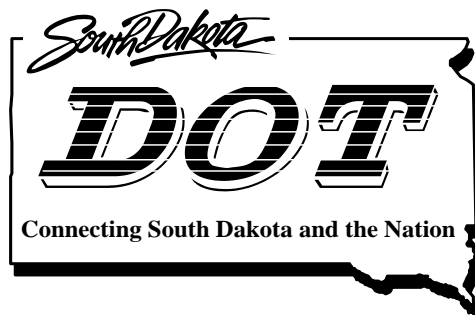


**South Dakota Department of Transportation**

**FHWA, FTA and FAA**

**Disadvantaged Business Enterprise**

**Program Plan**



# Index

Administrative Reconsideration for GFE.....	22
Annual Affidavits.....	33
Assurances.....	4
Bidders List.....	10
Bid Letting DBE responsibilities.....	12
Business Development Plan.....	15
Certification.....	24
Certification Appeals.....	37
Confidentiality.....	38
Contract Goals.....	21
Counting DBE Participation.....	23
Directory.....	14
Definitions of terms.....	5
Discrimination Contract Assurance.....	11
Federal Financial Assistance Agreement Assurance	10
Financial Institutions.....	12
Goals.....	20
Good Faith Efforts – Failure to meet DBE Goal.....	21
Good Faith Efforts – Replacing a DBE.....	23
Interstate Certification.....	33
Joint Checks.....	37
Liaison Officer.....	11

Mentor-Protégé Plan.....	15
Monitoring/Enforcement.....	16
Nondiscrimination.....	9
Notice of Change.....	33
Objectives and Policy Statement.....	4
Over-concentration.....	15
Payments to DBEs.....	16
Personal Financial Statement & Declaration of Social Disadvantage.....	25
Program Updates.....	11
Prompt Payment and Retainage.....	13
Quotas and Set-asides.....	20
Race-neutral/race-conscious methods.....	15
Reporting.....	10
Small Business Element.....	17
Sub-recipients.....	15
Transit Vehicle Manufacturers.....	9
Unified Certification Program.....	32

## Objectives and Policy Statement (26.1, 26.23)

The South Dakota Department of Transportation has established a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the United States Department of Transportation (USDOT), 49 CFR Parts 23 and 26. The Department has received federal financial assistance from USDOT, and as a condition of receiving this assistance, the Department has signed an assurance that it will comply with 49 CFR Parts 23 and 26.

It is the policy of the Department to ensure that DBEs, as defined in parts 23 and 26, have an equal opportunity to receive and participate in USDOT-assisted contracts. It is also our policy –

- a) To ensure nondiscrimination in the award and administration of USDOT-assisted contracts.
- b) To create a level playing field on which DBEs can compete fairly for USDOT-assisted contracts.
- c) To ensure that the DBE Program is narrowly tailored in accordance with applicable law.
- d) To ensure that only firms that fully meet 49 CFR Parts 23 and 26 eligibility standards are permitted to participate as DBEs.
- e) To help remove barriers to the participation of DBEs in USDOT-assisted contracts.
- f) To promote the use of DBEs in all types of USDOT-assisted contracts and procurement activities conducted
- g) To assist the development of firms that can compete successfully in the market place outside the DBE Program.
- h) To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

The DBE Program Specialist has been designated as the DBE Liaison Officer. In that capacity, the liaison officer is responsible for implementing all aspects of the DBE program. Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by the Department in its financial assistance agreements with USDOT.

  
\_\_\_\_\_  
Darin Bergquist, Department Secretary

  
\_\_\_\_\_  
Date

## **Definitions of Terms (§26.5)**

The terms used in this program have the meanings defined in 49 CFR §26.5.

*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* mean all the property of a person available for paying debts or for distribution, including one's respective share of jointly held assets. This includes, but is not limited to, cash on hand and in banks, savings accounts, IRA or other retirement accounts, accounts receivable, life insurance, stocks and bonds, real estate, and personal property.

*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 this part.

*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 this part, 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.

*Days* mean calendar days. In computing any period of time described in this part, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, in circumstances where the recipient's offices are closed for all or part of the last day, the period extends to the next day on which the agency is open.

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

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

(1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and

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

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

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

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

*Immediate family member* means father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, 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 definition of "tribally-owned concern" in this section.

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

*Liabilities* mean financial or pecuniary obligations. This includes, but is not limited to, accounts payable, notes payable to bank or others, installment accounts, mortgages on real estate, and unpaid taxes.

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

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

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

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

*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. If the offices from which management is directed and where the business records are kept are in different locations, the recipient will determine the principal place of business.

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

*Race-conscious* measure or program is one that is focused specifically on assisting only DBEs,

including women-owned DBEs.

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

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

*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 United States Small Business Administration.

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

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

*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 members 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.

*You* refers to a recipient, unless a statement in the text of this part or the context requires otherwise (i.e., 'You must do XYZ' means that recipients must do XYZ).

### **Nondiscrimination (§26.7)**

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

In administering the 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, sex, or national origin.

## **Records and Reporting (§26.11)**

The Department will report DBE participation as follows:

### **(§26.11(a))**

SDDOT will submit the Uniform Report of DBE Awards or Commitments and Payments Form to FHWA on a semi-annual basis on or by June 1<sup>st</sup> and December 1<sup>st</sup> each year.

SDDOT will submit the Uniform Report of DBE Awards or Commitments and Payments Form to FTA on a semi-annual basis on or by June 1<sup>st</sup> and December 1<sup>st</sup> each year.

SDDOT will submit the Uniform Report to DBE Awards or Commitments and Payments Form to FAA on a semi-annual basis on or by June 1<sup>st</sup> and December 1<sup>st</sup> each year.

### **(§26.11(c))**

All bidders on federal-aid contracts are required to provide a list of the names the firms they received a quote from. The Department maintains a list of all bidders and quoters through the electronic DBE database system. The firms on the bidders list are periodically surveyed to collect their address, age, and annual gross receipts.

### **(§26.11(d))**

All records documenting a firm's compliance with the requirements of this part will be maintained by the Department. The Department will maintain a complete application package for each certified firm and all affidavits of no-change, change notices, and on-site reviews. The current records will be maintained in the Department's EDMS (Electronic Document Management System), then they will be microfilmed and the Department will maintain the film and images permanently.

### **(§26.11(e))**

SDDOT will submit to the United States Department of Transportation Office of Civil Rights the DBE UCP information requested by January 1<sup>st</sup> of each year.

