

49 CFR Part 26, SUBPART D

CERTIFICATION ELIGIBILITY & STANDARDS

26.61 Burdens of Proof

- (a) USA certification eligibility determinations for participation as a DBE will be applied to the standards of this subpart.
- (b) Any firm seeking certification has the burden in demonstrating, by a preponderance of the evidence, it meets the requirements concerning group membership or individual disadvantage, business size, ownership and control.
- (c) Members of the designated groups identified in section 26.67 (a) are not required to provide burden of proofs as they are rebuttably presumed to be socially and economically disadvantaged. However, all presumptive members of the designated groups must provide information concerning their economic disadvantage with regards to their personal net worth.
- (d) All individuals who are not presumed to be socially and economically disadvantaged, or individuals against whom the presumption of disadvantage has been rebutted, have the burden in proving those requirements of 26.61 by a preponderance of the evidence.
- (e) All determinations concerning whether individuals and firms have met their burden of demonstrating group membership, ownership, control and social & economic disadvantage are made by considering all the facts in the record, viewed as a whole.

26.63 Group Membership Determinations

- (a) Questions concerning an individual's group membership must require the individual to demonstrate, by a preponderance of evidence, that he or she is a member of the group.
- (b) All determinations of group membership will consider if the person has held himself out to be a member of the group over a long period of time prior to application for certification and whether the person is recognized as a member of the group by the relevant community. Additional documentation in support of such group membership may be required.
 - (1) In rendering determinations on individuals found not to be members of a group presumed to be disadvantaged, the individual must then demonstrate social and economic disadvantage on an individual basis.
 - (2) Final decisions concerning membership in a designated group are subject to certification appeal procedures of 26.89.

26.65 Business Size Determinations

- (a) An eligible DBE firm (including its affiliates) must be an existing small business as defined by the Small Business Administration's (SBA) Standard Industrial Classification (SIC) codes, found in 13CFR part 121.
- (b) Additionally, a firm (including its affiliates) meeting the requirements of the SEA size standards may not be considered an eligible DBE if the firm has had an annual gross receipt average (last three fiscal years) in excess of \$16.6 million. The Secretary adjusts this amount for inflation from time to time.

26.67 Social and Economic Disadvantage Determinations

- (a)(1) USA rebuttably presumes that citizens of the United States (or lawfully admitted permanent residents) who are Women, Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals.

All applicants must attest via signature and notarization that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

- (2)(i) Each individual owner of a firm applying to participate as a DBE whose ownership and control are relied upon for DBE certification must also submit a signed, notarized statement of personal net worth, with appropriate supporting documentation.
- (ii) Net worth determinations exclude an individual's ownership interest in the applicant firm and the individual's equity in his or her primary residency,. No contingency liabilities will be considered in reducing an individual's net worth. The personal net worth of an individual claiming to be an Alaska Native will include assets and income from sources other than an Alaska Native Corporation and exclude any of the following which the individual receives from any Alaska Native Corporation:
- Cash (including cash dividends on stock received from an ANC) to the extent that it does not, in the aggregate, exceed \$2000 per individual, per annum; Stock (including stock issued or distributed by an ANC as a dividend or distribution on stock);
 - Stock (including stock issued or distributed by an ANC as a dividend or distribution on stock);
 - Land or an interest in land (including land or an interest in land received from an ANC as a dividend or distribution on stock);
 - An interest in a settlement trust.
- (b)(1) Rebuttal of Presumption of Disadvantage. In cases evidencing that an individual's personal net worth exceeds \$750,000, the individual's presumption of economic disadvantage is rebutted and no proceeding under paragraph (b)(2) of this section is required.
- (b)(2) In cases where there is a reasonable basis to believe that an individual who is a member of one of the designated groups is not socially and/or economically disadvantaged, USA may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. Such proceedings will follow the process outlined in section 26.87.
- (3) In such a proceeding, USA has the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. USA may require the individual to provide additional information relevant to the determination of his or her disadvantage
- (4) In cases where an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility, unless he or she makes an individual showing of social and/or economic disadvantage. In cases where the rebutting of presumption is being applied to the individual's personal net worth exceeding the \$750,000, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage.

