

## Chapter 1: SUBPART A – GENERAL

### Section 1: Objectives

As stated in 49 CFR 26.1, the objectives of the United States Department of Transportation (USDOT or DOT) Disadvantaged Business Enterprise (DBE) program are:

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

The Fixing America's Surface Transportation (FAST) Act reauthorized the implementation of the DBE program and affirmed the compelling need for its continuation to address race and gender discrimination in surface transportation-related business.

Ref: 49 CFR 26.1

### Section 2: Application

USDOT's DBE Program applies to all recipients that directly or indirectly receive federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, 105 Stat. 1914, or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, 112 Stat. 107. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, 119 Stat. 1144; and Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405; federal transit funds authorized by Titles I, III, V and VI of ISTEA, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA-21, Pub. L. 105-178. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, 119 Stat. 1144; and Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405; and airport funds authorized by 49 U.S.C. 47101, et seq.

The DBE Program does not apply to any contract that is to be performed entirely outside the United States, its territories and possessions, Puerto Rico, Guam, or the Northern Marianas Islands or any contract in which DOT financial assistance does not participate.

Ref: 49 CFR 26.3

### **Section 3: Definitions and Terms**

*Affiliation* has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR part 121. Except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when, either directly or indirectly:

- a. One concern controls or has the power to control the other; or
- b. A third party or parties controls or has the power to control both; or
- c. An identity of interest between or among parties exists such that affiliation may be found.

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.

*CDOT* means the Colorado Department of Transportation.

*CDOT DBE Program* means the program administered by CDOT according to this DBE Program Manual in order to carry out the requirements of 49 CFR Part 26.

*CFR* means the Code of Federal Regulations.

*Compliance* means correct implementation of the requirements of 49 CFR Part 26.

*Contingent liability* means a liability that depends on the occurrence of a future and uncertain event. This includes, but is not limited to, guaranty for debts owed by the applicant concern, legal claims and judgments, and provisions for federal income tax.

*Contract* means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them. For the 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* means calendar days unless otherwise stated. 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 CDOT'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.

*Disadvantaged Business Enterprise (DBE)* means a for profit small business concern:

- a. 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
- b. Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

*DBE 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.

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

*Emerging Small Business (ESB) Program* means CDOT's race-neutral small business program governed by 2 CCR 604-1 and the ESB Program Guidelines.

*Good Faith Efforts* means efforts to achieve a DBE goal which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the goal.

*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.

*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 the requirements of 49 CFR Part 26 have not been correctly implemented.

*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 North American Industrial Classification System (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the North American Industry Classification Manual—United States, which is available on the Internet at the U.S. Census Bureau Web site: <http://www.census.gov/eos/www/naics/> .

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

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

*Race conscious measure or program* means one that is focused specifically on assisting only DBEs, including women owned DBEs.

*Race neutral measure or program* means 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.

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

*Socially and economically disadvantaged individual* means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a members of groups and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual's control. Socially and economically disadvantaged includes:

- a. Any individual who a recipient finds to be a socially and economically disadvantaged individual. An individual must demonstrate that he or she has held himself or herself out, as a member of a designated group;
- b. Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged. 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:
  - 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), the 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. "Other," which means any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective and/or individuals who have been determined to be socially and economically disadvantaged based on the criteria for social and economic disadvantage.

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

*Subrecipient* means any recipient that receives Federal funds from FHWA, FTA or FAA through CDOT.

*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.

*USDOT* 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).

Ref: 49 CFR 26.5

#### **Section 4: Nondiscrimination**

CDOT and its subrecipients shall 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 its DBE Program, CDOT and its subrecipients shall 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 program with respect to individuals of a particular race, color, sex, or national origin.

Ref: 49 CFR 26.7

#### **Section 5: USDOT Guidance and Interpretations**

CDOT acknowledges that written interpretations and guidance are valid, and express the official positions and views of the Department of Transportation or any of its operating administrations, only if they are issued over the signature of the Secretary of Transportation or if they contain the following statement, “The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR part 26.”

Ref: 49 CFR 26.9

#### **Section 6: Record Keeping and Reports**

For each overall goal established by CDOT, by June 1 and December 1 of each year, or as otherwise requested, CDOT will transmit a Uniform Report of DBE Awards or Commitments and Payments, to the

applicable OA. Additionally, CDOT will continue to provide data about the CDOT DBE Program to USDOT as directed by the USDOT OAs.

By January 1 of each year, CDOT will report to the USDOT Office of Civil Rights the percentage and location in the State of certified DBE firms in the UCP Directory controlled by the following: women; socially and economically disadvantaged individuals (other than women); and individuals who are women and are otherwise socially and economically disadvantaged individuals.

CDOT will continue to maintain a bidders list to provide as accurate data as possible about the universe of DBE and non-DBE contractors and subcontractors who seek to work on CDOT's Federally-assisted contracts for help in setting its overall goals. As of January 2017, CDOT will use an annual registration process to create its bidders list. During the registration, CDOT will collect the following information:

- a. Firm name and address;
- b. Age of firm;
- c. Annual gross receipts;
- d. Number of employees; and
- e. Primary NAICS code.

The registration occurs in the same system used to manage the Colorado UCP Certification Directory. Therefore, the status of the firm as a DBE is provided via the vendor profile. CDOT also collects data on potential bidders via the Connect2DOT newsletter sign up form and program registration.

CDOT will maintain records documenting a firm's compliance with the requirements of this part. At a minimum, CDOT will keep a complete application package for each certified firm and all affidavits of no-change, change notices, and on-site reviews. These records will be retained in accordance with applicable record retention requirements of CDOT's financial assistance agreement with its OAs. CDOT will maintain other certification or compliance related records for a minimum of three (3) years unless otherwise provided by its financial assistance agreements, whichever is longer.

CDOT currently maintains a mix of paper and electronic records. Paper files are maintained in a locked room with access only by the Civil Rights and Business Resource Center staff. Electronic files are kept in B2G and are only available to management and certifications staff.

Ref: 49 CFR 26.11

## **Section 7: Assurance Statements**

Each financial assistance agreement CDOT signs with its subrecipients will include the following assurance:

The subrecipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of the DBE program or the requirements 49 CFR part 26. The subrecipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. CDOT'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 CDOT of its failure to carry out

its approved program, the USDOT may impose sanctions as provided for under 49 CFR part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).

Each contract CDOT signs with a contractor (and each subcontract the prime contractor signs with a subcontractor) will include the following assurance:

The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as CDOT deems appropriate, which may include, but is not limited to: (1) Withholding monthly progress payments; (2) Assessing sanctions; (3) Liquidated damages; and/or (4) Disqualifying the contractor from future bidding as non-responsible.

Ref: 49 CFR 26.13

### **Section 8: Exemptions or Waivers**

CDOT is not currently operating under any exemptions or waivers to the requirements of 49 CFR Part 26. If any such exemption or waiver becomes necessary, CDOT will follow the procedures outlined in 49 CFR 26.15. USDOT approval of CDOT's DBE Program can be found at **Subpart G, Exhibit A**.

Ref: 49 CFR 26.15