"><u>Section 26.31 Directory</u></a>	17
<a href="#"><u>Section 26.33 Overconcentration</u></a>	18
<a href="#"><u>Section 26.39 Business Development Programs</u></a>	18
<a href="#"><u>Section 26.37 Monitoring and Enforcement Mechanisms</u></a>	19
<a href="#"><u>SUBPART C – GOALS, GOOD FAITH EFFORTS, AND COUNTING</u></a>	<b>21</b>
<a href="#"><u>Section 26.43 Set-asides or Quotas</u></a>	21
<a href="#"><u>Section 26.45 Overall Goals</u></a>	21
<a href="#"><u>Section 26.49 Transit Vehicle Manufacturers Goals</u></a>	22
<a href="#"><u>Section 26.51 (a-c) Breakout of Estimated Race-Neutral &amp; Race-Conscious Participation</u></a>	22
<a href="#"><u>Section 26.51 (d-g) Contract Goals</u></a>	22
<a href="#"><u>Section 26.53 Good Faith Efforts Procedures</u></a>	24
<a href="#"><u>Section 26.55 Counting DBE Participation</u></a>	30
<a href="#"><u>SUBPART D – CERTIFICATIONS STANDARDS</u></a>	<b>33</b>
<a href="#"><u>Section 26.61 Burdens of Proof</u></a>	33
<a href="#"><u>Section 26.63 Group Membership</u></a>	33
<a href="#"><u>Section 26.65 Business Size Determinations</u></a>	33
<a href="#"><u>Section 26.67 Social and Economic Disadvantage</u></a>	31
<a href="#"><u>Section 26.69 Ownership</u></a>	31

<a href="#"><u>Section 26.71 Control</u></a> .....	31
<a href="#"><u>Section 26.73 Other Rules</u></a> .....	31
<b><a href="#"><u>SUBPART E – CERTIFICATION PROCEDURES</u></a></b> .....	<b>35</b>
<a href="#"><u>Section 26.81 Unified Certification Programs</u></a> .....	35
<a href="#"><u>Section 26.83 Procedures for Certification Decisions</u></a> .....	36
<a href="#"><u>Section 26.85 Interstate Certification</u></a> .....	39
<a href="#"><u>Section 26.86 Denials of Initial Requests for Certification</u></a> .....	42
<a href="#"><u>Section 26.87 Removal of a DBE's Eligibility</u></a> .....	42
<a href="#"><u>Section 26.88 Summary Suspension of Certification</u></a> .....	45
<a href="#"><u>Section 26.89 Certification Appeals</u></a> .....	46
<a href="#"><u>Section 26.91 Actions Taken Following DOT Certification Appeal Decisions</u></a> .....	48
<b><a href="#"><u>SUBPART F – COMPLIANCE AND ENFORCEMENT</u></a></b> .....	<b>49</b>
<a href="#"><u>Section 26.109 Information, Confidentiality, Cooperation</u></a> .....	49
<b><a href="#"><u>RESOURCE LINKS</u></a></b> .....	<b>50</b>

## **POLICY STATEMENT**

### NORTH DAKOTA DEPARTMENT OF TRANSPORTATION CIVIL RIGHTS DIVISION

Policy 3-1 DBE

Original Date: August 1, 2014

Revision Date: October 1, 2021

### **DISADVANTAGED BUSINESS ENTERPRISE POLICY STATEMENT (49 CFR 526.23)**

The North Dakota Department of Transportation (Department) has established a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the U.S. Department of Transportation (USDOT), 49 CFR Parts 23 and 26. The Department receives federal financial assistance from USDOT. As a condition of receiving this assistance, the Department has signed an assurance that it complies with 49 CFR Parts 23 and 26.

The DBE requirements of 49 CFR Parts 23 and 26 and the Department's DBE program apply to all federally-aided contracts and to any assignments made to subcontractors, subconsultants or sub recipients.

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, and national origin. Specifically, 42 USD 2000d states that "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." In addition to Title VI, there are other Nondiscrimination statutes which include: Section 162(a) of the Federal-Aid Highway Act of 1973 (23 USC 324) (sex), Age, Discrimination Act of 1975 (age), and Section 504 of the Rehabilitation Act of 1973/ADA of 1990 (disability). Taken together, these requirements define an over-arching Title VI/Nondiscrimination and ADA Program. Title VI and the additional Nondiscrimination requirements are applicable to programs receiving federal financial assistance due to the Civil Rights Restoration Act of 1987.

In regard to the DBE Program, the Department, its sub recipients, contractors, subcontractors, consultants, and subconsultants shall not discriminate on the basis of race, color, national origin, or sex. It is Department policy to ensure that DBEs, as defined in 49 CFR Parts 23 and 26, have an equal opportunity to receive and participate in USDOT-assisted contracts. It is also Department policy:

- To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs;
- To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
- To ensure that the Department's DBE program is narrowly tailored in accordance with applicable law;
- To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs;
- To help remove barriers to the participation of DBEs in DOT-assisted contracts;

- To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and
- To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

The Department will disseminate the policy when any updates are made to all Department staff as well as DBEs and non-DBEs. The policy will be disseminated to the broadest possible audience. We will:

- Broadcast the updated statement to all DBE and non-DBE firms through the Department's electronic notification email system (Listserv)
- Publish the updated policy in the next upcoming DBE newsletter
- Publish the updated policy on the Department DBE bid information web site at <http://www.dot.nd.gov/divisions/civilrights/docs/dbe/dbepolicystmt.pdf>

Each sub recipient, contractor, subcontractor, consultant, or subconsultant that fails to carry out the requirements set forth in 49 CFR Parts 23 and 26 may constitute a breach of contract, and after notification by the Department, may result in termination of the agreement or contract, or such remedy as the Department deems appropriate.

As the Department Director, I am charged with the overall responsibility for assuring compliance with 49 CFR Parts 23 and 26, including DBE programs delegated to sub recipients such as Metropolitan Planning Organizations and other political subdivisions. I have appointed the Civil Rights Division Director as the Department's DBE Liaison Officer. The DBE Liaison Officer is responsible for developing, coordinating, and monitoring the implementation of the Department's DBE program on a day-to-day basis. Division Directors and District Engineers are responsible for carrying out applicable facets of the DBE program within their areas.

Ramona Bernard is the Department's DBE Liaison Officer. She is responsible for implementing all aspects of the DBE program. Implementation of the DBE program has the same priority as compliance with all other legal obligations incurred by the Department in its financial assistance agreements with USDOT.



\_\_\_\_\_  
NDDOT Director

10-14-21

\_\_\_\_\_  
Date

## SUBPART A – GENERAL REQUIREMENTS

### SECTION 26.1 OBJECTIVES

The objectives are found in the policy statement on the first page of this program.

### SECTION 26.3 APPLICABILITY

As a recipient of federal funds from the Federal Transit Administration (FTA) NDDOT has established its DBE program in accordance with 49 CFR Part 26 and has committed to ensuring compliance on all FTA funded transportation projects through monitoring, reporting, and goal setting. Where DBE goal setting is not necessary or practicable, NDDOT will encourage race-neutral DBE participation. In addition, NDDOT distributes federal transportation funds to local public agencies, non-profit agencies, and tribal agencies throughout the state of North Dakota. As a condition of receipt of funding, these subrecipients must adopt the NDDOT FTA DBE Program Plan.

NDDOT is the recipient of 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, II, 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.

### SECTION 26.5 DEFINITIONS

Any definition whereby the key word is in quotation marks indicates that the original definition has been altered by the North Dakota Department of Transportation (Department). All other key words are defined as per the regulation.

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

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

**Alaska Native** means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in

the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

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

**Assets** means 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.

**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.

**"Compliance"** means that a recipient has correctly implemented the requirements of 49 CFR Parts 23 or 26.

**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.

**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 49 CFR Part 26, a lease is considered to be a contract.

**Contractor** means one who participates, through a contract or subcontract (at any tier), in a DOT-assisted highway, transit, or airport program, including DBE, MBE and WBE and non-DBE firms, including prime contractors, subcontractors, suppliers, brokers, vendors, regular dealers, and manufacturers.

**Days** means business 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.

**"Department"** means the North Dakota Department of Transportation (NDDOT) or the owning agency of a specific project.

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

- (1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and
- (2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

**"DBE applicant"** means one who submits an application for DBE certification to the Department.

**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.

**DOT** means the U.S. Department of Transportation, including the Office of the Secretary, and the Federal Transit Administration (FTA).

**Good faith efforts** (GFE) mean efforts to achieve a DBE goal or other requirement of 49 CFR Part 26 which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

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

**Immediate family member** means father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, sister-in-law, brother-in-law, and domestic partner and civil unions recognized under State law.

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

**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.

**Liabilities** means 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.

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

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

**Non-compliance** means that a recipient has not correctly implemented the requirements of 49 CFR Parts 23 or 26.

**Operating Administration or OA** means any of the following parts of DOT: the Federal Transit Administration (FTA). The "Administrator" of an operating administration includes his or her designees.

**Personal net worth** means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include: the individual's ownership interest in an applicant or participating DBE firm or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own



share of assets held jointly or as community property with the individual's spouse.

**Primary industry classification** means the 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 on the Internet at the U.S. Census Bureau Web site: <http://www.census.gov/eos/www/naics/>.

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

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

**Program** means any undertaking on a recipient's part to use DOT financial assistance, authorized by the laws to which 49 CFR Part 26 applies.

**Race/gender conscious measure or program (RGC)** is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

**Race/gender neutral measure or program (RGN)** is one that is, or can be, used to assist all small businesses. For the purposes of 49 CFR Part 26, *race/gender neutral* includes gender neutrality.

**Recipient** is any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FTA.

**"Responsive approach"** requires all bidders to submit the DBE participation information and other GFE documentation required by 49 CFR 26.53 at the time of bid submission.

**"Responsibility approach"** allows all bidders to submit the required GFE information before a commitment to perform the contract is made to a particular bidder (e.g., before contract award).

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

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

**Small Business Administration or SBA** means the U.S. Small Business Administration.

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

**Small business concern** means, with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR Part 121) that also does not exceed the cap on average annual gross receipts specified in 49 CFR Part 26.65(b).

**Socially and economically disadvantaged individual** means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity

as a member of groups 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 Marianas 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, the Maldives Islands, Nepal, or Sri Lanka;
  - (vi) Women;
  - (vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.
- (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.

**Spouse** means a married person, including a person in a domestic partnership or a civil union recognized under State law.

**Transit vehicle manufacturer** means any manufacturer whose primary business purpose is to manufacture vehicles specifically built for public mass transportation. Such vehicles include, but are not limited to: Buses, rail cars, trolleys, ferries, and vehicles manufactured specifically for paratransit purposes. Producers of vehicles that receive post-production alterations or retrofitting to be used for public transportation purposes (e.g., so-called cutaway vehicles, vans customized for service to people with disabilities) are also considered transit vehicle

manufacturers. Businesses that manufacture mass- produce or distribute vehicles solely for personal use and for sale “off the lot” are not considered transit vehicle manufacturers.

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

***Unified Certification Program (UCP)*** means the interagency organization that makes all certification decisions on behalf of FTA recipients. Certification decisions under the UCP are binding on all DOT recipients in North Dakota.

## **SECTION 26.7 NON-DISCRIMINATION REQUIREMENTS**

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

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

## **SECTION 26.11 RECORD KEEPING REQUIREMENTS**

### **Reporting to DOT: 26.11(b)**

The Department will submit the Uniform Report of DBE Awards or Commitments and Payments Form on a semi-annual basis to FTA on or by June 1<sup>st</sup> and December 1<sup>st</sup> each year in TrAMS. These reports will reflect payments actually made to DBEs on DOT-assisted contracts.

Subrecipients receiving FTA funds will submit the DBE Report to the Department in the BlackCat System semi-annually. The report submitted gathers awards/commitments; contracts, purchase order, invoices; payments on on-going contracts; and total payments on contracts completed during reporting period. The subrecipient report is submitted to the Local Government Division Transit Section in April and October of each year to ensure the Department can accurately and timely report DBE participation to FTA.

### **DBE Data Report**

The Civil Rights Division will report to DOT’s Office of Civil Rights, by January 1 of each calendar year, the percentage and location in North Dakota of certified DBE/ACDBE firms in the UCP Directory controlled by the following:

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

Certification and Compliance System (CCS) quickly and accurately pulls the ethnicity information from Certification data.

### **DBE Records Retention**

The Civil Rights Division will maintain records documenting a DBE firm’s compliance with 49 CFR 26.11. Complete application packages for each certified firm and all affidavits of no-

change, change notices, and Home Office (on site) Reviews, and other certification and compliance related records will be retained for a minimum of three (3) years after the DBE is no longer certified unless otherwise provided by applicable record retention requirements for the Department's financial assistance agreement, whichever is longer.

### **Bidders List: 26.11(c)**

The Department will create a bidders list, consisting of information about all DBE and non-DBE firms that bid or quote on DOT-assisted contracts. The purpose of this requirement is to allow use of the bidders list approach to calculating overall goals. The bidder list will include the name, address, DBE non-DBE status, age, and annual gross receipts of firms.

The Department will collect this information in the following ways:

- The Local Government Division Transit Section will develop a bidders list using Census data, the DBE directory and formal bidder lists provided by subrecipients for FTA funded projects. Potential bidders will be informally surveyed to establish if DBEs are ready willing and able to provide goods or services needed to carry out the project.
- The bidders list consists of all DBE and non-DBE contractors and subcontractors who seek work on the Department's federally assisted contracts. The list represents all bidders and quoters who seek work on the Department's federally assisted contracts regardless of whether the firm is selected to do the work or simply submits bids or quotes.
- The DBE Locally Bid Projects special provisions require each bidder to provide the Department a completed Form B within five (5) calendar days after each bid opening. The DBE special provision also requests suppliers, subcontractors, vendors, manufacturers, and regular dealers to submit copies of all their quotes to the Department. From this information a bidders list will be developed which will count all firms that are participating, or attempting to participate, on DOT-assisted contracts. The list will include all firms that bid on prime contracts or quote to subcontractors or primes, on DOT-assisted projects including both DBEs and non-DBEs.

The Local Government Division Transit Section will informally survey all firms on bidders list to determine age and size of business, where they are located, and if they are interested in participating on FTA funded projects.