- (c) 8(a) and SDB Firms. If a firm applying for certification has a current, valid certification recognized by the SBA under the 8(a) or small and disadvantaged business (SDB) program (except an SDB self certification), USA may accept the firm's 8(a) or SDB certification in lieu of conducting its own certification proceeding. USA reserves the right to accept or deny such certification for participation as an eligible DBE.
- (d) Individual determination of social and economic disadvantage. Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged may apply for DBE certification. USA will make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged.

26.69 Ownership Determinations

- (a) USA will consider all the facts in the record, viewed as a whole, when making determinations as to whether socially and economically disadvantaged participants own the firm,
- (b) An eligible DBE firm must be at least 51 percent owned by socially and economically disadvantaged individuals.
 - (1) If the firm is a corporation, such individuals must own at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding.
 - (2) If the firm is a partnership, 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged individual ; and be reflected in the firm's partnership agreement.
 - (3) If the firm is a limited liability company, at least 51 percent of each class of member interest must be owned by socially and economically disadvantaged individuals.
- (c) A firm's ownership by socially and economically disadvantaged individuals must be real, substantial, and continuing, going beyond pro forma ownership documents. 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.
- (d) Any and all securities reflecting ownership of a firm must be held directly by disadvantaged persons. No securities or assets held in trust or by any guardian for a minor will be considered as being held by disadvantaged persons. However , USA will consider securities or assets held in trust as being held by a disadvantaged individual when determining ownership if:
 - 1) The beneficiary of securities or assets held in trust is a disadvantaged individual and the trustee is the same or another such individual.
 - 2) The beneficiary of a trust is a disadvantaged individual who, rather than the trustee, exercises effective control over the management, policymaking, and daily operational activities of the firm. Those assets held in a revocable living trust may be counted only in this situation where the same disadvantaged.
- (e) USA will only consider those contributions of capital by the socially and economically disadvantaged owners used to acquire ownership interests if they are real and substantial. USA will not consider a promise to contribute contributions, unsecured notes payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee.

- (t) USA will only consider contributions of expertise by the socially and economically disadvantaged owners if they demonstrate the following:
 - (i) A specialized field;
 - (ii) Outstanding quality;
 - (iii) Critical to the firm's operations;
 - (iv) Indispensable to the firm's potential success;
 - (v) Specific to the firm's principal business activities;
 - (vi) Documented in the records of the firm, clearly identifying the contribution of expertise and its relative value to the firm;
 - (vii) The individual whose expertise is being relied upon must have a significant financial investment in the firm.

- (g) USA will only deem as held by a socially and economically disadvantaged individual, in determining ownership, all interests in a business or other assets obtained by the individual if they demonstrate the following:
 - 1) A final property settlement or court order in a divorce or legal separation, provided that no term conditions are inconsistent with this requirement;
 - 2) An inheritance due to the death of the former owner;

- (h)(1) USA will not consider as being held by socially and economically disadvantaged ownership, interests or assets in a business 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:
 - (i) Involved in the same firm for which the individual is seeking certification or an affiliate of that firm;
 - (ii) Involved in the same or similar business or industry; (iii) Engaged in an ongoing business relationship with the firm or its affiliate;
 - (2) USA will consider the interests or assets to be counted only if the disadvantaged owner can demonstrate by clear and convincing evidence that:
 - (i) The gift or transfer was made for reasons other than obtaining certification;
 - (ii) 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.

- (I) USA will apply the following rules when considering marital assets as a basis or ownership of a firm:
 - 1) When marital assets held jointly or as community property are used to acquire the ownership interest asserted by one spouse, the ownership interest will be deemed to have been acquired by that spouse with his or her 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 domiciled by the spouse or firm;
 - 2) The document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire ownership interest in the firm must be included as part of the firm's DBE application.

