

# SOUTH DAKOTA DEPARTMENT OF TRANSPORTATION

## Disadvantaged Business Enterprise Program

### *Out-of-State Firms*

#### Application Procedures and Policy Guidelines

***Please read the following before submitting an application for DBE certification.***

Firms interested in applying for and continuing certification as a Disadvantaged Business Enterprise (DBE) in South Dakota must follow the procedures outlined in this document.

Mail the completed packet to:

Department of Transportation  
DBE Program  
700 E Broadway Avenue  
Pierre SD 57501

#### **NEW APPLICATIONS**

If you own a firm whose principal place of business is located outside of South Dakota, you must first become certified by the Unified Certification Program (UCP) in your home state. You must then submit the following to the South Dakota DOT:

- A complete copy of the application and all supporting documentation you submitted to your home state.
- Any additional information you submitted to your home state or any other state(s) pertaining to your firm's application.
- All annual affidavits you submitted to your home state since the date of initial certification.
- All notices of change you submitted to your home state since initial certification.
- All correspondence and documentation you provided to your home state concerning your application or status as a DBE.
- All correspondence and documentation you provided to a UCP other than your home state concerning your application or status as a DBE.
- If you appealed a certification denial or decertification to USDOT, a copy of your letter of appeal.
- If you appealed a certification denial or decertification to USDOT, a copy of the response to the appeal you received from USDOT.
- An affidavit sworn to by your 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. The affidavit must affirm that you have submitted all information required and the information is complete and identical to that submitted to your home state.

Within seven (7) days of receipt of all applicable information indicated above, the DOT will request a copy of the site visit report from your home state including any updates to the site visit review, and any evaluation of the firm based on the site visit.

If the onsite review by your home state was conducted more than three (3) years prior to the date of the application to us, we may also require an affidavit to affirm that the facts in the onsite report remain true and correct, or request the home state to conduct another onsite.

If we determine your firm to be certifiable, you will be sent a letter of certification and placed on the DBE directory within 60 days of the date all required information was received.

## **CERTIFICATION DENIAL**

The DOT may determine if there is cause to believe that your home state's certification is erroneous or should not apply in South Dakota. Some of the reasons for this determination may include:

- Evidence that your home state's certification was obtained by fraud;
- New information, not available to your home state at the time of its certification, showing that your firm does not meet all eligibility criteria;
- Your home state's certification was factually erroneous or was inconsistent with the requirements of this part;
- South Dakota state law requires a result different from that of your home state;
- You failed to cooperate in providing all requested information or documentation indicated above.

If we disagree with your home state's certification decision, you will be sent a letter stating that certification is denied. The denial letter will be sent within 60 days from the date that all required information was received; and will state the specific reasons why your firm does not meet the requirements of Part 26 for DBE eligibility. You will be provided an opportunity to respond to the denial.

You may respond in writing or request to an in-person meeting with the DBE compliance officer to discuss our objection to your home state's certification approval. If you request a meeting, we will schedule the meeting to take place within 30 days of receiving your request. You bear the burden of demonstrating, by a preponderance of evidence, that your firm meets the requirements of Part 26 with respect to the particular issues raised in our letter of denial.

The DOT will issue a written decision within thirty (30) days of receipt of your written response or the meeting with the DBE compliance officer, whichever is later. Your firm's certification is stayed pending the outcome of this process.

The decision under this section may be appealed to the USDOT Office of Civil Rights.

Once denied certification you may not re-apply for twelve (12) months after the date the denial letter was signed.

## **CHANGES IN COMPANY CIRCUMSTANCES**

Once certified, you must inform the DOT in writing of any material change in the information contained in the original application within thirty (30) calendar days of the change.

You must attach supporting documentation describing the nature of the change if you wish to continue your certification.

## **ANNUAL AFFIDAVIT**

Approximately sixty (60) days prior to the anniversary of the date of your certification you will be sent an annual affidavit.

The annual affidavit must be returned by the anniversary date of your certification. Failure to return the affidavit will be cause for decertification and your firm's name will then be removed from the DBE directory.

## **DECERTIFICATION**

DOT may decertify your company. The decision will be based on one or more of the following:

- Changes have occurred in your firm's circumstances since initial certification that render your company unable to meet the eligibility standards.
- Information or evidence that was not available to us at the time your firm was certified.
- Information that was concealed or misrepresented.
- A change in the certification standards or requirements since your firm was initially certified.
- A documented finding that our initial determination to certify your firm was factually erroneous.
- Your failure to cooperate in providing information relevant to the certification process.
- Violations of the commercially useful function regulations demonstrating the existence of a pattern of conduct indicating your involvement in attempts to evade or subvert the intent or requirements of the DBE program.
- Fraud in connection with any violation of the DBE regulations.

