



Idaho Transportation Department

Disadvantaged Business Enterprise Program Plan

For Federally Funded Projects Per 49 CFR § 26 and 23

December 2024

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SUBPART A - GENERAL

A. Introduction

The Idaho Transportation Department (ITD) recognizes its responsibility to ensure that Disadvantaged Business Enterprises (DBEs) have equal opportunity to take part in the performance of USDOT-assisted contracts and subcontracts administered by ITD. As part of its continuing effort to fulfill this responsibility, ITD has revised the DBE Program Plan to reflect the requirements and guidance contained in 49 CFR § 26 and 23. Significant changes in the Plan will be submitted to the local FHWA office for approval.

B. Purpose

The purpose of the DBE Program Plan is to give guidance for ITD staff and subrecipients operating under this plan in implementing 49 CFR § 26 and 23 and provide DBEs and other contractors information on their responsibilities on USDOT-assisted contracts and ITD's implementing procedures. It further assures USDOT that ITD will never 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 26 on the basis of race, color, national origin, sex, age, disability, limited English proficiency or economic status.

In administering the DBE program, ITD 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 program with respect to individuals of a particular race, color, national origin, sex, age, disability, limited English proficiency or economic status.

C. Application (49 CFR 26.3)

1. This DBE Program applies to ITD and all Subrecipients that directly or indirectly receive the following:
 - a) Federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Public Law 102-240, 105 Stat. 1914, or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 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), Public Law 109-59, 119 Stat. 1144; Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405; Titles I, II, III, and VI of the Fixing America's Surface Transportation Act (FAST Act) Public Law 114-94;, and Divisions A and C of the Bipartisan Infrastructure Law

(BIL), enacted as the Infrastructure Investment and Jobs Act (IIJA), Public Law 117-58.

- b) Federal transit funds authorized by Titles I, III, V and VI of ISTEA, Public Law 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA-21, Public Law 105-178. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, 119 Stat. 1144; Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Public Law 112-141, 126 Stat. 405; Titles I, II, III, and VI of the Fixing America's Surface Transportation Act (FAST Act) Public Law 114-94; and Divisions A and C of the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117-58), Public Law 117-58.
- c) Airport funds authorized by 49 U.S.C. 47101, et seq.

The Program's requirements also apply to USDOT-funded non-construction programs including:

- Professional Service Agreements
 - Architectural/Engineering Contracts
 - Supply Contracts
2. The DBE Program does not apply to:
- a) 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
 - b) Any contract that is not USDOT-assisted.

D. Objectives of the DBE Program (49 CFR 26.1)

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

6. To promote the use of DBEs in all types of federally-assisted contracts and procurement activities conducted by recipients;
7. To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and
8. To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

E. Definition of Terms (49 CFR 26.5)

This plan adopts the term definitions as published in 49 CFR 26.

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 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.
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 — 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 Metlakatla 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) — 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 — 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.

BIDDER'S LIST — A register of all firms bidding on prime contracts, and bidding or quoting subcontracts on USDOT-assisted projects. This register includes: the firm name, firm address, firms status as a DBE or non-DBE, race and gender information of the firm's majority owner, NAICS code applicable to each scope of work the firm sought to perform in, age of the firm, and annual gross receipts of the firm.

BUSINESS, BUSINESS CONCERN OR BUSINESS ENTERPRISE — 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.

CERTIFICATION — The process by which an applicant is determined to be eligible to participate in the DBE Program.

COMPLIANCE — A recipient has correctly implemented the requirements of this part.

CONTINGENT LIABILITY — 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 — 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 — One who participates, through a contract or subcontract (at any tier), in a USDOT-assisted highway, transit, or airport program.

DAYS —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.

DBE DIRECTORY OF CERTIFIED FIRMS — A publication listing all DBEs who are now certified by ITD.

DECLARATION OF ELIGIBILITY (DOE) — Signed declaration submitted each year from owner of DBE/ Airport Concession Disadvantaged Business Enterprises (ACDBE) firm declaring that they still meet the eligibility requirements of the DBE program

DEPARTMENT OR USDOT — The U.S. Department of Transportation, including the Office of the Secretary, the Departmental Office of Civil Rights, the Federal Highway Administration

(FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).

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

DISTRIBUTOR — A supplier or has a distributorship agreement, that “drop ships” materials and will be assuming the risk of the shipment of goods. The distributor can count 40 percent of the contracted items towards the prime contractors DBE goal

DIVERSITY TRACKING SYSTEM – An on-line, cloud-based software program, contracted through a national third-party provider, B2GNow. It manages DBE certifications, manages ITD Bidders List registrations, tracks all the information required for the semi-annual USDOT Uniform Report of DBE Commitments/Awards and Payments, and helps contract administrators monitor DBE project goal attainment, prompt payment and retainage release compliance.

DOT-ASSISTED CONTRACT — 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.

FTA TIER I RECIPIENT — An FTA recipient to whom this part applies that will award prime contracts (excluding transit vehicle purchases) the cumulative total value of which exceeds \$670,000 in FTA funds in a Federal fiscal year.

FTA TIER II RECIPIENT — An FTA recipient to whom this part applies who will award prime contracts (excluding transit vehicle purchases) the cumulative total value of which does not exceed \$670,000 in FTA funds in a Federal fiscal year.

GOOD FAITH EFFORT (GFEs) — 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.

IMMEDIATE FAMILY MEMBER — Is a 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 OR NATIVE AMERICAN TRIBE — Any federally or State-recognized Tribe, band, nation, or other organized group of Indians (Native Americans), or an ANC.

JOINT VENTURE — 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.

JURISDICTION OF CERTIFICATION (JOC) — Location where a firm is initially certified.

LIABILITIES — 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.

MANUFACTURER — 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.

NATIVE HAWAIIAN — Any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.

NATIVE HAWAIIAN ORGANIZATION — 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 — A recipient has not correctly implemented the requirements of this part.

NOTICE OF DECISION (NOD) — A determination that denies a firm's application or decertifies a DBE.

NOTICE OF INTENT (NOI) — A recipient's letter informing a DBE of a suspension or proposed decertification.

OPERATING ADMINISTRATION (OA) — 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 — The net value of an individual's reportable assets and liabilities, per the calculation rules in (49 CFR § 26.68).

PRIMARY INDUSTRY CLASSIFICATION — 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 online on the U.S. Census Bureau website:
www.census.gov/naics/.

PRIMARY RECIPIENT — A recipient which receives DOT financial assistance and passes some or all of it on to another recipient.

PRINCIPAL PLACE OF BUSINESS — 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. The term does not include construction trailers or other temporary construction sites.

PROGRAM — Any undertaking on a recipient's part to use DOT financial assistance, authorized by the laws to which this part applies.

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

RACE-NEUTRAL — *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 — 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 that has applied for such assistance.

REGULAR DEALER — A firm that owns, operates, or maintains a store, warehouse, or another establishment in which their materials, supplies, articles, or equipment are bought, regularly sold or leased to the public in the usual course of business, and stocked with at least 51% inventory.

SECRETARY — DOT's Secretary of Transportation or the Secretary's designee.

SET-ASIDE — A contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

SMALL BUSINESS ADMINISTRATION (SBA) — The United States Small Business Administration.

SBA CERTIFIED FIRM — Firms that have a current, valid certification from or recognized by the SBA under the 8(a) BD or SDB programs.

SMALL BUSINESS CONCERN — As related 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 — Any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a member of a group 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:
 - a. “Black Americans,” which includes persons having origins in any of the Black racial groups of Africa;
 - b. “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;
 - c. “Native Americans,” which includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians;
 - d. “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 Mariana Islands, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;
 - e. “Subcontinent Asian Americans,” which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, Maldives, Nepal or Sri Lanka;
 - f. Women;
 - g. 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 — A married person, including a person in a domestic partnership or a civil union recognized under State law.

TRANSIT VEHICLE MANUFACTURER (TVM) — Any manufacturer whose primary business purpose is to manufacture vehicles built for mass transportation. Such vehicles include, but are not limited to buses, rail cars, trolleys, ferries, and vehicles manufactured specifically for paratransit purposes. Businesses that perform retrofitting or post-production alterations to vehicles so that such vehicles may be used for public transportation purposes are also considered TVMs. Businesses that manufacture, mass-produce, or distribute vehicles primarily for personal use are not considered TVMs.

TRIBALLY-OWNED CONCERN — Any concern at least 51 percent owned by an Indian tribe as defined in this section.

UCP — Unified Certification Program.

UNSWORN DECLARATION — An unsworn statement, dated and in writing, subscribed as true under penalty of perjury.

USDOT — The United States 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).

USDOT-ASSISTED CONTRACT — 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.

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).

F. Nondiscrimination (49 CFR 26.7)

1. ITD must never 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 26.7 on the basis of race, color, sex, or national origin.
2. In administering its DBE Program, ITD 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 program with respect to individuals of a particular race, color, sex, or national origin.

G. USDOT Guidance and Interpretations (49 CFR 26.9)

- a. Only guidance and interpretations (including interpretations set forth in certification appeal decisions) consistent with this part 26 and issued after

March 4, 1999 express the official positions and views of the Department of Transportation or any of its Operating Administrations.

- b. The Secretary of Transportation, Office of the Secretary of Transportation, FHWA, FTA, and FAA may issue written interpretations of or written guidance concerning 49 CFR 26.9. 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.

H. Record Keeping (49 CFR 26.11)

1. ITD will submit a report on DBE participation to the concerned Operating Administration containing all the information described in the Uniform Report to this part. This report must be submitted at the intervals required by, and in the format acceptable to, the concerned Operating Administration.
2. ITD will continue to provide data about its DBE program to the Department as directed by DOT Operating Administrations.
3. ITD obtains through the online Bidder Registration's bidders list information as described in paragraph (b) of this section and enter it into a system designated by the Department.
 - a. The purpose of this bidders list information is to compile as accurate data as possible about the universe of DBE and non-DBE contractors and subcontractors who seek to work on your federally assisted contracts for use in helping you set your overall goals, and to provide the USDOT with data for evaluating the extent to which the objectives of § 26.1 are being achieved
 - b. ITD must obtain the following bidders list information about all DBE and non-DBEs who bid as prime contractors and subcontractors on each of the federally assisted contracts:
 - I. Firm Name;
 - II. Firm address including ZIP code;
 - III. Firm's status as a DBE or non-DBE;
 - IV. Race and gender information for the firm's majority owner;
 - V. NAICS code applicable to each scope of work the firm sought to perform in its bid;

- VI. Age of the firm; and
 - VII. The annual gross receipts of the firm. You may obtain this information by asking each firm to indicate into what gross receipts bracket they fit (*e.g.*, less than \$1 million; \$1-3 million; \$3-6 million; \$6-10 million; etc.) rather than requesting an exact figure from the firm.
- c. ITD must collect the data from all bidders for the federally assisted contracts by requiring the information in paragraph (b) of this section to be submitted with the bids or initial responses to negotiated procurements. ITD must enter this data in the Department's designated system no later than December 1 following the fiscal year in which the relevant contract was awarded.
4. ITD must maintain records documenting a firm's compliance with the requirements of 49 CFR § 26.11. At a minimum, ITD must keep a complete application package for each certified firm and all Declarations of Eligibility, change notices, and on-site visit reports. These records must be retained in accordance with applicable record retention requirements for the recipient's financial assistance agreement. Records related to other certifications or compliance must be kept for at least three (3) years, unless a longer period is specified by applicable record retention requirements for the recipient's financial assistance agreement.
5. ITD, in each Unified Certification Program (UCP) established pursuant to 49 CFR § 26.81, must report to DOT's Departmental Office of Civil Rights each year, the following information:
- a. The number and percentage of in-state and out-of-state DBE certifications by gender and ethnicity (Black American, Asian-Pacific American, Native American, Hispanic American, Subcontinent-Asian Americans, and non-minority);
 - b. The number of DBE certification applications received from in-state and out-of-state firms and the number found eligible and ineligible;
 - c. The number of decertified firms:
 - (1) Total in-state and out-of-state firms decertified;
 - (2) Names of in-state and out-of-state firms decertified because Socially Economically Disadvantaged Owner (SEDO) exceeded the personal net worth cap;
 - (3) Names of in-state and out-of-state firms decertified for excess gross receipts beyond the relevant size standard.
 - d. The number of in-state and out-of-state firms summarily suspended;

- e. The number of in-state and out-of-state applications received for an individualized determination of social and economic disadvantage status;
- f. The number of in-state and out-of-state firms certified whose owner(s) made an individualized showing of social and economic disadvantaged status.

I. Assurance Statements (49 CFR 26.13)

1. ITD gives the following assurance, applicable to all USDOT-assisted contracts and their administration:

The Idaho Transportation Department 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 49 CFR part 26. Idaho Transportation Department shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The Idaho Transportation Departments' 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 Recipient of its failure to carry out its approved program, the Department 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.).

2. All contracts/agreements signed between ITD and all subrecipients or contractors will contain assurances stating, *"The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the Recipient deems appropriate, which may include, but is not limited to:*
 - a. Withholding monthly progress payments;
 - b. Assessing sanctions;
 - c. Liquidated damages; and/or
 - d. Disqualifying the contractor from future bidding as non-responsible."

J. Exemptions or Waivers of the DBE Program Requirement (49 CFR 26.15)

ITD is now not working under any exemptions or waivers to this part. If an exemption or waiver becomes necessary, ITD will follow the procedures outlined in 49 CFR 26.15 to address this.

SUBPART B - ADMINISTRATIVE REQUIREMENTS

A. Policy Statement (49 CFR 26.23)

IDAHO TRANSPORTATION DEPARTMENT DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

As a recipient of Federal funds ITD is required to administer a DBE program in compliance with all laws, regulations, Executive Orders, and guidance. It is the policy of the Idaho Transportation Department (ITD) to ensure that Disadvantaged Business Enterprises (DBE), as defined in 49 CFR 26 and 23, have an equal opportunity to receive and participate in United States Department of Transportation (USDOT)-assisted contracts. It is also our policy:

1. To ensure non-discrimination in the award and administration of USDOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs;
2. To create a level playing field on which DBEs can compete fairly for USDOT-assisted contracts;
3. To ensure that the DBE Program is narrowly tailored per applicable law;
4. To ensure that only firms that fully meet 49 CFR 26 and 23 eligibility standards are permitted to participate as DBEs;
5. To help remove barriers to the participation of DBEs in USDOT-assisted contracts;
6. To promote the use of DBEs in all types of federally-assisted contracts and procurement activities conducted by recipients;
7. To assist the development of firms that can compete successfully in the marketplace outside the DBE Program; and
8. To provide proper flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

The Office of Civil Rights Program Manager (CRPM) has been designated ITD's DBE Liaison Officer (DBELO). In that capacity, the CRPM 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 ITD in its financial assistance agreements with USDOT.