## **Federal Financial Assistance Agreement Assurance (§26.13(a))**

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

The South Dakota Department of Transportation shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any USDOT-assisted contract or in the administration of its DBE Program or the requirements of 49 CFR Part 26. The Department shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of USDOT-assisted contracts. The Department's DBE Program, as required by 49 CFR Part 26 and as approved by USDOT, is

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

### **Discrimination Contract Assurance (§26.13(b))**

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

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

- Assessment of liquidated damages as stated in Section VII of the DBE Special Provision
- Suspension of bidding privileges or debarment
- Withholding of progress payments
- Securing additional DBE participation on future Federal-aid contracts sufficient to make up for the DBE participation found to be unallowable
- Referral of the matter for criminal prosecution

### **Program Updates (§26.21)**

The Department will continue to carry out its program until all funds from USDOT financial assistance have been expended. The Department will provide to USDOT, FHWA, FTA and FAA updates representing significant changes in the program for approval.

### **Liaison Officer (§26.25)**

The Department designates the DBE Program Specialist as its DBE Liaison Officer. In that capacity, the Liaison Officer is responsible for implementing all aspects of the DBE program and ensuring that the Department complies with all provisions of 49 CFR Parts 23 and 26. The Liaison Officer reports to the Assistant Construction Manager.

The DBE Liaison Officer has direct and independent access to the Department's Secretary concerning DBE program matters. Please see the SDDOT [Organizational Chart](#) displaying the DBELO's position in the organization.

The Liaison Officer is responsible for developing, implementing and monitoring the DBE program, in coordination with other Department staff. Duties and responsibilities include:

- Develop and implement all aspects of the DBE program.
- Certifies DBE firms according to federal regulation.
- Monitors prime contractors' compliance with the DBE Special Provision.
- Reviews and approves replacement of DBEs on contracts with DBE goals.
- Gathers and reports statistical data and other information as required by USDOT.
- Analyzes progress toward DBE goal attainment and identifies ways to improve progress as well as assists Bid Letting to assign goals to contracts, as needed, to ensure the annual goal is met.
- Advises Department personnel on DBE matters and achievements.
- Participates with the legal counsel to determine contractor compliance with DBE commitments and assessment of liquidated damages for violations.
- Oversees supportive services to DBEs.
- Maintains the DBE directory.
- Participates in the Good Faith Effort reviews

**Bid Letting DBE Responsibilities:**

- Assigns individual goals to contracts, as needed, to ensure that the annual goal is achieved.
- Reviews prime contractor DBE commitments to determine if the contract goal was met, and to ensure that commitments are for services or work the designated DBEs are certified to perform.
- Compiles good faith effort packets for review by the DBE good faith effort committee.

**Disadvantaged Financial Institutions (§26.27)**

It is the policy of the Department to investigate services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals and use

those institutions when feasible. The Department will encourage prime contractors to use these institutions if the institution agrees to be identified as being owned by socially and economically disadvantaged individuals.

### **Prompt Payment and Retainage (§26.29)**

The following provision is included in the Standard Specifications for Roads and Bridges:

The contractor shall pay subcontractors or suppliers within 15 days of receiving payment for work that is accepted by the Department.

If the contractor elects to utilize retainage on subcontract work, the retainage shall be released within 15 days after the work is satisfactorily completed. A subcontractor's work is satisfactorily completed when all of the tasks called for in the subcontract have been accomplished, paid for, and documented in accordance with the contract. The required documentation may include, but is not limited to certified payrolls, material certification, haul road releases, pit releases, warranties, operating manuals, product literature, and verification of final quantities. The maximum amount permitted for retainage for any subcontract shall be 10% of each progress payment.

The prompt payment and release of retainage applies to all tiers of subcontracts.

If the contractor withholds payment beyond these time periods, written justification by the contractor shall be submitted to the Engineer upon request. If it is determined that a subcontractor or supplier has not received payment due without just cause, the Department may withhold future estimated payments and/or may direct the prime contractor to make such payment to the subcontractor or supplier. Prompt payment and release of retainage deviations will be subject to price adjustments as specified in Section 5.3 (Conformity with Plans and Specifications) of the Standard Specifications for Roads and Bridges.

If a contractor fails to pay a subcontractor or supplier in accordance with the above prompt payment and retainage specification, the Department will review payments to DBEs according to the process set forth in the section for "Monitoring Payments to DBEs." Unresolved payment complaints by DBE and non-DBE subcontractors and suppliers will be forwarded to the DOT Office of General Counsel to provide the complainant with a lien filing form. Receipt of the lien filing puts a temporary hold on an amount of money sufficient to cover funds due or to become due to the contractor. Validity and enforcement of the complaint is determined in the Circuit Court system.

### **Aeronautics**

The contractor may withhold retainage. The maximum amount permitted for retainage for any subcontract shall be 10% of each progress payment.

The Contractor is required to pay all subcontractors for satisfactory performance of their contracts no later than 15 days after the Contractor has received a partial payment. Contractor must provide the SDDOT evidence of prompt and full payment of retainage held by the prime Contractor to the subcontractor within 15 days after the subcontractor's work is satisfactorily completed. A subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented as required by the Owner. When the Owner has made an incremental acceptance of a portion of a prime contract, the work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed.

When at least 95% of the project work has been completed to the satisfaction of the SDDOT, the SDDOT shall, at the Owner's discretion and with the consent of the surety, prepare estimates of both the contract value and the cost of the remaining work to be done.

It is understood and agreed that the Contractor shall not be entitled to demand or receive partial payment based on quantities of work in excess of those provided in the proposal or covered by approved change orders or supplemental agreements, except when such excess quantities have been determined by the SDDOT to be a part of the final quantity for the item of work in question.

No partial payment shall bind the SDDOT to the acceptance of any materials or work in place as to quality or quantity. All partial payments are subject to correction at the time of final payment.

The Contractor shall deliver to the SDDOT a complete release of all claims for labor and material arising out of this contract before the final payment is made. If any subcontractor or supplier fails to furnish such a release in full, the Contractor may furnish a bond or other collateral satisfactory to the SDDOT to indemnify the SDDOT against any potential lien or other such claim. The bond or collateral shall include all costs, expenses, and attorney fees the SDDOT may be compelled to pay in discharging any such lien or claim.

### **Directory (§26.31)**

The Department maintains a directory identifying all certified DBEs. The directory lists the firm's address, phone number, types of work the firm has been certified to perform and most applicable North American Industry Classification System (NAICS) code. The directory is updated as changes occur and the most current version is available on the Department's web-site.