- (J) USA, in determining ownership, will not regard a contribution of capital as failing to be real and substantial or find a firm ineligible solely because:

- 1) The socially and economically disadvantaged individual acquired ownership interest as the result of a gift, or transfer without adequate consideration other than the types set forth in paragraph (h) of this section;
- 2) There is a co-signature provision for a spouse who is not a socially and economically disadvantaged individual on financing agreements, contracts for the purchase or sale of real personal property, bank signature cards, or other documents;
- 3) Ownership of the firm 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. *However, USA 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.*

26.71 Control Determinations

- (a) USA will consider all the facts in the record viewed as a whole when making determinations as to whether socially and economically disadvantaged participants control the firm.
- (b) An eligible DBE firm must be an independent business the viability of which does not depend on its relationship with another firm or firms.
 - (1) USA will scrutinize relationships with non-DBE firms in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.
 - (2) USA 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 applicant DBE firm.
 - (3) USA 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 applicant DBE firm.
 - (4) USA will consider the consistency of relationships between the DBE and non-DBE firms with normal industry practice factors being applied.
- (c) USA will not certify firms subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owner. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices such as cumulative voting rights, voting powers attached to different classes of stock, employment contracts, concurrence requirements by non-disadvantaged owners or partners, precedent or subsequent conditions, executory agreements, voting trusts, restrictions on or assignments of voting rights, or any other restrictions 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.
- (d) 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 management, policy and operations.
 - (1) The disadvantaged owner must hold the highest officer position in the company.
 - (2) Disadvantaged owners of a corporation must control the board of directors.
 - (3) One or more disadvantaged owners of a partnership must serve as general partners with control over all partnership decisions.

- (e) Individuals who are not socially and economically disadvantaged may be involved in a DBE firm. However, such individuals must not possess or exercise the power to control the firm or be disproportionately responsible for the operation of the firm.
- (f) USA will recognize delegation of authority (management, policymaking, or daily operations) in the firm to individuals who are not socially and economically disadvantaged individuals. However USA will closely scrutinize such delegations of authority to ensure they are 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 USA can reasonably conclude they exercise control over the firm's operations, management, and policy.
- (g) USA will require the socially and economically disadvantaged owners to have an overall understanding of, and the managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. Such 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 policymaking.

Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.
- (h) USA will require socially and economically disadvantaged persons who own and control certain types of firms (architecture, engineering, investigators, etc.) to possess licenses when state law requires the persons to have a particular license or other credentials in order to own these types of firm.
- (i)(1) USA will consider differences in remuneration between socially and economically disadvantaged owners and other participants in the firm in determining DBE certification. Such consideration shall be in the context of duties, responsibilities, normal industry practices, policies and practice concerning the firm's reinvestment of income and other explanations for the differences offered by the firm.
- (2) USA 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, in those cases where a non-disadvantaged individual formerly controlled the firm and a socially and economically disadvantaged individual now controls it. Particular consideration will be given when the non-disadvantaged owner remains involved with the firm and continues to receive greater compensation than the disadvantaged individual.
- (j) USA does not recognize absentee ownership of a business and part-time work in a full-time firm as constituting control. A socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm or to control its activities.
- (k)(1) USA will closely scrutinize firms whose control is professed to be by socially and economically disadvantaged individuals even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity.
- (m) USA will closely scrutinize a firm who either owns or leases equipment necessary to perform its work to ensure such leasing arrangements are within normal industry practices and do not involve a relationship with a prime contractor or other party that compromises the independence of the firm.
- (n) USA 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. Expanded certification for an additional type of work will require a written request from the existing DBE firm in which it must demonstrate to USA that its socially and economically disadvantaged owners are able to control the firm with respect to the additional type of work.

- (o) USA will consider DBE eligibility for franchisees if they meet the standards in this subpart and the franchiser or licensor is not affiliated with the franchisee or licensee.
- (p) In order for a partnership to be controlled by socially and economically disadvantaged individuals, non-disadvantaged partners must not have the power to contractually bind the partnership or subject the partnership to contract liability without the specific written concurrence of the socially and economically disadvantaged partner(s).
- (q) USA recognizes the use of employee leasing companies provided that the use of such leasing companies does not preclude the socially and economically disadvantaged individuals from controlling their firm if they continue to maintain an employer-employee relationship with the leased employees.