SIGNED 
SCOTT STOKES
Director

11/26/24
Date

B. DBE Liaison Officer (DBELO) (49 CFR 26.25)

1. Civil Rights Program Manager

DBE program objectives are implemented and monitored by Office of Civil Rights staff under the direction of the Civil Rights Program Manager who is appointed as the DBE Liaison Officer with overall responsibility for the program.

ITD Designated DBE Liaison Officer:

Asali Crisp
13311 W Chinden Blvd
Boise, ID 83714
(208) 334-8884 or Asali.Crisp@itd.idaho.gov

While the Civil Rights Program Manager (CRPM) reports to the Chief Innovation and Experience Officer (CIEO), the CRPM has direct independent access to the Director concerning DBE program matters as reflected on the *Exhibit A: ITD Division of Innovation and Experience Organization Chart*. Duties and responsibilities include:

- a) Advising the Director and the ITD Board on DBE matters and achievements; and
- b) Providing direction and guidance to the DBE Program Coordinator and other staff on implementing all aspects of ITD's DBE Program.

2. DBE Program Coordinator (DBEPC)

The DBE Program Coordinator reports to the Civil Rights Program Manager and handles administering the day-to-day operation of the program. Duties and responsibilities include:

- a) Gathering and reporting DBE-related reports, statistical data and other information required by USDOT;
- b) Writing and updating ITD's DBE Plan and related forms and procedures as needed;
- c) Working with all internal and external entities to set overall annual participation goals;
- d) Working with all internal and external entities to conduct and process the disparity study for ITD with the contracted firm;
- e) Monitoring all Federal-aid projects for possible DBE participation;
- f) When ITD is pursuing a Race/Gender-Conscious program, setting DBE project goals;

- g) Uploading all new contracts and payments into the Diversity Tracking System each month from reports pulled from iReport;
- h) "Locking in" new contracts each month into the Diversity Tracking System, and entering DBE goals, when applicable, at the same time;
- i) Analyzing ITD's progress toward goal attainment and taking steps to correct or improve progress;
- j) Determining contractor compliance with good faith efforts;
- k) Providing DBEs with information and assistance in preparing bids, obtaining bonding, and insurance;
- l) Planning and taking part in DBE training seminars;
- m) Providing outreach to DBEs and community organizations to advise them of procurement opportunities and business assistance;
- n) Post DBE bid opportunities on Civil Rights website under "Bids and Opportunities" tab;
- o) Keeping ITD's directory of certified DBEs;
- p) Monitoring professional service providers for the Supportive Services Program; and
- q) Conduct, record and participate in all DBE On-Site visits for certification and updated DBE on-sites reviews;
- r) Providing certification applications with summary information to ITD's DBE Certification Committee.

3. District Staff

District staff support the DBE program by:

- a) Initiating forms to set DBE goals for construction projects and consultant agreements;
- b) Entering subcontractors into the Diversity Tracking System, and monitoring ongoing Federal-aid contracts and agreements on the Diversity Tracking System, including prompt payment, final payment, retainage release and closeout;
- c) Monitoring contractor compliance with DBE commitments on each project;
- d) Performing Commercially Useful Function (CUF) on-site inspections on each DBE firm at the beginning of DBE work commencement on each project, using **Form 1701, Commercially Useful Function Determination (CUF)**;
- e) Proactively monitors prompt payments on a contract by contract basis;
- f) Assisting in collecting data and other contractual compliance with the DBE program.

C. DBE Financial Institutions (49 CFR 26.27)

The State of Idaho Department of Finance has found that there are no financial institutions owned and controlled by socially or economically disadvantaged individuals in the State of Idaho. ITD will monitor the availability of DBE financial institutions annually. If any financial institutions owned and controlled by socially or economically disadvantaged individuals are identified, ITD will make reasonable efforts to use these institutions and encourage prime contractors to use such institutions.

D. Prompt Payment and Retainage (49 CFR 26.29)

ITD Standard Specifications for Highway Construction Section 109.05 requires the Contractor to pay each subcontractor or supplier by the 20th calendar day after receiving payment from the Department, provided work performed complies with contract requirements. The Contractor must also return retainage to each subcontractor or supplier by the 20th calendar day after the subcontractor or supplier completes work satisfactorily. Contractor must also ensure that the first or lower tier subcontractors or suppliers meet these requirements.

Prompt payment is monitored monthly for payments to subcontractors and suppliers reported on the DBE Diversity Tracking System by the prime contractors. ITD districts/Local Highway Technical Assistance Council (LHTAC)/Ada County Highway District (ACHD) will also be monitoring proactively by contracts in real time. The subcontractors will confirm both

the timeliness and the amounts of the payments made to them. Discrepancies will be investigated and resolved by the proper ITD residency/LHTAC/ACHD with the DBE Program Coordinator (49 CFR § 26.29(d)). Payments to lower-tier subcontractors will be reported by the prime contractor or the subcontractors, as they choose.

ITD has selected the following prompt payment mechanism for retainage as required in 49 CFR § 26.29(b)(3), “You may hold retainage from prime contractors and provide for prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract clause obligating the prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within 20 days after your payment to the prime contractor.”

The release of any retainage held by the prime contractor on the subcontractor after the subcontractor’s work has been completed will be similarly reported, monitored and enforced. Partial and Final Acceptance procedures are described in sections 105.15(A) and (B) of the [ITD 2023 Standard Specifications for Highway Construction](#). (Note: ITD does not routinely hold retainage on prime contractors.)

As in the case of any material breach of contract, ITD’s Resident Engineer (RE) may withhold payment or partial payment or may take other progressive corrective action if the Contractor fails to comply with the prompt payment contract requirements and continue to do so until such time as the Contractor complies with these requirements. ITD may also impose sanctions barring the Contractor from bidding on future projects until prompt payment issues have been addressed or may disqualify the Contractor from future bidding as non-responsible, per 49 CFR § 26.13(b)). All provisions will be outlined further in the ITD Standard Specifications for Highway Construction Section 109.05.

For more information on corrective actions allowable following breach of contract, see ITD online Manuals at: <https://apps.itd.idaho.gov/Apps/manuals/ManualsOnline.html>.

E. DBE Directory of Certified Firms (49 CFR 26.31)

1. Office of Civil Rights staff solicit potential DBE transportation-related contractors for certification by:
 - a) Outreach to ethnic and minority groups and DBE and small business advocacy organizations throughout Idaho;
 - b) Sharing program information and updates with other Federal-aid recipients and subrecipients, including those outside the state; and
 - c) Outreach through vendor fairs, business conferences and statewide program presentations.

2. ITD compiles and keeps a directory of certified firms eligible to participate in transportation-related contracts under the DBE Program (49 CFR § 26.31(a)). The searchable directory is updated on a real-time basis and available on the internet on-demand at <https://itd.dbesystem.com>.

The Directory has the firm name, contact information, the types of work that the firm has been certified to perform as a DBE to include North American Industrial Classification System (NAICS) Codes, work descriptions, and the areas of the state in which the firm has expressed interest working.

F. Overconcentration (49 CFR 26.33)

1. The CRM will review DBE participation reports and statistics each year to determine whether an overconcentration of DBEs exist in any specific work area(s).
2. If ITD determines that DBEs in one or more areas of work are so over concentrated as to unduly burden the opportunity of non-DBE firms to participate in this type of work, ITD will device appropriate measures to address the overconcentration.
3. These measures may include the use of incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which ITD have determined that non-DBEs are unduly burdened.
4. ITD will request and obtain the approval of the concerned USDOT Operating Administration (OA) the determination of overconcentration and proposed measures devised to address it. Once approved, the measures will detailed in the DBE Program Plan.

G. Monitoring and Enforcement Mechanisms (49 CFR 26.37)

ITD will bring to the attention of the USDOT any false, fraudulent, or dishonest conduct in connection with the program so that USDOT can proceed with enforcement as provided in 49 CFR 26.109. ITD also will consider similar action under its own legal authorities, including review of the contractor's prequalification to bid and possible debarment actions.

The contract DBE Special Provisions for Race/Gender-Neutral Projects and Race/Gender-Conscious Projects, containing provisions and contract remedies, are incorporated in the ITD "[Standard Specifications for Highway Construction](#)", specifically 110.03 (A) and (B). These are attached as Exhibits F and G.

As part of the contracting practices, when the DBE subcontractor begins work on a project, the RE reviews the DBE's operation and completes Form 1701, Commercial Useful Function

Determination. The RE and/or his/her representative will forward a copy of Form 1701 to the DBEPC.

1. The RE ensures that DBE owners, supervisory staff and employees are distinguishable from other staff on the job.
2. If the RE determines that a DBE firm is not performing a CUF, the RE will notify the prime in writing, specifying those actions which violate the terms of the contract. The RE will give the prime five calendar days to correct the violation.
3. If the prime fails to remedy the violation, RE shall impose one or more sanctions such as withholding payments and other actions allowable for material breach of contract, and the payments made to that DBE will not be credited toward the contract goal. Depending on the time left in the contract, the RE may require the prime to make up any shortfall towards the DBE goal by subbing out another portion of work to a DBE.
4. At the request of the RE, the DBE Program Coordinator will investigate the non-performing DBE to determine if its job performance contains a pattern of relationships with non-minority businesses that brings the DBE's independence and control, and therefore its eligibility to participate, into question. *(See: Section D, Removal of DBE Certification)*

All participants in ITD's DBE program (including, but not limited to, recipients, DBE firms and applicants for DBE certification, complainants and appellants, and contractors using DBE firms to meet contract goals) are required to cooperate fully and promptly with USDOT and ITD compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so shall be a ground for appropriate action against the party involved (e.g., with respect to recipients, a finding of noncompliance; with respect to DBE firms, denial of certification or removal of eligibility and/or suspension and debarment; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment).

ITD will also implement the following running tally mechanisms:

1. With respect to achieving your overall goal, you must use a running tally that provides for a frequent comparison of cumulative DBE awards/commitments to DOT-assisted prime contract awards to determine whether your current implementation of contract goals is projected to be sufficient to meet your annual goal. This mechanism should inform your decisions to implement goals on contracts to be advertised according to your established contract goal-setting process.
2. With respect to each DBE commitment, you must use a running tally that provides for a frequent comparison of payments made to each listed DBE relative to the progress of work, including payments for such work to the prime contractor to determine whether the contractor is on track with meeting its DBE commitment and whether

any projected shortfall exists that requires the prime contractor's good faith efforts to address to meet the contract goal pursuant to § 26.37(c).

LOCAL OVERSIGHT

The ITD Office of Civil Rights will verify that local public agencies and other subrecipients are monitoring DBE programs during Title VI on-site reviews.

H. Fostering Small Business Development Participation (49 CFR § 26.39 & § 26.65)

CFR § 26.39 requires that ITD's DBE program "include an element to structure contracting requirements to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors."

For purposes of this program, small businesses are defined as those firms that meet the small business size standards defined in section 3 of the Small Business Act (SBA) and the SBA regulations implementing it (13 CFR § 121).

SBA size standards define whether a business is "small" and therefore eligible for government programs and preferences reserved for "small business" concerns. SBA size standards have been established for types of economic activity, or industry, generally under North American Industry Classification System (NAICS) codes. Size standards are usually reflected in the business' number of employees or, more commonly in the transportation-related industries, three-year average annual receipts.

49 CFR § 26 (DBE Program) caps business sizes to \$30.72 million in average gross receipts averaged over three years. In order to level the playing field between certified DBE firms and non-DBE firms awarded SBE contracts, we will strictly apply the SBA small business size standards and DBE program size limits. As a result, firms that meet the SBA small business size limit for a particular industry will not be any larger than a certified DBE firm in the same industry. This DBE program size limit, regardless of industry, restricts both certified DBE firms and non-DBE firms to average gross receipts of no more than \$30.72 million.

For example, the SBA small business size limit for most general contractors is \$47 million in receipts averaged over three years. The DBE program size limit is \$30.72 million in receipts averaged over three years. Therefore, general contractors averaging more than \$30.72 million in receipts would not be eligible for SBE contracts.

Verification of business size takes place through the annual ITD Bidder's List registrations. Participants in classes and other educational/outreach offerings by ITD would verify their small business status eligibility on class evaluations.

Idaho remains a relatively rural state and the primary makeup of ITD's contracting pool consists of small companies with gross receipts below the SBA size limit.

1. Fostering Small Business Participation

ITD is currently meeting its objective of small business inclusion by ensuring that a reasonable number of prime construction and consulting contracts are of a size that small businesses can successfully compete for them.

This is borne out by data analyzed on ITD construction contracts and professional agreement participation for recent fiscal years. The statistics indicate that ITD contracts are of a reasonable size and duration for small business inclusion without the need to unbundle contracts.

As ITD administers very few contracts that carry over for more than one construction season, procurement opportunities automatically tend towards smaller projects than can be competitively bid and performed by small business enterprises whose resources may be strained by longer-term contracts.

The majority of the prime contractors awarded ITD highway construction contracts qualify as small businesses — they do not exceed both the \$30.72 million size cap set by USDOT and the \$47 million size cap set by the SBA for prime construction contractors. Clearly, small businesses are successfully bidding as ITD primes.

The small amount of direct Federal-aid from the Federal Aviation Administration (FAA) and the Federal Transit Administration (FTA) to ITD's Divisions of Aeronautics and Transportation Performance do not require contract unbundling.

All small business enterprises working as subcontractors or subconsultants are further protected under ITD's prompt payment and retainage specification, which is written into all contracts and professional agreements, regardless of the funding source (federal or non-federal).