[DBE Directory](#)

### **Over-concentration (§26.33)**

Any firm working for, or attempting to seek work with the Department who feels their opportunity to participate in a federal-aid contract has been unduly burdened because of an over-concentration of DBE firms in a specific type of work may file a complaint with the Department. The complaint must include examples of how their 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 over-concentration. The complainant shall, within 90 days, be informed in writing of the Department's decision, along with the reasons for that determination.

If the Department determines that the complainant's opportunities have been unduly burdened due to over-concentration of DBEs in a specific type of work, action will be taken to alleviate that problem. The Department will consider options such as the use of incentives, technical assistance, business development plans or mentor-protégé plans. Other appropriate measures may also be considered that assist DBE firms in performing work outside the specific work types where non-DBE firms are unduly burdened. The Department may also consider other measures such as varying the use of contract goals or adjusting the credit allowed for certain types of work, to ensure that non-DBE firms are not unfairly prevented from competing for subcontracts. Any determination of over-concentration and subsequent remedy will be reviewed and approved by FHWA to ensure that changes do not result in disparate treatment.

### **Business Development and Mentoring Programs (§26.35)**

The Department has developed a Business Development program that is intended to encourage current and future DBE firms to take advantage of the twin opportunities of learning about how to set and achieve long-term business goals, based on their skills and abilities; and to meet short-term participation standards listed in 49 CFR Part 26, Appendix C. The Department may provide for a mentor-protégé program plan for DBEs who want to improve and/or expand their business. If a mentor-protégé program is implemented, the Department will follow the procedures outlined in 49 CFR 26.35.

Please click here to see the [Business Development Program Plan](#).

### **Monitoring Sub-recipient & Prime Contractors Compliance with Program Requirements (§26.37(a))**

Compliance by prime contractors and subcontractors is implemented by the requirements in the DBE Special Provision that is included in each contract. The specifics of monitoring methods in the DBE Special provision are provided in sections §26.37(b) and §26.37(c) of this document.

Federal-aid contracts administered by a sub-recipient are let by race-neutral means. The proposal includes the Special Provision for Disadvantaged Business Enterprise and a race

neutral DBE commitment form without a DBE contract goal.

If a bidder does commit to subcontract work to a DBE, the sub-recipient is required to enforce the Special Provision for Disadvantaged Enterprise the same as contracts administered by the DOT. Since commitments are race-neutral, the payment information collected is for reporting purposes only.

Sub-recipient contracts will be reviewed on a periodic basis to ensure that the Special Provision for Disadvantaged Business Enterprise, DBE commitment forms and DOT form 289 (if required to document payments to DBEs) are received and the contract was completed in accordance with all applicable DBE requirements.

### **Monitoring and Enforcement Mechanisms (§26.37(b))**

Department project engineers are responsible for monitoring the performance of DBEs to ensure that they perform a CUF for all work including trucking. Contractor DBE commitments are reviewed at the preconstruction meeting where the DBE's foreman is indicated and the requirements for performing a CUF are discussed. The process for monitoring CUF is included in the Construction Manual provided to all construction field personnel and provides for a checklist of things to look for. Project personnel will document CUF findings. Suspected violations are reported immediately to the DBE Compliance Officer to investigate and determine appropriate remedies if a violation occurred.

The Department Operations Review Team conducts internal reviews of policies and procedures for Department construction projects. As part of their review process they verify that the project engineer reviewed the DBE's work to ensure that they are performing a CUF.

After completion of the contract the project engineer signs a written certification to document that he/she has monitored the work of the contract and that the DBE reported on the commitment form performed a CUF.

### **Monitoring Payments to DBEs (§26.37(c))**

Within 30 days of physical completion of the project the contractor is required to submit Form DOT 289 (Certification of DBE Performance & Payments), listing DBE firms that participated in the contract, and the total dollar amount paid (and anticipated to be paid) to each. DBE attainments are compared to commitments and any payments less than 90 percent of the commitment, without proper justification and documentation, will have liquidated damages assessed against the contract. The contractor's final payment is not released until receipt of the Form DOT 289.

Contractors are required to maintain a running tally of payments to DBEs. For reports of payments not being made in accordance with the prompt payment provision, alleged discrimination against a DBE or other similar complaint, the tally may be requested for



review by the Department. The Department may perform audits of contract payments to DBEs to ensure that the amounts paid were as reported on the Form DOT 289. All contractors participating in federal-aid contracts are expected cooperate fully and promptly with the Department in compliance reviews, investigations and other requests for information regarding payments to DBEs. Their failure to do so is grounds for appropriate sanctions or action against the contractor.

The DOT will monitor the running tally on a program basis and if reporting issues are identified, additional reporting requirements may be implemented.

### **Aeronautics**

SDDOT undertakes ongoing monitoring of prime contractor payments to subcontractors over the course of any covered contract. Such monitoring activities will be accomplished through the following methods:

- Communication with the subcontractors during the project to ensure payment.
- SDDOT requires the prime contractor and all subcontractors to provide lien waivers to ensure final payment has been received.
- SDDOT will conduct payment reviews as necessary.

SDDOT requires prime contractors to maintain records and documents of payments to subcontractors, including DBEs, for a minimum of three (3) years unless otherwise provided by applicable record retention requirements for the SDDOT financial assistance agreement, whichever is longer. These records will be made available for inspection upon request by any authorized representative of the SDDOT. This reporting requirement extends to all subcontractors, both DBE and non-DBE.

Failure to comply is grounds for appropriate sanctions or action against the contractor.

### **Fostering Small Business Participation (§26.39)**

#### **Transit**

It is the policy of SDDOT-Transit to ensure that contracting opportunities made available to vendors facilitate competition by small business concerns. SDDOT-Transit is regularly able to follow this policy due to the size of contracting opportunities themselves. SDDOT-Transit awards contracting opportunities based on funding apportionments from the FTA, and does not typically have state funds available to award to sub-recipients.

SDDOT-Transit identified construction projects (such as bus facilities) as the largest

contracting opportunities for small businesses. Of the 43 construction projects undertaken by SDDOT-Transit in the past 10 years, 40 or 93% of them have been under \$500,000. SDDOT-Transit feels this threshold is low enough that most small businesses can bid.

SDDOT-Transit carefully balances the needs of the SDDOT-Transit program with the procurement requirements defined by the State of South Dakota and the Federal Transit Administration. SDDOT-Transit makes certain there are not unreasonable or unnecessary steps required of any business, including small business concerns. This is accomplished by eliminating unnecessary paperwork or requirements. Specifications include language and requirements detailed by the FTA and the State of South Dakota to meet procurement regulations. The SDDOT-Transit program does not add additional requirements that are not specified by the FTA or the State of South Dakota.