### **SECTION 26.13 FEDERAL FINANCIAL ASSISTANCE AGREEMENT**

The Department has signed the following assurances, applicable to all DOT-assisted contracts and their administration:

#### **Assurance: 26.13(a)**

The Director has signed the following assurance, applicable to all DOT-assisted contracts and their administration:

*The Department shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT assisted contract or in the administration of its DBE Program or the requirements of 49 CFR Part 26. The recipient shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of DOT assisted contracts. The recipient's DBE Program,*

*as required by 49 CFR Part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the Department of its failure to carry out its approved program, the Department may impose sanction as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).*

**Contract Assurance: 26.13b**

The Department will ensure that the following clause is placed in every DOT-assisted contract and subcontract:

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

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

## **SUBPART B - ADMINISTRATIVE REQUIREMENTS**

### **SECTION 26.21 DBE PROGRAM UPDATES**

As an FTA recipient receiving more than \$250,000 in FTA planning capital and or operating assistance in a federal fiscal year, the Department has instituted the DBE Program. The Department will carry out this program until it has spent all available funds from DOT. The Department will seek approval from DOT prior to making significant program changes and ensures its subrecipients will follow the program. The Civil Rights Division will manage the DBE FHWA program, the FTA DBE certification, and provide guidance to the Local Government Division Transit Section as needed for carrying out requirements of the FTA DBE Program.

### **SECTION 26.23 POLICY STATEMENT**

The Policy Statement is elaborated on the first page of this program.

### **SECTION 26.25 DBE LIASON OFFICER (DBELO)**

The Director has designated Ramona Bernard as the Department DBE Liaison Officer (DBELO). Ms. Bernard can be contacted at the Civil Rights Division (CDR), North Dakota Department of Transportation, 608 East Boulevard Avenue, Bismarck, ND 58505-0700, or [rbernard@nd.gov](mailto:rbernard@nd.gov), phone (701) 328-2576. She is the CRD Director and is responsible for implementing all aspects of the DBE program and ensuring that the Department complies with all provisions of 49 CFR Part 26. (Link to Policy Document)

Ms. Bernard has direct and independent access to the Department Director concerning DBE program matters. An organization chart displaying the DBELO's position in the organization is found at ( <https://www.dot.nd.gov/divisions/exec/docs/nddot.pdf?v1.0> ) and at (Resource Link A) to this program.

The DBELO is responsible for developing, implementing, and monitoring the DBE program, in coordination with other Department staff, on a day-to-day basis. The duties and responsibilities include, but are not limited to:

1. With appropriate Department staff, developing the Department's DBE program.
2. Coordinating the program with all applicable Department employees, contractors, subcontractors, consultants, subconsultants, minority and women's interest groups, and other appropriate public and private agencies.
3. Monitoring the implementation of facets of the Department's DBE program.
4. Collecting and analyzing pertinent data received regarding program participation.
5. Monitoring Department progress toward achieving its overall annual goal and the effectiveness of the DBE program.
6. Providing technical assistance and training to Department personnel, DBE firms, contractors, subcontractors, consultants, subconsultants, and subrecipients.
7. Disseminating program information to DBE firms regarding contracting opportunities in a timely manner.
8. Providing program reports as required by the Federal Transit Administration (FTA).
9. Chairing the DBE Unified Certification Board and the DBE Participation Review Committee.
10. Reporting regularly to the Director on the progress and achievements of the program.

11. Identifying problems or deficiencies and making recommendations for improvement or change.
12. Monitoring national best practices and using the information to upgrade the DBE program.
13. Building support for the program within the Department and the industry.
14. Maintaining communication to help resolve issues and increase program effectiveness.
15. Provides subrecipient guidance for implementing their DBE program.

The DBELO has a staff of three Civil Rights Program Administrators (CRPA) and one Administrative Assistant. One CRPA is assigned to the DBE program as part of the job description. The CRPA is a member of the Good Faith Efforts Review Committee as a resource participant. If the DBELO is unavailable to attend the Good Faith Efforts Review Committee, the CRPA stands in for them as a voting member. The CRPA analyzes the DBE participation and good faith effort documentation of contractors, as required by the DBE race/gender conscious and DBE race/gender neutral special provisions ([Resource Link B](#)) and presents a step-by-step summation to the Good Faith Efforts Review Committee. The CRPA is a non-voting member of the DBE Unified Certification Board, processes DBE/ACDBE applications, compiles data for the DBE/ACDBE Directory ([Resource Link C](#)), conducts DBE project site and home office reviews, conducts and writes the annual review of the supportive services contractor, and prepares statistical data for various reports. If the DBELO is unavailable to attend the Unified Certification Board meeting the CRPA stands in for them as a voting member. The CRPA gathers data relative to DBE goal setting, DBE participation, the bidders list, and good faith efforts review process.

The Local Government Division Transit Section Program Manager (or their designees) are responsible for carrying out all facets of the DBE program within their respective areas. They ensure appropriate division personnel are familiar with the requirements of 49 CFR Part 26, the Department's FTA DBE Program Administration Manual, and the specific division's responsibilities relative to the program. The Local Government Division Transit Section Program Manager (or their designees) meet periodically with the DBELO to evaluate the progress and achievements of the program and to identify program problems or deficiencies. The DBELO makes recommendations to the Director concerning necessary program changes and improvements.

Additionally, the NDDOT Local Government Division's Transit Section is responsible to oversee FTA grant award and procurements. The Local Government Division Transit Section will ensure that appropriate DBE requirements are included in all relevant transit documents, such as program guidelines, grant awards, specification for bus and equipment purchases, and construction of facilities and facility renovations.

## **SECTION 26.27 DBE FINANCIAL INSTITUTIONS**

It is Department policy to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community, and to encourage prime contractors on DOT-assisted contracts to make use of these institutions.

To determine which financial institutions are owned and controlled by socially and economically disadvantaged individuals, the Department contacted the following organizations:

- North Dakota Bankers Association
- North Dakota Department of Banking and Financial Institutions, and

- Independent Bankers Association

To date, one such institution has been identified. Turtle Mountain State Bank opened its doors on December 3, 2007 as the first privately owned Native American bank on a federally recognized Indian Reservation. <http://www.tmstatebank.com/>

## **SECTION 26.29 PROMPT PAYMENT MECHANISMS**

The Department does not hold retainage from prime contractors and requires a contract clause obligating prime contractors to make prompt and full payment of any retainage to subcontractors within 20 days after the subcontractor's work is satisfactorily completed.

The Department will include the following clauses, which apply to both DBE and non-DBEs, in each DOT-assisted prime contract.

The prime contractor must pay the subcontractor the amount due for work done or services rendered, less applicable retainage not to exceed 2 percent, from the current progress payment within 20 calendar days of receipt of payment from the Department or owning agency, unless the prime contractor has just cause to not make payment. If the prime contractor withholds payment from the subcontractor, the prime contractor must immediately notify the subcontractor and the project engineer, in writing, the reasons for withholding payment. The subcontractor may also notify the engineer if prompt payment has not been made.

If the Department or owning agency determines the prime contractor is withholding payment without just cause, interest will accrue at the rate provided by North Dakota Century Code 13-01.1-02. The prime contractor is responsible for paying the accrued interest starting on the 21<sup>st</sup> calendar day after the prime contractor receives payment. If the prime contractor is withholding subcontractor payments without just cause the Department or owning agency may suspend all payments due to the prime contractor until the subcontractor is properly paid and the contractor agrees to make payments as specified. If the Department or owning agency determines there is just cause for withholding payment, interest will not accrue on the amount due.

These prompt payment procedures apply to all tiers of subcontracts and are based on 49 CFR 26.29.

The Department or owning agency will determine whether the subcontractor's work has been "satisfactorily completed." A subcontractor's work is satisfactorily completed when all of the tasks called for in the subcontract have been accomplished, documented in accordance with the contract, and paid for on a pay estimate. To be satisfactorily complete, a subcontractor must provide all necessary final documentation required in the contract. Final documentation may include, but is not limited to certified payrolls, materials certification, haul road releases, pit receipts of payment, pit releases, night watchman reports, warranties, operating manuals, product literature, and verification of final quantities.

If the prime contractor elects to use retainage on subcontract work, prompt payment must also include the release of retainage monies that have been withheld from the subcontractor, within 20 days after the subcontractor's work is satisfactorily completed. Non-bonded subcontractors must submit proof of payment for all material bills and wages to the prime contractor before the prime contractor is required to pay the retainage. If retainage is not released as per this provision, interest will accrue at the rate provided by North Dakota Century Code 13-01.1-02 beginning the 21<sup>st</sup> calendar day after the subcontractor's work is satisfactorily completed.

Subrecipients will monitor prompt payment on all projects awarded by the subrecipient and submit SFN 62128 Certification of DBE Performance and Payments to NDDOT Local



Government Division Transit Section. Information must be maintained and provided to NDDOT Local Government Division Transit Section upon request and will be monitored during compliance reviews.

### No Circumvention

On federal aid contracts the contractor shall not include any provisions in its subcontract that would circumvent 49 CFP Part 26.29.

### Sanctions

If a prime contractor does not pay the subcontractor in a timely manner or have the disadvantaged business enterprise perform the specified dollar amount of work (subject to plan quantity changes), or fulfill the requirements of the DBE special provisions, the Department will take certain actions. After determining that any one of these requirements has not been met, the Department will provide written notice that the prime contractor has 14 calendar days, from receipt of the certified notification, to make a written request for a hearing. If a written request is not received, or if the prime contractor does not provide sufficient evidence at the hearing that the provisions have been met, the Department may:

- Withhold the prime contractor's progress payment until the prime contractor complies with all DBE special provisions
- Deduct, from the prime contractor's progress payments, the dollar amount of DBE participation committed to, but not achieved by the prime contractor
- Find the prime contractor in default
- Disallow the prime contract to bid in one or more scheduled bid openings after the date of the sanction is imposed
- Disqualify the contractor from future bidding
- Other correction action determined by the Department to be appropriate, or
- Any combination of the above.

### **SECTION 26.31 DIRECTORY**

Under the Department's Unified Certification Program (UCP), the Department's CRD maintains an online DBE/ACDBE Directory identifying all firms certified as DBE/ACDBEs under the UCP. The Directory lists the firm's name, owner's name, address, phone number, type of DBE/ACDBE designation, year formed, whether bonded, whether insured, area of work, labor force, equipment, NAICS code(s), and type of work the DBE/ACDBE firm has been certified to perform.

The Directory is published electronically and is located on the Department's Certification & Compliance System website at:

<https://dotnd.diversitycompliance.com/FrontEnd/VendorSearchPublic.asp?TN=dotnd&XID=7375>

The Directory is updated including additions, deletions, and other changes as they occur. The Directory's functionality allows users to export, download, and save DBE/ACDBE contact reports, the entire directory, a specific firms' information, or specific work categories.

The Directory is made available, electronically, to all DBE/ACDBE and non-DBE prime contractors, subcontractors, consultants, subconsultants, suppliers, vendors, manufacturers, regular dealers, county, city, and consulting engineers, tribal organizations, other minority and women's interest groups, Department staff, and other state and federal agencies.

## **SECTION 26.33 OVERCONCENTRATION**

The Department is not aware of overconcentration in any work area. However, any firm working for, or attempting to seek work with, the Department that feels its opportunity to participate in a federal aid contract has been unduly burdened because of an overconcentration of DBE firms in a specific type of work may file a complaint with the Department. The complaint must be submitted in writing and include examples of how the firm's opportunity to obtain work has been impaired, and the name(s) of DBE firms that have affected their ability to obtain work with the Department. The Department will review all pertinent records, and, if necessary, solicit additional information from other contractors and DBE firms to determine if the burden is a result of overconcentration. Any determination of overconcentration and subsequent remedy will be reviewed and approved by FTA to ensure that changes do not result in disparate treatment.

Should a determination be made that there are too many DBEs in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work; the Department will devise appropriate measures to address this overconcentration. Once the appropriate measures have been determined they will be forwarded to the relevant USDOT modal for approval.

## **SECTION 26.39 BUSINESS DEVELOPMENT PROGRAMS**

The implementation of a small business program is intended to facilitate compliance with the twin obligations in 49 CFR Part 26.51: (1) to meet the maximum feasible portion of the overall goal by using race/gender neutral means of obtaining DBE participation and (2) to establish DBE contract goals to meet any portion of the overall goal the Department is unable to meet using race/gender neutral means.

The Department will continue to facilitate competition by small businesses by taking all reasonable steps to eliminate obstacles such as unnecessary or unjustified bundling or other contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors. This is accomplished by streamlining paperwork and requirements. Specifications include language and requirements detailed by the FTA and the State of North Dakota to meet procurement regulations. The Department does not add additional requirements that are not specified by FTA or the State of North Dakota.

The Department will continue to expand its processes that assist small business enterprises to further foster small business participation. These processes include the following:

1. Advertise all transit projects regardless of their size to allow small businesses the opportunity to participate.
2. Encourage subrecipients to perform outreach to small businesses in their communities recruiting participation on projects.
3. All small business enterprises may receive or view the DBE Newsletter, via the ListServ or on the Department's website to provide:
  - a. A means by which prime contractors and subcontractors solicit participation on both race/gender conscious and race/gender neutral projects.
  - b. Training Opportunities relative to performing transportation projects or to aid small business enterprises in all facets of their business.

- c. List of contacts for the Civil Rights Division.
  - d. Small business-related articles and information.
4. Department training offered to small business enterprises.

## **SECTION 26.37 MONITORING AND ENFORCEMENT MECHANISMS**

The Department established a “Locally Bid Project” Special Provision in 2014 to cover DBE Program responsibilities required of subrecipients and their contractors. Locally Bid Projects are Race/Gender Neutral. The Locally Bid Project SP directs contractors to submit documentation and track participation as required to the project owner. The project owner reports any participation to the Local Government Transit Section. The Local Government Transit Section will track all DBE participation and report to FTA semi-annually.

The Department will implement appropriate mechanisms, including sanctions, suspension, debarment, and application of legal and contractual remedies available under Federal, state, and local law, as deemed appropriate and necessary to ensure compliance with the requirements by all program participants.

The Department will take the following monitoring and enforcement mechanisms to ensure compliance with 49 CFR Part 26.

- Bring to the attention of the Department of Transportation 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 26.109.
- Consider similar action under our own legal authorities, including responsibility determinations in future contracts.
- Provide a monitoring and enforcement mechanism to verify that work committed to DBEs at contract award is actually performed by the DBEs. This will be accomplished by imposing sanctions as described under Section 26.29 Prompt Payment.
- Keep a running tally of actual payments to DBE firms for work committed to them at the time of contract award.

### **Resolution of Nondiscriminatory DBE Issues and Concerns**

Issues and concerns raised by DBEs and contractors during the life of the project are brought to the attention of the project manager. If the project manager is unable to resolve the issue, they contact the Assistant District Engineer (ADE). If the ADE is unable to resolve the issue or concern, they may contact CRD.

The procedures for resolving nondiscriminatory DBE issues and concerns which were not resolved at the division level are as follows:

The party making the complaint provides written notice to the project manager, which must include:

- A statement concerning the nature of complaint;
- The name of the person or company against whom the complaint is being filed;

- The date the complaint occurred; and
- The name of the person filing the complaint.

The ADE notifies the DBELO of the complaint. The DBELO notifies FTA.

Oral complaints will be acted on, but not under the formal procedure until a written notice of complaint is received.