26.73 Other Rules Affecting Certification

- (a)(1) USA does not consider commercially useful function issues with respect to DBE certification eligibility standards. USA recognizes that commercially useful functions pertain solely to counting DBE participation and goals.
- (a)(2) USA will consider whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program when rendering certification decisions.
- (b) USA will evaluate the eligibility of a firm on the basis of present circumstances
- (c) USA requires all firms seeking DBE certification to cooperate fully with requests from USA and USDOT for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial or removal of certification.
- (d) USA will only accept firms organized for profit in consideration for DBE eligibility.
- (e) USA will only accept applicant firms owned by socially and economically disadvantaged individuals. Except as provided in this section, a firm that is not owned by such individuals but instead is owned by another firm - even another DBE firm -- cannot be an eligible DBE.
 - (1) A subsidiary of a DBE-eligible parent company or holding company may be certified if it otherwise meets all the requirements of this subpart. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company. In instances where the parent or holding company has not applied for certification, USA will require it to first demonstrate its DBE-eligibility prior to certifying the subsidiary.
 - (2) USA will certify such a subsidiary only if there is cumulatively 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals
- (f) Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is an independent business, owned and controlled by socially and economically disadvantaged individuals.
- (g) Prequalification as a condition for DBE certification is not required at this time
- (h) USA recognizes firms owned by an Indian tribe, Alaska Native Corporation, or Native Hawaiian organization as an entity, rather than by Indians, Alaska Natives, or Native Hawaiians as individuals. Such a firm must meet the size standards of 26.65 and be controlled by socially and economically disadvantaged individuals, as provided in 26.71.

49 CFR PART 26, SUBPART E - CERTIFICATION PROCEDURES

Eligibility Decisions

- (a) USA will ensure that only firms certified as eligible DBEs under this section participate in our DBE Program.
- (b) USA will determine eligibility of firms as DBEs consistent with the standards of subpart D of this part (26.67 through 26.73 above).
- (c) USA will take the following steps in determining whether a DBE firm meets the eligibility standards of subpart D:
 - (1) Perform an on-site visit to the offices and job sites of the firm, interview the principal officers & review their resumes/work history. USA may rely upon the site visit report of other recipient agencies when appropriate;
 - (2) Analyze ownership of stock (corporations);
 - (3) Analyze the bonding and financial capacity of the firm;
 - (4) Determine the work history of the firm, including contracts it has received and work completed;
 - (5) Obtain a statement of the type of work it prefers to perform within the DBE program;
 - (6) Obtain a list of owned or leased equipment and the licenses both the firm and its key personnel possess in the work it will be performing as part of the DBE program;
 - (7) Render determinations only on completed applications for certification which have been properly signed and notarized and in which the applicant attests to the accuracy and truthfulness of the information on the application;
- (d) USA will make available certification information it has obtained in connection with certification (application, support documentation, site visit reports, etc.) to other certifying agencies when requested.
- (e) USA will reserve the discretion to take any of the following actions when another DOT recipient has certified an applicant firm:
 - (1) Accept the certification decision of the other recipient;
 - (2) Render an independent certification decision based upon the other recipient's decision and additional information from the applicant;
 - (3) Require the applicant to go through USA's procedures for certification;
- (f) USA may, in the future, impose a reasonable application fee for certification, subject to approval of FTA. Fee waivers may be made on a case-by-case basis.
- (g) USA will safeguard from disclosure from unauthorized persons information gathered as part of the certification process which may reasonably be regarded as proprietary or other confidential business information consistent with applicable Federal, state & local law.
- (h) USA will certify DBE firms for a period of three years unless there is reason to believe the factual basis on which the original certification was made has changed.
- (i) All certified DBE firms must inform USA in writing of any change in circumstances affecting their ability to meet existing size, disadvantaged status, ownership, or control standards or any material change in the information provided in their applications for certification.

- (1) Changes in management responsibility among members of a limited liability company are covered by this requirement.
- (2) Supporting documentation detailing such notification of any changes is required.
- (3) Notices of a DBE firm's changes must be submitted in the form of a sworn, notarized affidavit and be provided within 30 days of the occurrence of each change.

Firms failing to make timely notification of such a change will be deemed to have failed to cooperate under section 26.109(c).

- (j) All DBE firms, (for a period of three years), must provide an annual, sworn, notarized affidavit affirming that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership or control requirements, or any material changes in the information provided in its application, except for such changes that have been notified to USA pursuant to paragraph (i) above. The affidavit shall also specifically affirm that the firm continues to meet SBA and DOT size standards and be submitted with supporting financial information (most recent financial statements and filed tax returns).