Contracting opportunities are kept separate throughout the year with the exception of rolling stock procurements, so as not to “bundle” them or their contract requirements. This ensures that a high number of contracting opportunities, including prime contracts and subcontracts are of a size that small businesses, including DBEs, can reasonably perform. Typically, contracting opportunities, including those for construction of bus storage facilities are awarded individually and based on availability of federal funds, eligible project expenses, and availability of local funds on behalf of sub-recipients. SDDOT-Transit treats each construction contracting opportunity as an individual project. Specifications and requirements are applicable to individual projects and locations and bid separately from another construction project in a different community for a different sub-recipient.

## **FHWA**

The Department is committed to structuring its contracting requirements to facilitate competition by small business concerns. Over the past five years the Department has had construction budgets ranging from \$250 Million to a high of \$430 Million. 90% of those contracts have been under \$5 Million and 60% have been less than \$1 Million.

Being a small rural state, the primary makeup of our contracting pool consists of small companies. For purposes of this element, the Department will use the definition of a small business as described in Section 3 of the Small Business Act and Small Business Administration (SBA) regulations implementing it, according to 13 CFR Part 121. The SBA has matched the NAICS code for highway, street and bridge construction to the size standard of average annual receipts less than \$36.5 Million. A survey of contractors and subcontractors on our bidders list shows that 86% have gross receipts below \$36.5 Million per year.

Because of South Dakota’s harsh winters and shortened construction seasons, projects are intentionally made smaller so they can be completed in one construction season. The Department administers very few contracts that carry over for more than one construction season. This automatically lends itself to smaller projects that can be competitively bid and built by small business enterprises.

During the development of the five-year construction program (STIP), all projects are reviewed from concept to contract to determine the feasibility of unbundling larger projects to a size that small businesses can reasonably bid and construct. The STIP is reviewed and jointly approved annually by FHWA and FTA. As part of the process the Department considers the size and capabilities of firms on the prequalified contractor list to ensure that a sufficient number of firms are available to bid on each contract.

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 eliminating unnecessary paperwork or requirements and that are not required by FHWA or the State of South Dakota. The Department keeps track of and reviews the number of bidders on all sizes of projects annually. This is done in an effort to ensure there is competitive bidding on all sizes of projects and that there is an adequate number of small projects for our smaller contractors to bid on.

## **FAA**

It is the policy of SDDOT-Aeronautics to ensure contracting opportunities made available to contractors facilitate competition by small businesses and DBE's. We are able to follow this policy due to the size of contracting opportunity. The SDDOT Office of Aeronautics awards one project a year. This project is statewide airport pavement preservation ranging from \$500,000 to \$2,000,000 per year. SDDOT-Aeronautics feels this threshold is low enough for small businesses or DBE's to participate. We are committed to create opportunities for small businesses to participate in the pavement maintenance program. There are currently no DBE's registered in South Dakota to do pavement maintenance. The pavement maintenance project combines all airports needing pavement maintenance for the fiscal year into one contract. The contract size is still considered small enough for small businesses and DBE's to participate. The pavement maintenance contract will have a DBE goal assigned and the prime contractor will be required to follow the DBE process. The prime will need to submit the required documentation with their bid submittal.

SDDOT-Aeronautics carefully balances the needs of the SDDOT-Aeronautics program with the procurement requirements defined by the State of South Dakota and the Federal Aviation Administration. SDDOT-Aeronautics makes certain there are not unreasonable or unnecessary steps required of any business, including small business concerns. This is accomplished by eliminating unnecessary paperwork or requirements. Specifications include language and requirements detailed by the FAA and the State of South Dakota to meet procurement regulations. The SDDOT-Aeronautics program does not add additional requirements that are not specified by the FAA or the State of South Dakota.

SDDOT encourages DBE and small business participation in and will continue to work with the SDDOT DBE Program Coordinator to promote the DBE program to find DBE's and small businesses to participate in pavement preservation.

### **Quotas and Set-asides (§26.43)**

The Department does not use quotas or set-asides for DBEs in the administration of this DBE program.

### **DBE Overall Goals (§26.45)**

#### **Transit**

The Department's Transit Office develops the overall DBE goal for FTA funds and assigns individual goals as deemed appropriate. The goal is submitted to FTA on August 1, on a triennial basis. The next submission of SDDOT Transit's Goal Setting Methodology is due August 1, 2020 for the 2021-2023 fiscal years.

The Transit's Goal Setting Methodology can be seen on the DOT's website:  
[Transit Goal Methodology](#)

#### **FHWA**

SDDOT's goal is submitted to USDOT on August 1, on a triennial basis. The next submission of SDDOT's Goal Setting Methodology is due August 1, 2021 for the 2022-2024 fiscal years.

SDDOT's Goal Setting Methodology can be seen on the DOT's website:  
[Goal Methodology](#)

#### **FAA**

The Department's Aeronautics Office develops the overall DBE goal for FAA funds and assigns individual goals as deemed appropriate. The goal is submitted to FAA on August 1, on a triennial basis. The next submission of SDDOT Aeronautics' Goal Setting Methodology is due August 1, 2022 for the 2023-2025 fiscal years.

The Aeronautics Office Goal Setting Methodology can be seen on the DOT's website:  
[FAA Goal Methodology](#)

### **Shortfall Analysis (26.47(c))**

If SDDOT's Highway Construction Program, Transit Program, and/or Aeronautics Program fails to meet its overall goal at the end of any fiscal year, a shortfall analysis and corresponding corrective actions will be provided to FHWA, FTA, and/or FAA within 90

days of the end of the fiscal year for approval.

The analysis will include analyzing in detail, the reasons for the difference between the overall goal and the awards and commitments in that fiscal year

The corrective action will establish specific steps and milestones to correct the problems SDDOT's Highway Construction Program, Transit Program, and/or Aeronautics Program has identified in their analysis and enable each program to meet fully the goal for the new fiscal year.

### **Contract Goals (§26.51(d-g))**

The Department will meet the maximum feasible portion of the goal by using race neutral means. It will also assign contract goals to cumulatively result in meeting any portion of our overall goal that is not projected to be met through the use of race neutral means.

The Department will establish contract goals only on those federal-aid contracts that have subcontracting possibilities, and on most federal-aid projects located on or roads leading to Indian reservations. The size of the contract goal will depend on circumstances of the contract such as:

- Type of work
- Location of project
- Availability of DBEs to perform the work

The Bid Letting Office along with the DBELO will meet prior to each bid letting opening date to determining and set a contract goal, if needed. Contract goals will be expressed as a percentage of the federal aid share of a USDOT assisted contract.