- If the complaint is incomplete, the person filing the complaint is asked to provide additional information.
- If the complaint is complete, it is categorized by the DBELO as:
  1. A contract administration issue when it involves:
    - a. A commercially useful function (work performed, materials, personnel, or equipment);
    - b. Honoring commitment to DBE;
    - c. Honoring commitment to contractor;
    - d. DBE substitution
    - e. Good faith efforts;
    - f. Timely payment to a DBE or non-DBE subcontractor; or
    - g. Default by DBE or contractor.

A review team consisting of Department staff from CRD and the Division is assembled. The review team is headed by the DBELO when the issue concerns discrimination and by the Division when the issue concerns contract administration.

The steps identified in the following paragraphs will be taken.

The review team makes recommendation, for non-Title VI issues, to the Director, for corrective action to be taken or sanctions against either part to be invoked.

- Both parties are notified of the proposed corrective action or sanctions and of their right to request a hearing. They are given 14 calendar days in which to request a hearing. If a hearing is requested, the hearing is held before the Office of Operations Director. Only information or arguments not previously heard by the review team may be presented.

The hearing is recorded.

After the hearing, or if no hearing is requested, the Office of Operations Director makes a final recommendation to the Director, for the corrective action to be taken or sanctions to be invoked. The Director makes the final decision and notifies both parties, in writing, by certified mail. The parties are notified of their rights to appeal decisions on discrimination issues only. Decisions on contract administration issues are non-appealable.

## SUBPART C - GOALS, GOOD FAITH EFFORTS, AND COUNTING

### **SECTION 26.43 SET-ASIDES OR QUOTAS**

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

### **SECTION 26.45 OVERALL GOALS**

The Department's Local Government Division Transit Section submits its overall goal to DOT on August 1, on a triennial basis. The next submission of NDDOT's Goal Setting Methodology is due August 1, 2022 for the 2023-2025 fiscal years.

The Department will post its Goal Setting Methodology on the DOT's website:  
<https://www.dot.nd.gov/divisions/localgov/docs/transit/FTA-2020-2022-Triennial-DBE-Goal-Setting-Methodology.pdf>

Before establishing the overall triennial goal, the Local Government Division Transit Section analyzes potential projects to determine if DBE participation is available. U.S. Census Bureau, Survey of Business Owner and Job Service North Dakota data are compared to establish the total number of North Dakota firms by NAICS codes. The DBE Directory is then compared with the data reviewed to obtain information concerning the availability of disadvantaged and non-disadvantaged businesses and the effects of discrimination on opportunities for DBEs. DBEs may be surveyed to determine if they are ready, willing, and able to provide the goods and services used to establish the triennial goal.

The Department will publish a notice of the proposed overall triennial goal, informing the public that the proposed overall triennial goal and its rationale are available for inspection during normal business hours at the CRD for 30 days following the date of the notice. The Department will accept comments on the goal for 30 days from the date of the notice. This advertisement will run two times in the ten major newspapers and all tribal newspapers. The goal will also be posted on the Department's web page. Copies will be provided electronically to all registered for the CRD listserv and anyone else requesting it. The notice will include addresses to which comments may be sent, including offices and websites, where the proposed overall triennial goal may be reviewed.

A public meeting will be held a minimum of 30 days prior to submission to FTA providing an additional opportunity for public comment.

Our overall triennial goal submission to DOT will include a summary of information and comments received during this public participation process and the Department's responses.

The Department implements the overall goal on October 1, on a triennial basis.

#### Shortfall Analysis

The Department will make every effort to encourage contractors to meet project goals on Race/Gender Conscious projects and achieve participation on Race/Gender Neutral projects. Based on revisions to the federal regulations that took effect January 28, 2011, if NDDOT does not meet its projected overall DBE goal at the end of the fiscal year, the reasons for not achieving the goal must be analyzed and specific steps taken in order to fully meet the goal in the new fiscal year.

The Local Government Division Transit Section will analyze the data used to prepare the semi-annual reports for the fiscal year. Awards/commitments and actual DBE participation will be reviewed to establish why the DBE goal was not met. Outreach efforts to DBEs will be analyzed to determine if it was successful. Identify ways to help increase DBE participation in the next fiscal year. Potential project for the next fiscal year will analyzed to determine if a race/gender goal would be feasible to meet the FTA DBE goal.

If required, the Shortfall Analysis must be completed by December 31<sup>st</sup>. The analysis will be maintained by the Local Government Division Transit Section and submitted to FTA upon request or as part of a State Management Review.

## **SECTION 26.49 TRANSIT VEHICLE MANUFACTURERS GOALS**

The Department will require each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, to certify that it has complied with the requirements of this section. Alternatively, the Department may, at its discretion and with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of the TVM complying with this element of the program.

The Local Government Division Transit Section will report all transit vehicle purchases to FTA via the TVM Reporting tool on the FTA website within 30 days of contract award by the sub-recipient.

## **SECTION 26.51(a-c) BREAKOUT OF ESTIMATED RACE-NEUTRAL & RACE-CONSCIOUS PARTICIPATION**

The Department will meet the maximum feasible portion of its overall goal by using race/gender neutral means of facilitating race/gender neutral DBE participation. Measures used to achieve this are:

- Identify type of work and location;
- Identify available DBEs in DBE Directory;
- Informally survey DBEs to see if they are available and willing to travel if necessary, and
- Notify all DBEs of project via ListServ.

## **SECTION 26.51(d-g) CONTRACT GOALS**

The Local Government Division Transit Section will use race/gender conscious contract goals to meet any portion of the overall goal that it does not project being able to meet using race/gender neutral means. This will be accomplished by advertising all projects regardless of their size, providing outreach and training opportunities to DBEs, and subrecipient outreach in their local communities.

The Local Government Division Transit Section will establish contract goals only on DOT-assisted contracts where subcontracting opportunities are specifically identified. The Local Government Division Transit Section will not necessarily establish a contract goal on every such contract, and the size of contract goals will be adapted to the circumstances of each contract (e.g., type and location of work and availability of DBEs to perform the particular type of work).

NDDOT Local Government Division Transit Section will make every effort to meet the FTA DBE goal using race-neutral means. If we are unable to attain the DBE goal through race-neutral participation, projects requested and awarded will be reviewed to determine if there is an opportunity for DBE participation.

If an opportunity is present, a contract goal may be established based on:

1. Type of work involved;
2. Location of the work; and
3. Available DBEs to perform the work.

If it is determined that FTA DBE goal can be met through race-neutral means, the program will be implemented without establishing specific contract goals during that year.

#### DBE Project Goal Setting Responsibilities

The Local Government Division Transit Section sets project goals with assistance from the DBELO or her designee. Goals are approved by the Office of Operations Director or a designee.

Approximately nine weeks prior to bid opening, each federally funded project is reviewed, and data is compiled by staff from the Local Government Division Transit Section relative to specific bid items previously quoted on by DBEs, including quantities, projected costs, and the location of the project. This information is then provided to the Civil Rights Division for analysis and setting of project goals.

The Department will express its contract goals as a percentage of the federal aid share of a DOT- assisted contract.

The Department will bring to the attention of the 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 Part 26.109. The Department will also consider similar action under its own legal authorities, including responsibility determinations in future contracts.

#### Good Faith Efforts Review Committee

The Good Faith Efforts Review Committee (Committee) is made up of three voting members to be selected based on the type of project. One member may be selected from the Local Government Division, Civil Rights Division, Construction Services Division, Maintenance Division or Financial Management Division. The DBELO, or her designee, chairs this committee.

If the bidder does not meet the project goal, the Transit Section Program Manager compiles, analyzes, presents data, and prepares the DBE Participation Review form to be heard by the Committee. The Transit Section Program Manager is a non-voting member.

Bidders and quoters on a project on which the DBE goal is not met must demonstrate and document that they have made every reasonable effort in good faith to meet the project goal and submit the required SFN 60829 Contractor Good Faith Efforts Documentation ([Resource Link E](#)) as required by the DBE race/gender conscious special provision after bid submittal.

The Committee is responsible for determining whether the bidder's good faith efforts are sufficient and making a recommendation to award or not award to the Director.

The Department will ensure that all information is complete, accurate, and adequately documents the bidder's good faith efforts before the Department commits to the performance of the contract by the bidder.

## SECTION 26.53 GOOD FAITH EFFORTS PROCEDURES

This Good Faith Efforts process is for low bid and/or design, bid, build contracting methods. Should the department utilize an innovative construction method, such as design build, a good faith efforts process will be adjusted as needed.

### Bidder and Quoter Compliance

The Department uses the **Responsibility Approach** to the bidder's compliance with good faith efforts requirements. As such, all required documentation must be submitted no later than 4 p.m. Central Time two (2) business days after the bid opening. The DBE race/gender conscious and race/gender neutral special provisions require bidders and quoters to comply with required documentation, regardless of whether they are the successful bidder or quoter. The appropriate DBE special provision is included in all DOT-assisted transportation contracts.

All bidders must complete SFN 52012 Form A ([Resource Link D](#)) at the time of bid. Form A contains:

- The name, address, and phone number of the DBEs quoting the project
- The name, address, and phone number of the DBEs being used
- The specific specification and code number for the services or products to be supplied
- The total dollar value of the work to be performed.
- The percentage of the dollar value being performed by the DBE

The proposal submitted by the bidder contains a clause binding the bidder to perform all the special provisions included in the contract. This is considered the bidder's written commitment to use the DBE listed on Form C.

### **Demonstration of good faith efforts (26.53(a) & (c))**

If the project goal is not met at the time of bid, bidders must demonstrate and document that they have made a good faith effort to meet the contract goal as required in the race/gender conscious special provision. Examples of good faith efforts are found in Appendix A to 49 CFR Part 26 and the race/gender conscious special provision. ([Resource Link B](#)) Documentation required for a contractor's good faith efforts toward meeting the project goal are spelled out in the RGC SP and in SFN 60829 ([Resource Link E](#)).

The Department will scrutinize a bidder's documented good faith efforts. When the apparent low bidder fails to meet the contract goal, but others meet it, it is reasonable to question whether the apparent low bidder made good faith efforts to meet the goal. (Appendix A to 49 CFR § 26 V) When evaluating the efforts of the low bidder to meet the contract goal, the Department will review the performance of other bidders.

A bidder will not be deemed to demonstrate good faith if he or she rejects a DBE simply because it is not the low bidder, or if the bidder is unable to find a replacement DBE at the original price.

The bidder must show that it took all necessary and reasonable actions to achieve a DBE goal which, by their scope, intensity, and appropriateness, could reasonably be expected to obtain sufficient DBE participation, even if the bidder's actions were not fully successful.

Bid differential(s) in approved formats must be submitted within two (2) business days with the



GFE documentation comparing the cost of work performed by a prime, subcontractor or a combination of both when used in place of a quote they received from a DBE for like items. The bid differential chart(s) must address every item the DBE quoted as well as detail the methodology applied in calculating the cost.

When a contract goal has been established, 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. 49 CFR 26, Appendix A, paragraph IV(D)(2) notes that the ability or desire of a prime contractor to self-perform does not relieve the responsibility of making Good Faith Efforts.

Prudent assessment of bid differentials is critical when determining if a price difference is excessive or unreasonable. Prime prices will always be lower than DBE quotes, simply stating that the DBE quote is higher will not be sufficient. If the goal is not met the DBE Participation Committee will scrutinize the GFE documentation in order to determine if giving up a portion of their own work to DBEs could have been done without substantial financial hardship.

Appropriate evidence documenting solicitation to DBE contractors must be submitted if the goal is not met. SFN 60829 Contractor Good Faith Efforts Documentation ([Resource Link E](#)) guides the bidder through the required steps for submission. The Department's evaluation of the efforts will be based on the bidder's submitted documentation.

All prime contractors must complete SFN 14268 DBE Participation Certification ([Resource Link O](#)) and submit to the project manager no later than 4 weeks after completion of DBE's contract. This form will be maintained as part of the project file.

#### Department's Evaluation of Good Faith Efforts

- If the apparent low bidder fails to achieve the project goal and fails to provide acceptable GFE documentation by the deadline, the Good Faith Efforts Review Committee (Committee) will notify the Director or a designee that the bidder failed to demonstrate GFE and recommend to "not award" the project to the bidder. The CRPA will notify other bidders via email to submit their GFE, or any missing documentation to potentially be considered for award, within 2 business days from the date of the Department's notification. The Department may either award the contract to the next lowest responsible bidder with a responsive bid or reject all bids.
- For apparent low bidders who have not met the project goal but have provided all required documentation, the Committee will evaluate the bidder's DBE participation and thereafter make a determination on whether the bidder adequately demonstrated GFE. The Committee will communicate its determination in writing to the Office of Operations Director (Operations).

#### **Administrative reconsideration (26.53(d))**

Administrative Reconsideration is the process that follows the DBE Participation Review Committee's "not award" determination which is made when the bidder has not met its assigned goal and the committee has determined the bidder has not demonstrated sufficient good faith efforts in attempting to meet the goal.

The Race/Gender Conscious SP specifies this process. Effectively, Administrative Reconsideration allows a bidder to make its case to executive management for not having met the goal or for not using a DBE. In this process:

- An in-person reconsideration meeting is available at the ALB's request.
- The Director's designee(s) will consider any information presented prior to or during the hearing concerning the issue of whether it met the goal or made adequate efforts to do so.
- The NDDOT reconsideration decision will be made by the Director's designee(s), who will not have taken part in the original determination.
  - If the Director's designee(s) determines the ALB made adequate good faith efforts to meet the goal, the job will be recommended for award.
    - If the Director's designee(s) determines that the ALB has failed to sway the decision from "Not Award", the ALB will receive written notice of the decision.
- The Director will make the final decision and may exercise such discretion as deemed appropriate.
- The result of the reconsideration process is not administratively appealable to the US Department of Transportation.

### **Good Faith Efforts when a DBE is replaced on a contract (26.53(f))**

#### Contract Compliance After the Time of Award

49 CFR 26.53(f)(1) i. states the prime contractor shall not terminate a DBE subcontractor listed at the time of award (or an approved substitute DBE firm) without the Department's prior written consent. This includes, but is not limited to, instances in which a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a non-DBE firm, or with another DBE firm.

Additionally, on replacing a DBE, primes are required to find a replacement to perform at least the same dollar amount of work under the contract to meet the contract goal per 49 CFR Part 26, Appendix A -New Guidance Concerning Good Faith.

The Department includes in each prime contract a provision stating:

- (A) That the contractor must utilize the specific DBEs listed to perform the work and supply the materials for which each is listed unless the contractor obtains written consent; and
- (B) That, unless the Department's consent is provided, the contractor must not be entitled to any payment for work or material unless it is performed or supplied by the listed DBE.

