



***Disadvantaged Business Enterprise (DBE)  
Program***

***January 2013***

Rockingham Planning Commission  
156 Water Street  
Exeter, NH 03833

## **DBE POLICY STATEMENT FOR THE ROCKINGHAM PLANNING COMMISSION MPO**

The Rockingham Planning Commission (RPC) Metropolitan Planning Organization (MPO) has established a Disadvantaged Business Enterprise (DBE) Program in accordance with regulations of the U.S. Department of Transportation (USDOT), 49 Code of Federal Regulations (CFR) Part 26. As a subrecipient of Federal funds, through the New Hampshire Department of Transportation (NHDOT) the RPC MPO has submitted Title VI Assurances to affirm its compliance with Federal regulations.

Based on consultation with NHDOT and the Federal Highway Administration (FHWA), the MPO has adopted, by reference, the Disadvantaged Business Enterprise (DBE) Program and DBE Contracting Goals of the NHDOT for FY2011-FY2013.

It is the policy of the RPC MPO to ensure that DBEs, as defined in 49 CFR § 26, have an equal opportunity to receive and participate in Federally-assisted contracts. It is also our policy:

1. To ensure nondiscrimination in the award and administration of Federally-assisted contracts;
2. To create a level playing field on which DBEs can compete fairly for Federally-assisted contracts;
3. To ensure that the DBE Program is narrowly tailored in accordance with applicable law
4. To ensure that only firms that fully meet 49 CFR § 26 eligibility standards are permitted to participate as DBEs;
5. To help remove barriers to the participation of DBEs in Federally-assisted contracts; and
6. To assist the development of firms that can compete successfully in the market place outside the DBE Program.

The position of Senior Transportation Planner has been designated as the RPC MPO's DBE Liaison Officer. The DBE Liaison Officer and Staff are responsible for developing, implementing and managing all aspects of the DBE Program. Implementation of the DBE Program is accorded the same priority as compliance with all other legal obligations incurred by the MPO in its financial assistance agreements with the FHWA and the Federal Transit Administration.

The MPO has disseminated this policy statement to MPO staff and members of the MPO Policy Committee; DBE and non-DBE businesses, that perform work for the MPO on Federally-assisted contracts, and organizations that communicate with such businesses. The MPO DBE Program will be mailed to all requesting agencies or individuals and made available through the MPO website: [www.rpc-nh.org](http://www.rpc-nh.org)

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Cliff Sinnott, Executive Director

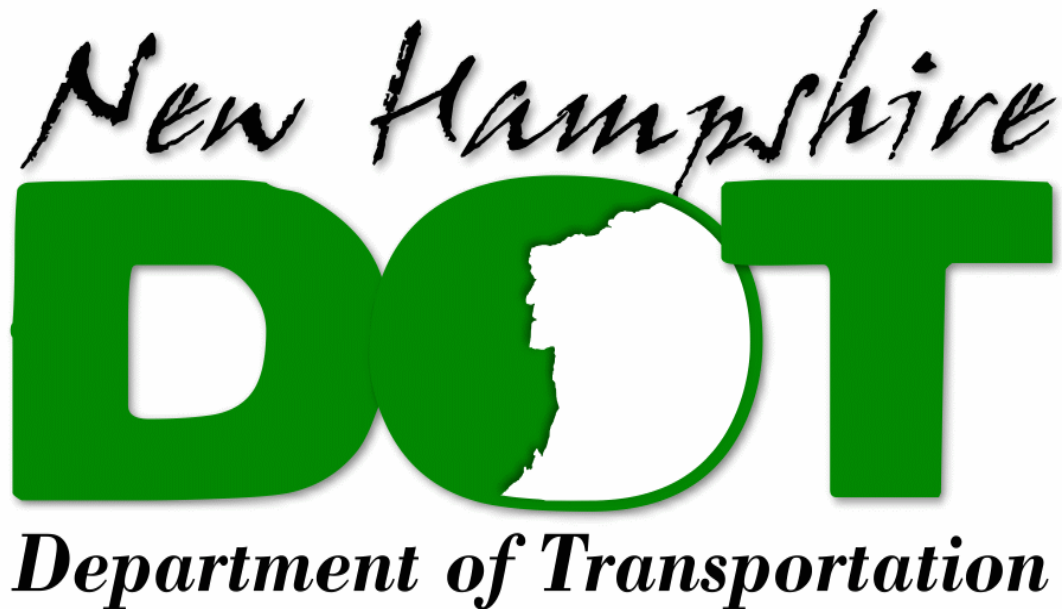
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Date

# Disadvantaged Business Enterprise (DBE)

## Program Procedures

**DRAFT**



Revised 3/2011

## **DBE POLICY STATEMENT FOR THE NH DEPARTMENT OF TRANSPORTATION**

The New Hampshire Department of Transportation (NHDOT) has established a Disadvantaged Business Enterprise (DBE) Program in accordance with regulations of the U.S. Department of Transportation (USDOT), 49 Code of Federal Regulations (CFR) Part 26. As a primary recipient of Federal funds, the NHDOT has submitted Title VI Assurances to affirm its compliance with Federal regulations.

It is the policy of the NHDOT to ensure that DBEs, as defined in 49 CFR § 26, have an equal opportunity to receive and participate in Federally-assisted contracts. It is also our policy:

1. To ensure nondiscrimination in the award and administration of Federally-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 Federally-assisted contracts;
3. To ensure that the DBE Program is narrowly tailored in accordance with applicable law
4. To ensure that only firms that fully meet 49 CFR § 26 eligibility standards are permitted to participate as DBEs;
5. To help remove barriers to the participation of DBEs in Federally-assisted contracts; and
6. To assist the development of firms that can compete successfully in the market place outside the DBE Program.

The Chief of Labor Compliance has been designated as the NHDOT's DBE Liaison Officer. The DBE Liaison Officer and Staff are responsible for developing, implementing and managing all aspects of the DBE Program. Implementation of the DBE Program is accorded the same priority as compliance with all other legal obligations incurred by the NHDOT in its financial assistance agreements with the Federal Highway Administration (FHWA).

The NHDOT has disseminated this policy statement to the Commissioner, Directors and all components of our organization; DBE and non-DBE businesses that perform work for NHDOT on Federally-assisted contracts. The NHDOT DBE Program will be mailed to all requesting agencies or individuals and made available through the NHDOT website: <http://www.nh.gov/dot/business/contractors.htm>.