Affidavits must be submitted no later than the anniversary date of the last certification. Firms failing to provide timely affidavits will be deemed as failing to cooperate under 26.109(c).

- (k) USA will render decisions on submitted applications for certifications within 90 days of receiving ALL required information from the applicant firm.

26.85 Denial of Initial Certification

- (a) USA will provide all firms a written explanation of the reasons for the denial of initial certification which specifically references the evidence in the record that supports each reason for the denial. Any documents and other information on which the denial is based will be made available to the applicant upon request.
- (b) Any firm which has been denied by USA may not reapply for certification prior to one (1) year from the date of denial. The time period for reapplication begins to run on the date the denial letter is received by the firm. All denial letters will be sent via certified mail.
- (c) All firms issued an administratively final denial may appeal the denial with the U.S. Department of Transportation, Office of Civil Rights, per the appeal process outlined under section 26.89.

26.87 Decertification/DBE Ineligibility

- (a)
 - (1) USA will review any complaints, either written or anonymously filed, alleging that a currently certified firm is ineligible. Complaint reviews will be initiated only when specific reasons why the firm is ineligible have been identified. Confidentiality of complainants' identities is protected as provided in section 26.109(b).
 - (2) USA will review any material provided by the firm and the complainant, and any other available information. USA may request additional information from the firm or conduct any other investigation deemed necessary.
 - (3) If USA determines there is reasonable cause to believe that the firm is ineligible, the firm will be sent a written notice proposing to find it ineligible, setting forth the reasons for the proposed determination.

If USA determines such reasonable cause does not exist, the firm and the complainant will be notified in writing of this determination and the reasons for it.

All statements of reasons for findings on issues of reasonable cause will specifically reference the evidence in the record on which each reason is based.

(b) All firms notified of reasonable cause to remove eligibility will be provided an opportunity for an informal hearing at which the firm may respond to the proposed removal of eligibility. A firm may provide information and arguments concerning why it should remain certified either in person or elect to present information and arguments in writing without going to the hearing.

(1) USA will bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of part 26.

(2) USA will maintain a complete record of the hearing, acceptable under state law for the retention of a verbatim record of an administrative hearing. DOT appeals if there is an appeal to DOT under 26.89, DOT will receive a transcript of the hearing. USA will retain the original record of the hearing and only provide a copy of the transcript to the firm when requested. A charge for only the cost of copying the record will be imposed upon all firms in informal hearings.

(3) Firms may opt to present information and arguments in writing, without going to a hearing.

(c) USA will ensure that a decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject to direction from the office or personnel who did take part in these actions.

The decision maker will be an individual who is knowledgeable in the certification requirements of USA's DBE program.

(d) USA will not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to USA at the time of its certification of the firm. USA will base such a decision only on one or more of the following:

(1) Changes in the firm's circumstances since certification that now render the firm unable to meet the eligibility standards.

(2) Information or evidence not available to USA at the time of certification.

(3) Information that was concealed or misrepresented by the firm in previous certification actions by USA.

(4) A change in the certification standards or requirements of USDOT.

(5) A documented finding that USA's determination to certify the firm was factually erroneous.

(e) NOTICE OF DECISION: USA will provide the firm a written notice of the decision and the reasons for it, including specific references to the evidence supporting each reason for the decision.

The notice will inform the firm of the consequences of USA's decision and of the availability of an appeal to the Department of Transportation under 26.89. Copies of the notice will be sent to the complainant or the FTA if the FTA directed USA to initiate the proceeding.

(f) (1) STATUS DURING PROCEEDINGS: A firm remains an eligible DBE during the pendency of USA's proceeding to remove its eligibility.

(2) A firm does become ineligible on the effective date of USA's notice of decision.

(g) EFFECTS OF REMOVAL OF ELIGIBILITY: USA will take the following action when removing a firm's DBE eligibility:

(1) Disallow a contractor's commitment to using the ineligible firm (DBE prime/ DBE subcontractor) only when a subcontract or contract has not been executed before the issuance of a USA decertification notice.

The ineligible firm will not count toward the contract goal or overall goal and USA will direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrable good faith efforts.