#### Exception for Replacements Due to Public Necessity

When replacement work is required as a matter of public necessity, (e.g., safety, storm water issues), the contractor must immediately notify the project manager and the DBE or Non-DBE/BD intended at the time of award. If the DBE or Non-DBE/BD is unable to perform the work within the time specified by permit or administrative rule, the DBE or Non-DBE/BD must notify the prime immediately; and, within one business day, a written explanation must be submitted to the prime with a copy to the project manager. The project manager refers all replacement approval requests to the Assistant Division Director (ADE). In a case of public necessity, the ADE has the authority to allow the contractor to self-perform the replacement work or to find

another contractor to complete it.

### Termination for Cause

A DBE or Non-DBE/BD may not be terminated without the Department's prior written consent.

The Department will provide such written consent if the Department agrees that the contractor or subcontractor has good cause to terminate the DBE firm or Non-DBE/BD.

Circumstances which may be considered good cause for termination include when the listed DBE or Non-DBE/BD:

- Fails or refuses to execute a written contract
- Fails or refuses to perform the work of its subcontract in a way consistent the Department's Standard Specifications and/or with normal industry standards, provided, that good cause does not exist if the failure or refusal of the listed DBE or Non-DBE/BD to perform its work on the subcontract results from the bad faith or discriminatory action of the prime or subcontractor
- Fails or refuses to meet the prime contractor's reasonable nondiscriminatory bond requirements
- Becomes bankrupt, insolvent, or exhibits credit unworthiness
- Is ineligible to work on public works projects because of suspension and debarment proceedings
- Is ineligible to receive DBE credit for the type of work required
- Dies or becomes disabled with the result that the listed DBE or Non-DBE/BD is unable to complete its work on the contract
- Other documented good cause that the Department determines compels the termination of the listed DBE or Non-DBE/BD

Good cause does not exist if the prime contractor or subcontractor seeks to terminate a DBE or Non-DBE/BD which was relied upon to obtain the contract so that the contractor can self-perform the work for which the DBE or Non-DBE/BD was engaged or so that the contractor can substitute another DBE or Non-DBE contractor after contract award.

The contractor must immediately give written termination notice to DBE or the Non-DBE/BD. At the same time, SFN 60595 ([Resource Link F](#)) and its supporting documentation must be provided to the project manager for review and analysis of the reasons for the intended termination.

The contractor must give the DBE or Non-DBE/BD five business days to respond to the termination notice. Within that time, the DBE or Non-DBE/BD should respond with a written explanation of their reasons and/or objections to the proposed termination and specifically address why the Department should deny the contractor's request. This explanation should be submitted in reply to the contractor with a copy to the project manager.

The project manager will send the contractor's SFN 60595, the DBE or Non-DBE/BD's written response(s) and any other accompanying documentation to the Local Government Division Transit Section. If the Local Government Division Transit Section concurs that a termination is warranted, the contractor must seek a DBE to perform the work.

All DBEs currently certified in the specific area of work to be performed, must be contacted in writing or by phone, and quotes solicited. If available, a DBE will be selected to perform a dollar value of work, equal to the value of the commitment not achieved, unless the contractor can

demonstrate the DBE quote is unreasonable, using the same comparison in section “Good Faith Efforts Documentation.”

Upon receipt of appropriate written GFE documentation, and prior to commencement of any replacement work, Local Government Division Transit Section will consider the contractor’s efforts and provide a final written decision to the project engineer.

In instances where trucking replacements are sought, DBEs and/or Non-DBEs as allowed by regulation must be selected to cover all the trucking required until sufficient participation is met.

### Unfulfilled Obligations

If the goal has not been met at the time of award, the contractor must continue to make good faith efforts throughout the duration of the contract, that is, from the time of award until completion of the contract.

The Department requires SFN 60595 and its supporting documentation when a contractor, DBE, or Non-DBE/BD used in a Bid Differential (Non-DBE/BD) does not fulfill her or his obligations in any of the following situations:

- The prime contractor is unable to perform the full amount of work committed to be completed, by the prime’s workforce and equipment, at the time of award, or
- The Non-DBE/BD to which the prime contractor committed using at the time of award, is unable to perform the full amount of work, or
- The DBE or Non-DBE/BD withdraws voluntarily from the project and provides to the prime written notice of its withdrawal.

SFN 60595 and its supporting documentation must be provided to the project manager for review and analysis. If the DBE or Non-DBE/BD is not able to perform, the prime contractor must provide written documentation from the DBE or Non-DBE/BD as to the reasons. The project manager refers all replacement approval requests to the Transit Program Manager.

If the Department concurs that a substitution is warranted, the prime contractor will seek a DBE to perform the work. All DBEs currently certified in the specific area of work to be performed, must be contacted in writing or by phone, and quotes solicited. If available, a DBE will be selected to perform a dollar value of work, equal to the value of the commitment not achieved, unless the contractor can demonstrate the DBE quote is unreasonable, using the same bid differential comparison in section “Good Faith Efforts Documentation.”

In instances where trucking replacements are sought, DBEs and/or Non-DBEs as allowed by regulation must be selected to cover all the trucking required until sufficient participation is met.

The Local Government Division Transit Section will provide a written final determination to the project manager and/or ADE.

The prime contractor is responsible for any additional costs incurred as a result of the prime contractor’s failure to fulfill the original commitment or the DBE or Non-DBE/BD’s failure to perform.

### Good Faith Efforts in the event of Significant Change Orders

Change orders over \$500,000 that will significantly change the project have an impact on the project goal, the contractor’s goal achievement, and the contracting opportunities available to

DBE and other small businesses.

The Department processes change orders per the purchasing procedures in North Dakota Century Code CHAPTER 54-44.4 STATE PURCHASING PRACTICES NDDOT Construction Manual Section 5 Contract Changes/Estimates page 8 outlines the Department's procedures to process change orders and the values various personnel are authorized to approve.

Change orders over \$500,000 are considered a Major Change/Major Extra Work and must be authorized by the Office of Operations Director. (See page 8 NDDOT Construction Manual Section 5)

If the project has an assigned DBE goal, the prime must submit SFN60595 to document its good faith efforts to solicit and hire DBEs to perform the work and increase their participation toward the new project goal amount.

The Office of Operations, Local Government Division Transit Section and Civil Rights Division will evaluate the specific changes in cost, character, or scope of work. When a Major Change/Major Extra Work change order is presented to the Office of Operations, Local Government Division Transit Section, Civil Rights Division will be notified. Following notification, Civil Rights Division, Local Government Division Transit Section and Office of Operations will meet to consider the following.

1. How does the change in value affect the prime's goal achievement?
2. Will the prime's current participation including the new amount meet the goal?
  - If not, how much more participation is needed to achieve the goal with the new amount?
3. Are there DBEs currently on the project who could be hired to do the work?
  - If so, has a quote from the DBE been solicited?
4. Is this new work? Are subcontractors new to the project required?
  - If so, did the prime provide adequate GFE documentation?
5. Are there DBEs in the DBE Directory who are certified to perform the work being changed?
  - If so, did the prime provide adequate GFE documentation?
  - If not, no further Good Faith Efforts are required.

After review of the above, the Office of Operations Director will determine whether to approve the change order. If approved, the project's change order will be incorporated as part of the contract.

#### Non-Compliance, Failure to Perform and Sanctions

Contractors who repeatedly fail to perform the contract requirements, make late contract-related payments, or employ fraudulent practices risk sanctions which may include, but are not limited to:

- (1) Withholding monthly progress payments;
- (2) Deducting the DBE participation dollar amount (difference between committed to and achieved);
- (3) Finding the contractor in default;

- (4) Assessing sanctions;
- (5) Liquidated damages; and/or
- (6) Disqualifying the contractor from future bidding as non-responsible;
- (7) Any combination of the above.

## **SECTION 26.55 COUNTING DBE PARTICIPATION**

The Department will count DBE participation toward our overall annual goal as provided in 49 CFR Part 26.55 as noted in either Special Provision - Race/Gender Conscious or Race/Gender Neutral as specified under Counting DBE Participation.

No DBE credit is given toward any goals if the firm is not certified at the time of the execution of the contract.

Dollar value of work performed by a DBE after it has ceased to be certified is not counted toward a project's goal or the Department's overall goal. The prime contractor is still able to count the participation of the firm through the life of the contract, they are not required to go through good faith efforts or the replacement approval process if a firm they are utilizing is no longer certified after the commitment is made.

The Department does not count the participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE.

### **The Department counts DBE participation as follows:**

**Manufacturer:** Manufacturer credit is appropriate when the DBE maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under contract and of the general character described by the specifications. Alterations or customization of a "stock" product would be eligible for manufacturer credit. DBE credit is awarded at 100% for this type of work. Delivery type is not relevant in this type of credit.

**Broker Credit (Manufacture Representative, Procurement Specialist, Leasing):** Broker credit is appropriate when the DBE arranges or expedites the transaction of materials or supplies that it does not manufacturer or deliver and is never in possession of the products. In this type of transaction, a DBE would serve as a third-party intermediary between the manufacturer and the contractor providing project driven sales. The DBE assumes little to no risk in this transaction and is awarded DBE credit for the "mark-up" of the product only. Drop ship transactions would only be eligible for broker credit. There is no maintained facility where inventory is kept on a regular basis for sale.

For direction on how a specialty item can be eligible for supplier credit, see the information provided below. A specialty item that does not fully meet these requirements can only be credited at brokerage rates.

**Regular Dealers/Suppliers:** Supplier credit is appropriate when the DBE owns, operates or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business sells to the general public with inventory on hand. If a legitimate public warehouse exists, that regularly stocks, deals and sells to the walk-in-public, then the method of delivery of

the goods is not examined. Supplier credit would be awarded at 60% of the cost of the materials. 49 CFR 26.55 (e)(ii)

### **Bulk Items 49 CFR 26.55 (e)(ii)**

A DBE may be eligible for supplier credit in regard to non-specialty bulk items (i.e. Petroleum, steel, asphalt, aggregate) without a warehouse or storefront. If bulk items are purchased directly from the manufacturer the DBE must both own and operate its own distribution equipment. The DBE may supplement its own distribution equipment through a long-term lease (defined as more than one year) but the DBE must demonstrate unimpeded access to the leased equipment and operate the equipment with the DBE's own employees. If all these circumstances do not exist, the DBE is only eligible for broker credit.

### **Specialty Products**

Specialty products are those products that are ordered contract-specific for a job. Examples may include, but are not limited to, steel beams, concrete beams, box culverts or piping. Supplier credit is available in two different scenarios:

- Supplier credit would be available if the DBE owns its own facility and is in the business of selling products and materials to the public and sells products of similar nature to the specialty item and the DBE must take possession of the specialty item to determine quality and quantity of the specialty item(s). To be eligible for supplier credit, the DBE must deliver the specialty item with its own distribution equipment and employees.
- Supplier credit would be available if the DBE does not own its own facility but does own its own distribution equipment which it uses to pick up the specialty item(s) and deliver to the job site with the DBE's own employees.

Any other scenario dealing with specialty products would only be eligible for broker credit.

**Regular Dealers vs. Brokers/Expeditors/Facilitators:** On a case-by-case basis, DBE regular dealers may count only the fees/commissions charged for providing procurement assistance as a manufacturer's representative or expeditor of transactions. The key factor in this determination is whether the prime and/or its subcontractors could have ordered the materials without the DBE's assistance. If a non-DBE contractor could have procured the materials or supplies without the intervention of the DBE, the DBE is not performing a regular dealer capacity. To assist in determining the difference, the Department may poll each regular dealer to request their ordering and delivery process.

**Trucking:** The Department counts DBE trucking on a one-for-one basis. A DBE, on each of its contracts, must first own and operate at least one fully licensed, insured, and operational truck. A DBE may then supplement its fleet using lease/broker agreements. Only trucks leased from a reputable dealer count towards the firm's DBE participation. Full credit is given for the transportation value of leased/brokered trucks owned, operated, and insured by other DBEs. A DBE trucking firm may subcontract to non-DBE trucking firms. If a DBE subcontracts trucks from non-DBEs, the total value of trucking services provided by non-DBEs cannot exceed the value of trucking services provided by DBEs.

- Example: DBE owns 2 trucks and subcontracts 4 trucks from non-DBE(s). The total number of trucks that may be counted towards DBE participation is 4 of the 6 trucks.

When a DBE leases more non-DBE than DBE trucks, only the fee or commission the DBE trucker received is credited for the extra non-DBE trucks.

- Example: DBE owns 2 trucks and subcontracts 4 trucks from non-DBE(s). Total number of trucks that may be counted towards DBE participation is 4 of the 6 trucks. Brokerage or other fee of \$X.XX may also be counted toward DBE participation.

A legitimate subcontract must be in place between the DBE and non-DBE trucking firm in order to count participation. Additional reporting under the DBE contract may also be necessary to report non-DBE non-match payments and/or brokerage/fees for non-DBE non-match trucks if applicable. Certified payroll requirements also apply.

A DBE trucker is responsible for identifying the number of trucks to be used on a project for DBE participation credit. If the 1:1 DBE Trucking Ratio is utilized SFN 60781 DBE Weekly Trucking ([Resource Link N](#)) report is required to be completed and submitted to the project manager weekly, which will indicate the number of DBE-owned trucks and the number of non-DBE trucks the DBE has provided for use on the contract.

### **Commercially Useful Function (CUF)**

The Department requires CUF reviews on the work of every DBE to maintain DBE program integrity. The contractor may count towards its DBE goal only those expenditures to certified DBE firms that provide a Commercially Useful Function (CUF) on the project. CUF issues only pertain to counting DBE credit, and does not affect payment. SFN 62120 Performance – Commercially Useful Function Certification ([Resource Link G](#)) will be used by the Department and maintained as part of the project file.

A DBE performs a CUF when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. 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 materials itself.

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 to obtain the appearance of DBE participation.

In the case of a DBE performing as the prime contractor, count the portion of the work actually performed by the DBE's own forces, plus any work subcontracted to DBE firms. Any work subcontracted to non-DBE firms (at any tier) would not be counted as part of the overall participation of the DBE prime. A CUF is not required to be completed on a DBE performing as the prime contractor, however must be completed for any DBE working for the DBE prime.

If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of the contract than would be expected on the basis of normal industry practice for the type of work involved, it is not performing a CUF.

Transit subrecipients will certify the DBE is performing a Commercially Useful Function prior to submitting SFN 62128 Certification of DBE Performance and Payments ([Resource Link H](#)) to NDDOT Local Government Division Transit Section.



## **SUBPART D - CERTIFICATION STANDARDS**

### **SECTION 26.61 BURDENS OF PROOF**

A firm seeking certification has the burden of demonstrating, by a preponderance of the evidence, that it meets the requirements of Part 26 Subpart D and Part 23 Subpart C concerning group membership or individual disadvantage, business size, ownership, and control.

Members of the designated groups identified in 26.67(a) are presumed to be socially and economically disadvantaged. Applicants in the designated groups must submit a signed, notarized statement that they are a member of one of the groups noted in 26.67(a).