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George N. Campbell, Jr.  
Commissioner

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Date

## **Program Authority**

### NHDOT's DBE Program

On February 2, 1999, the United States Department of Transportation (US DOT) published, in the **Federal Register**, its final rule, 49 CFR Part 26, entitled "Participation by Disadvantaged Business Enterprises in Department of Transportation programs," as amended September 8, 2000, June 16, 2003 and February 28, 2011. It superseded all Disadvantaged Business Enterprise (DBE) regulations, orders, circulars and administrative requirements concerning financial assistance programs issued by the US DOT before March 4, 1999. This rule requires the Rockingham Planning Commission (RPC) Metropolitan Planning Organization (MPO) to implement a program to encourage the participation of DBEs in its Federal-aid contracting activities.

This program document details NHDOT procedures and implementation of the DBE program as required by the USDOT, with oversight provided by the Federal Highway Administration (FHWA).

### **Funding Sources with NHDOT DBE Program Oversight**

Rules and regulations of the NHDOT DBE program are applicable to any state or municipal Federally-assisted projects awarded or administered by the department which are funded from the following sources:

1. Federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, 105 Stat. 1914, or Titles I, III and V of the Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21), Pub. L. 105-178, 112 Stat. 107.
2. Federal transit funds authorized by Titles I, III, V and VI of ISTEA, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III and V of the TEA-21, Pub. L. 105-178.
3. Airport funds authorized by 49 U.S.C. 47101, et seq.
4. The 2005 SAFETEA-LU Act (Safe, Accountable, Flexible, Efficient, Transportation, Equity Act: A Legacy for Users) Pub. L 190-59.

## **Program Information**

### Overall DBE Participation Goal

The NHDOT administers a race/gender neutral DBE program, and relies on the cooperation of all state contractors to utilize DBEs to attain overall state DBE program goals. The NHDOT may place specific DBE goals on selected projects if it is determined that failure to attain DBE goals on those specific projects will disproportionately impact the state's ability to reach its overall DBE goal.

The statewide DBE goal for FY 2011 is 4%. The NHDOT program goals are determined and submitted according to criteria set forth in 49 CFR 26.45. The statewide DBE goal for any current year, and the methodology and process used to establish the current statewide DBE goal is available for review online at:

<http://www.nh.gov/dot/org/administration/ofc/documents.htm>

#### Unified Certification Program

The NHDOT has identified all USDOT recipients and sub recipients within the State of New Hampshire. These participating agencies, through agreement, recognize the NHDOT as having the "sole" authority to make certification decisions on their behalf. Furthermore, participating agencies shall utilize the DBE directory published by the NHDOT and shall acknowledge only those firms identified therein as certified DBEs. The statewide DBE directory is available online at:

<http://www.nh.gov/dot/org/administration/ofc/index.htm>

#### Source for DBE Application and Additional DBE Program Information

For a DBE application, current list of certified DBEs, additional program information or documents call, write, or visit the NHDOT DBE web site.

New Hampshire Department of Transportation  
Office of Federal Compliance  
Disadvantaged Business Enterprise (DBE) Program  
7 Hazen Drive, PO Box 483  
Concord, NH 03302-0483  
603-271-6612 (Phone)  
603-271-8048 (Fax)

Web address: <http://www.nh.gov/dot/org/administration/ofc/index.htm>

#### Reporting False, Fraudulent, or Dishonest Conduct

Please report any fraudulent or dishonest conduct concerning the DBE program to the NHDOT DBE Coordinator at 603-271-6612. Information provided will be kept strictly confidential and referred to the appropriate team for investigation.

#### **1. Certification Standards for DBE Applicants**

The integrity of the NHDOT DBE program depends, to a large extent, upon the establishment of systematic procedures to ensure that only bona fide disadvantaged businesses are certified to participate in federally assisted programs. In essence, only

small firms independently owned and controlled by socially and economically disadvantaged persons are eligible to participate in the US DOT's DBE program. The NHDOT will use the following standards to establish DBE certification eligibility in accordance with 49 CFR Part 26, formal US DOT guidance, the NHDOT Memorandum of Understanding, and US DOT interpretations of the regulations contained in their appeal decisions.

### Small Business Size

In order to be certified, a business must qualify as a small business as defined by U.S. Small Business Administration (SBA) regulations at 13 CFR Part 121, as amended. Size standards for each applicant shall be determined by identifying the firm's primary area(s) of work, locating the related North American Industry Classification System (NAICS) code(s) and applying the corresponding SBA size standard.

No business shall be considered small if average annual gross receipts of the business and its affiliates exceed \$22.41 million over the previous three fiscal years, even though receipts do not exceed the threshold for the applicable NAICS code. This maximum size standard is adjusted periodically to offset inflation.

### Social and Economic Disadvantage Status

All applicants for DBE certification must submit a signed, notarized certification that the presumptively disadvantaged owner(s) is, in fact, socially and economically disadvantaged.

A signed, notarized statement of personal net worth must be submitted for each individual owner of a firm whose ownership and control are relied upon for DBE certification. Supporting documentation, including personal tax returns, is required as evidence. If an individual's personal net worth exceeds \$1.32 million (excluding the value of the individual's primary residence and ownership equity in the firm seeking certification), the individual's presumption of economic disadvantage is rebutted and he or she will not qualify for this program.

If an individual's presumption of social and/or economic disadvantage is rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility.

Under 49 CFR §§ 26.5 and 26.67, United States citizens or lawfully admitted permanent residents who are members of the following groups are presumed to be socially and economically disadvantaged:

1. Black Americans, which includes persons having origins in any of the Black racial groups of Africa.

2. 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.
3. Native Americans; which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians.
4. Asian-Pacific Americans, which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong.
5. Subcontinent Asian Americans; which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
6. Women.
7. Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

Note: Special rules apply to certification of firms related to Alaska Native Corporations (ANC). See 49 CFR § 26.73(i).

Persons who are visibly identifiable as a minority need not provide documentation of their racial heritage. Persons who are not visibly identifiable as a minority may be requested to provide documentation of their racial heritage on a case-by-case basis in accordance with 49 CFR § 26.63(b).

#### Individual Determinations of Social and Economic Disadvantage

Persons who are not presumed to be socially and economically disadvantaged, including individuals whose presumed disadvantage has been rebutted, may apply for DBE certification. The applicant has the burden of demonstrating, by a preponderance of evidence, that they are socially and economically disadvantaged. No individual whose personal net worth exceeds \$1.32 million (excluding the value of the applicant's primary residence and equity in the firm seeking certification) may be deemed economically disadvantaged. In making determinations of social and economic disadvantage for non-presumptive individuals, the NHDOT will use the standards put forth by 49 CFR Part 26, Appendix E. (see attachment 10)



### Determinations of Ownership

In determining whether the socially and economically disadvantaged participants in a firm own the firm, the NHDOT is required by 49 CFR 26.69 to consider all the facts in the record, viewed as a whole. Ownership is determined as followed:

1. To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals
2. The firm's ownership by socially and economically disadvantaged individuals must be real, substantial and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interest, as demonstrated by the substance, not merely the form, or arrangements.
3. All securities that constitute ownership of a firm shall be held directly by disadvantaged persons.
4. The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial.