However, ITD is always looking for ways to include all available contractors in its contracts, whether that means bundling or unbundling jobs or limiting the size of its contracts so that smaller businesses may be awarded contracts.

All small business enterprises have the ability to access the ITD Contractor Page, which posts the Notice to Contractors, plan sets, plan holder lists, bid abstracts, and other pertinent notifications regarding the Department's bid opening process. Likewise, consultants, service providers and suppliers can access other ITD webpages for similar information on professional agreements, and solicitations for goods and services.

2. Business Development Opportunities

ITD has taken the following steps and forged community partnerships to fully integrate the small business element:

ITD, through its DBE Supportive Services, offers small business development to assist firms with bidding procedures, bonding assistance, marketing and other small business functions. Through this small business outreach, ITD has successfully helped small firms in growing their business to eventually compete on larger contracts and become prime contractors.

DBE Supportive Services has a contact list comprised of businesses, partners and economic development contacts established throughout the region. Through this contact list, ITD DBE Supportive Services is able to communicate via email a biweekly training calendar to a great number of small businesses about upcoming opportunities to grow small businesses.

ITD currently partners with the U.S. Small Business Administration, Idaho APEX Accelerators, Idaho Department of Commerce, and various other federal agencies to provide training to all businesses state-wide, relative to doing business with the government. These free sessions focus on educating small firms in doing business with state and federal government entities and other topics such as bonding, doing business with large prime contractors, procurement opportunities for veteran-owned businesses, bidding and estimating construction projects, marketing to the construction industry, contract provisions, negotiating, and other procurement-related topics. ITD does, and will continue to:

- a) Include non-DBE small businesses in the no-cost training sessions provided to DBE participants statewide to promote business stability and improve contract/project management;
- b) Include non-DBE small businesses in the statewide workshops on Doing Business with the Government (Federal and State);
- c) Include non-DBE small business participants in the regularly scheduled DBE networking sessions to provide networking opportunities between sub-contractors and prime contractors for the development of business relationships;
- d) Identify and publish training opportunities being sponsored by groups outside of ITD. ITD publishes a state-wide training schedule bi-weekly via e-mail;
- e) Provide a monthly newsletter that includes information regarding industry changes, government procurement processes, and various business-related topics; and
- f) In addition to the annual training sessions, provide counseling upon request by any company on such topics as procurement processes and marketing, and provide

referral to other small business program services by means of state-wide annual training, outreach efforts such as the monthly newsletter, bi-weekly training calendars, targeted (by topic and/or geographic area) emails on time-sensitive events which could not be included in the training calendars, and ITD contract notification. These referrals include but are not limited to the following partners:

- U.S. Small Business Administration (Boise and Seattle District Offices);
- Idaho APEX Accelerators;
- U.S. Department of Veterans Affairs;
- Idaho National Laboratory;
- Idaho Small Business Development Centers;
- Service Corps of Retired Executives (SCORE);
- Tribal Employment Rights Offices.

ITD also partners with the SBA, several area Economic Development companies, the Department of Labor and the Department of Commerce in order to offer small businesses assistance in various business growing services. These partnerships have been instrumental in allowing small businesses to grow and learn more about becoming larger companies and being able to bid larger jobs in the State of Idaho.

3. Small Business Set-Aside

ITD has no procedures in place at this time for small business set-asides, but reserves the option of revisiting it as needed, in accordance with Idaho State Code.

SUBPART C - GOALS, GOOD FAITH EFFORTS, and COUNTING

A. Role of Statutory 10% Goal (49 CFR 26.41)

1. The statutes authorizing the DBE Program provide that, except to the extent the Secretary determines otherwise, not less than 10 percent of the authorized funds are to be expended with DBEs.
2. This 10 percent goal is an aspirational goal at the national level, which the Department uses as a tool in evaluating and monitoring DBEs' opportunities to participate in contracts.
3. The national 10 percent goal does not authorize or require ITD to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.

B. Use of Set-Asides or Quotas (49 CFR 26.43)

In accordance with 49 CFR 26.43, ITD is not permitted to use quotas for DBEs on USDOT Federal-aid contracts unless no other method to redress egregious instances of discrimination exists. ITD will make every effort to avoid creating barriers to the participation of new, emerging, or untried businesses on its projects. ITD does not use set-asides or quotas for DBEs in the administration of its DBE Program.

C. Setting Overall Goals (49 CFR 26.45)

1. Overall Annual Participation Goals (for FHWA, FTA, and FAA-Funded Programs)

ITD will use the following process every three years (goals for FHWA, FAA and FTA will be established on staggering years) to determine its overall annual participation goals for the appropriate modes:

a) The goal schedule is now set as follows:

- FTA: 2024-2026
- FAA: 2024-2026
- FHWA: 2023-2025

- b) Each April, the Office of Civil Rights will consult with minority, women's and contractor groups, community organizations, and other organizations or officials to obtain information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and ITD's efforts to establish a level playing field for the participation of DBEs. Concerns and comments will be considered in developing the goals.
- c) The actual goal will be determined either through a formal disparity study, and/or through a goal-setting methodology using "Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program" published by the U.S. Department of Transportation Office of Small and Disadvantaged Business Utilization.
- d) On or about June 1, ITD will publish a notice on its website and through social media advising the public of the proposed overall goal, and that the rationale for its development is available for inspection during normal business hours in the Office of Civil Rights for 30 calendar days following publication. The notice will further inform readers that comments will be received for 45 calendar days from the date of publication at the above address. Proposed goals and a summary of public comments are sent to each USDOT operating administration by August 1 of each year. Included with the goals are descriptions of the methodologies used, the base figures, and the evidence relied on for adjustments.
- e) ITD will submit the new methodology and goal to the above-mentioned OAs by August 1st, and once the methodology receives a legal sufficiency review, it will take effect on October 1st and will be valid for three years. The goal provides for participation by all certified DBEs and is not subdivided into group-specific goals (49 CFR § 26.45).

D. Failure to Meet Overall Goal (49 CFR 26.47)

1. ITD cannot be penalized or treated by the Department as being in noncompliance with the 49 CFR § 26 because ITD's DBE participation falls short of the overall goal set by ITD unless:
 - a) ITD has failed to implement and administer the DBE program in good faith;
 - b) ITD does not have an approved DBE program; or
 - c) ITD does not have an overall DBE goal.
2. If the awards and commitments shown on ITD's Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall goal applicable to that fiscal year, ITD will do the following in order to be regarded by the Department as implementing its DBE program in good faith:

- a) Analyze in detail the reasons for the difference between the overall goal and awards and commitments in that fiscal year;
 - b) Establish specific steps and milestones to correct the problems ITD identifies in its analysis and to enable it to meet fully its goal for the new fiscal year;
 - c) ITD will submit, within 90 days of the end of the fiscal year, the shortfall analysis and corrective actions developed under paragraphs (2)(a) and (b) of this section to the appropriate OA for approval. If the OA approves the report, ITD will be regarded as following the requirements of this section for the remainder of the fiscal year.
3. The OA may impose conditions on ITD as part of its approval of ITD's analysis and corrective actions including, but not limited to, modifications to its overall goal methodology, changes in its race-conscious/race-neutral split, or the introduction of additional race-neutral or race-conscious measures.
 4. ITD may be regarded as being in noncompliance with 49 CFR § 26 and therefore subject to the remedies in 49 CFR 26.103 or 26.105 and other applicable regulations, for failing to implement its DBE Program in good faith if any of the following things occur:
 - a) ITD did not submit its analysis and corrective actions to the OA in a timely manner as required under paragraph (c)(3) of this section;
 - b) The OA disapproves ITD's analysis or corrective actions; or
 - c) ITD does not fully implement the corrective actions to which it has committed or conditions that the OA has imposed following review of ITD's analysis and corrective actions.
 5. If ITD's Uniform Report of DBE Awards or Commitments and Payments or other information, coming to the attention of the OA, demonstrates that current trends make it unlikely that ITD will achieve DBE awards and commitments that would be necessary to allow it to meet its overall goal at the end of the fiscal year, the OA may require ITD to make further good faith efforts, such as by modifying its race-conscious/race-neutral split or introducing additional race-neutral or race-conscious measures for the remainder of the fiscal year.

E. Transit Vehicle Manufacturers (49 CFR 26.49)

In accordance with 49 CFR 26.49, transit vehicle manufacturers, as a condition of being authorized to bid on FTA-assisted transit vehicle procurements, will also be required to establish and submit for FTA's approval an overall DBE percentage goal.

Additionally, agreements between ITD and all subrecipients will contain assurances that subrecipients will not discriminate on the basis of race, color, national origin, or sex in the performance of this contract as well as language that obligates subrecipients to either:

1. Develop and implement, their own DBE Program Plan, with the concurrence of ITD and its primary Operating Administration; or
2. Adopt and implement the provisions of the ITD DBE Program.

F. Meeting Annual Overall Goals (49 CFR 26.51)

ITD's overall annual goals provide for participation by all certified DBEs and are not limited to specific groups.

ITD meets the maximum feasible portion of its overall goals using race-neutral methods.

Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures, is awarded a subcontract on a prime contract that does not carry a DBE goal, or even if there is a DBE goal, wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g., a prime contractor that uses a strict low bid system to award subcontracts).

1. Race-Neutral Methods

To obtain the maximum feasible portion of its overall DBE Goal through race/gender-neutral means, ITD uses the following methods:

- a) Publicizing construction project notices and consulting requests for proposal in order to encourage DBEs and other small businesses to participate;
- b) Implementing a supportive services program for DBE and other small businesses to develop record-keeping and business management skills;
- c) Providing training to DBE and other small businesses to improve management, record keeping, financial and accounting capabilities;
- d) Providing services to DBE and other small businesses to improve long-term development, ability to handle increasingly significant projects, and achieve eventual self-sufficiency;
- e) Assisting DBE and other small businesses to develop their capability by utilizing emerging technology and conducting business through electronic media;
- f) Providing other technical assistance to DBE and other small businesses as needed;

- g) Review and identify projects that can be unbundled in order to promote small businesses including DBEs to perform as a prime;
- h) Identify and promote joint ventures to allow DBE firms to compete for and perform prime contracts; and
- i) Ensure that a reasonable number of prime contracts are of a size that small businesses including DBEs, can reasonably perform.

2. Design-Build Contracting

ITD is developing a goal-setting process for future design-build solicitations. The process will encompass opportunities for both the design and construction phases of these projects. Processes for determining good faith efforts and offering administrative reconsideration will be incorporated.

3. Pre-Bid, Contract and Award Procedures

a) Contract Proposals

All federal aid projects require the following DBE Program Requirement language as the first Contractor Note in the project proposals:

Failure to comply with the DBE program requirement of X.XX% is a Breach of Contract. Whenever the Engineer determines, after investigating and obtaining evidence the Contractor has not complied with the DBE Special Provisions, the Engineer will take corrective action. Refer to the Standard Specifications for Highway Construction, Section 110.

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

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

*For additional DBE Program information see the ITD DBE Program at:
<http://apps.itd.idaho.gov/apps/ocr/civil/pdf/dbeplan.pdf>.*

b) Contract Assurance

ITD includes in its USDOT-assisted contracts, and reviews all sub-contracts for inclusion, the following clause:

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 the termination of this contract or such other remedy as ITD deems appropriate.

c) Contract Goals

Contract goals will be used to meet that portion of the overall goal not projected to be met by race/gender-neutral means and will be expressed as a percentage of USDOT-assisted contracts. If during the course of the year it becomes apparent that ITD will exceed its overall goal based on race/gender-neutral means, contract goals will be reduced to the extent required so as not to exceed the overall goal. If it appears the race/gender-neutral portion will not be met, ITD will increase the amount of contract goals.

Before soliciting bids, ITD residency/LHTAC/ACHD staff and DBE Program Coordinator (DBEPC) will review each Federal-aid construction/professional service project (project) to determine the percentage goal, if any, that will be assigned to the contract or agreement (contract). Goal criteria include:

- Location of the project;
- Contract line items with DBE subcontracting, service, or supplier potential (or overall scope of work, for Request for Proposals);
- Availability of qualified DBEs electing to bid in the location; and
- Estimated total cost or work scope percentage of the project.

Due to the nature of the selection process, Term Agreements and Task Orders will not be reviewed for DBE participation.

For construction projects, residency, LHTAC or ACHD will fill out its part of **Form 2324, Process for Setting DBE Goal and TSP Hours on Federal Aid Projects**, and submit to the DBEPC.

For design projects, the Consultant Services section initiates the completion of **Form 2323, Process for Setting DBE Goal on Federal-aid Agreements** by the assigned ITD District/LHTAC/ACHD personnel and submits it to the DBEPC.

- (i) DBEPC reviews the completed forms, engineer's estimate or work scope, compares available DBE firms to each, completes the project goal then returns the form(s) to the initiating party for filing.
- (ii) ITD District/LHTAC/ACHD incorporates the assigned DBE goal into the Notice to Contractors and Requests for Proposal. Instructions and guidance to the bidders/proposers (bidder) for using appropriate commitment form (2324/2323) or procedure will be included.

d) Change of Work Scope (Plan Addenda)

When ITD district/LHTAC/ACHD adds new work areas to the original scope of work that has already been posted for advertisement, which results in a 10% or \$100,000 (whichever is less) overall increase or decrease to the contract or agreement amount, ITD residency/LHTAC/ACHD/Consulting Services must send a revised 2323/2324 to the DBEPC, who will review the request to determine if the DBE project goal must be adjusted.

e) Contract Commitments

When Federal-aid projects have assigned DBE goals, all bidders or proposers (bidders) must include either a:

- (i) Completed **Form 2396 Contractor DBE Commitments** with the bid packages (this form will be available in electronic format in ITD's online bidding software).

Bidders must either meet or exceed the project goal, or provide documentation of their good faith efforts in the "Summary of DBE Good Faith Effort" section of Form 2396.

Each DBE commitment must be submitted by using the **2399 DBE Subcontractor Commitment or 2400 DBE Supplier/Distributor/Broker Commitment** acknowledging they understand they are committed to perform the designated work items listed on the form for the specific project.