- (2) Permit a contractor's commitment to using the ineligible firm (DBE prime/DBE subcontractor) if a subcontract has been issued before USA has notified the DBE firm of its ineligibility. The contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE goal for the firm's work.

The ineligible DBE's performance of the contract remaining after issuance of USA's notice of ineligibility shall count toward the contract goal. USA will, however, refrain from crediting such contract remainder in its overall goal reports to FTA.

- (3) Exception: Should the DBE's ineligibility be caused solely by its having; exceeded established size standards during the performance of the contract, USA will continue to credit its participation on that contract for both contract and overall contract goals.

- (j) AVAILABILITY OF APPEAL: A firm may appeal administratively final removal decisions by USA directly to USDOT under 26.89.

26.89 Certification Appeals

- (a) Any firm or complainant may appeal USA's decision in any certification or removal of eligibility matter to USDOT. The address to which appeals are to be sent is:

U. S. Department of Transportation Office of Civil Rights Certification Appeals Branch 400 7th St., SW, Room 2401 Washington, DC 20590

- (b) USA will promptly implement any DOT certification appeal decisions affecting the eligibility of DBEs for DOT-assisted contracting (e.g., certify a firm if DOT has determined that USA's denial of its application was erroneous). Pending the Department's decision, the USA's decision will remain in effect.

USA has also established an administrative appeal process within its internal structure. An independent committee will review all administrative appeals. Such appeals are to be sent to the attention of the DBE Administrative Appeal Officer for consideration. Appellants are advised that exhaustion of this system is required.

- (c) All appeals to USDOT must be filed within 90 days of USA's final decision date. Appeals must be sent in writing to USDOT, including information and arguments concerning why USA's decision should be reversed. The following procedures will apply when considering appeals either administratively or directly to USDOT.

- (1) If the appellant is the firm which has been denied certification or whose eligibility has been removed, whose owner is determined not to be a member of a designated disadvantaged group, or concerning whose owner the presumption of disadvantage has been rebutted, the appeal letter must state the name and address of any other recipient which currently certifies the firm, which has rejected an application for certification from the firm or removed the firm's eligibility within one year prior to the date of appeal, or before which an application for certification or removal or eligibility is pending. Failure to provide this information may be deemed a failure to cooperate under 26.109.

- (2) If the applicant is other than one described in (c)(1) above, a request to the firm whose certification has been questioned for the information called for in section (c)(1) will be made. Failure to provide this information may be deemed a failure to cooperate under 26.109.

- (d) When USDOT receives an appeal, USA will provide a copy of the complete administrative record in the matter including hearing transcripts, within 20 days of USDOT's request for the record.

- (e) USDOT will make its decision based solely on the entire administrative record. USDOT does not make a partial review of the matter and does not conduct a hearing. USDOT may supplement the administrative record by adding relevant information made available by other federal, state or local law enforcement authorities, other DOT offices, other recipients, firms or private parties.

- (f) When USA is required to provide supplemental information to USDOT, it will also make this information available to the firm and any third-party complainant consistent with Federal or applicable state laws concerning; freedom of information and privacy.
- (1) USDOT affirms USA's decision unless it determines, based on the entire administrative record, that USA's decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification.
 - (2) If USDOT determines that USA's decision was unsupported or inconsistent with the substantial evidence or procedural provisions of this part concerning certification, USDOT will reverse USA's decision and direct USA to immediately (upon receiving such notice) certify the firm or remove its eligibility, as appropriate.
 - (3) USDOT is not required to reverse USA's decision if USDOT determines that a procedural error did not result in fundamental unfairness to the appellant or prejudice its opportunity to present its case.
 - (4) If the record is incomplete or unclear with respect to significant matters impacting the outcome of the case, USDOT may remand the record to USA with instructions seeking clarification or augmentation of the record before making a finding.
 - (5) USDOT will not uphold USA's decision based on grounds not specified in USA's decision.
 - (6) USDOT's decision is based on the status and circumstances of the firm as of the date of the decision being appealed.
 - (7) USDOT will provide written notice of its decision to USA, the firm, and the complainant in an ineligibility complaint. Copies of the notice are also sent to any other recipient whose administrative record or decision has been involved in the proceeding.
 - (8) USDOT's policy is to make its decision within 180 days of receiving the complete administrative record. Should USDOT not make its decision within this period, it will provide written notice to all concerned parties in the matter, identifying the reason for the delay and a date by which the decision will be made.