### Control and Independence

Control, as defined in 49 CFR § 26.71, is comprised of three parts: operational control, managerial control and independence. To establish control, the disadvantaged owner(s) must have sufficient expertise and authority, specifically in the firm's field of operations, to control the overall destiny and the day-to-day operations of the firm. Additionally, a firm must be an independent business whose viability does not depend on its relationship with another firm or non-disadvantaged individual. In determining whether the disadvantaged owner(s) controls the firm, the following factors will be considered:

1. Operational Control
  - A. Of primary importance is the extent to which the disadvantaged owner actually operates the business. The disadvantaged owner must show he or she makes the basic decisions in the daily operations of the firm.
  - B. The disadvantaged owner must have an overall understanding of and technical competence and experience directly related to the type of business in which the firm is engaged and in the firm's operations. Technical competence is defined as experience, education, expertise and/or background sufficient to afford the disadvantaged owner an ability to control the critical operations of the firm's business, including but not limited to operations such as estimating, marketing,

sales, field supervision and bidding. Technical competence in this sense does not mean expert knowledge. It means substantial knowledge of the technical requirements of the industry for which the business seeks certification.

- C. If state or local law requires a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged person(s) who owns and controls a potential DBE firm must possess the required license or credential.
- D. The disadvantaged owner should be able to show that basic decisions pertaining to the daily operations of the business are made independently. If a disadvantaged owner relies on the decisions of other employees in the critical operations of the firm's business, the disadvantaged owner must show he or she can intelligently use and critically evaluate information presented in making decisions concerning the daily operational activities of the business.
- E. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.
- F. In order to be viewed as controlling a firm, a 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.

## 2. Managerial Control

- A. The disadvantaged owner must have 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 operation.
- B. The disadvantaged owner should be able to show there are no restrictions through corporate charter provisions, by-law provisions, contracts, voting rights or powers, bank signatures, or any other formal or informal documents, which would limit control of the firm.
- C. The disadvantaged owner should be able to show, clearly through documentary evidence, that he or she controls the firm in areas such as, but not limited to:
  - 1) The disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president). In a corporation, disadvantaged owners must control the board of directors.
  - 2) In a partnership, one or more disadvantaged owners must serve as general partners with control over all partnership decisions.

- 3) The disadvantaged owner must have the power to hire and fire any persons to whom key control operations have been delegated.
- D. Differences in wages and other compensation between the disadvantaged owner and non-disadvantaged individuals will be considered as a factor in determining who controls the firm.

### 3. Independence

- A. An independent firm is one whose viability does not depend on its relationship with other firms or individuals. Factors which will be reviewed in determining independence pursuant to 49 CFR § 26.71 include relationships with non-DBE firms in areas such as personnel, facilities, equipment, financial and/or bonding support and other resources.
- B. A firm is considered controlling or having power to control a certified DBE or an applicant when one or more of the following circumstances are found to exist:
- 1) Officers, directors, employees, or principal stockholders of one firm serve as a working majority of the board of directors or officers of the DBE firm.
  - 2) The DBE shares common office space and/or employees and/or equipment and/or other facilities with another business (whether or not for a purported fee or other consideration) particularly where both firms are in the same or related industry or field of operations or were formerly affiliated.
  - 3) Former officers, directors, principal stockholders and/or key employees of one firm organize a new DBE business in the same or related industry or field of operation and serve as its officers, directors, principal stockholders and/or key employees.
  - 4) One firm gives or promises to give the other subcontracts, financial or technical support and/or other facilities (whether or not for a purported fee or other consideration).
- C. The certifying agency will also consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms compromise the independence of the potential DBE.
- D. The potential DBE's relationships with prime contractors will be examined to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of a potential DBE.

- E. Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to show that a firm is an independent business.
- F. A business operating under a franchise or license agreement may be certified if it meets the standards and the franchiser or licensor is not affiliated with the franchisee or licensee.
- G. DBE firms entering into a joint venture with another DBE firm must have the joint venture certified as a separate entity.

**Note:** The NHDOT shall only grant certification to a DBE firm in the specific type of work in which the disadvantaged owners have the ability to control the firm. These specific classifications are selected from the SBA North American Industry Classification System Codes (NAICS).

## **2. NHDOT Certification Procedures**

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### Purpose

Certification procedures are designed to ensure all businesses participating in the NHDOT DBE program meet the initial and continuing eligibility standards as defined in US DOT regulations 49 CFR Part 26. Subpart D.

Firms wishing to be considered for DBE certification must complete the “New Hampshire Department of Transportation Disadvantage Business Enterprise (DBE) Uniform Certification Application” and submit all pertinent information requested on the attached supporting documents checklist (see attachment 2) The application is designed to solicit information to determine whether an applicant business is eligible for certification as a DBE under 49 CFR Part 26, subpart D. All information submitted is kept strictly confidential and may only be disseminated for the purpose of certification appeal to the USDOT, or to any other state to which the individual’s firm has applied for certification under 26.85.

**Note:** Due to a change in the SBA 8(a) and SDB rules allowing for self certification, SBA certified firms are now required to apply for DBE certification without regard or consideration of their SBA self certified status.

**Note:** New Hampshire recognizes the validity of current DBE certifications issued by an official Unified Certification Authority from another state. DBE firms holding a current “Home State DBE Certification” are eligible for an abridged NH DBE certification process. Out of state DBE certified firms need to complete and submit the following to be considered for NH DBE certification:

1. A copy of the firms current home state DBE certification letter.
2. A copy of the firms most recent tax return.
3. A completed Statement of Disadvantage and Personal Net Worth. (see attach 2)
4. A completed Items of Work and firm contact information page. (see attach 2)

The NHDOT will complete the reciprocal DBE certification process for out of state DBE applications within thirty (30) calendar days, when administratively feasible.

#### Application Processing Procedures

Completed NHDOT DBE applications and all required information should be mailed or delivered to the NHDOT using the address provided with the application. All DBE certification applications shall be date stamped when received by the NHDOT Office of Federal Compliance. The following steps will be initiated when an application for DBE certification is received by the NHDOT:

#### Initial Application Intake

All applications shall be reviewed for completeness within thirty (30) calendar days of receipt. If the application is deemed to be complete, the application will proceed to the next step in processing. If the application is deemed to be incomplete, the NHDOT will do the following:

1. Send a letter to the applicant informing them which additional information is required to complete their application, including a specific deadline of approximately thirty (30) calendar days to provide the missing information. (see attachment 3)
2. If all of the required information is submitted by the date specified in the request, the application will be deemed complete and proceed to the next step in processing.
3. If all of the required information is not received by the date specified, the application will be deemed incomplete and returned to the applicant. The applicant may not re-apply for DBE certification for a period of six (6) months, as specified in a letter to be included with the returned incomplete application.