All DBE Commitment documents (2396 Contractor DBE Commitment, 2399 DBE Subcontractor Commitment, and 2400 DBE Supplier/Distributor/Broker Commitment) are due on bid day by the noted time listed on the bid documents. The commitments can be hand delivered to ITD Headquarters Office of Civil Rights before the time listed on the document or by email to DBEBidSubmittial@itd.idaho.gov

No documentation will be accepted after the time listed on bid documents.

- (ii) Completed Form [2398 Consultant DBE Commitment](#) submitted with the bid proposal.

Proposers must either meet or exceed the project goal, or provide documentation of their good faith efforts in the “Summary of DBE Good Faith Effort” section of Form 2398. These results will be evaluated by the proposal review team on a “pass/fail” basis.

Each commitment is accompanied by written confirmation by the DBE acknowledging they understand they are committed to perform the designated work items on this specific project, as well as any documentation relating to good faith efforts.

Bids which do not comply with these requirements will be considered non-responsive. ITD will then follow its procedures regarding non-responsive bids.

(Note: Federal-aid projects that do not have assigned DBE goals are exempt from these requirements.)

Upon submission, the Contracting Services Section will forward the commitment form to DBEPC to confirm:

- The committed firms are DBEs certified to perform the designated work items;
- Each commitment is accompanied by written confirmation by the DBE acknowledging they understand they are committed to perform the designated work items on this specific project;
- The total committed items meet or exceed the project’s stated DBE goal.

f) Change of Work Scope (Change Orders)

Before approving Form **2317 Record of Change Order Authorization**, the District must take the following actions:

- (i) When changing quantities but not the work scope of the project:

1. If the increased quantities are for work item(s) committed to DBE(s), then no action is required unless the DBE does not possess an adequate Idaho Public Works License for performance. The new committed amount will be noted in the B2GNow Tracking System for that DBE.

Note: the additional quantities may not be contracted to a new subcontractor, unless the DBE does not possess an adequate Idaho Public Works License

for performance. In those cases, the prime will substitute this DBE (or make a good faith effort to do so) with another DBE holding the proper licensure.

2. If the increased quantities are for work item(s) committed to a non-DBE, then nothing will need to be noted by the districts.
- (ii) If deleting contract work from the original scope of work, a 5555 DBE Commitment Change form must be processed to show and document the changes from the original commitment and what changes or good faith efforts the prime made to meet the original goal. The form must be sent to the Office of Civil Rights and the DBEPC will review the request to determine if the DBE project goal must be adjusted.

If the deleted work area(s) were committed to DBE(s), the DBEPC, after consultation with the FHWA Division Office, will determine whether the prime will be required to make up the goal deficiency, if one occurs, through additional DBE subcontracting. The decision will be based on all circumstances, including time left in the contract and availability of DBE firms to do the work. (49 CFR § 26.53 (g))

All DBE commitment changes must be noted on the form **5555 DBE Commitment Change**. This form must be signed and approved by the RE and then the DBEPC before the 2317 is approved.

G. Good Faith Efforts (GFE) Process (49 CFR 26.53)

1. If the apparent low bidder's DBE commitment **does not** meet the project goal, it must be accompanied by the "Summary of DBE Good Faith Effort" section of the proper commitment form (2396 or 2398: see above under 3.f)), along with documentation substantiating good faith efforts to meet the goal.
2. The Contracting Services Section will send the "Summary of DBE Good Faith Effort" along with **all** bids or proposals with corresponding DBE commitment forms to DBEPC for GFE Evaluation for the purposes of comparison.
3. Using [Form 2891](#), **Evaluation of Contractor/Consultant Good Faith Efforts to Meet the Contract DBE Requirement**, DBEPC evaluates the information submitted by the apparent low/successful bidder to determine GFE efforts made, when made, and how intense those efforts were, as per USDOT guidance described in 49 CFR 26, Appendix A.

This evaluation includes, but is not limited to:

- a) Whether the bidder solicited DBEs through all adequate, reasonable and available means, allowing sufficient time for response, and at least one follow-up call or email on initial solicitations;
 - b) Whether the bidder selected portions of the work to be performed by DBEs increase the likelihood of meeting the DBE goals (including, where appropriate, breaking down contracts into economically feasible units to facilitate DBE participation);
 - c) Whether the bidder provided interested DBEs with information about the plans, specifications, and requirements of the contract in a timely manner;
 - d) Whether the bidder negotiated in good faith with interested DBEs, not rejecting DBEs as unqualified without sound reasons based on a thorough investigation of their capabilities and availability;
 - e) Whether the bidder made efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance required by ITD or the bidder;
 - f) Whether the bidder made efforts to assist interested DBEs in obtaining equipment, supplies, materials, or related assistance or services;
 - g) Whether the bidder effectively used the services of available minority/women community organizations, contractors' groups, government business assistance offices, or others that might assist in identifying DBE firms;
 - h) Whether the bidder was involved in any pre-solicitation or pre-bid meetings that were scheduled to inform DBEs of contracting and subcontracting opportunities;
 - i) Whether the bidder utilized the ITD Office of Civil Rights "Invitation to Bids" website in soliciting DBE bids;
 - j) Whether any other actions were taken to meet the goal;
 - k) Whether the other bidders/proposers could meet or exceed the goal.
4. After evaluation of the bidder's good faith efforts, the DBEPC will advise Advertisement and Award or Consulting Services to notify the bidder that either:
- a) The bidder's good faith effort was accepted; and the "Notice to Proceed" is forthcoming; or
 - b) The bidder's good faith effort was rejected, with the reason(s) for the rejection stated in writing by the Contracting Services Section. The bidder will be offered an opportunity for administrative reconsideration by providing written documentation or

argument to the Chief Engineer within three calendar days of being informed of ITD's decision.

5. If the apparent low bidder fails to respond within three calendar days from the date of the rejection, ITD will deem the bid **non-responsive**. ITD will follow Department procedures regarding non-responsive bids.
6. If the bidder requests reconsideration, the Contracting Services Section will schedule a meeting between the ITD Chief Engineer and the bidder within five (5) calendar days of the administrative reconsideration request at a time and place (or by telephone) convenient for both parties.

The Chief Engineer will advise the bidder in writing of his/her decision within two working days of the meeting. If the Chief Engineer determines the bidder made a good faith effort, then the letter will state the reasons for that decision. The decision of the Chief Engineer is final, and will be communicated to all other involved ITD parties as well as the bidder.

H. Counting DBE Participation toward Contract Goals (49 CFR 26.55)

Even under the following scenarios for counting DBE participation towards a prime contractor's contract goal, no DBE participation may be counted toward a contractor's final compliance with its DBE contractual obligations until the amount being counted has actually been paid to the DBE (49 CFR § 26.55(h)).

1. Commercially Useful Functions

The contractor may count toward its DBE goal only those expenditures to certified DBE firms that provide a Commercially Useful Function (CUF) on the project. CUF issues only pertain to counting DBE credit, and does not affect payment.

- a) A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, ITD will 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.
- b) A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are

passed to obtain the appearance of DBE participation. When determining if a DBE is an extra participant, ITD will examine similar transactions, particularly those in which DBEs do not participate.

- c) In the case of a DBE performing as the prime contractor, count the portion of the work actually performed by the DBE's own forces, plus any work subcontracted to DBE firms. Any work subcontracted to non-DBE firms (at any tier) would not be counted as part of the overall participation of the DBE prime.
- d) 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, ITD will presume that it is not performing a commercially useful function.
- e) When a DBE is presumed not to be performing a commercially useful function as provided in paragraph (c)(3) of this section by the DE, the DBE may present evidence to the DE to rebut this presumption. While ITD's CUF determinations are not appealable by DBEs to the USDOT, CUF decisions are subject to review by the concerned OA.

Note: ITD may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.

2. Certification Status

- a) If a firm is not currently certified as a DBE at the time of the contract award, ITD will not count the firm's participation toward any DBE goals, except as provided for in 49 CFR § 26.87(i).
- b) ITD will not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward ITD overall goal (49 CFR § 26.55(g)).

ITD uses the following guidelines for counting DBE participation in specific categories:

I. Construction Contract

Count 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. Include 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).

II. Professional Services

Count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a USDOT - assisted contract, toward DBE goals, provided ITD determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.

III. Subcontracting

- a) 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) Lower-tier DBE subcontracts (whether with a DBE or non-DBE subcontractor) may be counted toward the prime contractor's DBE goal. However, if the upper-tier subcontractor is unable or unwilling to perform for any reason, the prime contractor should be prepared to assume responsibility for utilizing the second-tier contractor if the second-tier DBE contractor is listed on the Form 2396 and the prime contractor has received credit for the second-tier contract.

IV. Suppliers

ITD will determine the amount of credit awarded to a firm for the provisions of materials and supplies (e.g., whether a firm is acting as a regular dealer or a transaction expediter) on a contract-by-contract basis.

NOTE: A firm may not necessarily be only a regular dealer, distributor or only a broker, as the firm's role may change from contract to contract. For example, a firm that acts as a regular dealer on Contract #1 may act simply as a "transaction expediter" or "broker" on Contract #2. It would receive DBE credit for 60 percent of the value of the goods supplied on Contract #1 while only receiving DBE credit for its fee or commission on Contract #2.

a) Regular Dealers

If the materials or supplies are purchased from a DBE regular dealer, ITD will count 60 percent of the cost of the materials or supplies toward DBE goals.

For purposes of this section, a regular dealer is an established 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 under its own name, as its principal line of business, and in the usual course of business.

- (i) To determine if a firm is a regular dealer requires examination of the activities of the business over time, both within and outside the context of the DBE program. The distinction to be drawn is between the regular sale or lease of the products in question and merely occasional or ad hoc involvement with them.
- (ii) A regular dealer will not be required to have every item it supplies to be physically present in the firm's store, warehouse, etc. before it is sold to a contractor. However, the establishment in which the firm keeps items it sells to the public should be more than a token location. The firm should carry at least 51 percent of the materials in stock. For example, a mere showroom, the existence of a hard-copy or on-line catalog, or the presence of small amounts of material that make questionable the ability of the firm to effectively supply quantities typically needed on a contract, are generally not sufficient to demonstrate that a firm regularly deals in the items.
- (iii) The role the firm plays on a specific contract should be consistent with the regular sale or lease of the products in question, as distinct from a role better understood as that of a broker, packager, manufacturer's representative, or other person who arranges or expedites a transaction.
- (iv) For example, a firm that regularly stocks and sells Product X may, on a particular contract, simply communicate a prime contractor's order for Product Y to the manufacturer, acting in a transaction expediter capacity (see Item "Broker/Transaction Expediter, below.)
- (v) A firm 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 if the person both owns and operates distribution equipment for the products. Any supplementation of regular dealers' own distribution equipment shall be by a long-term lease agreement (to be used over an extended period of time to serve a variety of customers and/or contracts) and not on an ad hoc or contract-by-contract basis.

b) Distributor

Is a supplier or has a distributorship agreement, that "drop ships" materials and they will be assuming the risk of the shipment of goods. The distributor can count 40 percent of the contracted items towards the prime contractors DBE goal. If a supplier has less than 51 percent of an item in their normal stock but will fulfill the order, they will be considered a distributor and can only count 40 percent of the sale of goods for the DBE goal. For clarification on what the firm qualifies for, refer to Form 2400.

c) Brokers, Transaction Expeditors and Facilitators

Brokers, expeditors, packagers, manufacturers' representatives, transaction facilitators, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this section. In these situations, ITD will count the entire amount of fees or commissions charged for assistance in the procurement of

the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, provided ITD determines the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. ITD will not count any part of the cost of the materials and supplies toward DBE goals, however.

- (i) For example, items are “drop-shipped” directly from a manufacturer’s facility to a job site, never being in the physical possession of or transported by a supplier. The supplier’s role involves nothing more than contacting the manufacturer and placing a job-specific order for an item that the manufacturer then causes to be transported to the job site. In such a situation, the supplier’s role can be better described as that of a “broker” or “transaction expediter”.
- (ii) If the firm does not provide any commercially useful function (i.e., it is simply inserted as an extra participant in a transaction), then no DBE credit can be counted as either a regular supplier or a broker.

d) Determinations

The DBEPC will perform the determination between the role of regular dealer, distributor, and broker/expediter/facilitator during the review of the DBE commitment. The firms must submit the **2400 DBE Supplier/Distributor/Broker Commitment** form to determine which category the DBE firm will be categorized as at the time of bid.

e) Manufacturers

If the materials or supplies are obtained from a DBE manufacturer (as defined in Subpart A, Section E., “Definition of Terms”), count 100 percent of the cost of the materials or supplies toward DBE goals.

V. Trucking Firms (49 CFR § 26.55(d))

Trucking contracts performed by DBE firms shall count toward the goals as follows:

- a) The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals;
- b) The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract;
- c) The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs;
- d) 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;

- e) The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE that leases trucks equipped with drivers from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE leased trucks equipped with drivers not to exceed the value of transportation services on the contract provided by DBE-owned trucks or leased trucks with DBE employee drivers.
- f) The DBE may lease trucks without drivers from a non-DBE truck leasing company. If the DBE leases trucks from a non-DBE truck leasing company and uses its own employees as drivers, it is entitled to credit for the total value of these hauling services.
- g) The 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. Oversight will be performed by District staff through CUF On-Site Reviews (see Part G).

3. DBE Joint Ventures (49 CFR § 26.55(b))

Using **Form 646b Schedule B, Information for Determining Joint Venture Eligibility**, the Office of Civil Rights evaluates the proposed joint venture. The CRPM and ITD Legal Counsel must approve all DBE Joint Venture agreement(s) before the execution of any contract.

When a DBE performs as a participant in a joint venture, only the 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 will be counted toward DBE goals.

4. Termination of DBEs on Project (49 CFR § 26.53 (f)(1))

Primes cannot terminate for convenience a committed DBE subcontractor without the written consent of the RE or LHTAC/ACHD equivalent. The district must also have completed a CUF review of the firm and found them not meeting the requirements.