### **Good Faith Efforts on Race-Conscious Contracts (§26.53(a-b))**

The Department treats bidders' compliance with good faith effort requirements as a matter of responsiveness. All solicitations for federal-aid contracts require each bidder to submit a DBE commitment form with their bid, or it is non-responsive. The DBE commitment form must provide the following information:

- The name(s) of DBE firms that will participate in the contract.
- A description of the work or list of bid items that each DBE will perform or materials/service provided.
- The committed dollar amount of participation to each DBE firm.
- If a contract goal was not met, evidence of good faith efforts.

Good faith effort documentation must be submitted to the Department bid letting office within two (2) business days from the date the bidders are contacted by the Department. The successful bidder must also submit a DOT Form 289B, (DBE Notification of Intent to Subcontract) for each DBE firm listed on the commitment form providing the following:

- Written and signed documentation of commitment to use a DBE subcontractor or supplier.
- Written and signed confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment.

### **Documenting good faith efforts (§26.53(c))**

Any bidder who fails to meet an assigned contract goal is obligated to show its good faith efforts. The bidder can demonstrate this by documenting and providing its efforts to the Department's bid letting office. Examples of good faith efforts are found in Appendix A to 49 CFR Part 26 and the Special Provision for Disadvantaged Business Enterprise.

The DBE Good Faith Effort Committee is responsible for determining whether a bidder who failed to meet the contract goal has documented sufficient good faith efforts to be considered responsive. The committee's responsibility is to ensure that all information is complete and accurate, and adequately documents the bidder's good faith efforts before the Department awards the contract to the low bidder.

The DBE Good Faith Effort Committee consists of a representative from the following offices Project Development, Civil Rights, Construction Support Services, Legal. The DBE Liaison Officer will also be present to provide guidance as needed.

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

Within two business days of being informed by the Department that it is not responsible because it failed to document sufficient good faith efforts, a bidder may request administrative reconsideration. The bidder must make a reconsideration request to the Department's Bid Letting Engineer. The reconsideration request will be heard by either the Department Secretary or designee, neither of which will have played a role in the original determination that the bidder did not make sufficient good faith efforts.

As part of the reconsideration, the bidder may provide written documentation or arguments concerning whether it met the goal or made adequate good faith efforts to do so. The bidder will also have an opportunity to meet in person with the Department Secretary or his designee. Within two business days of the reconsideration meeting, the Department will issue the bidder a written decision explaining the basis for a finding that the bidder did or did not meet the goal, or make adequate good faith efforts to do so.

The results of the reconsideration process are not administratively appealable to the USDOT.

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

On race conscious contracts, the Department requires contractors to make good faith efforts to replace a DBE that is terminated or otherwise failed to complete its work with another DBE. The Department requires the prime contractor to notify the DBE Liaison Officer immediately of the DBE's inability or unwillingness to perform and provide reasonable documentation.

In these situations, the Department requires the prime contractor to obtain prior approval of the substitute DBE and to provide copies of new or amended subcontracts, or documentation of good faith efforts. If it is found that a contractor knowingly attempted to circumvent the Special Provision for Disadvantage Business Enterprise the Department will not make payment for the work that was originally committed to a DBE and sanctions may be imposed that may include any of the following:

- Assessment of liquidated damages
- Suspension of bidding privileges
- Withholding progress payments
- Securing additional DBE participation of future federal-aid contracts sufficient to make up for the DBE participation found to be unallowable
- Referral of the matter for criminal prosecution

### **GFE – DBE bidders/offerors for Prime Contracts (§26.53(i))**

When determining whether the DBE bidders/offerors for a prime contract has met a contract goal the Department counts the work the DBE has committed to performing with its own forces as well as the work that it has committed to be performed by DBE subcontractors and DBE suppliers.

### **GFE – All Contracts/subcontracts Must Comply (§26.53(j))**

The Department requires prime contractors to make available upon request a copy of all DBE subcontracts.

### **Counting DBE Participation (§26.55(a-h))**

The Department will count DBE participation toward overall and contract goals as provided in 49 CFR §26.55 as noted in the [DBE Special Provision Section IV](#)

The Department will not count the participation of a DBE subcontractor toward the prime contractor's DBE achievements or the Department's overall DBE APG until the dollar amount being counted has been paid directly to the DBE.

The Department will not count toward DBE participation materials or services provided by a DBE who is not currently certified prior to and including the date of the Notice of Award or a DBE who loses certification at any time after the date of the Notice of Award.

### **Subpart D – Certification Standards**

The Department uses the certification standards of Part 23 and Subpart D of Part 26 and the certification procedures of Subpart E of Part 26 to determine the eligibility of firms to participate as DBEs in USDOT-assisted contracts. To be certified as a DBE, a firm must prove, by a preponderance of evidence, that it meets the requirements concerning group membership or individual disadvantage, business size, ownership and control. The Department will make its certification decisions based on the facts as a whole.

### **Determining Burdens of Proof and Group Membership (§26.61 & 26.63)**

Firms applying for certification must submit a signed and notarized affidavit stating they belong to one of the rebuttably presumed designated groups that are socially and economically disadvantaged per **§26.67(a)**. Included are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and Subcontinent Asian Americans.

If the department determines there is reason to question the applicant's group membership there will be a written explanation explaining why there is question of group membership provided. The department will also request additional documentation from applicant supporting his or her group membership.

If it is determined the applicant is not a member of one of the designated groups the applicant then must show by a preponderance of evidence that they are socially and economically disadvantaged.

The Department's decision is subject to the certification appeals procedure of §26.89.

Firms applying for certification under the group membership of Native American must submit documentation of tribal membership by the owner of the firm (i.e. tribal membership card or enrollment documentation). The membership must be in a federal or state recognized tribe.

If the applicant is not a member of a federal or state recognized tribe then the applicant must show evidence that they are socially and economically disadvantaged per Appendix E to Part 26 of the CFR.



### **Determining Business size (§26.65)**

The Department will ensure the DBE firm does not exceed the Small Business Administration's size standards (see 13 CFR 121.402) for the type(s) of work the firm will perform on USDOT assisted contracts.

Any firm regardless of work type will be ineligible for DBE certification if the firm has average annual gross receipts greater than \$23.98 million over a three year period.