#### Application Review

Complete DBE applications shall be date stamped and must be processed within sixty (60) calendar days of being deemed complete. Regulations allow for a one-time extension of sixty (60) additional calendar days upon providing written notice to the firm citing the reason for the extension.

### On-site visits

On-site visits are required by 49 CFR § 26.83(c)(1) and are conducted by the NHDOT representative at the applicant's principal place of business with firms seeking first-time certification or recertification. The NHDOT may, at their discretion, request to visit a current work site and perform a commercially useful function review. On-site visits will be scheduled at a mutually convenient time for the NHDOT and the firm.

When conducting an on-site visit, all individuals included in the firm's application for the purpose of claiming disadvantaged status must be present. During the on-site visit, the NHDOT representative will ask questions designed to clarify information contained in the application and ascertain if the applicant, the firm and facilities meet the standards for certification as required by 49 CFR 26, subpart D. During the on-site visit, the NHDOT representative may review a firm's financial, corporate, payroll and other records. US DOT regulation 49 CFR § 26.73 (c) states: "DBE firms and firms seeking DBE certification shall cooperate fully with NHDOT requests (and US DOT 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." A subsequent on-site visit may be necessary if the basis upon which the certification was granted has changed. In addition, on-site visits are conducted as a result of:

1. US DOT request .
2. Other states DBE certification agency requests.
3. Company changes affecting eligibility
4. Third-party written complaint
5. Changes in the firm's principle business activity

### Certification Decisions

Following the on-site visit, a report based on facts contained in the application, accompanying documents and the on-site visit report will be developed by the DBE Coordinator and a certification eligibility decision will be made. The DBE Coordinator may consult with the Chief of Labor Compliance for guidance when circumstances are warranted.

Firm's eligible for DBE certification shall be issued a DBE certification letter, including the scope of work the firm can perform as detailed in the firm's approved NAICS codes. NAICS Codes and specific descriptions are available online at <http://www.census.gov/eos/www/naics/>. DBE certification is limited to the scope of work as described by the approved NAICS codes. NAICS codes may be modified or added if there is a factual basis in the record to do so.

## NHDOT Eligibility Denial Process

If grounds for a determination of certification ineligibility are sufficient, the NHDOT DBE Coordinator will provide notice to the firm of Certification Denial. The Notice of Certification Denial will contain specific reasons for the decision and advises the applicant of its right to appeal to the USDOT.

**Firms denied DBE certification must wait twelve (12) months after the effective date of the final decision before reapplying for DBE certification.**

## Appeals to the USDOT

Applicants have ninety (90) days from the date of the Notice of Certification Denial to appeal to the USDOT. Should a currently certified DBE firm appeal to the USDOT; the denial will not become effective until a decision has been rendered by the USDOT. Firm's not currently certified by the NHDOT will remain uncertified pending the USDOT decision. The appeal letter to the USDOT must contain information and arguments on why the denial should be reversed.

Appeals should be mailed to:

**U.S. Department of Transportation  
Departmental Office of Civil Rights  
External Civil Rights Programs Division (S-33)  
1200 New Jersey Ave., S.E.  
Washington, DC 20590  
Phone: (202) 366-4754 TTY: (202) 366-9696  
Fax: (202) 366-5575**

## DBE Annual Renewal Obligations

To ensure certified DBE's continue to meet all qualifications as set forth in 49 CFR 26, the NHDOT requires certified DBE firms submit the following documents annually, during the month of their initial certification. The NHDOT will send notification of the annual renewal requirement and provide the appropriate forms and instructions for submission. The following forms are required annually:

1. Annual No Change Affidavit to be signed by the DBE principal owner (see attachment 4)
2. A certificate of Disadvantage and Personal Net Worth Statement
3. A copy of the firm's most recent tax return
4. A copy of their home current state certification (not required for NH firm's)

If the above mentioned forms are not completed and returned in a timely manner or, if information provided on the annual renewal forms indicate conditions that may effect a

firm's continued certification eligibility, the NHDOT DBE Coordinator may request additional information for clarification and/or may initiate proceedings for the NHDOT DBE certification removal process.

### DBE Recertification

DBE certifications are valid for a minimum of three (3) years. Annual DBE renewals must be completed in order to maintain DBE certification eligibility. DBE's shall be requested by the NHDOT to recertify approximately every seven (7) years. Failure to comply with annual renewal requests for information or recertification requests may result in the DBE's removal from the DBE program.

### NHDOT DBE Certification Removal and Appeal Process

The NHDOT may remove a certified DBE from eligibility in accordance with 49 CFR §26.87. Removal of eligibility to participate in the NHDOT DBE program may occur for any of the following reasons:

1. Notification by the firm that it no longer meets Federal regulations for DBE certification.
2. If the DBE's business entity has changed to the extent the business is no longer a small business concern.
3. If the socially and economically disadvantaged individual's status has been challenged by the NHDOT as a result of information received through the annual renewal submission requirements or, as a result of an investigation initiated by a complaint from a third party. If as a result of these inquiries the NHDOT has found the individual does not meet the definition of a "socially and economically disadvantaged individual" used in 49 CFR §§ 26.63, 26.67 and Appendix E, "Individual Determinations of Social and Economic Disadvantage," and that the firm is no longer owned and controlled at least 51 percent by a socially and economically disadvantaged individual(s).
4. If the firm's business entity has changed to the extent the business is no longer owned and controlled by socially and economically disadvantaged individual(s) as defined by the Federal regulation. For Federal-aid projects if the MUCP agency receives an order from the Office of the Secretary of Transportation, US DOT, to remove the eligibility of a DBE firm.
5. If an investigation uncovers evidence of violations of 49 CFR Part 26, with regard to the actual work performed by a DBE and the findings and conclusions show that the firm's ownership or control has changed to the extent that the firm is no longer eligible.

If grounds for removal of eligibility are sufficient, the firm notified by mail, with the reasons for the decision and advised of the opportunity for an informal hearing before



the NHDOT. The applicant has thirty (30) calendar days from the date of the delivery of the notice of intended removal of eligibility to file an appeal.

#### Intent to Remove Eligibility Hearing

The NHDOT DBE Coordinator will schedule a hearing within thirty (30) days of receipt of a request. The NHDOT Senior Hearings Examiner, whose office did not take part in the decision to remove the firm's eligibility and, is not subject to direction from the Office of Federal Compliance shall hold the hearing. At the hearing, reasons for the intended removal of eligibility will be discussed, either in person by the DBE, or through an administrative review on documents, if requested by the firm. The hearings examiner will receive evidence intended to show that certification eligibility should not be removed and will ask questions related to the intended removal of eligibility.