Individuals who are not members of the designated groups, have the burden of proving, by a preponderance of the evidence, that they are socially and economically disadvantaged.

Determinations on whether individuals and firms have met their burden of demonstrating group membership, ownership, control, and social and economic disadvantage (where disadvantage must be demonstrated on an individual basis) by considering all the facts in the record, viewed as a whole. CFR does not give guidelines on considering various types of businesses (i.e., S-Corp, LLC, etc.) differently. Firms are required to know if and how their business structure may affect their ability to be certified or graduation from the program.

### **SECTION 26.63 GROUP MEMBERSHIP**

Members of the designated groups identified in 26.67(a) are presumed to be socially and economically disadvantaged. Applicants in the designated groups must submit a signed, notarized statement that they are a member of one of the groups noted in 26.67(a).

In making such a determination, the Department will consider whether the person has held himself out to be a member of the group over a long period of time prior to application for certification and whether the person is regarded as a member of the group by the relevant community.

To prove their membership in a designated group, individuals may provide documentation of memberships in ethnic organizations, i.e., the Black Chamber of Commerce; birth certificates that indicate an individual's parentage; an individual with disabilities may provide loan application denials or other supporting documentation which shows the inability to access capital. NDDOT currently does not provide a Veterans Program.

### **SECTION 26.65 BUSINESS SIZE DETERMINATIONS**

To be an eligible DBE, a firm (including its affiliates) must be an existing small business as defined by Small Business Administration (SBA) standards.

The Department will apply current SBA business size standards found in 13 CFR part 121 appropriate to the types of work a firm seeks to perform in DOT-assisted contracts, including the primary industry classification of the applicant.

The firm is not an eligible DBE in any Federal fiscal year if the firm has had average annual gross receipts over the firm's previous three fiscal years, in excess of \$26.29 million. The financial management subject matter expert reviews the firm and its affiliates to determine whether their gross receipts average complies with the regulation

## **SECTION 26.67 SOCIAL AND ECONOMIC DISADVANTAGE**

The Department presumes that members of the designated groups identified in 26.67(a) are socially and economically disadvantaged. Applicants in the designated groups must submit a signed, notarized statement that they are a member of one of the groups noted in 26.67(a).

The Department requires each individual owner of a firm applying to participate as a DBE, whose ownership and control are relied upon for DBE certification, to certify that he or she has a personal net worth that does not exceed \$1.32 million. The applicant owner must submit their supporting documentation through the online application system. The online personal net worth form mirrors the DOT Personal Net Worth Statement and is in full compliance with the federal rule requiring the use of the form with no revisions. The financial statement and tax documentation is reviewed by a financial management subject matter expert for compliance with the regulation governing economic disadvantage.

In addition, the Department utilized the size standard for adjusted gross income of the majority owner(s) of the firm not to exceed an average of \$350,000 of the most current 3-year period. Other states may not utilize this criterion as it is optional in 49 CFR part 26. North Dakota has historically used this criteria and plans to continue.

## **SECTION 26.69 OWNERSHIP**

To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals. The financial management subject matter expert reviews whether the applicant's capital or expertise to acquire their ownership interests is real, substantial, and continuing. To make that determination, the financial management subject matter expert reviews debt instruments, loan documents, the firm's value vs. contributions, transfers, bank signature cards and contracts among other submitted documentation.

## **SECTION 26.71 CONTROL**

A DBE applicant firm must prove its independence from other firms, employee/employee relationships between disadvantaged owners of the potential DBE and non-DBE firms or people associated with non-DBE firms. The applicant's control of the firm is reviewed and scrutinized in accordance with 26.71.

The Department will grant certification for only those specific types of work in which the socially and economically disadvantaged owner has the ability to control the firm with respect to that type of work. The Department will assign the NAICS code(s) and descriptor(s) that most narrowly and specifically describe the work being requested for certification and performance on federally assisted contracts. Firms may request and be certified in multiple NAICS codes where appropriate. When an existing DBE firm requests to be certified to perform additional services beyond their existing certified services, the new NAICS code(s) will also be as specific as possible for the work being requested.

The firm bears the burden of providing detailed company information needed to make an appropriate NAICS code designation.

## **SECTION 26.73 OTHER RULES**

The Department will not include requirements outside of the scope of DBE certification such as prequalification status, state business licenses, or whether the applicant's type of work is likely to be performed in the state.

## **SUBPART E – CERTIFICATION PROCEDURES**

### **SECTION 26.81 UNIFIED CERTIFICATION PROGRAMS**

The Department, under its Unified Certification Program (UCP) agreement, makes all certification decisions on behalf of FHWA, FAA, and FTA recipients. Certification decisions under the UCP are binding on all DOT recipients in North Dakota. An applicant is only required to apply to the Unified Certification Board for DBE and/or ACDBE certification and once certified, the certification will be honored by all DOT recipients in North Dakota. The Department coordinates the UCP responsibilities for FHWA, FAA, and FTA recipients. There is no cost to FTA or FAA for these coordinated efforts.

Under the UCP, the DBE certification standards of 49 CFR Subpart D of Part 26, and the DBE certification procedures of Subpart E of Part 26, and Part 23 for airport concessions, are used to determine the eligibility of firms to participate as DBE/ACDBEs in DOT-assisted contracts. To be certified as a DBE/ACDBE, a firm must meet all certification eligibility standards. Certification decisions will be based on the facts as a whole.

The UCP will cooperate fully with oversight, review, and monitoring activities of the DOT and its operating administrations. The Department will implement DOT directives and guidance concerning certification matters. The Department will carry out all obligations with respect to certification and nondiscrimination requirements contained in 49 CFR Part 26 and Part 23.

The Department certifies the eligibility of DBE firms for purposes of this program. The Department certifies eligible firms that primarily provide services and/or products related to the development, construction, maintenance, and operation of a transportation system. It is the responsibility of the applicant to provide the necessary information as requested by the Department. The burden of proof of eligibility within the program is upon the applicant, not the Department. Prior certification by another state or agency does not ensure certification by the Department.

Only firms certified by the Department at the time of the execution of the contract can be counted for participation toward meeting any DBE goals except as provided for in 49 CFR Part 26.87.

#### Staffing

The DBELO has a Civil Rights Program Administrator (CRPA) assigned to the DBE program as part of their duties. The CRPA serves as a non-voting member of the Good Faith Efforts Review Committee (unless designated by the DBELO) and is a member of the DBE Unified Certification Board (Board) and processes DBE/ACDBE applications, compiles data for the DBE/ACDBE Directory, may conduct DBE project site and home office reviews, conducts and writes the annual review of the supportive services contractor, prepares statistical data for various reports, and updates the DBE/ACDBE Directory as needed.

Should an applicant apply for certification as a concessionaire (ACDBE) the ND Aeronautics Commissioner provides a designee to serve as a voting member of the Board.

New members to the Board are provided training. Full time members from the CRD, Construction Services Division, and Financial Management Division generally sit in as an observer for approximately 2-3 months before they become a voting member. Other

representatives serve as subject matter experts on an as needed basis.

All costs to support the unified certification program have been, and will continue to be, included in the CRD annual budget. The ND Aeronautics Commission designee will serve on the Board at no cost to the Department.

### **DBE Unified Certification Board**

The DBE Unified Certification Board is made up of any three voting members; one from the CRD, one from the Financial Management Division, and one subject matter expert representing any of the following divisions: Bridge, Communications, Construction Services, Design, Environmental and Transportation Services, Information Technology, Human Resources, Local Government, Maintenance, Materials and Research, Planning & Asset Management, or Programming. The North Dakota Aeronautics Commission provides a member for airport related applicants. The DBELO, CRD, or his/her designee, chairs the Board. In the case of an interstate certification applicant where subject matter expertise is not readily available within the Department, contact with the home state to determine the means used to establish expertise is appropriate.

The CRPA and DBESS prescreen DBE/ACDBE applications before they are presented to the board. The CRPA reviews, analyzes, compiles, and presents data, and prepares the DBE Certification recommendation form for signature by the applicable board members. (In house forms - SFN 17539- renewal, SFN 14853-new.)

The CRD division director or designee reviews the application as a whole as it relates to the regulations. The application's financials are reviewed by the Financial Management Division member. The subject matter expert member serves in an ad hoc role depending on the applicant's type of work.

### **DBE/ACDBE Directory 26.81**

See 49 CFR §26.31 DBE Directory Section on Page 17 of this manual.

### **SECTION 26.83 PROCEDURES FOR CERTIFICATION DECISIONS**

North Dakota firms wishing to participate as DBE/ACDBE contractors, subcontractors, manufacturers, regular dealers, joint ventures, or mentor-protégées in any project using federal funds from the FHWA, FTA, or FAA must be certified by the Department's UCP. To this end, the Department has established the following procedures to be followed in the certification of these in-state firms.

#### DBE / ACDBE Application

Each business, including the DBE partner in a joint venture, wishing to participate as a DBE/ACDBE must complete and submit the DBE Uniform Certification Application through CCS. The Department does not accept paper/hard copy applications or any electronic versions other than through CCS.

The UCP requires an applicant to submit the federal Uniform Certification Application and Personal Net Worth Statement without modification. The electronic online system application mirrors the required USDOT DBE Application and Personal Net Worth Statement and is in full compliance with the federal rule requiring the use of the form with no revisions.

The online certification system allows electronic signatures of the owner(s) applicant(s);

however, any documents which must be signed before a notary public must be scanned and uploaded to the system.

The application may be launched either from the Department's web page at <http://www.dot.nd.gov/divisions/civilrights/dbecert.htm> or by navigating directly to: <https://dotnd.diversitycompliance.com/>

All communication with applicants is exchanged within the system. All requests for supporting documentation and answers to questions regarding the application is exchanged through the system. Each member of the UCP has access to the system. Certification decisions are based solely on the application, its documentation, and the interview (a recording of which is also stored in the applicant's record).

In accordance with 49 CFR §26.83 (c)(2), the Department requests supplemental documents to be uploaded depending on the type of business seeking certification. In the case of an interstate certification, an "affidavit of correct and current application" is required.

The Department's DBE Program home page includes instructions, links, Frequently Asked Questions, and other resources for applicants.

Documentation may be required to verify applicant's assertions of fact such as copies of contracts, copies of commercial driver's licenses, or spousal renunciation, if a reasonable person would require additional information.

The applicant's record once started, is saved into the system. The applicant may continue with the application at any time by simply logging in to the account record. Therefore, an applicant has the option of entering and saving information over time. The system allows the applicant to print any page, instruction, or make a screen capture for later use and reference.

All North Dakota-based certification applications (DBE or ACDBE - airport concessionaire applicants) will be handled in the same manner. The Department will not accept SBA certification documentation as substitutions for the DBE Uniform Certification Application.

Applicants wishing to apply for DBE/ACDBE status or DBE joint venture eligibility may do so through the CCS system.

### DBE Applicant Assistance

With access to CCS, DBE Supportive Services Consultants are able to identify when new applicants establish an account and begin their work. Thereafter, DBESS contacts the applicant to offer assistance in completing the application or in answering any questions regarding the certification process.

A list of the documentation required to complete the application is located in the applicant's CCS account record and in the Resources section of the DBE home page.

On-site/home-office and/or project site reviews are conducted on all in-state applicants prior to their oral interview with the Board. Out-of-state applicant's home office reviews are requested from their home- state Department of Transportation. The Department is not required to process an application for certification from a firm having its principal place of business outside the state if the firm is not first certified by the UCP in the state in which it maintains its principal place of business. (§26.81(d)) Therefore, applicants must be certified in their home state before applying for certification in North Dakota.

## Oral Interview

The DBE Application and any Applications for Determining Joint Venture Eligibility reviewed by the Board. All applicants applying for certification will be invited to participate in an oral interview (either face-to-face or via electronic means) with the Board. If this proves to be a hardship for an applicant, the Board will make other arrangements for the oral interview on a case-by-case basis.

Interviews are conducted with each applicant(s) making up at least 51 percent ownership. The interviews are scheduled as needed to accommodate applicants in their process in a timely manner. The questions asked of the applicant(s) concern ownership, financial arrangements, day-to-day management and control, expertise in the area(s) in which the applicant is seeking certification, or any other questions the Board deems appropriate. All oral interviews are recorded.

In instances where the applicant is an airport concessionaire, the representative from the ND Aeronautics Commission will ask the expertise questions during the oral interview.

Under §26.83 (k), the Department must make decisions on applications for certification within 90 days of receiving, from the applicant firm, all information required in the certification process. This time may be extended for no more than an additional 60 days upon written notice to the firm explaining fully and specifically the reasons for the extension. The Department's failure to make a decision by the applicable deadline is deemed a constructive denial of the application, on the basis of which the firm may appeal to DOT under 49 CFR Part 26.89.

The Department will advise each applicant within 30 days from the receipt of the application whether the application is complete and suitable for evaluation, and if not, what additional information or action is requested.

The Board determines whether to certify the firm based on its application as a whole. If the Board determines the firm is to be certified, a letter is sent to the applicant firm notifying them of the Board's determination. If the Board determines the firm is to be denied, it will make a recommendation to the Office of Operations Director to deny certification of an applicant based on the information provided, the oral interview, 49 CFR Part 26 and Part 23, and the Department's DBE program. The Office of Operations Director makes the decision to deny certification to the applicant(s).

The Department makes all necessary and reasonable efforts to expedite the certification process. Where applicable, FTA and FAA recipients will be notified of certification actions for applicants in their field. All certification decisions by the Board are binding on all Department recipients.

The Department may make additional on-site/home office reviews or project-site reviews at random to determine the continuing eligibility of a DBE firm.

State DOTs/UCPs are encouraged to perform onsite reviews on a regular basis. The Department will review up to 10 North Dakota-based DBEs on an annual basis. During these onsite reviews, the State DOT/UCP will review relevant documents as long as such requests are reasonable.

The Department safeguards 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.

## Notice of Changes and Annual Affirmation of DBE Program Eligibility

DBE firms are required to notify the Department in a written affidavit, of any change in circumstances affecting its ability to meet size, disadvantaged status, ownership, or control criteria of 49 CFR Part 26, or of any material changes in the information provided with the specific DBE's application for certification.

DBEs are required to submit the affidavit and its accompanying documentation (business tax returns) through the CCS system. With any material changes in management responsibility among members of a limited liability company, the DBE must notify the Department and provide supporting documentation describing in detail the nature of such changes. DBE firms must submit the written notification within 30 days of the occurrence of the change. If the DBE firm fails to make timely notification of such a change, the firm will be deemed to have failed to cooperate under 49 CFR Part 26.109(c).

DBE firms are required to annually submit a Notice of Changes and Annual Affirmation of DBE Program Eligibility (SFN 52158) ([Resource Link M](#)) (also known in other states as Affidavit of No Change), to the Department on the anniversary date of certification. The affidavit must comply with the requirements of 49 CFR 26.83(j). CCS will send DBEs whose annual affidavit of no change is due email notices of the date due 90, 60, and 30 days in advance of the due date. The emails will contain instructions and a link to the system.