- a) The prime must notify the DBE, in writing, of the intent to terminate allowing for five calendar days of response time to dispute the termination.
- b) The prime then notifies the RE of their intent to terminate the DBE, giving a justification for the action.

- c) The RE forwards the request to the DBEPC with a recommendation for approval or denial.
- d) The DBEPC confers with the DBE, obtains from DBE a written acknowledgement if possible that they agree with the termination, and then will notifies the RE on whether the commitment is or is not terminated for good cause.
- e) If the RE approves the termination then the prime must replace the terminated DBE with another DBE to the extent needed to meet the contract goal, or make every effort, and document all good faith efforts to do so. If the prime is unable to obtain substitute DBEs, it must submit documentation of good faith efforts in:
 - (i) obtaining substitute DBEs to complete the unfinished work; or
 - (ii) making an effort to break out other contract items to provide DBE subcontracting opportunities.
- f) The prime must obtain the written approval of substitute DBE(s) from the RE and the DBEPC before signing and submitting copies of the revised or new subcontracts along with **Form 315 Request to Subcontract or Sub-Subcontract**.
- g) If the RE does not approve the termination then the prime must continue with the DBE subcontractor as previously committed.
- h) ITD reserves the right to waive or adjust the goal as appropriate, depending on project circumstances.
- i) If all or part of the work committed to a DBE sub is eliminated from the project, the DBEPC in cooperation with FHWA Division Office will determine whether the prime contractor will be required to make up the deficiency, if one occurs that reduces the creditable amount below the contract goal, through additional DBE subcontracting. The decision will be based on all circumstances, including time left in the contract and availability of DBE firms to do the work.
- j) A prime's inability to find a replacement DBE at the original price is insufficient to support a finding that good faith efforts have been made to replace the original DBE. The fact that the prime has the ability and/or desire to perform the contract work with its own forces does not relieve the contractor of the obligation to make good faith efforts to find a replacement DBE, and it is not a sound basis for rejecting a prospective replacement DBE's reasonable quote.
- k) Note: The prime is ultimately responsible for following these same steps in obtaining written approval from ITD for the termination/replacement of lower-tier DBE subs.
- l) If the prime contractor makes a termination/substitution of a DBE without following the steps listed above in obtaining the RE's approval, then contractor will not receive

payment for those contract work items or materials, nor will the RE approve those pay estimates until the prime follows the correct procedures.

SUBPART D - CERTIFICATION STANDARDS

A. Burdens of Proof (49 CFR 26.61)

1. The firm seeking certification has the burden of demonstrating, by a preponderance of the evidence, that it meets the requirements of this subpart concerning group membership or individual disadvantage, business size, ownership, and control.
2. ITD will rebuttably presume that members of the designated groups identified in §26.67(a) are socially and economically disadvantaged; they do not have the burden of proving when applying that they are socially and economically disadvantaged. However, applicants must submit a signed, notarized statement that they are a member of one of the “presumptive” groups in 49 CFR § 26.67(a). Applicants also have the obligation to provide ITD information concerning their economic disadvantage with proper documentation of their personal net worth, which cannot exceed the net worth cap of \$2.047 million (see C.2., below).
3. Individuals who are not presumed to be socially and economically disadvantaged, and individuals concerning whom the presumption of disadvantage has been rebutted, have the burden of proving to ITD, by a preponderance of the evidence, that they are socially and economically disadvantaged. ITD will use the standards set forth in Appendix E of the DBE Regulations in making its determination.

B. Business Size Determinations (49 CFR 26.65)

1. To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. ITD will apply current SBA business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in USDOT-assisted contracts, including the primary industry classification of the applicant.
2. However, even if a firm meets the SBA size requirements, it is not eligible if the firm (including its affiliates) currently has three-year average annual gross receipts in excess of the USDOT statutory cap of \$30.40 million.

C. Social and Economic Disadvantage (49 CFR 26.67)

1. ITD will rebuttably presume 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. ITD requires applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

- a) If ITD, after reviewing the signed notarized statement of membership in a presumptively disadvantaged group, has reason to question the individual's claim of membership in that group, ITD will require the applicant to present additional evidence that he or she is a member of the group. ITD will provide the individual a written explanation of its reasons for questioning his or her group membership in its request for additional evidence. ITD will take special care that it does not impose a disproportionate burden on members of any designated group.
 - b) In making its determination, ITD will take into consideration whether the applicant has held himself out to be a member of the group over a long period of time prior to application for certification and whether the person is regarded as a member of the group by the relevant community. The applicant may be required to produce appropriate documentation of group membership.
 - c) If ITD does not find the applicant to be a member of a "presumptive" group, the applicant must prove social and economic disadvantage on an individual basis.
2. ITD requires each individual owner of a firm applying to participate as a DBE, whose ownership and control are relied upon for DBE certification, to certify that he or she has a personal net worth that does not exceed \$2.047 million, using the USDOT-provided Personal Net Worth Form. Everyone claiming social and economic disadvantage must support this with a signed statement of personal net worth on the USDOT personal net worth form, with appropriate supporting documentation. ITD may ask for more documentation or clarification regarding assets and liabilities such as brokerage statements or property assessments as needed to make the determination, using the guidance set forth in 49 CFR 26.67.
- a) ITD may rebut presumption of economic disadvantage in two ways:
 - (i) If the statement of personal net worth and supporting documentation shows that the applicant's personal net worth exceeds \$2.047 million, the individual's presumption of economic disadvantage is rebutted. ITD is not required to have further proceedings in order to rebut the presumption of economic disadvantage in this case, and the individual is not eligible to participate in the DBE Program.
 - (ii) If the applicant's assets and income level collectively may lead ITD to conclude (using guidance set forth in 26.67(b)) that the applicant is not economic disadvantaged.

In this case, ITD will hold a proceeding as described in Subpart E in order to rebut the presumption of economic disadvantage.
3. If ITD has reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged ITD may, at any time, start a proceeding as described in Subpart E to determine whether the presumption should be regarded as rebutted with respect to that individual. ITD's proceeding will follow the procedures of §26.87. ITD will have the burden of

demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. ITD may require the individual to produce information relevant to the determination of his or her disadvantage.

Once the 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 is able to make an individual showing of social and/or economic disadvantage.

4. If an owner is not presumed to be socially or economically disadvantaged under paragraph (a) of 26.67 they may demonstrate they are based on their own experiences and circumstances that occurred within American society. To attempt to prove this they can provide a personal narrative that describes in details specific acts or omissions that have impeded their progress or success in education, employment, and/or business, including obtaining financing. They must identify at least one objective basis for the detrimental discrimination and how this has caused the owner harm, including the type and magnitude.

D. Ownership (49 CFR 26.69)

1. In determining whether the socially and economically disadvantaged participants own the firm, ITD will consider all the facts in the record viewed as a whole, including the origin of all assets and how and when they were used in obtaining the firm.
2. To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.
 - a) In the case of 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.
 - b) In the case of a partnership, 51 percent 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 percent 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, including their contribution of capital or expertise to acquire their ownership interests, must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. Proof of contribution of capital should be submitted at the time of the application. When the contribution of capital is through a loan, there must be documentation of the value of assets used as collateral for the loan.

Insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, mere participation in a firm's activities as an employee, or capitalization not commensurate with the value for the firm.

4. The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and be entitled to the profits and loss commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements. Any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm's profits, compared to the disadvantaged owner(s), are grounds for denial.
5. All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Except as provided in this paragraph (d), 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.
6. 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.
7. When "expertise" is relied upon as part of a disadvantaged owner's contribution to acquire ownership, the owner's expertise must be:
 - a) In a specialized field;
 - b) Of outstanding quality;
 - c) In areas critical to the firm's operations;
 - d) Indispensable to the firm's potential success;
 - e) Specific to the type of work the firm performs; and

- f) Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.

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

- 8. For purposes of determining ownership, these interests in a business or other assets obtained by a socially and economically disadvantaged individual will be deemed eligible:
 - a) A final property settlement or court order obtained through 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.
- 9. All interests in a business or other assets obtained by the disadvantaged 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.

will not be considered eligible for establishing ownership. To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate to ITD, by clear and convincing evidence, that:

- a) The gift or transfer 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 provided the gift or transfer.
- 10. 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, ITD 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. ITD will not count a greater portion of joint or community property assets

toward ownership than Idaho law recognizes as belonging to the socially and economically disadvantaged owner of the applicant firm.

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.

11. The follow situations, while not automatically disqualifying factors in determining firm ownership, will merit closer scrutiny:
 - a) A socially and economically disadvantaged individual acquired his or her ownership interest as the result of a gift, or transfer without adequate consideration;
 - 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. In this case, ITD 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.

E. Control (49 CFR 26.71)

1. In determining whether socially and economically disadvantaged owners control a firm, ITD will consider all the facts in the record, viewed as a whole, and in light of its current circumstances.
2. Only an independent business, not depending on other businesses for its viability, is eligible for DBE certification.
 - a) In determining whether a potential DBE is an independent business, ITD will scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.
 - b) ITD 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) ITD will scrutinize 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, ITD will weigh the consistency of relationships between the potential DBE and non-DBE firms against normal industry practices.
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 paragraph does not preclude a spousal co-signature on documents as provided for in §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 or immediate family members 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, policymaking, 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 ITD 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 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.

8. If state 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 Idaho or local law does not require such a person to have such a license or credential to own and/or control a firm, ITD will not deny certification solely on those grounds. However, ITD may take into overall 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. ITD may consider differences in compensation between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a firm as a DBE, but within 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. ITD may still determine that a firm is controlled by its socially and economically disadvantaged owner although that owner's compensation is lower than that of some other participants in the firm.

However, in a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, ITD may consider a difference between the compensation of the former and current owner/manager 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.

10. In order to be viewed as controlling a firm, 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 to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time

business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.

11. A socially and economically disadvantaged individual may control a firm 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. Except as otherwise provided in this paragraph, ITD will make a judgment about the control the socially and economically disadvantaged owner exercises vis-a-vis other persons involved in the business as it does in other situations, without regard to whether or not the other persons are immediate family members.

If ITD 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, there is a rebuttable presumption of control by the non-disadvantaged individual unless the disadvantaged individual now owning the firm demonstrates to ITD, 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 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, ITD will consider whether the firm owns equipment necessary to perform its work. However, ITD 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. ITD 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 needs to demonstrate that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. This does not require a new certification or recertification process, but ITD will

verify the disadvantaged owner's control of the firm in the additional type of work, with an additional on-site review if necessary.

- a) The types of work a firm can perform (whether on initial certification or when a new type of work is added) will be described in terms of the most specific available NAICS code for that type of work, particularly the principal goods or services which the firm would provide to USDOT recipients. Multiple NAICS codes will be assigned where appropriate. During the annual No Change Affidavit submissions, ITD will review the NAICS codes to ensure that they are appropriately applied to the firm (49 CFR § 26.71(n)(1)).
 - b) If a firm believes that there is not a NAICS code that fully describes the type(s) of work in which it is seeking to be certified as a DBE, it may request that the certifying agency, in its certification documentation, supplement the assigned NAICS code(s) with a clear, specific, and detailed narrative description of the type of work in which the firm is certified.
 - c) ITD may change certification classifications or descriptions if there is a factual basis in the record. However, ITD will not make after-the-fact statements about the scope of a certification which is not supported by evidence in the certification record.
15. A business operating under a franchise or license agreement may be certified if it meets the standards described in this subpart and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, ITD will generally disregard 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.
- However, 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.
17. The socially and economically disadvantaged individuals controlling a firm may use an employee leasing company. The use of such a company 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. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-

the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

F. Other Factors affecting Certification (49 CFR 26.73)

1. Only firms organized for profit may be eligible DBEs. Not-for-profit organizations, even though controlled by socially and economically disadvantaged individuals, are not eligible to be certified as DBEs.
2. ITD will evaluate the eligibility of a firm on the basis of present circumstances. ITD will not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards in this subpart.
3. ITD will not refuse to certify a firm solely on the basis that it is a newly formed firm, has not completed projects or contracts at the time of its application, has not yet realized profits from its activities, or has not demonstrated a potential for success. If the firm meets disadvantaged, size, ownership, and control requirements of this subpart, the firm is eligible for certification.
4. ITD will not require a DBE firm to be prequalified as a condition for certification
5. An eligible DBE firm must be owned by individuals who are socially and economically disadvantaged. Except as provided below, a firm that is not owned by such individuals, but instead is owned by another firm—even a DBE firm—cannot be an eligible DBE.
 - a. If socially and economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, ITD may certify the subsidiary if it otherwise meets all 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.
 - b. ITD may certify such a subsidiary only if there is cumulatively 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals. The following examples illustrate how this cumulative ownership provision works:
 - (i) *Example 1:* Socially and economically disadvantaged individuals own 100 percent of a holding company, which has a wholly-owned subsidiary. The subsidiary may be certified, if it meets all other requirements.
 - (ii) *Example 2:* Disadvantaged individuals own 100 percent of the holding company, which owns 51 percent of a subsidiary. The subsidiary may be certified, if all other requirements are met.

- (iii) *Example 3:* Disadvantaged individuals own 80 percent of the holding company, which in turn owns 70 percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by disadvantaged individuals is 56 percent (80 percent of the 70 percent). As this is more than 51 percent, ITD may certify the subsidiary, if all other requirements are met.
 - (iv) *Example 4:* Same as Example 2 or 3, but someone other than the socially and economically disadvantaged owners of the parent or holding company controls the subsidiary. Even though the subsidiary is owned by disadvantaged individuals, through the holding or parent company, ITD will not certify it because it fails to meet control requirements.
 - (v) *Example 5:* Disadvantaged individuals own 60 percent of the holding company, which in turn owns 51 percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by disadvantaged individuals is about 31 percent. Since this is less than 51 percent, ITD will not certify the subsidiary.
 - (vi) *Example 6:* The holding company, in addition to the subsidiary seeking certification, owns several other companies. The combined gross receipts of the holding companies and its subsidiaries are greater than the size standard for the subsidiary seeking certification and/or the gross receipts cap of §26.65(b). Under the rules concerning affiliation, the subsidiary fails to meet the size standard and cannot be certified.
6. 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.
 7. DBE firms and firms seeking DBE certification shall cooperate fully with ITD's requests (and USDOT requests) for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial or removal of certification.
 8. ITD may consider, in making certification decisions, 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. As with all certification-related decisions, these processes would be subject to the steps described in §26.83
 9. Consideration of whether a firm performs a commercially useful function or is a regular dealer pertains solely to counting toward DBE goals once the firm has already been certified as DBEs. ITD will not consider commercially useful function issues in any way in making decisions about whether to certify a firm as a DBE, unless the CUF violations indicate an ongoing pattern requiring further investigation of a firm's control.