The NHDOT Hearings Examiner will only deliberate the findings of the Notice of Intent to Remove Eligibility, the certification file and the appealing firm's rebuttal of these findings. The Hearings Examiner will not consider any new developments/changes in the firm's organization, structure or operations that occurred after the date of the Notice of Intent to Remove Eligibility or any changes that were not documented in the certifying agency's file as of that same date. The Hearings Examiner will render a written decision based on his/her findings during the hearing, within sixty (60) calendar days after the conference.

The Hearings Examiners decision will determine whether the intended removal of eligibility will be sustained or overruled. The Hearings Examiners determination will have full force and effect.

If no written request for appeal is received as specified above, the intended determination to remove eligibility will become final and have full force and effect. Firms must wait twelve (12) months after the effective date of the final decision before reapplying for DBE certification with the NHDOT.

#### Appeals to the US DOT

Firms may appeal to the US DOT within ninety (90) calendar days of the date of the final decision. The appeal letter must contain information and arguments on why the removal of eligibility should be reversed. The NHDOT's decision remains in effect, pending the US DOT's decision in the matter. 49 CFR §26.89 describes the process for appeals to the US DOT. Send appeals to the following address:

**U.S. Department of Transportation  
Departmental Office of Civil Rights  
External Civil Rights Programs Division (S-33)  
1200 New Jersey Ave., S.E.  
Washington, DC 20590  
Phone: (202) 366-4754 TTY: (202) 366-9696 Fax: (202) 366-5575**

### Third Party Complaints

As provided by 49 CFR § 26.87, any person may file a written complaint alleging that a currently certified firm is in violation of DBE regulations. Information received about a DBE prior to the initial certification decision being made will be considered in the investigation of the application for certification.

The NHDOT is not required to accept a general allegation that a firm is ineligible or an anonymous complaint. Confidentiality of complainants' identities are protected to the extent provided in 49 CFR § 26.109(b).

1. The ineligibility complaint shall be filed with the department in writing no later than 180 days after the date of an alleged violation or the dates on which a continuing course of conduct in violation of this part was discovered. The department may extend the time for filing or waive the time limit in the interest of justice, specifying in writing, and reasons for so doing. The complainant shall include any information or arguments supporting their assertion that the DBE firm against whom the complaint is lodged is ineligible and should not continue to be certified.

The complainant must sign the complaint and give an address and telephone number where they may be reached during the investigation.

2. While the complaint is pending, the DBE against whom the complaint was lodged will remain eligible to participate in the DBE program.
3. The NHDOT will evaluate information available to it and may also request additional information from the DBE firm or conduct any other investigation deemed necessary.
  - A. A DBE will not have its eligibility removed based on a complaint without first having an opportunity to respond to the complaint.
  - B. Failure of the DBE to appear at a scheduled investigatory conference or to respond, if requested by the department, in writing, to the complaint within 30 calendar days of mailing may result in removal of eligibility.
4. The NHDOT will make a determination as to the eligibility of the DBE based on information received for the record. Both the complainant and the DBE will be notified in writing of the determination and the reasons for the determination. Notifications shall reference specific evidence in the record on which each reason is based. If the NHDOT intends to remove the DBE's eligibility to participate in the DBE program, the process for removal of eligibility shall be followed. If the NHDOT determines there is no reason to believe that the DBE against whom the complaint is filed is ineligible, the department will inform the challenging party in writing.

5. The complainant may request, in writing, a review of the decision before the DBE Coordinator. The request must be made within 30 calendar days of the date of written notification of the decision. If no request for review is submitted within thirty (30) calendar days, the decision is final.

If you are a complainant in an ineligibility complaint, you may appeal the determination to the US DOT pursuant to the procedures set forth in 49 CFR §26.89. If you want to file an appeal, you must send a letter to the US DOT within 90 days of the NHDOT's final decision, including information and arguments concerning why the NHDOT decision should be reversed. Pending US DOT's decision in the matter, the NHDOT decision remains in effect.

#### US DOT Directive to Remove a Firm's Eligibility

1. If US DOT believes the record provides reasonable cause to believe that a DBE certified by the department is not eligible, US DOT may direct the NHDOT to begin proceedings to remove the DBE's certification.
2. US DOT will provide the NHDOT and the DBE firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.
3. The NHDOT must immediately take steps to remove the DBE's certification eligibility. The US DOT will follow the process for removal of eligibility.

All participants in the DBE program, including contractors using DBE's to meet contract goals, are required to cooperate fully with NHDOT in a compliance or certification review, investigation or request for information. Failure to cooperate may result in a finding that the firm is not in compliance with the program procedures and appropriate action against the firm may be taken.

### **3. Commercially Useful Function**

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DBEs are required to perform a commercially useful function (CUF) on Federally-funded contracts. CUF requirements are included in 49 CFR § 26.55. Failure to perform a CUF can result in removal of eligibility to participate as a DBE if it is determined that the DBE owner(s) no longer meets certification standards for ownership or control. Prime contractors are also subject to sanction when DBEs do not perform a CUF on their Federally-funded projects.

A DBE does not perform a CUF if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. Such pass-through arrangements are in violation of Federal regulation and may result in removal of eligibility to participate as a DBE.

DBEs working, as participants in a joint venture must be responsible for a distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.

In order to provide a CUF, DBEs must:

1. Perform a bona fide service, such as professional, technical, consultant, or managerial services, or provide bonds or insurance specifically required for the performance of a US DOT-assisted contract, providing the fees are reasonable and not excessive as compared with fees customarily allowed for similar services.
2. Perform all their contracted work items with the DBEs own managers, supervisors, foreman, workers, materials and equipment. Use of another contractor's supervisors, managers, foremen, workers, materials, or equipment to do work contracted or subcontracted to the DBE is in violation of CUF requirements.
3. Be paid for their work as agreed upon in their contract.
4. Do their work according to normal industry practice, except where such practices violate DBE regulations outlined in 49 CFR Part 26.

Detail regarding performance of a CUF is provided below:

#### DBEs Management

Management includes scheduling work operations, ordering and paying for equipment and materials necessary to do the contract, preparing and submitting payrolls and all other required reports and forms and hiring and firing of employees, including supervisory employees.

1. The DBE must supervise the daily operations of the work contracted.
2. The DBE owner may act as superintendent and directly supervise the work, or a skilled and knowledgeable superintendent who is a regular employee of the DBE must directly supervise the work. If the latter is used, the DBE owner must be actively involved in making operational and managerial decisions of the firm.
3. All administrative functions must be done by personnel responsible to or employed by the DBE at facilities or locations under the control of the DBE.