### **SECTION 26.85 INTERSTATE CERTIFICATION**

49 Code of Federal Regulations §26.85(c) states that any firm that is currently certified in its home state and wishes to become certified as a DBE/ACDBE in North Dakota, must provide the following information through the CCS online system. Any notarized documentation must be scanned and submitted by fax or attached online through the system.

In the case of DBE/ACDBEs applying for interstate certification, the Department will make every effort to facilitate the application.

The Department will not require a new application from a DBE/ACDBE currently certified in its home state. In addition to DBE Supportive Services, interstate certification applicants have access to numerous resources on the DBE home page.

In order to be certified:

- (1) The applicant must provide to the NDDOT UCP a copy of its home state certification letter, a complete copy of its home state application form with all supporting documents, and any non-duplicative information submitted to any other state for the purpose of certification. "Supporting documents" refers to all documents submitted to the home state as part of the firm's initial certification application package. This includes any notices of changes (§26.83(i)), affidavits of no change (see §26.83(j)) and the accompanying federal tax returns submitted to the home state to support its continuing DBE Program eligibility. The applicant must submit any correspondence with their home state (or any other recipient) concerning an application or their status as a DBE firm.
- (2) The applicant must also provide to NDDOT any notices or correspondence from states other than the home state relating to its status as an applicant or certified DBE in those states. For example, if the applicant has been denied certification or decertified in a state other than the home state, or subject to a decertification

action there, the applicant must inform NDDOT of this fact and provide all documentation concerning this action to NDDOT.

- (3) If the applicant has filed a certification appeal with DOT (see §26.89), it must inform NDDOT of the fact and provide NDDOT with the letter of appeal and DOT's response.
- (4) The applicant 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 to affirm that all the information required by 49 CFR 26.85(c) has been submitted, that the information is complete and, in the case of the information required above (§26.85(c)(1)), is an identical copy of the information submitted to the home state.

For purposes of categorizing the work to be certified and to define the equipment, especially trucks, to be included on the DBE Directory, out-of-state DBE applicants are also asked to include:

- NAICS codes being requested, and a narrative on the services an applicant proposes to be certified to perform.
- A current list of Equipment to be used working in North Dakota so that appropriate participation may be counted toward the state's DBE Goal Achievement. The Department does not have a reciprocity agreement with any other UCP.

When the Department receives from an applicant firm all the information listed in the section above, the Department must take the following actions:

#### Request for Home State Site Visit Review

Within seven working days of receiving the out-of-state DBE/ACDBE's application, CRD will contact the home state and request a copy of the home-office/site visit review report for the applicant, any updates to the review report for the applicant, and any evaluation of the firm based on the site visit. According to 49 CFR § 26.85(d)(1), the home state must transmit this information to the Department within seven days of receiving the Department's request. A pattern of the home state not complying with such requests in a timely manner is noncompliance with this Part.

If the Department has not received a copy of the site visit review report from the home state by 14 business days after making a timely request for it, the Department may hold action required by 49 CFR part 26.85(d)(2-4) in abeyance pending receipt of the site visit review report. In this event, the Department must no later than 30 days from the date on which it received from an applicant firm all the information required in 49 CFR Part 26.85(d), notify the firm in writing of the delay in the process and the reason for it.

The Board may request clarification from the applicant as necessary.

After reviewing all the documentation provided, the Board 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 North Dakota.



Reasons for making such a determination may include the following:

- Evidence that the home state certification was obtained by fraud
- New information not available to the home state at the time of its certification, showing that the firm does not meet all eligibility criteria
- The home state's certification was factually erroneous or was inconsistent with the requirements of this part
- North Dakota state law requires a result different from that of the state law of the home state
- The information provided by the applicant firm did not meet the requirements of 49 CFR Part 26.85(c).
- The firm's majority owner(s) adjusted gross income exceeds the 3 year average of \$350,000. Many states don't use this criterion as it is optional, North Dakota does.

Unless there is good cause to believe that the home state's certification is erroneous or should not apply, the Department must, no later than 60 days from the date on which the Department received from the applicant firm all the information required by 49 CFR Part 26.85(c), send the applicant firm a notice that it is certified and place the firm on the Department's directory of certified firms.

If the Department has determined that there is good cause to believe that the home state's certification is erroneous or should not apply, the Department will, no later than 60 days from the date on which the Department received from the applicant firm all the information required by 49 CFR Part 26.85(c), send the applicant firm a notice stating the reasons for the determination.

The notice must state with particularity the specific reasons why the Department believes that the firm does not meet the requirements of 49 CFR Part 23 or 26 for DBE eligibility and must offer the firm an opportunity to respond to the Department with respect to those reasons.

- The firm may elect to respond in writing, to request an in-person meeting with the **UCP Board** (the Department's decision maker) to discuss its objections to the firm's eligibility, or both. If the firm requests a meeting, the Department must schedule the meeting to take place within 30 days of receiving the firm's request.
- The firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements of 49 CFR Part 23 or 26 with respect to the particularized issues raised by the Department's notice. The firm is not otherwise responsible for further demonstrating eligibility to the Department.
- The **UCP** is thoroughly familiar with the provisions of 49 CFR Part 23 or 26 concerning certification.
- The Department must issue a written decision within 30 days of the receipt of the written response from the firm or the meeting with the **UCP**, whichever is later.
- The firm's application for certification is stayed pending the outcome of this process.
- A decision under this section may be appealed to the Departmental Office of Civil Rights, USDOT, under 49 CFR Part 26.89.

#### DOCR Ineligibility Determination Online Database

As a UCP, when the Department denies a firm's application, rejects the application of a firm certified in their home state or any other state in which the firm is certified, through the procedures of 49 CFR Part 26.85(d)(4) or decertifies a firm, NDDOT must make an entry in the

Department of Transportation, Office of Civil Rights' (DOCR's) Ineligibility Determination Online Database located on the web at: (<https://www.civilrights.dot.gov/user>)

The Department must enter the following information:

- The name of the firm
- The names(s) of the firm's owner(s)
- The type and date of the action
- The reason for the action.

As a UCP, the Department must check the DOCR website at least once every month to determine whether any firm that is applying to the Department for certification or that the Department has already certified is on the list.

For any such firm that is on the list, we will promptly request a copy of the listed decision from the UCP that made it. As the UCP receiving such a request, the Department must provide a copy of the decision to the requesting UCP within seven days of receiving the request. As the UCP receiving the decision, the Department must then consider the information in the decision in determining what, if any, action to take with respect to the certified firm or applicant.

## **SECTION 26.86 DENIALS OF INITIAL REQUESTS FOR CERTIFICATION**

When the Department denies a request by a firm, which is not currently certified with the Department, to be certified as a DBE/ACDBE, the Department must provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based must be made available to the applicant, on request.

Applicants are also advised of their right, as provided for in 49 CFR Part 26.89, to appeal to the U.S. Department of Transportation. The determination of ineligibility of certification is effective immediately and remains in effect until and unless the DOT makes a determination reversing the Department's action.

Applicants may correct identified deficiencies any time and reapply after six months of the date of the denial letter. A new application must be created within CCS if the firm is reapplying, and all previous paperwork will have to be resubmitted.

## **SECTION 26.87 REMOVAL OF A DBE'S ELIGIBILITY**

### Third Party-Initiated Ineligibility Complaints

Any person may file a written complaint with the Department alleging that a currently certified DBE is ineligible and specifying the alleged reasons why the firm is ineligible. The Department 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 complainant's identities will be protected as required by 49 CFR Part 26.109(b).

The Department must review its records concerning the firm, any material provided by the firm and the complainant, and other available information. The Department may request additional information from the firm or conduct any other investigation deemed necessary.

If the Department determines, based on this review, that there is reasonable cause to believe

that the firm is ineligible, the Department must provide written notice to the firm that the Department proposes to find the firm ineligible, setting forth the reasons for the proposed determination. If the Department determines that such reasonable cause does not exist, the Department 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.

#### Department-Initiated Proceedings

If, based on notification by the firm of a change in its circumstances or other information that comes to the Department's attention, the Department determines that there is reasonable cause to believe that a currently certified firm is ineligible, the Department 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.

#### DOT Directive to Initiate Proceeding

If the DOT determines that information in the Department's certification records, or other information available to the DOT, provides reasonable cause to believe that a firm the Department certified does not meet the eligibility criteria of 49 CFR Part 26, the DOT may direct the Department to initiate a proceeding to remove the firm's certification.

The DOT must provide the Department and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.

The Department must immediately commence and prosecute a proceeding to remove eligibility.

#### Hearing

When the Department notifies a firm that there is reasonable cause to remove its eligibility, as provided for in 49 CFR Part 26.89(a-c), the Department must give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.

In such a proceeding, the Department 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.

The Department must maintain a complete record of the hearing, by any means acceptable under state law for the retention of a verbatim record of an administrative hearing. If there is an appeal to DOT under 49 CFR Part 26.89, the Department must provide a transcript of the hearing to DOT and, on request, to the firm. The Department must retain the original record of the hearing. The Department may charge the firm only for the cost of copying the record.

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

#### Separation of Functions

The Department must ensure that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the

matter, to direction from the office or personnel who did take part in these actions.

The decision maker must be an individual who is knowledgeable about the certification requirements of the Department's DBE program and 49 CFR Part 26.

### Grounds for Decision

The Department must not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to the recipient at the time of its certification of the firm. The Department may base such a decision only on one or more of the following:

- Changes in the firm's circumstances since the certification of the firm by the Department that render the firm unable to meet the eligibility standards of 49 CFR Part 26
- Information or evidence not available to the Department at the time the firm was certified
- Information that was concealed or misrepresented by the firm in previous certification actions by a recipient
- A change in the certification standards or requirements of the DOT since the Department certified the firm; or
- A documented finding that the Department's determination to certify the firm was factually erroneous.

### Notice of Decision

Following its decision, the Department must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of the Department's decision and of the availability of an appeal to the U.S. Department of Transportation under 49 CFR Part 26.89. The Department must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed the Department to initiate the proceeding.

### Status of the Firm During Proceedings

A firm remains an eligible DBE during the pendency of the Department's proceeding to remove its eligibility.

The firm does not become ineligible until the issuance of the notice provided for in 49 CFR Part 26.87.

### Effects of Removal of Eligibility

When the Department removes a firm's eligibility, the Department must take the following action:

- When a prime contractor has made a commitment to using the ineligible firm, or the Department has made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before the Department issues the decertification notice in 49 CFR Part 26.87(g), the ineligible firm does not count toward the contract goal or overall [aspirational] goal. The Department must direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate to the Department that it has made a good faith effort to do so.
- If a prime contractor has executed a subcontract with the firm before the Department 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 the Department 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 Department issued the notice of its ineligibility must not count toward the Department's overall [aspirational] goal but may count toward the contract goal.

- Exception: If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, the Department may continue to count its participation on that contract toward overall [aspirational] and contract goals.

#### Availability of Appeal

When the Department makes an administratively final removal of a firm's eligibility, the firm may appeal the removal to the U.S. Department of Transportation under 49 CFR Part 26.89.

#### Appeal to DOT

A firm may immediately appeal a determination of ineligibility of certification to the DOT without going through the Department's administrative reconsideration procedure.

Further instructions are found in the Certification Appeal to the DOT 49 CFR Part 26.89.

### **SECTION 26.88 SUMMARY SUSPENSION OF CERTIFICATION**

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

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

The Department will consider all relevant factors, including how much information is available, the credibility of the information and allegations given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result.

When a firm is suspended under §26.88, the Department will immediately notify the DBE of the suspension by certified mail, return receipt requested, to the last known address of the DBE owner(s). The suspension is temporary pending an expedited proceeding (under §26.87) to determine whether the DBE is eligible to participate in the program.

Suspension is a temporary status of ineligibility pending a hearing/proceeding as outlined in §26.87 to determine whether the DBE is eligible to participate in the program or should be removed. The suspension takes effect when the DBE receives, or is deemed to have received, the Notice of Suspension.

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

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

The decision to immediately suspend a DBE under these circumstances is not appealable to the US Department of Transportation. However, the failure of a recipient to lift the suspension or reinstate the firm or commence a decertification proceeding, is appealable to the U.S. Department of Transportation under §26.89, as a constructive decertification.

## **SECTION 26.89 CERTIFICATION APPEALS**

### **Filing an Appeal**

A firm that is denied certification or whose eligibility is removed by the Department may make an administrative appeal to the DOT.

Complainants in an ineligibility complaint to the Department, including those directed by the FHWA, FTA, or FAA in the circumstances provided in 49 CFR Part 26.87(c), may appeal to the DOT if the Department 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.

Appeals are to be sent to the following address: U.S. Department of Transportation, Departmental Office of Civil Rights, 1200 New Jersey Avenue, SE, Washington, D.C. 20590-0001.

Pending the DOT's decision in the matter, the Department's decision will remain in effect. The DOT does not stay the effect of the Department's decision while it is considering an appeal.

To file an appeal, a letter must be sent to the DOT within 90 days of the date of the Department's final decision, containing information and arguments concerning why the Department's decision should be reversed. The DOT may accept an appeal filed later than 90 days after the date of the decision if the DOT determines that there was good cause for the late filing of the appeal or in the interest of justice.

When it receives an appeal, the DOT requests a copy of the recipient's complete administrative record in the matter. The Department will provide the administrative record, including a hearing transcript, within 20 days of the DOT's request. The DOT may extend this time period on the basis of the Department's showing of good cause. To facilitate the DOT's review of the Department's decision, the Department will ensure that such administrative records are well organized, indexed, and paginated. Records that do not comport with these requirements are not acceptable and will be returned to the Department to be corrected immediately. If an appeal is brought concerning the Department's certification decision concerning a firm, and the Department relied on the decision and/or administrative record of another recipient, this requirement applies to both recipients involved.

The DOT makes its decision based solely on the entire administrative record. The DOT does not make a de novo review of the matter and does not conduct a hearing. The 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.

As a recipient, when the Department provides supplementary information to the DOT, the Department must also make this information available to the firm and any third-party complainant involved, consistent with federal or applicable state laws concerning freedom of information and privacy. The DOT makes available, on request by the firm and any third-party complainant involved, any supplementary information it receives from any source.

The DOT affirms the Department's decision unless it determines, based on the entire administrative record, that the Department's decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of 49 CFR Part 26 concerning certification.

If the DOT determines, after reviewing the entire administrative record, that the Department's decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of 49 CFR Part 26 concerning certification, the DOT reverses the Department's decision and directs the Department to certify the firm or remove its eligibility, as appropriate. The Department must take the action directed by the DOT's decision immediately upon receiving written notice of it.