G. Tribally Owned Firms and Alaskan Native Corporations

1. A firm that is owned by an Indian tribe or Native Hawaiian organization, rather than by Indians or Native Hawaiians as individuals, may be eligible for certification. Such a firm must meet the size standards of this subpart, and be controlled by socially and economically disadvantaged individuals
2. The following special rules apply to the certification of firms related to Alaska Native Corporations (ANCs).
 - a. Notwithstanding any other provisions of this subpart, a direct or indirect subsidiary corporation, joint venture, or partnership entity of an ANC is eligible for certification as a DBE if it meets all of the following requirements:
 - (i) The Settlement Common Stock of the underlying ANC and other stock of the ANC held by holders of the Settlement Common Stock and by Natives and descendants of Natives represents a majority of both the total equity of the ANC and the total voting power of the corporation for purposes of electing directors;
 - (ii) The shares of stock or other units of common ownership interest in the subsidiary, joint venture, or partnership entity held by the ANC and by holders of its Settlement Common Stock represent a majority of both the total equity of the entity and the total voting power of the entity for the purpose of electing directors, the general partner, or principal officers; and
 - (iii) The subsidiary, joint venture, or partnership entity has been certified by the Small Business Administration under the 8(a) or small disadvantaged business program.
3. ITD will not require the USDOT uniform application form an ANC-related entity applies for certification. It will only require documentation from the firm sufficient to demonstrate that entity meets the requirements listed above. ITD will also require sufficient information about the firm to allow it to administer its program (e.g., information that would appear in the ITD DBE Directory).
4. If an ANC-related firm does not meet all the conditions of 2. above, then it must meet the requirements of 1. of this section in order to be certified, on the same basis as firms owned by Indian Tribes or Native Hawaiian Organizations.

SUBPART E - DBE CERTIFICATION PROCEDURES

A. DBE Certification Process (49 CFR 26.83)

A business applying to ITD for certification as a DBE is required to submit the USDOT Uniform Certification Application (*Exhibit C*) through an on-line service at: <https://itd.dbesystem.com>. All relevant supporting documentation, including a personal net worth statement, must also be submitted. Failure of the applicant to supply all necessary information and documentation is grounds for denying certification.

1. Idaho Unified Certification Program (49 CFR 26.81)

All recipients and sub-recipients of Federal-aid in Idaho are signatories to the “Agreement Establishing the Idaho Unified Certification Program for the Disadvantaged Business Enterprise Program”. In it, it is agreed that the ITD Office of Civil Rights will administer the certification process, including appointing a certification committee which will perform all certification functions.

The certification committee is made up of four members representing different disciplines of ITD, including construction, professional agreements and finance. One spot is permanently designated for the Office of Civil Rights Contract Compliance Officer. All members are required to complete the online DBE Certification Training offered by National Highway Institute (NHI).

The DBE Program Coordinator serves in an advisory capacity.

2. Certification Assistance by DBE Program Coordinator

The DBE Program Coordinator provides appropriate assistance to all firms seeking ITD certification (This assistance includes providing information pertaining to the DBE application process, requested documentation and status of applications).

The DBE Program Coordinator also screens applicant firms to determine whether the services/products provided by the firm are utilized in USDOT programs. ITD is unable to certify firms engaged in non-transportation related businesses.

When the DBE Program Coordinator is satisfied that an application is complete and all documentation has been provided, a summary of the application (and relevant documents), along with a brief description of areas of concern, are taken with the DBEPC when they conduct the on-site review. When possible, they will bring a district personnel who is a specialist in the type of work to provide valuable insights when conducting the on-site review.

3. On-Site Reviews

- a) Before the review is conducted, Reviewers should become familiar with the application summary and develop any additional questions that will help clarify the applicant's eligibility.
- b) The DBEPC will contact the firm advising the owner(s) that a review will be scheduled within two weeks.
- c) The DBEPC and other District employee when feasible (preferably knowledgeable in the applicant's areas of expertise), meet with the applicant firm at the arranged time to interview owners, verifying that the application information is correct and up to date. It is important that Reviewers describe what they observe during the review; if there is reason to suspect the owner(s) is not completely forthright in his/her answers, the circumstances and suspicions should be described and the rationale for conclusions reached as documented on the [Form 2420 DBE Certification On Site Review](#).
- d) The on-site review will be recorded on a tape recorder and then saved to the application files.
- e) If the applicant firm is currently working within a reasonable distance of the districts, the DBEPC will also visit the worksite(s) to determine if job-site operations are consistent with information obtained in interviews and meet requirements for DBE certification.
- f) The completed Form 2420 is forwarded to the DBE Program Coordinator for presentation to the Certification Committee at the next meeting.

4. Interstate Certification (CFR 49 CFR 26.85)

- a) ITD must process and approve all interstate DBE and ACDBE applications within 10 business days of receipt.
- b) After the firm has been certified ITD may request copies from the DBEPC of any on-sites or application documents from the JOC where the firm was initially certified.
- c) Requests for on-site reviews and other application materials by other state UCPs on Idaho certified DBE firms will be provided within 30 days.

5. Certification Committee Review

- a) The Certification Committee meets at the call of the DBE Program Coordinator monthly or more frequently if necessary.

- b) The committee evaluates the application documentation and the information obtained from the On-Site Review against the eligibility criteria contained in 49 CFR 26, Subpart D, and 49 CFR 23, Subpart C.

Information furnished by the applicant which can reasonably be considered proprietary or confidential business information, as well as personal net worth statements and other personal or financial information, will not be made available to third parties without written consent of the applicant, except when USDOT requires the information in determining disadvantaged status in an appeal procedure. The documentation referenced in this section is not subject to disclosure under Idaho's Public Records law.

- c) After thorough examination of all relevant information viewed as a whole, the Committee may:
 - (i) Withhold certification pending receipt of additional information. If certification is withheld pending receipt of additional information, the DBE Program Coordinator obtains the information and resubmits the application at a subsequent committee meeting.
 - (ii) Certify the firm. If the application is approved, a certificate valid for one year is prepared by the DBE Program Coordinator and sent, with a cover letter, to the DBE firm.
 - (iii) Deny certification.

If certification is denied, the DBE Program Coordinator notifies the applicant by certified mail, of the committee's decision, reasons for denying certification, and the procedure for appeal to the USDOT. Upon request, all documents and other information on which denial is based will be made available to the applicant. Applicants denied certification may apply again three months from the date of denial (49 CFR § 26.86).

6. Decisions

On eligibility of in-state firms will be made within 90 days of receipt of all required information. This time period may be extended once for an additional 30 days with written notice to the firm. ITD's failure to make a decision during this time frame constitutes constructive denial of the application. Applicants may appeal to USDOT.

B. Reporting Changes (49 CFR 26.83)

Annually, the DBE Program Coordinator will advise DBEs they must complete a sworn affidavit, declaring 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 form, except for changes

about which the DBE has notified ITD. (*Exhibit E, Affidavit of No Change*). Documentation of the firm's gross receipts (i.e., a federal business tax return) must accompany the affidavit.

ITD certifies DBEs continuously unless and until certification has been removed. This continuous certification is contingent on the firm's continuing certification eligibility and on receipt of an annual Declaration of Eligibility (DOE) with the firm's most recent business tax return.

ITD will not require DBEs to undergo a recertification process. However, ITD will conduct on-site reviews of its in-state DBEs on a five-year basis using **Form 2322 DBE Certification Five Year On Site Review**, in order to record any changes or expansion to the firm, and also to provide up-to-date on-site review reports to other states UCPs upon request.

ITD may also conduct a certification review of a certified DBE firm, including a new on-site review, if appropriate in light of changed circumstances (e.g., of the kind requiring notice under §26.83(i) or relating to suspension of certification under §26.88, a complaint, or other information concerning the firm's eligibility. If information comes to ITD's attention that leads it to question the firm's eligibility, ITD may conduct an on-site review on an unannounced basis, at the firm's offices and job sites.

DBEs must inform ITD in a sworn affidavit of any change in circumstances affecting its ability to meet size, disadvantaged status, ownership and control requirements, management changes or any material change in the information provided in the application form within 30 days of the change. Supporting documentation describing in detail the nature of the changes must be attached. If a DBE fails to make timely notification of such changes, it will be deemed to have failed to cooperate under 49 CFR 26.109(c).

When requested for purposes of certification, ITD will make available to states or other financial recipients of USDOT funds, all relevant information pertaining to an applicant's eligibility, including all application materials and reports of on-site reviews within 30 days of receipt of the request, provided the DBE has signed written authorization for transfer of the application, including tax forms and statements of personal net worth, to the requesting agency.

C. Denial of Initial Certification (49 CFR 26.86)

1. Applicants who have been denied certification will be provided with a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based will be made available to the applicant, on request.
2. Applicants who believe they have been wrongly denied certification as a DBE may file an appeal in writing to USDOT, Office of Civil Rights within 90 days after certification has been denied. The process for appealing, and content of the appeal, are described in 49 CFR 26.89. 2.

3. The decision of ITD from which the appeal action is taken is binding within Idaho. However, this decision is not binding to other recipients.

ITD will take the following action when a USDOT determination is applicable:

- a) If the USDOT determines that ITD erroneously certified a firm, ITD will remove the firm's eligibility upon receipt of the determination. Removal of the firm's eligibility will be effective as of the date of the receipt of the USDOT determination.
 - b) If the USDOT determines that ITD erroneously failed to find reasonable cause to remove a firm's eligibility, ITD will expeditiously begin procedures to determine if the firm's eligibility should be removed.
 - c) If the USDOT determines that ITD erroneously declined to certify or removed the eligibility of a firm, ITD will certify the firm effective on the date ITD received the USDOT determination.
 - d) If the USDOT determines that ITD erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, ITD will take appropriate corrective action as determined by the USDOT.
 - e) If the USDOT affirms ITD's determination, then no further action is necessary.
4. Firms which have been denied certification may reapply for DBE application no sooner than 90 days after the denial, with the time period of reapplication running from the date of receipt of the firm's denial letter. A firm which has appealed a denial cannot reapply for certification until after the course of the appeal has run and USDOT submits a decision.

D. Removal of DBE Certification (49 CFR 26.87)

ITD will investigate and if necessary initiate certification removal proceedings when notified by third parties, knowledgeable ITD employees, or USDOT that they are in possession of evidence that questions the eligibility of currently certified DBE firm(s) in relation to the standards and acceptable operating procedures contained in this plan and 49 CFR § 26 and § 23.

1. ITD-Initiated Actions

ITD-initiated proceedings may be based on notification by the DBE firm that its circumstances have changed or by information received from ITD employee(s) that suggests the DBE is ineligible and should be investigated for potential removal of certification. ITD will initiate actions for removal of a DBE firm certification:

- a) If it is determined that it does not meet one or more of the eligibility standards listed in Subpart D. of this plan;
 - (i) The ITD employee who becomes aware of a DBE firm's questionable circumstances or practices collects all relevant information and submits it to the DBE Program Coordinator for further investigation. If the DBE Program Coordinator believes there is reasonable cause to find the firm ineligible for the DBE Program, the information is presented to the Certification Committee for evaluation and decision.
 - (ii) It is found that the original certification of the firm was performed in error, as it was not in compliance with standards set forth in Section D.
 - (ii) If an investigation shows that the DBE has failed to perform a "Commercially Useful Function (CUF) and that failure constitutes part of a pattern of relationships with non-disadvantaged businesses that brings the DBE's independence and control into question; or

If the Committee concludes that the evidence points to ineligibility, they instruct the DBE Program Coordinator to advise the DBE firm in writing that ITD proposes to find the firm ineligible, specifying the reasons for its determination, and the evidence on which those reasons are based. The letter will further offer the DBE firm an opportunity to respond to ITD's decision at an informal hearing described in III) G. 4. below.

- b) A DBE "fails to cooperate" or is "unresponsive" to requests for annual "no change" affidavit and accompanying documentation; or
- c) A DBE that is suspended or debarred by USDOT for conduct related to the DBE program will automatically be removed from State UPC Program.

2. Third Party Complaints

Third party complaints submitted to ITD must be written and contain specific reasons why the complainant believes the DBE is ineligible to participate in the DBE Program. General allegations or anonymous complaints will not be addressed. Complaints should be directed to the DBE Program Coordinator.

- a) If the complainant(s) request their identities be kept confidential, ITD will honor that request unless it hinders the investigation, hearing, or denies due process to other parties. In these circumstances, complainants will be requested to waive confidentiality and advised that failure to do so may result in closure of the investigation or dismissal of the hearing.
- b) After investigation by the DBE Program Coordinator, the ITD Certification Committee will consider allegations in the complaint and evaluate additional information from the

DBE firm or other sources. After a thorough review of the record, the Committee instructs the DBE Program Coordinator to either:

- (i) Advise the complainant and the DBE firm in writing that it finds no reasonable cause to believe that the firm is ineligible, the specific reasons for that determination, and the evidence on which the reasons are based; or
- (ii) Confirm that it has found reasonable cause to proceed with decertification actions.

3. USDOT-Initiated Proceedings

USDOT-initiated proceedings begin when USDOT advises ITD that information in a DBE's certification records or other information in their possession gives them reason to believe that an ITD certified firm does not meet the eligibility criteria, and further directs ITD to initiate proceedings to remove the firm's certification.

- a) USDOT provides ITD and the DBE firm a notice setting forth the reasons for the directive and supplying other relevant documentation.
- b) ITD Certification Committee then begins certification removal procedures as outlined in this Plan.