#### DBEs Work Force

The DBE must supervise and perform contract work with workers on its payroll and under the direct supervision of the DBE owner(s) or a superintendent of the DBE who is a regular employee, consistent with normal industry practice.

1. The DBE or his/her superintendent must, on a full-time basis, supervise and control the work of the contract.
2. The majority of the DBE's workforce and his or her superintendent/foreman must be regular employees of the DBE.

### DBEs Equipment

DBEs may lease equipment consistent with standard industry practice.

1. It is not acceptable to bid a project based on a "labor and materials only" basis. The DBE must either own or lease equipment used to do its work. The cost of equipment leased from the prime or an affiliate of the prime may not be counted toward DBE participation goals.
2. A DBE must submit lease agreements for all equipment leased. Lease/rental agreements must be separate from the subcontract and must specify the terms of the lease arrangement. Operation of leased/rented equipment should be subject to the full control of the DBE.

If the equipment is of a specialized nature, the lease may include the operator. If this practice is generally acceptable within the industry, the operator can remain on the lessor's payroll. Such an arrangement should be for a short-term and involve a specialized piece of heavy equipment readily available at the job site.

For equipment that is not specialized, the DBE is expected to provide the operator and all payroll and labor compliance requirements.

3. A DBE may not pay for rented or leased equipment by having the payment deducted from the prime contractor's payment(s) to the DBE for work done.

**Note:** DBE may not use equipment belonging to another contractor without having a formal lease agreement for the equipment.

### Materials

The DBE must 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.

1. Invoices for materials used in the DBEs work should be invoiced to the DBE firm and not to the prime contractor. The department will periodically review invoices for materials to ensure compliance.

2. The cost of materials and supplies the DBE subcontractor purchases from the prime contractor or its affiliate may not be counted toward DBE participation goals.
3. The NHDOT does not allow the use of Joint Checks for the purchase of materials, supplies or any other purpose.

### Trucking Operations

The DBE must be responsible for the management and supervision of the entire trucking operation on a particular contract and there cannot be a contrived arrangement for the purpose of meeting DBE goals. The following rules must be observed:

1. The DBE must own and operate at least one fully licensed, insured and operational truck used on the contract.
2. 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.
3. 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.
4. The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit for the total value of the transportation services provided by non-DBE lessees not to exceed the value of transportation services provided by DBE-owned trucks on the contract.

Example to this paragraph (d)(5): DBE Firm X uses two of its own trucks on a contract. It leases two trucks from DBE Firm Y and six trucks from non-DBE Firm Z. DBE credit would be awarded for the total value of transportation services provided for the four trucks owned by DBE Firms X and Firm Y. Credit not to exceed the dollar value of services provided by the DBE truckers may also be awarded for four of the six trucks provided by non-DBE Firm Z. In all, full credit would be allowed for the participation of eight trucks. With respect to the other two trucks provided by Firm Z, DBE credit could be awarded only for the fees or commissions pertaining to those trucks Firm X receives as a result of the lease with Firm Z.

For purposes of this paragraph (d), a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck.

## Commercially Useful Function Reviews and Outcomes

The NHDOT Contract Administrators/Engineers or Consultants with project oversight shall perform a CUF review for each DBE, on every Federally-assisted project, at least once during the life of the project. This information shall be kept onsite for review by the NHDOT Office of Federal Compliance Review Officers. The Compliance Review Officers shall, when feasible, conduct more detailed CUF reviews to ensure that DBEs are performing a CUF.

Investigations are done on DBE firms suspected of not performing a CUF as a result of field monitoring or based on receipt of a third-party complaint. Investigations showing a DBE may not have complied with all CUF requirements on a project(s) may result in the firm being called in for a conference with the NHDOT Office of Federal Compliance to discuss the alleged violation(s).

Non-attendance to a conference may result in the removal of certification for failure to cooperate. Following the CUF conference, the DBE Coordinator will review information received and make a determination regarding the DBE firm's compliance with the Federal regulations. Firms are notified in writing of the determination. Determinations include:

1. No violation(s) of Federal regulations found.
2. Minor violation(s) of Federal regulations will result in the firm being cited and warned that future violations may result in removal of eligibility to participate as a DBE. The cited firm is subject to increased field monitoring of the firm's projects.
3. The department may remove work classifications related to CUF violations. Firms do not have the right to appeal removed work classifications.
4. The NHDOT may remove a firm's eligibility to participate as a DBE, if it is determined that violations occurred on more than one project; and that these violations indicate a lack of independence or control of the DBE firm or disadvantaged owner.
5. One major violation showing willful intent to subvert the Federal regulations may result in removal of firm's eligibility to participate as a DBE.

Further information on removal of a DBE's eligibility may be found in 49 CFR §26.87.

Prime contractors are responsible for their subcontractors. When DBE certified firms are determined to have violated federal regulations by failing to perform a CUF, prime contractors are notified in writing and given the opportunity to provide explanation. Prime contractors who are unable to show compliance with Federal regulations or who knowingly participated or allowed the CUF violation to occur are subject to a variety of sanctions. Sanctions are based on the severity of the violation and may include:

1. The prime will be determined to have a deficiency in DBE participation corresponding to the dollar value of the DBE's work that did not meet Federal regulations.
2. The NHDOT's Prequalification Committee will be notified of the prime's DBE participation and may affect their prequalification status.
3. Referral to the NH Office of the Attorney General for investigation.

### **Counting DBE participation**

Allowable credit for payments made to DBEs for work performed. A contractor may take credit for payments made to a certified DBE that satisfies CUF requirements at the following rate. A DBE Prime Contractor; count 100% of the value of work performed by own forces, equipment and materials count towards DBE goals.

1. An approved DBE subcontractor; count 100% of the value of work performed by the DBE's own forces, equipment and materials, excluding the following:
  - A. The cost of materials/supplies purchased from a non-DBE Prime Contractor.
  - B. The value of work provided by non-DBE lower tier subcontractors, including non-DBE trucking to deliver asphalt to a DBE contractor.
2. A DBE owner-operator of construction equipment; count 100% of expenditures committed.
3. A DBE manufacturer; count 100% of expenditures committed. The manufacturer must be a firm that operates or maintains a factory or establishment that produces on the premises the materials or supplies obtained by the Contractor.
4. A regular DBE dealer/supplier; count 60% of expenditures committed.
5. A regular dealer/supplier is defined as a firm that owns, operates, or maintains a store, warehouse or other establishment, in which the materials or supplies required for the performance of the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. A person may be a dealer in such bulk items as petroleum products, steel, cement, gravel, stone or asphalt without owning, operating or maintaining a place of business, if the person both owns and operates distribution equipment for the products, by the means of a long term agreement, and not by a contract by contract basis.
6. A DBE Broker; count for DBE credit only the fees or commissions charged for assistance in the procurement, and, fees and transportation charges for the delivery



of materials or supplies required at the job site, but not the cost of materials procured.