The DOT is not required to reverse the Department's decision if the 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.

If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the DOT may remand the record to the Department with instructions seeking clarification or augmentation of the record before making a finding. The DOT may also remand a case to the Department for further proceedings consistent with DOT instructions concerning the proper application of the provisions of 49 CFR Part 26.

The DOT does not uphold the decision based on grounds not specified in the Department's decision.

The DOT's decision is based on the status and circumstances of the firm as of the date of the decision being appealed.

The DOT provides written notice of its decision to the Department, 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. The notice includes the reasons for the DOT's decision, including specific references to the evidence in the record that supports each reason for the decision.

The DOT's policy is to make its decision within 180 days of receiving the complete administrative record. If the DOT does not make its decision within this period, the 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.

All decisions made pursuant to 49 CFR Part 26.85, are administratively final and are not subject to petitions for reconsideration.

## **SECTION 26.91 ACTIONS TAKEN FOLLOWING DOT CERTIFICATION APPEAL DECISIONS**

If the Department is the recipient from whose action an appeal under 49 CFR Part 26.89 is taken, the decision is binding on the Department which includes all recipients in North Dakota pursuant to the UCP. It is not binding on recipients not subject to the UCP (i.e., recipients or UCPs in other states).

If Department is the recipient to which a DOT determination under 49 CFR Part 26.89 is applicable, the following action must be taken:

- If the DOT determines that the Department erroneously certified a firm, the Department *must* remove the firm's eligibility on receipt of the determination, without further proceedings on its part. Effective on the date of the Department's receipt of the DOT's determination, the consequences of a removal of eligibility set forth in 49 CFR Part 26.87 will take effect.
- If the DOT determines that the Department erroneously failed to find reasonable cause to remove the firm's eligibility, the Department must expeditiously commence a proceeding to determine whether the firm's eligibility should be removed, as provided in 49 CFR Part 26.87.
- If the DOT determines that the Department erroneously declined to certify or removed the eligibility of the firm, the Department must certify the firm, effective on the date of the Department's receipt of the written notice of DOT's determination.
- If the DOT determines that the Department erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, the Department must take appropriate corrective action as determined by the DOT.

If the DOT affirms the Department's determination, no further action is necessary.



## **SUBPART F - COMPLIANCE AND ENFORCEMENT**

### **SECTION 26.109 INFORMATION, CONFIDENTIALITY, COOPERATION**

The Department will safeguard from disclose to third party's information that may reasonably be regarded as confidential business information, consistent with Federal, state, and local law.

The Department will not release information included in the DBE application and supporting documentation or the personal financial information and supporting documentation to a third-party (other than USDOT) without the written consent of the submitter.

The Department will fully and promptly cooperate with the USDOT in any requests for information for compliance reviews, certification reviews, investigations, and other requests for information.

#### **Monitoring Payments to DBEs**

We will require prime contractors to maintain records and documents of payments to DBEs for three years following the performance of the contract. These records will be made available for review upon request by any authorized representative of the Department. This reporting requirement also extends to any certified DBE subcontractor.

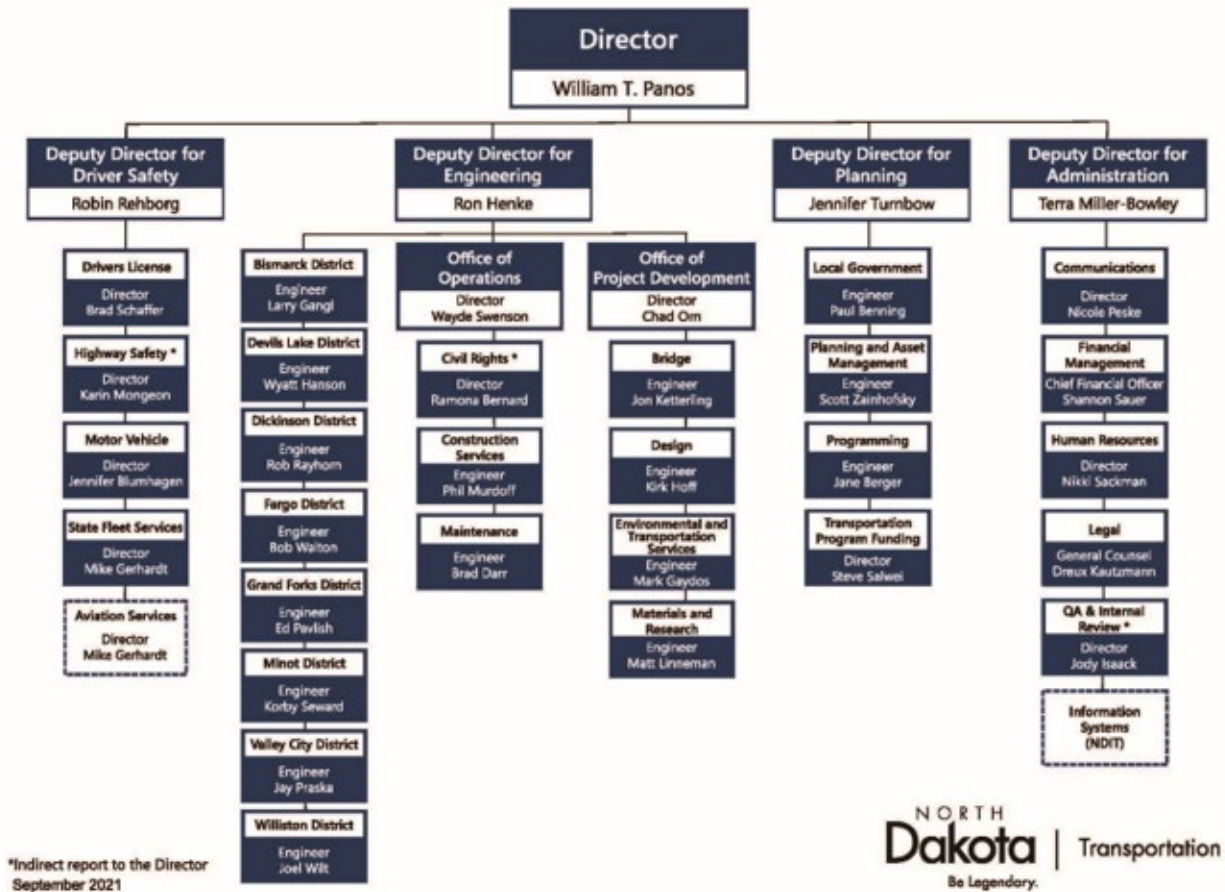
We will perform interim audits of contract payments to DBEs. The audit will review payments to DBE subcontractors to ensure that the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts states in the schedule of DBE participation.

# RESOURCE LINKS

## A: NDDOT ORGANIZATION CHART

To access NDDOT's Organizational Chart, Click:

<https://www.dot.nd.gov/divisions/exec/docs/nddot.pdf>



**FIGURE 1 NDDOT ORGANIZATION CHART**

## **B: DBE SPECIAL PROVISION – RACE/GENDER CONSCIOUS & RACE/GENDER NEUTRAL**

To access the RGC DBE SP, click the link and select the most current date in the drop down box under Special Provision, Race Gender Conscious on the page:

[\*\*NDDOT -Disadvantaged Business Enterprise/Airport Concession Disadvantaged Business Enterprise\(DBE/ACDBE\) Program\*\*](#)

To access the RGN DBE SP, click the link and select the most current date in the drop down box under Special Provision, Race Gender Neutral on the page:

[\*\*NDDOT -Disadvantaged Business Enterprise/Airport Concession Disadvantaged Business Enterprise\(DBE/ACDBE\) Program\*\*](#)

The RGN DBE SP for Transit Locally Bid Projects is provided to Transit subrecipients. See Attachment 1.

## **C: DBE/ACDBE DIRECTORY**

To access the NDDOT's DBE Directory, click "DBE Directory" at:

<https://dotnd.diversitycompliance.com/FrontEnd/SearchCertifiedDirectory.asp?XID=7485&TN=dotnd>

## **D: SFN 52012 DISADVANTAGED BUSINESS ENTERPRISE PARTICIPATION (RGN) FOR TRANSIT USE ONLY – FORM A**

To access NDDOT's DBE Directory, click:

<https://www.dot.nd.gov/forms/sfn52012.pdf>

## **E: SFN 60829 CONTRACTOR GOOD FAITH EFFORTS DOCUMENTATION**

To access SFN 60829 Contractor Good Faith Efforts Documentation, click:

<https://www.dot.nd.gov/forms/sfn60829.pdf>

## **F: SFN 60595 REPLACEMENT APPROVAL REQUEST**

To access SFN 60595 Replacement Approval Request, Click:

<https://www.dot.nd.gov/forms/sfn60595.pdf>

## **G: SFN 62120 DBE PERFORMANCE – COMMERCIALY USEFUL FUNCTION CERTIFICATION**

To access SFN 62120 DBE Performance – Commercially Useful Function Certification, click:

<https://www.dot.nd.gov/forms/sfn62120.pdf>

## **H: SFN 62128 CERTIFICATION OF DBE PERFORMANCE AND PAYMENTS**

To access SFN 62128 Certification of DBE Performance and Payments, click

<https://www.dot.nd.gov/forms/sfn62128.pdf>

## **I: FTA Triennial DBE Goal Setting – FY 2020-2022**

To access NDDOT's FTA Goal Setting Methodology select Federal Transit Administration 2020-2022 Triennial DBE Goal Setting Methodology on the NDDOT Transit Operator Portal, click:

[NDDOT - Transit Operator Portal](#)

## **J: NDDOT DBE PROGRAM HOMEPAGE**

To access NDDOT's DBE Homepage, click:

[NDDOT -Disadvantaged Business Enterprise/Airport Concession Disadvantaged Business Enterprise\(DBE/ACDBE\) Program](#)

## **K: DBE UNIFORM CERTIFICATION APPLICATION**

All new certification applications must be submitted through the NDDOT Certification & Compliance system at: <https://dotnd.diversitycompliance.com/>

The Federal Uniform Certification Application is mirrored in NDDOT's online application process and complies with the standard application. Access:

[Ready To Apply? | US Department of Transportation](#)

## **L: DBE CERTIFICATION & COMPLIANCE SYSTEM**

All new certification applications must be submitted through the NDDOT Certification & Compliance system at: <https://dotnd.diversitycompliance.com/> No hard copy applications or emailed documents will be accepted.

### **M. NO CHANGE AFFIDAVIT FOR DBE PROGRAM ELIGIBILITY**

The NDDOT Civil Rights Certification & Compliance System stores SFN 52158. When completing the No Change Affidavit and Annual Update the form is available to be filled in, signed, and notarized. Log in to the NDDOT Civil Rights Certification & Compliance System at:

[Civil Rights Certification and Compliance System - North Dakota Department of Transportation \(diversitycompliance.com\)](https://diversitycompliance.com)

### **N. SFN 60781 DBE WEEKLY TRUCKING REPORT**

To access SFN DBE Weekly Trucking Report, Click:

<https://www.dot.nd.gov/forms/sfn60781.pdf>

### **O. SFN 14268 DBE Participation Certification**

To access SFN 14268 DBE Participation Certification, Click:

<https://www.dot.nd.gov/forms/sfn14268.pdf>

**NORTH DAKOTA DEPARTMENT OF TRANSPORTATION SPECIAL  
 PROVISION: DISADVANTAGED BUSINESS ENTERPRISE PROGRAM**

**PROJECT \_\_\_\_\_**

Federal Authority .....	1	Monitoring and Enforcement.....	4
Solicitation Efforts.....	1	Commercially Useful Function .....	4
Form A.....	2	Submitting Quotes to Bidders .....	4
Form B.....	2	Definitions.....	4
Form C .....	2	Counting DBE Participation .....	5
Failure to Provide Required Docs.....	2	Form A.....	9
Award of Contract.....	3	Form B.....	10
Prime Contractor Monitoring.....	3	Form C.....	11

**FEDERAL AUTHORITY**

The following paragraph must be included in all subcontracts of all tiers in accordance with 49 CFR § 26.13(b):

The contractor or all tiers of subcontractors shall not discriminate on the basis of race, color, sex, sexual orientation, gender identity, national origin, age, or disability in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR § 26.13 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 NDDOT deems appropriate which may include, but is not limited to:

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

It is the prime contractors' responsibility to ensure all subcontractors, manufacturers, and regular dealers/suppliers comply with the requirements of this special provision. In addition, the prime contractor has the responsibility to monitor DBE performance on the project, to ensure that the DBE performs a commercially useful function.

<b>PROJECT OWNER CONTACT INFORMATION</b>			
Mailing Address:	Fax:	Phone & Email Project Owner Administrator:	Phone & Email Project Engineer:

**SOLICITATION EFFORTS**

To let DBEs and others know who is actively seeking quotes for a particular job, prime contractors are strongly encouraged to do steps 1-2; steps 3-5 are required.

All forms are to be submitted to the Project Owner within 5 CALENDAR days of the bid opening. When errors are found on Form A, B, or C, the prime contractor will be required to replace the form within 2 CALENDAR days of the request.

## **STEP 1: ADVERTISE**

The prime contractor is strongly encouraged to utilize the NDDOT's searchable online DBE Directory to solicit DBE participation. The DBE Directory is located online at: <https://dotnd.diversitycompliance.com/>

The prime contractor is strongly encouraged to directly contact by email or fax, all DBEs certified in the specific type of work required.

- Contact with DBEs should be made no later than 5 p.m. seven calendar days before the bid opening.
- Use the DBE Directory to determine the DBE firms certified in the work to be subcontracted.

## **STEP 2: RECEIVE AND EVALUATE ALL QUOTES OFFERED**

All prime contractors and subcontractors are responsible for receiving and evaluating all quotes offered, regardless of whether the quotes are calculated by the ton-mile, hour, acre or square mile, and regardless of whether work elements intended to be subcontracted. It is the responsibility of any person receiving quotes to convert the quotes to an acceptable format, if necessary.

## **STEP 3: SUBMIT DBE INTENDED – FORM A – AT TIME OF BID**

All prime contractors and large subcontractors (over \$250,000) must submit [SFN52012](#) Form A (page 9) to the Project Owner at the time of bid. Form A is a list of all the DBEs who provided quotes, in any tier for this job. This form is required regardless of whether the bidder is using a DBE. If no DBE provided quotes, enter "no DBE quotes received" on Form A. If no company provides quotes, enter "no quotes received" on Form A. (<http://www.dot.nd.gov/forms/SFN52012.pdf>)

## **STEP 4: SUBMIT LIST OF ALL QUOTES – FORM B – WITHIN 5 CALENDAR DAYS**

All prime contractors and large subcontractors (over \$250,000) must submit [SFN52013](#) Form B (page 10) to the Project Owner. Form B must list all quotes received from each of the businesses which were submitted from all tiers of subcontracting. Each quote must be identified or marked as either DBE or non-DBE. This form is required regardless of whether the bidder received quotes from DBEs and/or non-DBEs.