If we acquire information that indicates that you are no longer eligible for certification as a DBE, we will notify you in writing of our preliminary intent to remove certification. The notification will include reasons for that determination, and provide you with an opportunity to provide information for us to consider before making a final decision. You may present information in writing or at an informal meeting. If you do not respond to the letter of intent or request a meeting by the

designated date, the DOT will interpret this to mean that you accept the DOT's decision, and certification will be removed.

If you do provide additional information, that information will be reviewed before the DOT takes final action. On the basis of our review, the DOT may modify its preliminary decision, rescind its preliminary decision or sustain its decision and revoke certification. Regardless of our decision, you will be advised of that decision and the reasons for it in writing. If the decision is to revoke certification, you will be advised of the appeal process. This process is described in detail in the section titled "Hearings and Appeals."

## COUNTING DBE PARTICIPATION ON DOT CONTRACTS

Only firms certified at the time of the letting will count toward DBE participation. When participating in a federal-aid contract, only the value of the work actually performed by your firm will count toward DBE participation as follows:

- The entire amount of the portion of the contract that is performed with your own work force. Included will be the cost of supplies and materials obtained by you for the work of the contract, including equipment you lease (except materials or equipment you purchase or lease from the prime contractor or its affiliate).
- The entire amount of fees or commissions charged by you for providing a bona fide service such as professional, technical, consultant or managerial, or for providing bonds or insurance specifically required for the performance of a federal-aid contract. The DOT must determine, however, the fee to be reasonable and not excessive when compared to fees customarily charged for other similar services.
- If you subcontract out a portion of the work of your contract to another firm, the value of the subcontracted work will count toward DBE participation only if the subcontractor is also a DBE. Any subcontracting must also meet the DOT's requirements for subletting of contracts found in the Standard Specifications for Roads and Bridges. Work that you subcontract to a non-DBE will not count toward DBE participation. **It is your responsibility to ensure that quotes you submit to prime contractors clearly indicate the amount of work intended to be performed with your own work force so DBE participation is correctly counted toward the Department's overall DBE goal.**

In addition to the above, DOT will count expenditures to you toward DBE participation only if you perform a commercially useful function (CUF) on a contract as follows:

- When you are responsible for actually performing, managing and supervising the work involved. For materials, you must also be responsible for negotiating the price, determining quality and quantity, ordering and installing (when applicable) and paying for the products yourself. To determine if you are performing a CUF, the DOT will evaluate the amount of work subcontracted to you, if the amount paid to you is commensurate with the work you actually performed, the DBE credit claimed for performance of your work, industry practice and other relevant factors.
- You are not performing a CUF if your role is limited to that of an extra participant in a transaction where funds are merely passed through your company in order to create an illusion of DBE participation. In determining whether you are such a participant, the DOT will examine similar transactions, particularly those in which DBEs do not participate.

- If the DOT finds you are not performing a CUF we will notify you in writing, outlining the basis for this finding. You may present evidence to rebut this finding. The DOT may determine that you are performing a CUF given the type of work involved and normal industry practice. Repeated violations of CUF requirements may lead to loss of DBE certification if it indicates a pattern of conduct indicating attempts to evade or subvert DBE program requirements.

DBE Trucking. The DOT will use the following factors to determine whether you, as a DBE trucking company, are performing a CUF:

- You must be responsible for managing and supervising the entire trucking operation for which you are responsible on a particular project. There cannot be a contrived arrangement for using non-DBE trucks for the purpose of meeting DBE participation.
- You must own and operate at least one fully licensed, insured and operational truck which is used on that contract.
- The prime contractor will receive DBE credit only for the value of the trucking you provide using trucks you own, insure and operate, and drivers you employ.
- You may lease trucks from other DBE firms, including owner-operators who are certified as DBEs. If you lease trucks from other DBEs, the prime contractor will also receive credit for the value of the trucking service the lessee DBE provides on the contract. However, if you lease trucks from a non-DBE, the prime contractor will be entitled to credit only for the fee or commission you receive as a result of the lease arrangement. In this instance the prime contractor will not receive credit for the value of the trucking service provided by the lessees, since these services are not provided by a DBE. **It is your responsibility to ensure that quotes you submit to prime contractors clearly indicate the amount of hauling intended to be performed with DBE trucks so DBE participation is correctly counted toward the Department's overall DBE goal.**