7. A broker is defined as any person(s) or firm who arranges or expedites transactions for materials or supplies, and does not take physical possession of the materials or supplies at their place of business for resale.
8. A DBE renter of construction equipment to a contractor; count 20% of expenditures committed, with or without operator.
9. A bona fide DBE service provider; count 100% of reasonable fees or commissions.
10. Eligible services include professional, technical, consultant, or managerial, services and assistance in the procurement of essential personnel, facilities, equipment, materials or supplies required for the performance of the contract.
11. Eligible services also include agencies providing bonding and insurance specifically required for the performance of the contract.
12. A trucking, hauling or delivery operation, count 100% of expenditures committed when trucks are owned, operated, licensed and insured by the DBE and used on the contract and, if applicable, includes the cost of the materials and supplies. 100% of expenditures committed when the DBE leases trucks from another DBE firm including an owner-operator. 100% of reasonable fees, or commissions, the DBE receives as a result of a lease arrangement for trucks from a non-DBE, including an owner-operator.
13. Any combination of the above.

#### **4. DBE Program Goals**

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The FHWA has adopted a Three-year DBE goal setting methodology. Requiring the submission of the DOT FHWA goals at staggered three-year intervals, the NHDOT shall submit their DBE Goal for FY 2012-2014 by August 1<sup>st</sup>, 2011 and at three-year intervals thereafter.

By June 15<sup>th</sup> of 2011, and at three year intervals thereafter, the NHDOT will publish a notice of the proposed overall DBE goal, informing the public that the proposed DBE goal and its rationale are available for inspection during normal business hours at the Office of Federal Compliance in the John O. Morton Building, Concord, NH. and by contacting the NHDOT DBE Coordinator at 603-271-6612. The proposed DBE goal will be available for public review and comment for a period of 30 days following the date of the notice. The NHDOT will publish the notice in the only statewide newspaper: *The New Hampshire Sunday News*.

Our overall DBE goal submission to the USDOT will include a summary of information and comments received, if available, during this public participation process and our responses. The NHDOT will begin implementing our overall DBE goal on October 1st of each year, unless otherwise directed by the USDOT.

Before establishing the overall goal, the NHDOT will solicit input from DBEs, general contractor groups, community and minority organizations, and other Federal and State officials or organizations to obtain information concerning the availability of disadvantaged and non-disadvantaged businesses.

The following is a list of some of the organizations the NHDOT will contact:

- The Associated General Contractors,
- The New Hampshire Health and Human Services/Economic Services,
- The International Institute of New Hampshire multi-cultural Center for Refugees,
- The Office for Minority Health and Refugee Affairs,
- The New Hampshire Department of Education/Sex Equity,
- The New Hampshire Job Training Council

### **FHWA DBE Goal FY 2011**

The following DBE Goal was established for FY 2010. The established DBE Goal was extended and utilized in FY 2011 due to the change in submission requirements by FHWA.

The methodology used to establish the current NHDOT FY 2011 DBE goal will be the same for its future DBE goal setting procedures.

The NHDOT intends to expend 4.0% of the amounts received under the Transportation Equity Act for the 21st Century or any subsequently enacted Federal laws, with small business concerns owned and controlled by socially and economically disadvantaged individuals. It is the intent of NHDOT that this expenditure is obtained (to the extent practicable), through a race and gender- neutral program.

Note: The NHDOT will continue to determine the DBE program overall goal for each fiscal year for NHDOT informational purposes only. As allowed under current FHWA rules, the NHDOT may make a mid-cycle adjustment to its methodology if changes in circumstances that have a significant impact on the established goals are experienced. Any mid-cycle adjustment may not take effect until approved by the FHWA.

### **Method of Attainment**

The NHDOT will calculate the overall goal using the criteria based in 49 CFR § 26.45. The determination will be based on a level of DBE participation relative to all businesses

ready, willing and able to participate on Federally assisted contracts, and reflect a level of participation expected in the absence of discrimination. The overall goal setting procedure is based on the following:

#### Step 1: Base Figure

In determining the DBE goal for FY 2010, NHDOT identified all subcontractors (DBE and non DBE) that provided bids or quotes to active prime contractors pursuant to any advertised Federal-aid project during the 2008 calendar year.

NHDOT further determined the number of all businesses that have bid or quoted on Federally assisted contracts as prime contractors. With this information, NHDOT was able to determine the availability of ready, willing and able DBE's relative to all businesses ready, willing and able to participate on Federally-assisted contracts. The table below identifies the base figure or "Total Percentage" of participation expected based on the relative availability of DBEs.

All business that have bid or quote	358
DBE's that have bid or quoted	14
<b>Total Percentage</b>	<b>3.91%</b>

After considering the following adjustment bases, the NHDOT determined a **final goal of 4.0%** for FY 2010. Due to subsequent changes in the annual goal setting process, the 2010 DBE goal was also utilized for FY 2011.

#### Step 2: Adjustment to Base Figure

The Department assessed during the 2008 calendar year there was a decrease in the number of FHWA construction projects advertised by the NHDOT. This created the low base figure compared to past years number of highway construction contractors that submit bids and quotes. There are no additional steps needed to adjust the base figure in order to narrowly tailor the DBE Program.

#### Breakout of Estimated Race-Neutral and Race-Conscious Participation

The NHDOT estimates that, in meeting our overall goal of 4.0 %, NHDOT will obtain 3.0% from race-neutral participation and 1 % through race-conscious measures.

#### **FAA DBE Goal FY 2011**

The FAA has adopted a Three-year DBE goal setting methodology. Requiring the submission of the DOT FAA goals at staggered three-year intervals, the NHDOT shall

submit their first FAA DBE Goal for FY 2012-2014 by August 1<sup>st</sup>, 2011 and at three-year intervals thereafter.

NHDOT, through its Division of Aeronautics, does not anticipate receiving grants for airport planning and development in excess of \$250,000 in FY 2011, therefore, will not be required to submit an updated DBE program for FY 2011. The Division of Aeronautics does however, anticipate some Federal funding of NHDOT assisted contracts. In these instances, the Division of Aeronautics intends to expend 4.0% of the amounts received under the Transportation Equity Act for the 21st Century or any subsequently enacted Federal laws, with small business concerns owned and controlled by socially and economically disadvantaged individuals. It is the intent of the Division of Aeronautics that this expenditure be obtained (to the extent practicable), through a race and gender neutral program.