If no DBE provided quotes, enter "no DBE quotes received" on Form B. If no company provides quotes, enter "no quotes received" on Form B. (<http://www.dot.nd.gov/forms/SFN52013.pdf>)

## **Step 5: SUBMIT NOTIFICATION OF INTENT TO USE DBE - FORM C – WITHIN 5 CALENDAR DAYS**

The apparent low bidder must submit a [SFN 52160](#) Form C (page 11) for every DBE to be used on the project. The contractor and DBE must both sign the form. Signatures need not be original; faxed signatures are acceptable. Form C applies to all tiers of subcontractors working with DBEs. If no DBEs are used, Form C is not required.

If the information on Form A and Form C differ (e.g., bid items numbers, quantities, or dollar amounts), the prime contractor or subcontractor must explain the difference in writing using the Comments section when submitting Form C. (<http://www.dot.nd.gov/forms/SFN52160.pdf>)

## **FAILURE TO PROVIDE REQUIRED DOCUMENTATION**

If the apparent low bidder fails to submit the required documentation on a project in question, the Project Owner will consider the bid non-responsive. Apparent low bidders may be sanctioned for failure to provide Form A and Form B, plus Form C if applicable.

## **AWARD OF CONTRACT**

Contract award will be made to the lowest responsible bidder whose proposal substantially complies with the requirements prescribed herein to the satisfaction of the Project Owner.

## **PRIME CONTRACTOR RESPONSIBILITIES, MONITORING, AND REPORTING**

Until the DBE duties on the project are complete, the prime contractor is responsible for the DBEs listed on Form C and for the specific bid items or products that the bidder committed to during the pre-award process.

The prime contractor is responsible to:

- Invite and encourage all DBEs listed on Form C to the pre-construction conference. If the DBE is unable to attend, it is the prime contractors' responsibility to provide them with a copy of the minutes.
- Ensure their company as well as any subcontractors, manufacturers, and regular dealers/suppliers comply with the requirements of this special provision.
- Monitor DBE performance on the project, to ensure that the DBE performs a commercially useful function.
  - Complete the Certification of DBE Performance and Payments (SFN 62128) to certify that the DBE is performing a commercially useful function to ensure DBE program integrity. (<https://www.dot.nd.gov/forms/sfn62128.pdf>)
- Ensure they and their subcontractors maintain project records and documents of payments to DBEs for three years following acceptance of the final payment from NDDOT.
  - Make these records available for inspection, upon request, by an authorized representative of the Project Owner or USDOT.
- Keep a running tally of actual payments to DBEs for work committed to them at any time during the life of the contract.
  - Submit Certification of DBE Performance and Payments (SFN 62128). This report must indicate the amount(s) paid to each DBE on the project for the reporting period. (<https://www.dot.nd.gov/forms/sfn62128.pdf>)
- Verify DBE participation as stated in Form C and Requests to Sublet



- Submit DBE Participation Certification (SFN 14268 - <http://www.dot.nd.gov/forms/SFN14268.pdf>) for every DBE used on the project to the project engineer no later than 4 weeks after completion of the DBE's contract.

### **MONITORING AND ENFORCEMENT MECHANISMS**

The Project Owner will bring to the attention of the USDOT any false, fraudulent, or dishonest conduct in connection with the DBE program, so that USDOT can take the steps (e.g., referral to the Project Owner of Justice for criminal prosecution, or referral to the USDOT Inspector General for action under Suspension and debarment or Program Fraud and Civil Remedies rules) provided in subsection 26.107 of 49 CFR Part 26. The Project Owner will also consider similar action under its own legal authorities, including responsibility determination in future contracts.

### **GUIDELINES FOR SUBMITTING QUOTES TO BIDDERS**

All DBE and non-DBE businesses are strongly encouraged to use the example quote form SFN 60211. If this form is not used, follow the guidelines below. Faxed quotes must clearly indicate the date and time the fax was sent.

All quotes should clearly state:

- Date of the bid opening.
- Job number.
- Project number.
- Item numbers.
- Units or quantities.
- Whether mobilization is included.
- Cost of bond if required.
- Any other special conditions.
- Specify whether a quote is for a partial bid item, i.e., does not include something required by the specifications for a particular bid item.
- Tied or not tied. When a quote is tied, it means the quote will be considered only if all of the bid items are included.
- Show agreed changes on a revised quote; initial and date the change and send.
- Blanket quotes for the construction season are not allowed (i.e. trucking, striping, signing, etc.)
- Subcontractors over \$250,000 must include a copy of Form A with their quote when submitting it to the prime contractor.
- Trucking quotes: the type and number of units available and their capacity for both own firm and any other DBE firms to be used, the dollar value of the work to be actually performed by own forces-and other DBEs intended to use.

### **DEFINITIONS**

**Aggregate providers** are considered subcontractors rather than regular dealers/suppliers, regardless of the amount of their quote.

**Apparent low bidder** means the bidder whose bid is read as low bid at the bid opening.

**Bidder** means the prime contractor who submits a bid on a contract.

**Broker** means an agent who negotiates contracts of purchase, work, lease, or sale; or buys and sells goods; or negotiates between buyers and sellers; but without having custody of the property. A broker may assist in the procurement of facilities, materials or supplies required for the performance of the contract. A broker is not regarded as a manufacturer or regular dealer/supplier for the purposes of this program.

**Blanket quote** means when a business provides the same quote, for all projects, at a bid opening, using the same price or when a business provides one quote for an entire season, at one rate, that is not project specific. Generally this is done by trucking firms.

**Contractor** means all DBE (including MBE and WBE) and non-DBE firms, including prime contractors, subcontractors (under/over \$250,000), brokers, vendors, regular dealers/suppliers, and manufacturers at any tier.

**Disadvantaged business enterprise or DBE** means a for-profit small business concern that is listed in the NDDOT DBE Directory. (<https://dotnd.diversitycompliance.com/>)

**Equipment supplier** is a firm who provides equipment for sale or lease, without operators, and whose primary business function is equipment sales or leasing.

**Manufacturer** means a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications. (26.55 [e] [1] [ii])

**Prime contractor** means bidders or contractors who are submitting proposals on this project, regardless of the size of the project.

**Quoter** means a DBE or a non-DBE subcontractor (under/over \$250,000), broker, vendor, regular dealer/supplier, or manufacturer who submits quotes to another contractor.

**Subcontractor quoting over \$250,000** means a subcontractor whose quote is over \$250,000 on any project and who is not a-broker, vendor, regular dealer/supplier, or manufacturer. All aggregate providers are considered subcontractors, regardless of the amount of their quote.

**Regular dealer / Supplier** means a DBE firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. (26.55 [e] [2] [ii])

- To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. (26.55 [e] [2] [ii] [A])
- A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in this paragraph (e)(2)(ii) if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis. (26.55 [e] [2] [ii] [B])

- Materials is defined as aggregate, steel, petroleum products, concrete, asphalt, and other construction materials.

**Tier** means various levels of contractors on the job. For example a prime contractor's subcontractor (B) is referred to as the second tier. When B subcontracts with C, C becomes the third tier. This process could continue indefinitely.

## COUNTING DBE PARTICIPATION

The Project Owner will count DBE participation toward our overall annual goal as provided in 49 CFR 26.55 (e).

1. When a DBE participates in a contract, the Project Owner counts only the value of the work actually performed by the DBE toward DBE goals.
  - A. The Project Owner counts the entire amount of that portion of a construction contract (or other contract not covered by paragraph 1B of this section) that is performed by the DBE's own forces. 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 purchases or leases from the prime contractor or its affiliate). (26.55 [a] [1])
  - B. The Project Owner counts 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 USDOT-assisted contract, toward DBE goals, if the Project Owner determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services. (26.55 [a] [2])
  - C. When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is also a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals. (26.55 [a] [3])
2. The Project Owner counts expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:
  - A. If the materials or supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies toward DBE goals. (26.55 [e] [1] [i])
  - B. If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies toward DBE goals. (26.55 [e] [2] [i])

Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this paragraph (e) (2). (26.55 [e] [2] [ii] [C])
  - C. With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, if

the Project Owner determines the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the materials and supplies themselves toward DBE goals, however. (26.55 [e] [3])

3. If a firm is not currently certified as a DBE in accordance with the standards of 49 CFR 26 subpart D at the time of the execution of the contract, the Project Owner does not count the firm's participation toward any DBE goals, except as provided for in 49 CFR 26.87(i). (26.55 [f])
4. The Project Owner does not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward the Project Owner's overall annual goal. (26.55 [g])
5. The Project Owner does not count the participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE. (26.55 [h])
6. When a DBE performs as a participant in a joint venture, the Project Owner counts a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals. (26.55 [b])

### **COMMERCIALLY USEFUL FUNCTION (CUF)**

DBEs are responsible for performing a commercially useful function. Should the DBE be unable to perform a commercially useful function or perform as stated on Form C it is the DBE's responsibility to immediately notify the prime contractor orally and in writing. (See page 3 for reporting requirements.)

1. The Project Owner counts participation to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.
  - A. 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, the Project Owner must evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors. (CFR 26.55[1])
  - B. A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, the Project Owner must examine similar transactions, particularly those in which DBEs do not participate. (CFR 26.55[2])
  - C. If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of

work involved, the Project Owner must presume that it is not performing a commercially useful function. (CFR 26.55[3])

- D. When a DBE is presumed not to be performing a commercially useful function as provided in paragraph 1C of this section, the DBE may present evidence to rebut this presumption. The Project Owner may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices. (CFR 26.55[4])
  - E. The Project Owner's decisions on commercially useful function matters are subject to review by Federal Transit Administration, but are not administratively appealable to USDOT. (CFR 26.55[5])
- 2 The Project Owner will use the following factors in determining whether a DBE trucking company is performing a commercially useful function:
- A. The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals. (26.55[d] [1])
  - B. The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract. (26.55[d] [2])
  - C. 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. (26.55[d] [3])
  - D. The DBE may lease trucks from another DBE firm, including an owner-operator certified as a DBE. The DBE leasing trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract. (26.55[d] [4])
  - E. The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. Participation by non-DBE lessees receives credit only for the fee or commission it receives as a result of the lease arrangement.
  - F. For purposes of this paragraph (4) (2), a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE. (26.55 [d] [6]).

**DISADVANTAGED BUSINESS ENTERPRISE PARTICIPATION (RGN)**

North Dakota Department of Transportation, Local Government  
 SFN 52012 (12-2021)

**FOR TRANSIT USE ONLY**

**FORM A**

		Revision Date
Contractor		Telephone Number
Job No.	Project Number	Bid Opening Date

Email to transitnd@nd.gov by 4 P.M. 5 calendar days after the bid opening.

**Note:**

This revised Form A represents additions or corrections to the bidders original Form A submitted electronically at the time of bid.

**PRINT ALL NUMBERS CLEARLY AND LEGIBILITY**

- List DBEs your firm intends to use on this project. Participation counts toward the DBE Race/Gender Neutral goal.
- List the DBEs to be used by subcontractors toward the project goal. Include the subcontractor's Form A listing the DBEs to be used by the subcontractor.
- List the bid item numbers to be performed by DBEs and the total dollar value of the contract.  
 DBE trucking firms: List hauling to be performed with own equipment and employees and any non-DBE trucks used as match.
- DBE bidders: List the work to be performed with "own forces and equipment".  
 Separately list any work to be subcontracted to DBEs and any materials to be purchased from DBEs.

X	DBE Firm	
	List Specific Bid Item Numbers or Products to be Supplied	Total Contract Dollar Value
	Percent DBE will do with own equipment/forces =	
	Percent Non-DBE trucker will perform = If Regular Dealer, X 60% =	

ADD FIRM

**LIST OF BUSINESSES THAT SUBMITTED QUOTES (RN)**

North Dakota Department of Transportation, Civil Rights Division  
 SFN 52013 (Rev. 04-2013)

**FORM B**

Contractor		Phone
Job No.	Project No.	Bid Opening Date

All bidders must submit Form B within 5 CALENDAR DAYS to include all tiers of subcontracting. Copies of all quotes must be retained, by each bidder, until the project is awarded. Use the contact information on page 1 of this Special Provision to submit this form.

List below the names of all businesses including subcontractors, suppliers, vendors, regular dealers, manufacturers, and brokers who provided quotes for this project. This includes information from any large subcontractor who also provided a quote on this project and their subcontractors, suppliers, vendors, regular dealers, manufacturers, and brokers.

Name of Business	Contact Person	Phone
Mailing Address		Type of Work (See Reverse Side for Codes)
Name of Business	Contact Person	Phone
Mailing Address		Type of Work (See Reverse Side for Codes)
Name of Business	Contact Person	Phone
Mailing Address		Type of Work (See Reverse Side for Codes)
Name of Business	Contact Person	Phone
Mailing Address		Type of Work (See Reverse Side for Codes)
Name of Business	Contact Person	Phone
Mailing Address		Type of Work (See Reverse Side for Codes)
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Name of Business	Contact Person	Phone
Mailing Address		Type of Work (See Reverse Side for Codes)
Name of Business	Contact Person	Phone
Mailing Address		Type of Work (See Reverse Side for Codes)
Name of Business	Contact Person	Phone
Mailing Address		Type of Work (See Reverse Side for Codes)

If no DBE provided quotes, enter "no DBE quotes received". If no company provides quotes, enter "no quotes received".

**NOTIFICATION OF INTENT TO USE DBE (RN)**

North Dakota Department of Transportation, Civil Rights Division  
 SFN 52160 (Rev. 04-2013)

**FORM C – DUE BY 4 P.M. 5 CALENDAR DAYS AFTER THE BID OPENING**

1. The prime contractor and any subcontractors who list DBE Participation on Form A must complete Form C for each of their respective, intended DBEs. The prime contractor is also responsible for the completion and submission of a Form C for each DBE commitment made by any lower-tier subcontractor.
2. Comments: Include a written explanation for any difference between the bid item numbers, quantities, or dollar amounts originally listed on Form A.
3. Signatures: Form C must be signed by the prime contractor or subcontractor and their respective, intended DBE. A DBE signature is required on any additional pages or attachments to Form C.
4. Award will not be made until a Form C is received for each intended DBE listed on Form A.
5. Use the contact information on page 1 of this Special Provision to submit this form.

Form C is an indication to the Project Owner that all DBEs listed on Form A have agreed to be used on this project; Form C does not take the place of any contract.

Prime Contractor or Subcontractor		Project No.	
Intended DBE		Bid Opening Date	Job No.

Bid Item Nos.	Work Description	Units	Approx. Quantity	Unit Costs	Amount
<b>Total</b>					<b>\$ 0.00</b>

<b>Comments</b>
-----------------

Prime Contractor/Subcontractor Signature	Title	Date
Intended DBE Signature	Title	Date