4. Due Process

- a) Advise the DBE firm in writing that it proposes to find the firm ineligible, specifying the reasons for its determination, and the evidence on which those reasons are based. The letter will further offer the DBE firm an opportunity to respond to ITD's decision at an informal hearing described below.
- b) The complainant or DBE firm may appeal the decision by ITD to the USDOT Office of Civil Rights. An applicant who appeals the denial of its application for certification to the Department is not prohibited from reapplying at the end of the waiting period if the appeal has not been decided.
- c) The DBE firm remains eligible to participate on ITD contracts during the pendency of ITD removal of certification proceedings but not during appeals to USDOT.

5. Informal Hearing Procedures

In these proceedings, ITD bears the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards.

Note: No hearing is necessary if the DBE firm exceeds the statutory personal net worth cap and does not dispute that fact.

- a) The CRPM is designated as the coordinator for the identification of a Hearing Officer and is responsible for arranging a time and place for the hearing in coordination with the DBE Program Coordinator, the DBE Firm and the Hearing Officer. The identified Hearing Officer is responsible for evaluating written arguments and information if the DBE elects to respond to the certification removal notice in that manner. The identified Hearing Officer will be knowledgeable about the certification requirements of the DBE program. (Reasonable extensions of time may be allowed in any step of the following procedure.)
- b) The DBE firm is advised in the Notice of Intent to Remove Certification that it has 10 working days in which to request a hearing and the hearing options available — oral or written — and the procedures accompanying each option:
- c) Oral hearings are scheduled approximately 30 days from the receipt of the DBE's request for hearing, contingent on the schedules of the Hearing Officer, DBE Program Coordinator, and DBE owners.
 - (i) Oral hearings will be audio taped. In addition, the DBE owner(s), witnesses and the DBE's attorney may be present but no witnesses will be sworn in and the rules of evidence will not apply. The DBE Program Coordinator and ITD legal counsel (if appropriate) will present the position of the Certification Committee. ITD will retain the original record of the hearing. Verbatim transcripts will be available on appeal to USDOT.
 - (ii) If the DBE requests that arguments be submitted in written form, all arguments and information must be submitted within 30 calendar days from receipt of request for hearing. The Hearing Officer will make a decision within 30 calendar days of receipt of all written information.
 - (iii) Written arguments and information from the DBE are evaluated against the written arguments and information presented by the DBE Program Coordinator.
 - (iv) If the DBE fails to attend the scheduled oral hearing (without reason and notification) or to submit written arguments within time limits established, the firm will forfeit eligibility.
- d) The decision by the Hearing Officer on the arguments in either oral or written arguments will be based on any one or more of the following conditions:
 - (i) Changes in the DBE's circumstances since certification that render the DBE ineligible;
 - (ii) Receipt of information or evidence not available at the time of certification;
 - (iii) Receipt of information that was concealed or misrepresented before or during certification proceedings;

- (iv) Changes in USDOT standards for certification; and/or
 - (v) Documented findings that certification was factually erroneous;
 - (vi) Failure of the DBE to cooperate under §26.73 (c);
- a) ITD notifies the DBE by certified mail of the Hearing Officer's decision and reasons for it, including specific references to the evidence in the record that supports each reason for the decision.

If the decision removes eligibility, the notice will further inform the DBE of the consequences of the decision and the DBE's right to appeal to the USDOT. A copy of 49 CFR 26.89 (Process for Certification Appeals to the Department of Transportation) will be sent with the certification removal notice. Copies of the notice are also sent to third party complainants or USDOT, if appropriate.

6. USDOT Appeals

If the applicant appeals to USDOT, ITD will provide USDOT (within 20 days of request) the administrative record, including a hearing transcript. The record will be well organized, indexed and paginated. Upon notification by USDOT, ITD will immediately take action as directed. See Section F., below.

If the decision states no reason to remove certification, the DBE is so notified, and the proceedings are closed.

7. DOCR DBE Ineligibility Database

ITD will list on USDOT Office of Civil Rights (DOCR's) online database information on any firm whose certification is denied or removed.

ITD will monitor the DOCR web site as required and when needed request any required information from other UCPs within the seven-day time frame. The requested information will be consider for determining any needed actions in respect to certified DBE firms or applicants in Idaho.

8. Effects of Removal of Certification on Contracts

- a) If ITD has made a commitment to use an ineligible DBE prime contractor, or a prime contractor has committed to using an ineligible DBE, but a contract or subcontract has not been executed before the removal of certification notice has been issued, the ineligible firm does not count toward the contract or overall goal. The prime

contractor must meet the contract goal with an eligible DBE firm or show that it made good faith effort to do so.

- b) If ITD has executed a contract with a subsequently ineligible DBE prime contractor, or a prime contractor has executed a subcontract with a subsequently ineligible DBE firm, ITD and the prime contractor will receive credit toward the DBE goals. However, in either case, that portion of the DBE's contract remaining after Notice of Removal of Certification will not count toward ITD's overall goal, but will count toward the contract goal, EXCEPT if the ineligibility stems solely from having exceeded the size standard during the performance of the contract, the DBE's performance will be counted toward both contract and overall goals.

E. Summary Suspension of Certification (49 CFR 26.88)

1. ITD shall immediately suspend a DBE's certification without adhering to the requirements in §26.87(d) (detailed in Section D., above) when an individual owner whose ownership and control of the firm are necessary to the firm's certification dies or is incarcerated.
2. ITD 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 ITD in writing of any material change in circumstances as required by §26.83(i) or fails to timely file an affidavit of no change under §26.83(j).

In determining the adequacy of the evidence to issue a suspension, ITD 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.

3. The concerned OA may direct ITD to act pursuant to paragraph (1) or (2) of this section if it determines that information available to it is sufficient to warrant immediate suspension.
4. When a firm is suspended pursuant to paragraph (1) or (2) of this section, ITD 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.
5. Suspension is a temporary status of ineligibility pending an expedited show cause hearing/proceeding as listed in Section D. "Removal of DBE Certification" 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.

6. 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 ITD'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 if the DBE is performing a commercially useful function under the existing contract.
7. 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 ITD information demonstrating that the firm is eligible notwithstanding its changed circumstances. Within 30 days of receiving this information, the ITD will either lift the suspension and reinstate the firm's certification or commence a decertification action as listed in Section D. "Removal of DBE Certification". If ITD starts a decertification proceeding, the suspension remains in effect during the proceeding.
8. The decision to immediately suspend a DBE under paragraph (1) or (2) of this section is not appealable to USDOT. The failure of ITD to either lift the suspension and reinstate the firm or start a decertification proceeding, as required by paragraph (7) of this section, is appealable to the USDOT as described in Section D. "Removal of DBE Certification", as a constructive decertification.

F. Effect of USDOT Certification Appeal Decisions (49 CFR 26.91)

1. If ITD is the recipient from whose action an appeal under 49 CFR § 26.89 is taken, the decision is binding. It is not binding on other recipients.
2. If ITD is a recipient to which a USDOT determination under 49 CFR § 26.89 is applicable, ITD will take the following action:
 - a) If the Department decides that ITD erroneously certified a firm, ITD will remove the firm's eligibility on receipt of the determination;
 - b) If the Department determines that ITD erroneously failed to find reasonable cause to remove the firm's eligibility, ITD will expeditiously commence a proceeding to determine whether the firm's eligibility should be removed, as provided in 49 CFR 26.87;
 - c) If the Department determines that ITD erroneously declined to certify or remove the eligibility of the firm, ITD will certify the firm, effective on the date of ITD's receipt of the written notice of the Department's determination;
 - d) If the Department affirms ITD's determination, no further action is necessary.

SUBPART F - COMPLIANCE AND ENFORCEMENT

A. Compliance Procedures Which Apply to ITD (49 CFR 26.101)

1. If ITD fails to comply with any requirement of this part, ITD may be subject to formal enforcement action under 49 CFR § 26.103 or 105 or appropriate program sanctions by the concerned OA, such as the suspension or termination of Federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied. Program sanctions may include, in the case of the FHWA program, actions provided for under 23 CFR 1.36; in the case of the FAA program, actions consistent with 49 U.S.C. 47106(d), 47111(d), and 47122; and in the case of the FTA program, any actions permitted under 49 U.S.C. chapter 53 or applicable FTA program requirements.
2. As provided in statute, ITD will not be subject to compliance actions or sanctions for failing to carry out any requirement of this part because ITD has been prevented from complying because a Federal court has issued a final order in which the court found that the requirement is unconstitutional.

B. Enforcement Actions under FHWA and FTA (49 CFR 26.103)

1. Noncompliance Complaints

Any person who believes that a recipient did not follow its obligations may file a written complaint with the concerned OA's Office of Civil Rights.

If you want to file a complaint, you must do so no later than 180 days after the date of the alleged violation or the date on which you learned of a continuing course of conduct in violation of this part. In response to your written request, the Office of Civil Rights may extend the time for filing in the interest of justice, specifying in writing the reason for so doing. The Office of Civil Rights may protect the confidentiality of your identity as provided in 49 CFR Part 26.109. Complaints under this part are limited to allegations of violation of the provisions of this part.

2. Compliance Reviews

The concerned OA may review the recipient's compliance with this part at any time, including reviews of paperwork and on-site reviews, as proper. The Office of Civil Rights may direct the OA to start a compliance review based on complaints received.

3. Reasonable Cause Notice

If it appears, from the investigation of a complaint or the results of a compliance review, that ITD, as a recipient, is in noncompliance with this part, the appropriate USDOT office

promptly sends ITD, return receipt requested, a written notice advising ITD that there is reasonable cause to find ITD in noncompliance. The notice tells the reasons for this finding and directs ITD to reply within 30 days concerning whether ITD wishes to begin conciliation.

4. Conciliation

- a) If ITD requests conciliation, the proper USDOT office shall pursue conciliation for at least 30, but not more than 120, days from the date of ITD's request. The proper USDOT office may extend the conciliation period for up to 30 days for good cause, consistent with applicable statutes.
- b) If ITD and the appropriate USDOT office sign a conciliation agreement, then the matter is regarded as closed, and the OA considers ITD compliant. The conciliation agreement sets forth the measures ITD must or will take to ensure compliance. While a conciliation agreement is in effect, ITD stays eligible for FHWA or FTA financial assistance.
- c) The concerned OA shall monitor ITD's implementation of the conciliation agreement and ensure that its terms are followed. If ITD does not carry out the terms of a conciliation agreement, ITD is in noncompliance.
- d) If ITD does not request conciliation, or a conciliation agreement is not signed within the time given in paragraph (d)(1) of this section, then enforcement proceedings begin.

5. Enforcement Actions.

- a) Enforcement actions are taken as provided in this subpart.
- b) Applicable findings in enforcement proceedings are binding on all USDOT offices.

C. Enforcement Actions in FAA Programs (49 CFR 26.105)

1. Compliance with all requirements of this part by airport sponsors and other recipients of FAA financial assistance is enforced through the procedures of Title 49 of the United States Code, including 49 U.S.C. 47106(d), 47111(d), and 47122, and regulations implementing them.
2. The provisions of 49 CFR 26.103 (b) and this section apply to enforcement actions in FAA programs.
3. Any person who knows of a violation of this part by a recipient of FAA funds may file a complaint under 14 CFR part 16 with the Federal Aviation Administration Office of Chief Counsel.

D. Enforcement Actions for Participants in the DBE Program (49 CFR 26.107)

1. If a firm that does not meet the eligibility criteria tries to participate in ITD's DBE Program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances showing a serious lack of business integrity or honesty, the Department may initiate suspension or debarment proceedings against the firm under 2 CFR § 180 and 1200.
2. If a firm, while trying to meet DBE contract goals or other DBE Program requirements, uses or tries to use, based on false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria, the Department may initiate suspension or debarment proceedings against that firm under 2 CFR § 180 and 1200.
3. In a suspension or debarment proceeding brought under paragraph (1) or (2) of this section, the concerned OA may consider the fact that a recipient has certified a purported DBE. Such certification does not prevent the Department from determining that the DBE, or another firm that has used or tried to use it to meet DBE goals, should be suspended or debarred.
4. The Department may take enforcement action under 49 CFR § 31, Program Fraud and Civil Remedies, against any participant in the DBE program whose conduct is subject to such action under 49 CFR § 31.
5. The Department may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement about participation of a DBE in any program or otherwise violates applicable Federal statutes.

E. Confidentiality, Cooperation, and Intimidation or Retaliation (49 CFR 26.109)

ITD will safeguard from disclosure to third parties information that may be regarded as confidential business information, consistent with Federal, state, and local law. Idaho Public Records Law allows ITD to protect certain records from inspection or disclosure, including contractor records that are privileged or confidential information, etc. Notwithstanding any contrary provisions of state or local law, ITD will not release personal financial information submitted in response to the personal net worth requirement to a third party (other than USDOT) without the written consent of the submitter.

1. Availability of records.

- a) In responding to requests for information concerning any aspect of the DBE program, ITD complies with provisions of the Federal Freedom of Information (5 U.S.C. 552) and Privacy Acts (5 U.S.C. 552a). ITD may make available to the public any information concerning the DBE Program of which is not prohibited by Federal law.
- b) Notwithstanding any provision of Federal or state law, ITD will not release information that may reasonably be construed as confidential business information to any third party without the written consent of the firm that gave the information. This includes applications for DBE certification and supporting documentation. However, ITD will send this information to USDOT in any certification appeal proceeding under 49 CFR 26.89 of this part or to any other state to which the individual's firm has applied for certification under 49 CFR 26.85.

2. Confidentiality of information on complainants.

Notwithstanding the provisions of paragraph (a) of this section, the identity of complainants shall be kept confidential, at their election. If such confidentiality will hinder the investigation, proceeding or hearing, or result in a denial of proper administrative due process to other parties, the complainant must be advised for the purpose of waiving the privilege. Complainants are advised that, in some circumstances, failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing. FAA follows the procedures of 14 CFR § 16 with respect to confidentiality of information in complaints.

3. Cooperation.

All participants in the Department's DBE program (including, but not limited to, recipients, DBE firms and applicants for DBE certification, complainants and appellants, and contractors using DBE firms to meet contract goals) are required to cooperate fully and promptly with USDOT and recipient compliance reviews, certification reviews, investigations, and other requests for information, including copies of all DBE subcontracts, agreements and other related documents per 49 CFR 26.53(j). Failure to do so shall be a ground for proper action against the party involved (e.g., with respect to recipients, a finding of noncompliance; with respect to DBE firms, denial of certification or removal of eligibility and/or suspension and debarment; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment).