### **Determining Social and Economic Disadvantage (§26.67)**

The Department requires the firm to submit the USDOT provided Personal Net Worth Statement and Declaration of Social Disadvantage signed and notarized with each new application. The personal net worth statements and supporting documentation are reviewed to ensure that the disadvantaged owners' net worth does not exceed the current size limit of \$1.32 million. As part of the review process the department ensures the following:

- Exclude individual's ownership interest in the applicant firm
- Exclude individual's equity in his or her primary residence
- Do not use a contingent liability to reduce an individual's net worth
- With respect to assets held in vested pension plans, IRAs, 401(k) accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time without significant adverse tax or interest consequences, include only the present value of such assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time.

As per §26.67(4)(c), a firm cannot transfer assets to an immediate family member, to a trust a beneficiary of which is an immediate family member, or to the applicant firm for less than fair market value within two years of applying to DBE program or of the review of firms annual affidavit. If any transfers are within the two year window and the disadvantaged owner must show that the transfer was to an immediate family member for their education, medical expenses or other form of essential support.

After review, the individual owner's presumption of economic disadvantage may be rebutted in the following two ways:

- If the individual's personal net worth exceeds \$1.32 million
- If the individual is able to accumulate substantial wealth. In determining this, the department will consider factors that include but are not limited to the following:
  - Whether the average adjusted gross income of the owner over the most recent three year period exceeds \$350,000
  - Whether the income was unusual and not likely to occur in the future
  - Whether the earnings were offset by losses
  - Whether the income was reinvested in the firm or used to pay taxes arising in the normal course of operations by the firm

- Other evidence that income is not indicative of lack of economic disadvantage
- Whether the total fair market value of the owners assets exceed \$6 million

The Personal Net Worth form can be found here - [Personal Net Worth Form](#)

### **Determining Ownership (§26.69)**

The Department will not consider an applicant firm to be independently owned if it is inextricably associated with another through ownership, affiliation, sharing of employees, facilities, profits and losses. Factors which will be considered by the department in determining whether the firm is independently owned will include the date the firm was established, the adequacy of the financial and physical resources for the work involved, and the degree to which financial, equipment leasing, business, and other relationships with non-minority firms vary from normal industry practice.

1. In determining whether the socially and economically disadvantaged participants in a firm own the firm, the department will consider all the facts in the record, viewed as a whole.
2. To be an eligible DBE, a firm must be at least 51% owned by socially and economically disadvantaged individuals, as outlined below:
  - a. In the case of a corporation, such individuals must own at least 51% of the each class of voting stock outstanding and 51% of the aggregate of all stock outstanding.
  - b. In the case of a partnership, 51% of each class of partnership interest must be owned by socially and economically disadvantaged individuals. Such ownership must be reflected in the firm's partnership agreement.
  - c. In the case of a limited liability company, at least 51% of each class of member interest must be owned by socially and economically disadvantaged individuals.
3. The firm's ownership by socially and economically disadvantaged individuals must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.
4. All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Except as provided in this paragraph, no securities or assets held in trust, or by any guardian for a minor, are considered as held by disadvantaged persons in determining the ownership of a firm. However, securities or assets held in trust are

regarded as held by a disadvantaged individual for purposes of determining ownership of the firm, if:

a. The beneficial owner of securities or assets held in trust is a disadvantaged individual, and the trustee is the same or another such individual; or

b. The beneficial owner of a trust is a disadvantaged individual who, rather than the trustee, exercises effective control over the management, policy-making, and daily operational activities of the firm. Assets held in a revocable living trust may be counted only in the situation where the same disadvantaged individual is the sole grantor, beneficiary, and trustee.

5. The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

6. The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership:

a. The owner's expertise must be:

- i. In a specialized field;
- ii. Of outstanding quality;
- iii. In areas critical to the firm's operations;
- iv. Indispensable to the firm's potential success;
- v. Specific to the type of work the firm performs; and
- vi. Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.

b. The individual whose expertise is relied upon must have a significant financial investment in the firm.

7. The Department will always deem as held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual:

a. As the result of a final property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce decree is inconsistent with this section; or

b. Through inheritance, or otherwise because of the death of the former owner.

8. The Department will presume as not being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm who is:

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

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

- d. The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
- e. The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.

9. The Department will apply the following rules in situations in which marital assets form a basis for ownership of a firm:

- a. When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, The Department will deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. SDDOT will not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.
- b. A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.

10. The Department may consider the following factors in determining the ownership of a firm. However, the Department must not regard a contribution of capital as failing to be real and substantial, or find a firm ineligible, solely because:

- a. A socially and economically disadvantaged individual acquired his or her ownership interest as the result of a gift, or transfer without adequate consideration, other than the types set forth in paragraph 8 of this section;
- b. There is a provision for the co-signature of a spouse who is not a socially and economically disadvantaged individual on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents; or
- c. Ownership of the firm in question or its assets is transferred for adequate consideration from a spouse who is not a socially and economically disadvantaged individual to a spouse who is such an individual. In this case, the Department will give particularly close and careful scrutiny to the ownership and control of a firm to ensure that it is owned and controlled, in substance as well as in form, by a socially and economically disadvantaged individual.

### **Determining Control (§26.71)**

The Department will not consider the disadvantaged owner(s) of an applicant firm to be in control of the firm if they do not possess experience and technical competence in the types of work which the firm typically performs. In determining control, the DBE Liaison Officer will perform an on-site visit to the offices of the firm and to job sites on which the firm is working, as necessary, to interview the disadvantaged owner(s) and key employees of the firm to determine if the disadvantaged owner(s) possesses the power to make independent and unilateral business decisions which guide the firm.

1. In determining whether socially and economically disadvantaged owners control a firm, SDDOT will consider all the facts in the record, viewed as a whole.
2. Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.
  - a. In determining whether a potential DBE is an independent business, SDDOT will scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.
  - b. SDDOT will consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm.
  - c. SDDOT will examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm.
  - d. In considering factors related to the independence of a potential DBE firm, SDDOT will consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.

3. A DBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm. This does not preclude a spousal co-signature on documents as provided for in 49 CFR 26.69(j)(2).

4. The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.

a. A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president).

b. In a corporation, disadvantaged owners must control the board of directors.

c. In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.

5. Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

6. The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policy making, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that the Department can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.

7. The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this

information to make independent decisions concerning the firm's daily operations, management, and policy making. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

8. If South Dakota law or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type must possess the required license or credential. If South Dakota state law or local law does not require such a person to have such a license or credential to own and/or control a firm, the Department will not deny certification solely on the ground that the person lacks the license or credential. However, the Department may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.

9. The Department may consider differences in remuneration between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a firm as a DBE. Such consideration will be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm.