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

26.91 USA Actions following USDOT Appeal Decisions

- (a) USDOT's decisions in appeals from USA's actions are binding on USA.
- (b) USA will take the following actions following an appeal decision from USDOT:
 - (1) If USDOT determines that USA erroneously certified a firm, the firm's eligibility will be immediately removed upon receipt of the determination, without further proceedings on USA's part.
 - (2) If USDOT determines that USA erroneously failed to find reasonable cause to remove the firm's eligibility, USA will expeditiously commence a proceeding to determine whether the firm's eligibility should be removed.
 - (3) If USDOT determines USA erroneously declined to certify or removed the eligibility of the firm, USA will certify the firm, effective on the date of receipt of the written notice from USDOT.
 - (4) If USDOT determines that USA erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, USA will take appropriate corrective action as determined by USDOT.

- (5) If USDOT affirms USA's determination, no further action is necessary.

If DOT has upheld USA's denial of certification to or removal of eligibility from a firm, or directed the removal of a firm's eligibility, other recipients with whom the firm is certified may commence a proceeding to remove the firm's eligibility under section 26.87.

Where USDOT has reversed USA's denial of certification to or removal of eligibility from a firm, other recipients must take the USDOT action into account in any certification action involving the firm. However, other recipients are not required to certify the firm based on the USDOT decision.

49 CFR PART 26, SUBPART C - GOALS, GOOD FAITH EFFORTS, AND COUNTING

26.55 HOW IS DBE PARTICIPATION COUNTED TOWARD GOALS?

- (a) When a DBE participates in a contract, USA counts only the value of the work actually performed by the DBE toward DBE goals.
- (1) USA counts the entire amount of that portion of a construction contract (or other contract not covered by paragraph (a)(2) of this section) that is performed by the DBE's own forces. Included is the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).
 - (2) USA counts the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, toward DBE goals, provided it determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.
 - (3) When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.
- (b) When a DBE performs as a participant in a joint venture, USA counts a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.
- (c) USA counts expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.
- (1) A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, USA must evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.
 - (2) A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, USA must examine similar transactions, particularly those in which DBEs do not participate.
 - (3) If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, USA must presume that it is not performing a commercially useful function.
 - (4) When a DBE is presumed not to be performing a commercially useful function as provided in paragraph (c)(3) of this section, the DBE may present evidence to rebut this presumption. USA may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.

- (5) USA decisions on commercially useful function matters are subject to review by the concerned operating administration, but are not administratively appealable to DOT.
- (d) USA will use the following factors in determining whether a DBE trucking company is performing a commercially useful function:
- (1) The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.
 - (2) The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.
 - (3) The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
 - (4) The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.
 - (5) The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE does not receive credit for the total value of the transportation services provided by the lessee, since these services are not provided by a DBE.
 - (6) For purposes of this paragraph (d), a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.
- (e) USA counts expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:
- (1)(i) If the materials or supplies are obtained from a DBE manufacturer, USA counts 100 percent of the cost of the materials or supplies toward DBE goals.
 - (ii) For purposes of this paragraph (e)(1), a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.
 - (2)(i) If the materials or supplies are purchased from a DBE regular dealer, USA counts 60 percent of the cost of the materials or supplies toward DBE goals.
 - (ii) For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.
 - (A) To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.
 - (B) A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone or asphalt without owning, operating, or maintaining a place of business as provided in this paragraph (e)(2)(ii) if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.

- (C) Packages, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this paragraph (e)(2).
- (3) With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, USA counts the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials and supplies required on a job site, toward DBE goals, provided USA determines the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. However, USA does not count any portion of the cost of the materials and supplies themselves toward DBE goals.
- (f) If a firm is not currently certified as a DBE in accordance with the standards of subpart D of this part at the time of the execution of the contract, USA does not count the firm's participation toward any DBE goals, except as provided for in 26.87 (i).
- (g) USA does not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward USA's overall goal.
- (h) Do not count the participation of a DBE subcontractor toward the prime contractor's DBE achievements or USA's overall goal until the amount being counted toward the goal has been paid to the DBE.