The DOT will count expenditures for materials or supplies toward DBE participation as follows:

- If materials or supplies are purchased from you, as a certified DBE manufacturer, the DOT will count 100 percent of the cost of the materials or supplies toward DBE participation. A manufacturer is a firm that operates a factory that produces, on the premises, materials or equipment required under the contract, and of the general character described by specification.
- If materials are purchased from you, as a certified DBE regular dealer, the DOT will count 60 percent of the cost of the materials toward DBE participation. A regular dealer is a firm that owns and maintains a store or warehouse where materials 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. To be a regular dealer, your firm must be an established business that engages in, as its principal business and under its own name, the purchase and sale of the product(s) in question.
- Packagers, brokers, manufacturers' representatives or other persons who merely arrange or expedite transactions are not regular dealers.
- With respect to materials purchased from a DBE who is neither a manufacturer, nor a regular dealer, we will count toward DBE participation only the amount of the fee or commission charged for assistance in the procurement of the materials. We must,

however, determine the fee to be reasonable and not excessive when compared to fees customarily allowed for similar services. In this instance, we will not count any portion of the cost of the materials and supplies themselves toward DBE participation.

### **THIRD-PARTY CHALLENGES**

Any individual may file a complaint with the DOT that you are not eligible for certification, specifying the reasons. The DOT is not required to accept general allegations that a firm is ineligible, or an anonymous complaint. The complaint may include any information supporting the complainant's assertion that your firm is ineligible. Confidentiality of the complainants' identity shall be protected at their election. If such confidentiality will hinder the proceeding, or result in denial of appropriate administrative due process to other parties, the complainant will be advised of the purpose of waiving the privilege. Complainants are advised that, in some circumstances, failure to waive the privilege may result in closure of the investigation or dismissal of the proceeding.

The Federal Highway Administration (FHWA) may also review our certification records. If they determine that you do not meet the eligibility criteria, they may direct us to remove your certification. Should this occur, the DOT will start a proceeding to remove your eligibility.

In responding to requests for information concerning any aspect of the DBE program, we shall safeguard from disclosure to unauthorized persons information that may reasonably be considered as confidential business information consistent with federal, state and local law. The Department will not release any information regarding your application for DBE certification and supporting documents or personal financial information submitted in response to the personal net worth requirement to a third party (other than to USDOT) without your written consent.

We shall review our records and any material provided by the complainant concerning your firm. We may request additional information from you or conduct any other investigation we deem necessary.

If we determine there is reasonable cause to believe that your firm is ineligible, we will provide written notice to you of our preliminary finding that your firm is ineligible, stating the reasons. If we determine that reasonable cause does not exist, we will notify the complainant and you in writing of our determination and the reasons for it. All statements of findings on the issue of reasonable cause will specifically reference the evidence in the record on which each reason is based.

If changes in circumstances come to our attention and we determine there is reasonable cause to believe that you are no longer eligible, we will provide you written notice of that finding. The notice will set forth the reasons for the proposed determination, specifically referencing the evidence in the record on which each reason is based.

If FHWA determines that information in our records, or other information available to them, provides reason to believe that your firm does not meet the eligibility criteria of 49 CFR 23 or 26, FHWA may direct us to initiate a proceeding to remove your firm's certification. FHWA must provide you and us a notice stating the reasons for their directive, including any relevant documentation or other information. If FHWA determines that you do not meet the eligibility criteria, we shall immediately start a proceeding to remove your certification.

## **HEARINGS AND APPEALS**

If we notify you there is cause to remove certification, you will be provided an opportunity for an informal hearing. At the hearing you may present arguments why your firm should remain certified.

The DOT shall maintain a complete verbatim record of the hearing. If you file an appeal to USDOT following a de-certification hearing, a copy of the transcript of the hearing will be provided to USDOT. You may also request a copy of the transcript. We may charge you the cost of copying the record.

You may also elect to present information and arguments in writing, without going to a hearing. The final decision in a proceeding to remove your eligibility will be made by individuals that did not participate in the intended de-certification decision.

Following the determination, you will be provided a written notice of the decision and the reasons for it. The decision will include specific references to the evidence in the record that supports each reason. The notice will inform you of the consequences of the decision and your right to appeal the decision to the USDOT. An appeal must be filed within ninety (90) calendar days of the date of our final decision.