4. Intimidation and retaliation.

ITD, its recipients and subrecipients, contractors, or any other participant in the program, must not intimidate, threaten, coerce, or discriminate against any individual or firm for interfering with any right or privilege secured by this subpart or because the individual or

firm has made a complaint, testified, aided, or participated in any manner in an investigation, proceeding, or hearing under this part. Anyone who violates this prohibition will be in noncompliance with this subpart.

EXHIBITS

ITD Departmental Organization Chart

ITD Division of Innovation and Experience Organization Chart

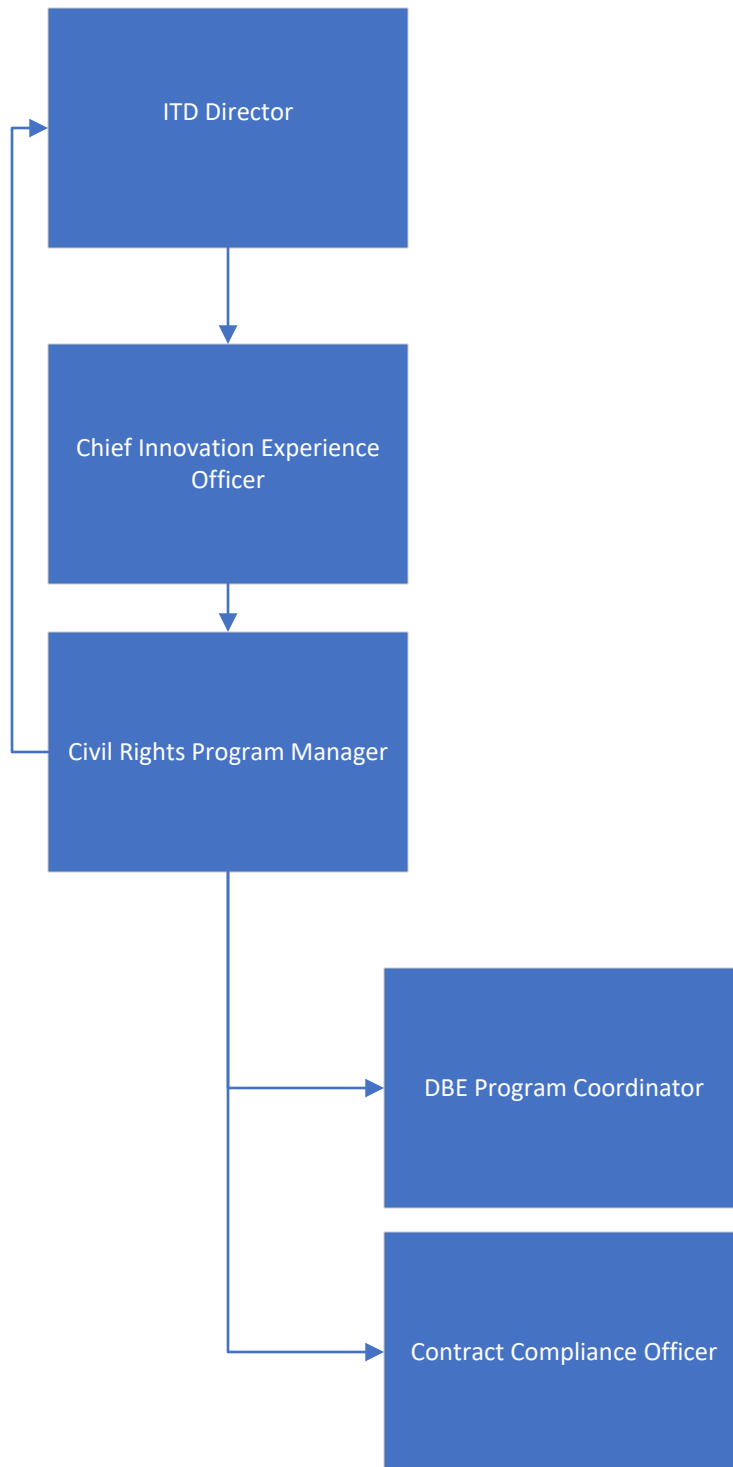
ITD Civil Rights Staff

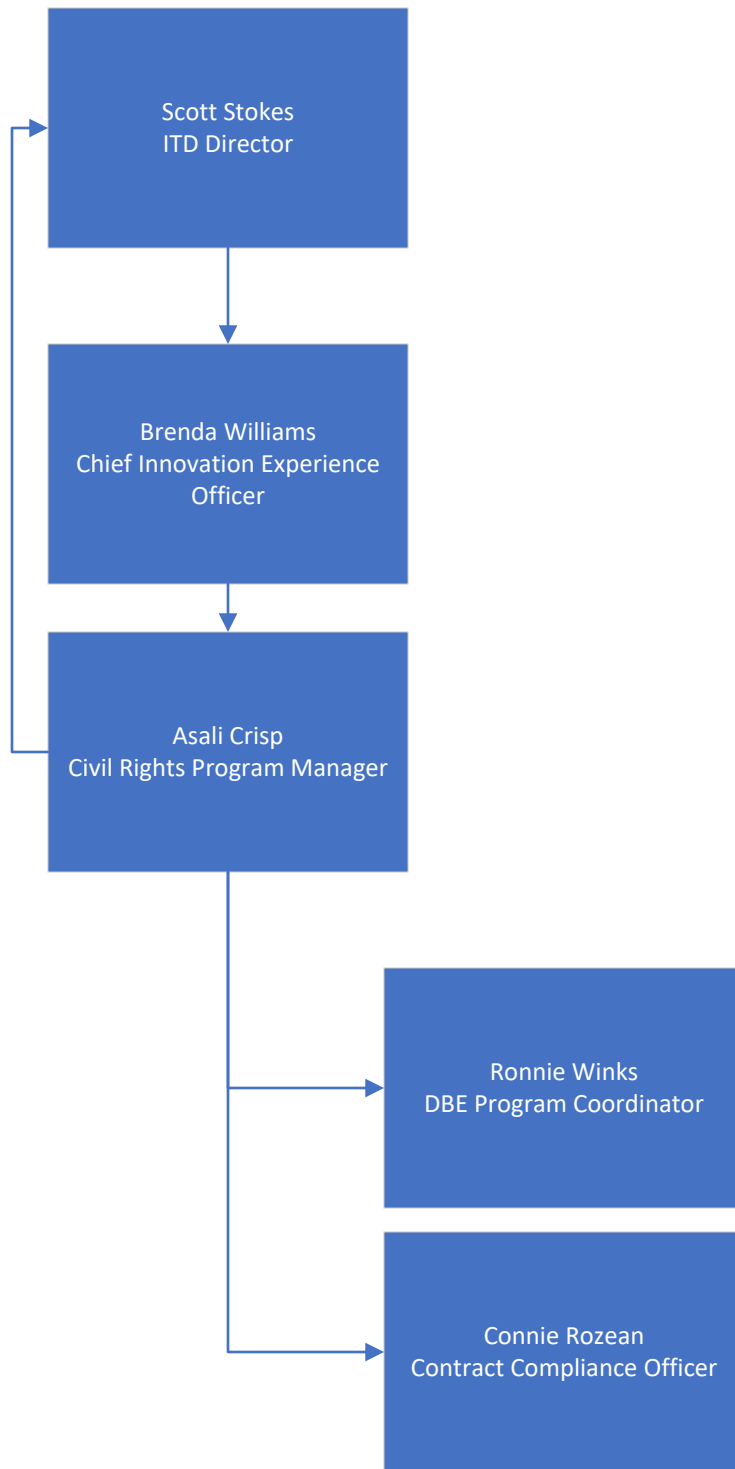
DBE Special Provisions for Race/Gender-Conscious Projects

DBE Special Provisions for Race/Gender-Neutral Projects

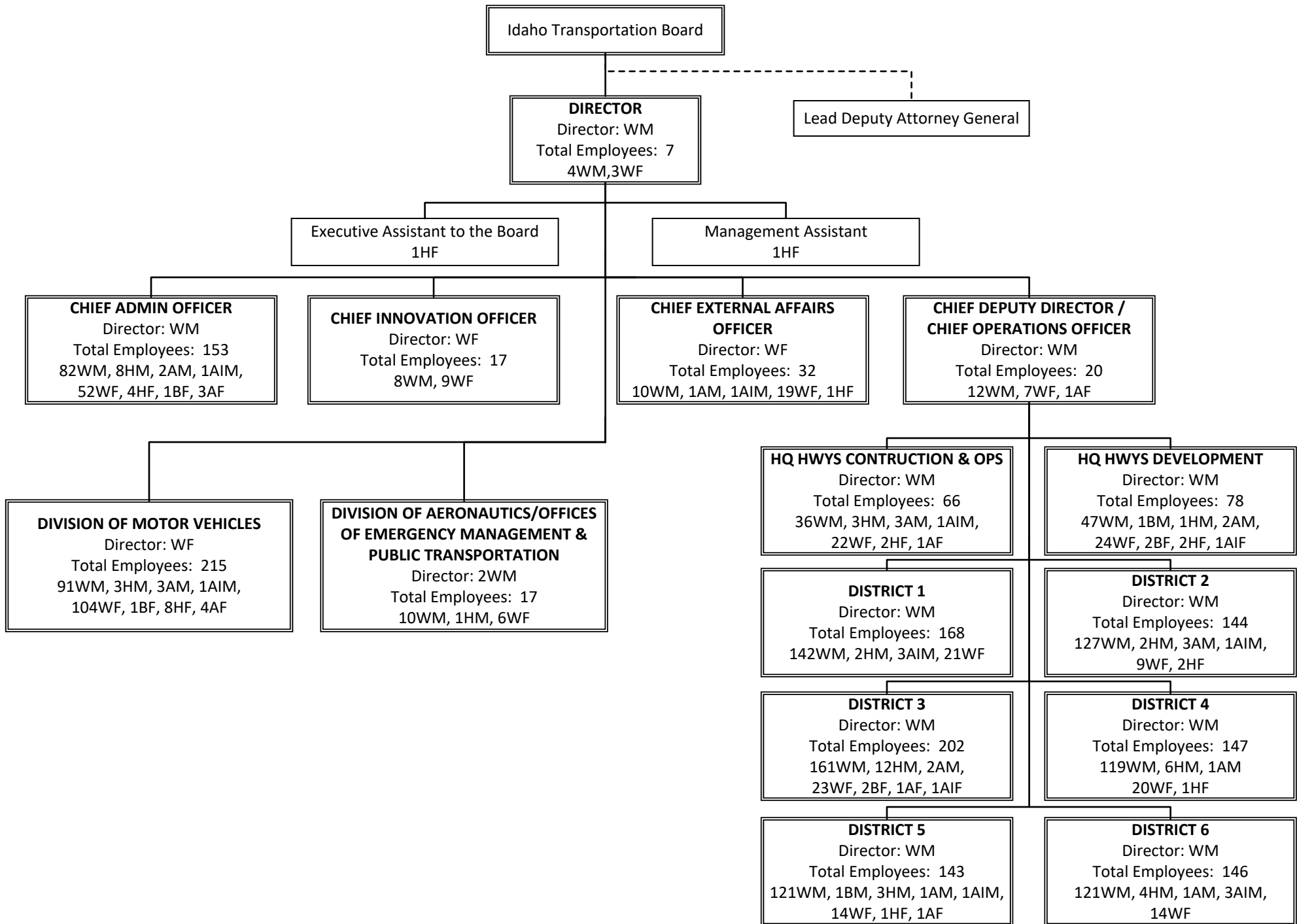
Official ITD Forms (Available under [ITD Form Finder](#))

0315	Request to Contract
0646b	Schedule B Information for Determining Joint Venture Eligibility
1701	Disadvantaged Business Enterprise Job Site Review Commercially Useful Function Determination
2322	DBE Regular Dealer Verification Form
2323	Process for Setting DBE Goal On Federal-Aid Agreements
2324	Process for Setting DBE Goal and TSP Hours on Federal Aid Projects
2396	DBE Contractor Commitments
2398	Consultant DBE Commitment
2399	DBE Subcontractor Commitment Form
2400	DBE Supplier/Distributor/Broker Commitment Form
2420	DBE Certification On Site Review
2422	DBE Certification Three Year On Site Review
2891	Evaluation of Contractors Good Faith Effort To Meet the Contract DBE Requirements
5555	DBE Commitment Change Form





IDAHO TRANSPORTATION DEPARTMENT ORGANIZATIONAL PROFILE



DBE Special Provisions for Race/Gender-Conscious Projects

DBE PROGRAM REQUIREMENTS

10/21

For bidding purposes, the Contractor must comply with the DBE program requirement of X.X%. Upon award, the approved percentage on the ITD-2396 DBE Commitments form becomes contractual and failure to comply is a breach of contract. Any change to this contractual commitment during the administration of the contract must be coordinated through the Office of Civil Rights.

Whenever the Engineer determines, after investigating and obtaining evidence the Contractor has not complied with the DBE program requirement, the Engineer will take corrective action. Refer to the Department's Standard Specifications for Highway Construction, Section 110, Civil Rights.

The Contractor, sub recipient, or subcontractor will not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The Contractor will 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 the termination of this contract or such other remedy as the recipient deems appropriate (e.g., withholding monthly progress payments, assessing sanctions, liquidated damages, disqualifying the Contractor from future bidding as non-responsible).

x

For additional DBE Program information see the Department's DBE program requirements located at: <https://itd.idaho.gov/civilrights/>

DBE Special Provision for Race/Gender-Neutral Projects

DBE PARTICIPATION:

In an effort to achieve ITD's DBE Annual Participation Goal (APG) of 10% utilization, ITD respectfully requests and encourages responder to consider utilizing subcontractors and suppliers listed on our DBE Directory located at: <https://itd.dbesystem.com> . For more information regarding ITD's DBE Program, call the ITD DBE coordinator at (208) 334-8567.