In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, The Department may consider a difference between the remuneration of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the non-disadvantaged individual remains involved with the firm and continues to receive greater compensation than the disadvantaged individual.

If the Department cannot determine that the socially and economically disadvantaged owners – as distinct from the family as a whole – control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.

12. Where a firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged individual, and the non-disadvantaged individual remains involved with the firm in any capacity, the disadvantaged individual now owning the firm must demonstrate to the Department, by clear and convincing evidence, that:

- a. The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
- b. The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who formerly owned and/or controlled the firm.

13. In determining whether a firm is controlled by its socially and economically disadvantaged owners, SDDOT may consider whether the firm owns equipment necessary to perform its work. However, SDDOT will not determine that a firm is not controlled by socially and economically disadvantaged individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.

14. The Department will grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm. To become certified in an additional type of work, the firm will need to demonstrate to SDDOT that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work.

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

16. In order for a partnership to be controlled by socially and economically disadvantaged individuals, any non-disadvantaged partners must not have the power, without the specific written concurrence of the socially and economically disadvantaged partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.

#### **NAICS Codes (§26.71(n)(1))**

The Department will only certify firms for the specific types of work that the socially and economically disadvantaged owner is in control of. The Department will use the most specific NAICS code or codes that best describe the principal goods or services the firm provides. The NAICS codes are made available as part of the DBE Directory.

#### [DBE Directory](#)

#### **Other Rules (§26.73)**

The Department will make certification determinations of a firm based on the certification standards as a whole and will not include requirements outside of the scope of DBE certification.



The Commercially Useful Function requirement only pertains to firms that are already DBE certified and is not part of the certification process nor is it appealable to the USDOT.

### **Unified Certification Program (§26.81)**

Since the inception of the DBE program FHWA, FTA and FAA recipients have always used the certification program administered by SDDOT. FTA and FAA recipients refer prospective applicants to the SDDOT DBE Program. The DBE Directory includes firms certified for use by all operating administrations.

#### [Unified Certification Program Document](#)

### **Annual Affidavits and Notices of Change (§26.83 (i) and (j))**

The Department requires DBEs, on the anniversary date of their certification, to submit an Annual Affidavit to update information in the DBE directory and affirm that the company continues to meet all of the eligibility criteria. Instate DBEs are required to submit with the affidavit supporting documentation of the firms size and gross receipts.

The Department requires DBEs to provide written notification of any change in circumstances affecting the firm's ability to meet size, disadvantaged status, ownership or control criteria, or of any material change in the information provided in the Uniform Certification Application within thirty (30) days of the change.

Any firm failing to submit the Annual Affidavit or notice of change will have its certification removed following the procedures consistent with §26.109 (c).

### **Interstate Certification (§26.85)**

Out-of-state firms must first obtain certification from the Unified Certification Program (UCP) in their home state. The applicant must submit the following to the Department:

- A complete copy of the application and all supporting documentation submitted to the home state.
- Any additional information submitted to the home state or any other state(s) pertaining to the firm's application.
- All annual affidavits submitted to the home state since the date of initial certification.
- All notices of change submitted to the home state since initial certification.

- All correspondence and documentation provided to the home state concerning the application or status as a DBE.
- All correspondence and documentation provided to a UCP other than the home state concerning the application or status as a DBE.
- If the firm appealed a certification denial or decertification to USDOT, a copy of the applicant's letter of appeal.
- If the firm appealed a certification denial or decertification to USDOT, a copy of the response to the appeal by USDOT.
- 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. The affidavit must affirm that the applicant has submitted all information required and the information is complete and identical to that submitted to the home state.

Within seven (7) days of receipt of all applicable information indicated above, the Department will request a copy of the site visit report from the 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 the home state was conducted more than three (3) years prior to the date of the application to the Department, 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 an onsite report is not received within fourteen (14) days, the applicant will be notified that there will be a delay in the decision due to unavailability of the report.

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

- Evidence that the home state's 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;
- South Dakota State law requires a result different from that of the home State;
- The applicant failed to cooperate in providing all requested information or documentation indicated above.

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

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

The firm may respond in writing or request to an in-person meeting with the DBE compliance officer to discuss the Department's objection to the home state's certification approval. If the firm requests a meeting, the Department will 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 Part 26 with respect to the particular issues raised in the Department's letter of denial.

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

The decision under this section may be appealed to the USDOT Office of Civil Rights under §26.89 of this part.

#### **Denial of Initial request for Certification (§26.86)**

If the Department decides to deny certification to a firm, a written explanation of the reasons for denial will be given. The letter will specifically reference evidence in the application that supports each reason for denial as well as information on how to appeal the decision to USDOT. The department will also provide, upon request, the documentation and other information on which the denial is based upon to the applicant.

After a denial, should the applicant want to reapply, there is a 12 month waiting period before they may do so. If they want to appeal the denial they may do so pursuant to §26.89.

#### **Removal of DBE Eligibility (§26.87)**

Any person may file a written complaint alleging a DBE is ineligible and give specific reasons as to why they believe the DBE is ineligible. The Department does not have to accept a general allegation that a DBE firm is ineligible or an anonymous allegation. Confidentiality will be maintained as provided in §26.109.

The Department may also initiate its own proceedings based off of new information received either by the firm itself or other information received.

A review of the firm's records and any new information received will be conducted. If the Department finds reasonable cause to remove a firm's eligibility the firm will be provided with written notice and will be given an opportunity for an informal hearing, at which time the firm may respond and provide information and/or arguments as to why it should remain certified.

If a firm wants to appeal the decertification decision, they may do so pursuant to §26.89.

### **Suspension of Certification (§26.88)**

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

(b)(1) 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 eligibility of the DBE firm to remain certified, or when the DBE fails to notify the recipient or UCP in writing of any material change in circumstances as required by §26.83(i) of this part or fails to timely file an affidavit of no change under §26.83(j).

(2) In determining the adequacy of the evidence to issue a suspension under paragraph (b)(1) of this section, the department shall consider all relevant factors, including how much information is available, the credibility of the information and allegations given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result.

(c) The concerned operating administration may direct the department to take action pursuant to paragraph (a) or (b) this section if it determines that information available to it is sufficient to warrant immediate suspension.

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

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

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

(g) 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 information demonstrating that the firm is eligible notwithstanding its changed circumstances. Within 30 days of receiving this information, the recipient must either lift the suspension and reinstate the firm's certification or commence a decertification action under §26.87 of this part. If the recipient commences a decertification proceeding, the suspension remains in effect during the proceeding.