You will remain an eligible DBE during the review of the proceeding to remove your certification. You do not become ineligible until the issuance of the final notice to remove your certification. If you appeal our certification decision to USDOT, your appeal letter must include the name(s) and address(es) of any other agency(ies) that have rejected certification of your firm within one year of the appeal. Your appeal must also include any agency where an application for certification or a removal of eligibility of your firm is pending. Failure to provide this information may be deemed a failure to cooperate.

## **DBE NONDISCRIMINATION COMPLAINT PROCEDURE**

Department policies and procedures have been designed and implemented in accordance with applicable federal and state nondiscrimination statutes and regulations. The following process has been established to provide for the orderly and timely resolution of any complaints alleging discrimination.

The Civil Rights Compliance Officer will make him/her known to all office and program managers with the Department and, with the assistance of these managers, will attempt to resolve all Civil Rights complaints arising from Department activities.

In addition, the Civil Rights Compliance Officer will make periodic visits to any locations and/or areas determined to be problematic in an attempt to alleviate any problems in advance of a complaint.

The following complaint procedures are applicable to all Department program areas:

1. Any person or group claiming to be aggrieved by an unlawful discriminatory practice based on race, color, national origin, sex, age or disability may by himself/herself or through his/her legally authorized representative, make and sign a complaint and should file such complaint with the Department within 300 calendar days (180 days if a company has less than 15 employees or if this involves age discrimination) following the date of the alleged discriminatory action. All complaints will be filed with the Department Civil Rights Compliance Officer who will evaluate the complaint and gather additional information from the complainant if necessary. The appropriate program area manager and division director will be notified of the complaint.

2. The Civil Rights Compliance Officer or designee has 60 calendar days to conduct an investigation of the allegations and prepare preliminary findings. The Civil Rights Compliance Officer or designee may refer the matter to the appropriate program area to make every reasonable effort to resolve the complaint as quickly as possible or attempt informal resolution through other methods
3. All complaints that cannot be quickly (within 30 calendar days from the preliminary findings being issued) resolved will be reviewed by a committee consisting of the Secretary of the Department or his or her designee, the Civil Rights Compliance Officer and the program manager involved. The committee will hold an informal hearing with the complainant seeking resolution and will render a decision regarding the complaint within 15 working days of the hearing.
4. When the Department arrives upon a final decision regarding the complaint filed with the Department, it will notify the complainant in writing of the decision and of the complainant's rights, if dissatisfied with the decision, to bring the matter to the attention of the appropriate federal agency, typically the Federal Highway Administration (FHWA) or Federal Transit Administration (FTA). The Department will advise the complainant of the name and address of the agency and/or individual to contact.
5. The Department will provide the federal agency with a copy of the complaint along with any investigatory report within 60 calendar days of the filing of the complaint. The Department will also furnish the federal agency a report indicating final disposition of the complaint within 5 working days of advising the complainant of the disposition.

The Department, acting through the Civil Rights Compliance Officer, will expedite all discrimination complaints filed by individuals, business, group or institution. Information regarding the complaint process will be provided through Department publications, Department program activities, and individual personal contact with persons affected by Department activities.

## **FRAUD IN THE DBE PROGRAM**

The DOT will monitor the activities of DBE firms to ensure that they meet all requirements regarding ownership, economic disadvantage, management, control and commercially useful function standards. Those requirements are included above, in the initial application for certification, the annual affidavit, in 49 CFR Parts 23 or 26, and in the Definitions and Eligibility Standards provided with the initial application for certification.

Any DBE firm violating these requirements may be subject to the following:

- Decertification from the DBE program
- Enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies
- Referral to the Department of Justice for prosecution under 18 USC 1001 or other applicable provisions of law.



## **JOINT CHECKS TO DBESs**

A joint check is a check issued by a prime contractor to a DBE subcontractor and to a material supplier or another third party for items or services to be incorporated into a project. For a prime contractor to receive DBE credit the DBE must perform a commercially useful function and be responsible for negotiating price, determining quality and quality, ordering materials and installing (where applicable) and paying for materials.

To ensure that the DBE is independent of the prime contractor and in compliance with the regulation, use of joint checks will be reviewed and allowed only under certain circumstances.

If a contractor requests to issue a joint check to you, you may be contacted to verify the circumstances described in the contractor's request.

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**DBE firms must understand that certification confers a privilege that is not extended to all firms wishing to do business in the highway construction industry. This privilege is the right to compete for a position, not the right to have a position.**

**DBE firms must be reasonably competitive in their costs, perform work of acceptable quality, and meet project timelines. DBE certification does not suspend or eliminate any of these requirements. DBE firms are not exempt from any of the regular and normal expectations that the contractor might have of other subcontractors or suppliers.**