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

### **Certification Appeals (§26.89)**

Any firm or complainant who appeals a certification decision appeals directly to the USDOT and addressed to:

United States Department of Transportation  
Departmental Office of Civil Rights  
1200 New Jersey Avenue SE.  
Washington, DC 20590-0001

The Department will implement a USDOT certification appeal decision affecting the eligibility of DBEs for federal-aid contracting, such as certifying a firm if USDOT has determined that our denial of an application was erroneous.

### **Joint Checks (Policy Memorandum Dated August 30, 2006)**

To ensure that a DBE is performing a commercially useful function and independent of the prime contractor, requests to issue joint checks to a DBE will be reviewed by the Department and allowed only under following conditions:

Issued for valid reasons only, and not simply for the convenience of the prime contractor

Used for a specific contract or specific time frame and not long-term or open ended

Payment is sent to the DBE and not directly to the supplier

Prior written approval is obtained from the DBE Compliance Officer. The request must include the following:

Name of the DBE the joint check will be issued to

Name of the supplier the joint check will be issued to

The DOT contract number(s)

The DOT PCN number(s)

The work the DBE will be performing on each contract

The specific reason for the joint check request

The Department will review the request and verify the circumstances indicated with the DBE. A copy of the request and approval will be provided to the prime contractor and the DBE.

### **Confidentiality (§26.109)**

The Department will safeguard from disclosure to a third-party 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.

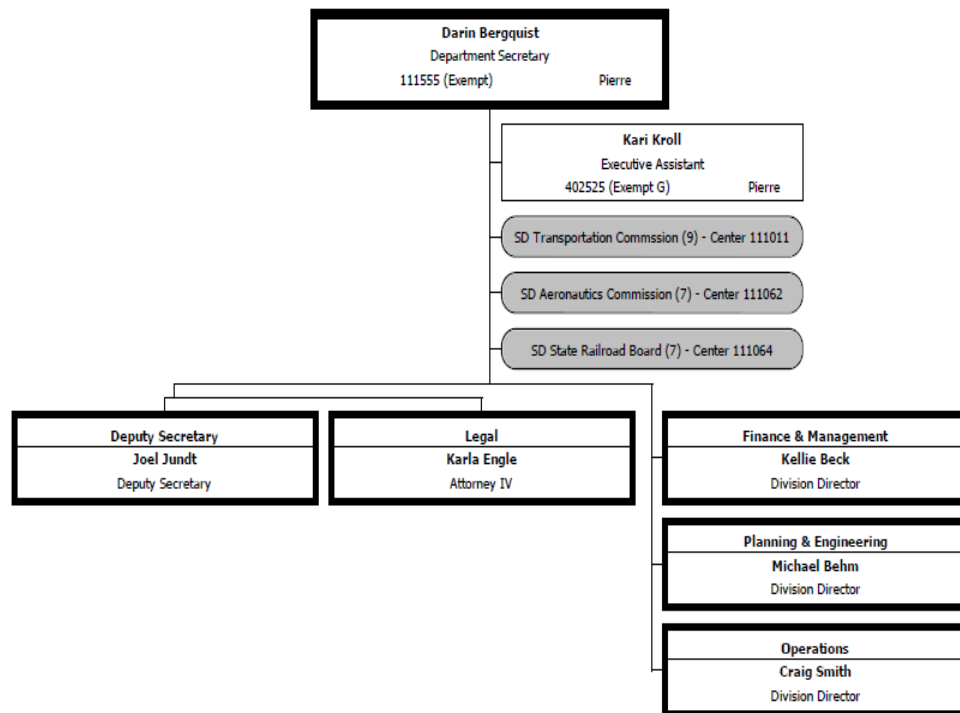
### **Attachments**

- [Race Neutral DBE Assurance and Intended DBE Participation – Form 289R/N](#)
- [Race Conscious DBE Assurance and Intended DBE Participation – Form 289R/C](#)
- [DBE Notification of Intent to Subcontract – Form 289B](#)
- [Certification of DBE Performance and Payments – Form 289](#)
- [Annual Affidavit – South Dakota firms](#)
- [Annual Affidavit – Out-of-State firms](#)

# Organizational Chart

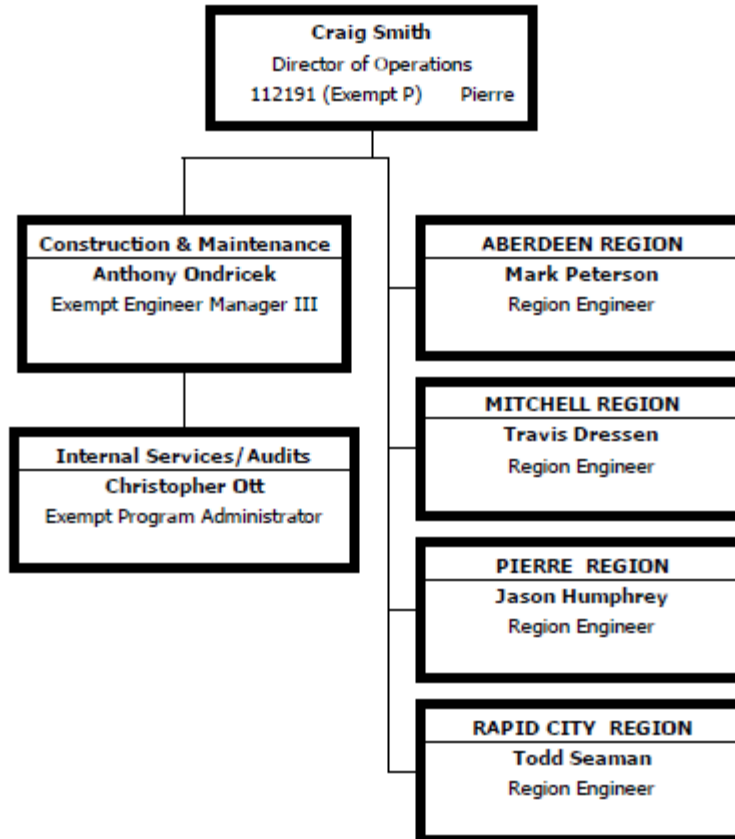
## SOUTH DAKOTA DEPARTMENT OF TRANSPORTATION

01/06/2020



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**SOUTH DAKOTA DEPARTMENT OF TRANSPORTATION**  
**Division of Operations**





**SOUTH DAKOTA DEPARTMENT OF TRANSPORTATION**  
**Division of Operations - Operations Support**  
**(Centers 111322)**

10/07/2019