#### Method of Attainment

The conventional services included in FAA contracting opportunities within the State are comparable to most NHDOT Federally-funded contracts for maintenance and construction of State highways and utilize the same contractors and DBEs. Due to the limited amount of anticipated Federal funding in FY 2011, the Division of Aeronautics has chosen to adopt the NHDOT FHWA DBE goal of 4%, for Federally-assisted FAA projects for FY 2011.

#### **FTA DBE Goal for FY 2011-2013**

Pursuant to the USDOT's Rule Change to Three-Year DBE Goal Setting Methodology. The following FTA DBE goal is effective for FY 2011-2013.

NHDOT, through its Bureau of Rail and Transit, intends to expend 2.5% of the amounts received from Federal financial assistance that is conducive to contracting on DOT-assisted contracts for Sections 5311, 5316 and 5317, with small business concerns owned and controlled by socially and economically disadvantaged individuals (DBEs).

It is the intent that this expenditure be obtained to the extent practicable, through a race and gender-neutral program (see 49 CFR § 26.5 for definitions).

Federal Financial assistance for Sections 5303/5304 consolidated planning funds is not conducive to contracting. Section 5307 is direct recipient funds and Section 5310 is rolling stock for vehicles and is also not conducive to contracting. Section 5309 funding is not slated for construction to begin in fiscal years 2011 to 2013, and rolling stock for vehicles, offers no opportunities for contracting.

## Method Of Attainment

NHDOT will calculate the overall goal using the criteria based in 49 CFR § 26.45. The determination will be based on a level of DBE participation relative to all businesses ready, willing and able to participate on Federally assisted contracts, and reflect a level NHDOT would expect in the absence of discrimination. The overall goal setting procedure is based on the following:

### Step 1: Base Figure

**Service Area:** The DBE goal for monies received by the Bureau of Rail and Transit was established using guidelines published in the Federal Register by first determining the service areas and then calculating the DBE goal from that area. The service area was determined to be Statewide.

**Data Sources:** The DBE goal was found by determining the number of businesses listed by the 2008 US Census Bureau in the County Business Pattern and filtered for firms in the North American Industry Classification System (NAICS) Sub sectors, and other items.

- 453210 – Office Supplies
- 441310 – Automotive Parts & Accessories
- 423420 – Office Equipment
- 423430 – Computer Equipment/Software
- 32311 - Printing and Related Support Activities
- 81233 - Personal and Laundry Services
- 541810 - Advertising Agencies
- 811212 – Computer/Office Machine Repair & Maintenance
- 339950 – Sign Manufacturing
- 441320 – Tire Dealers

These numbers become the denominator. The numerator was found by determining the number of current ready, willing and able businesses that are DBEs on file with the State of New Hampshire.

$$\frac{\text{Formula (5309, 5311 \& 5316) DBE (22)}}{\text{CBP (825)}} = 2.67\%$$

### Step 2: Adjustment to Base Figure

The Department assessed the impact of specific factors requiring narrow tailoring of the DBE Program.

The overall goal was adjusted based on the following information:

1. Historical & Current Capacity to Perform Work - The average DBE goal attainment for the past three years has been 3.11%. However, during this period there were contracting opportunities for transportation consultants, design engineering firms and highway construction projects. In FY 2011-2013 there are no apparent contracting opportunities in these areas where there is a greater concentration of ready, willing and able DBEs. Despite best efforts in promoting the DBE program through the Department's supportive services contract, we anticipate that this factor will continue to negatively impact the apparent level of attainable DBE participation.
2. Currently, NHDOT has twenty-two ready and willing DBEs for Sections 5309, 5311 and 5316 that can fulfill administrative and operational contracting requirements: transit advertising and marketing services (5), office product suppliers (5), printing services (3), computer equipment suppliers (3), sign suppliers and installers (4), automotive accessories (1), and administrative services (1).

By applying the respective percentages calculated in the base figure (Step 1), an accurate level of anticipated DBE participation was derived.

Considering the base figure from Step 1 and the impacts from Step 2, NHDOT, through its Bureau of Rail and Transit, has selected an overall annual **DBE goal of 2.5% for Fiscal Years 2011-2013**. The NHDOT will obtain its goal through race and gender-neutral participation.

Should our contracting opportunities unexpectedly increase, decrease, or significantly change during the three year period such that the submitted goal is rendered obsolete, the NH DOT will appropriately amend both the goal and DBE contracting practices in order to ensure the goal and program as a whole is narrowly tailored and accurately reflects the actual contracting opportunities available during the specified time period. Mid-cycle adjustments may not take effect until approved by the FTA.

NHDOT will publish a notice of the proposed overall goal, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at the Office of Federal Compliance in the John O. Morton Building, Concord, NH for 30 days following the date of the notice, and informing the public that NHDOT will accept comments on the goals for 45 days from the date of the notice. The NHDOT will issue this notice by September 26, 2010. The notice must include addresses to which comments may be sent and addresses (including offices and websites) where the proposal may be reviewed. NHDOT will publish the notice in the only statewide newspaper, Manchester's Union Leader.

## **5. Means to Meet the Overall Goals**

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It is the intent of the NHDOT that DBE participation is obtained, to the extent practicable, through a race and gender-neutral program.

### Race/Gender-Neutral

Pursuant to 49 CFR § 26.51, the NHDOT will meet the maximum feasible portion of its overall goal by using race/gender-neutral means of facilitating DBE participation. The NHDOT has determined that race-neutral means will include:

- Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE, and other small businesses participation;
- Notifying Prime Contractors of current DBE availability, the DBEs scope of services and arranging interviews/introductions when necessary;
- Providing assistance in overcoming limitations such as inability to obtain bonding;
- Providing technical assistance and other services;
- Carrying out information and communications programs on contracting procedures and specific opportunities;
- Identifying other state agencies which provide services to increase DBE bidding and contracting opportunities;
- Providing services to help DBEs improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;
- Ensuring availability of the NHDOT DBE directory at [www.nh.gov/dot](http://www.nh.gov/dot) ; and
- Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

Each time the NHDOT submits its overall goal for review and approval by the USDOT, the NHDOT will also submit the portion of the overall goal that is expected to be met through race/gender-neutral means, and the basis for that position. If the NHDOT finds that it is not achieving the projected DBE participation through race-neutral means, which would result in the Department not meeting its overall goal, the NHDOT will apply race-conscious means (contract goals).

### Race/Gender-Conscious

Race/Gender-Conscious measures will be in the form of specified contract goals. Contract goals will be used so that, over the period to which the overall goal applies, they will cumulatively result in meeting any portion of the overall goal that is not projected to be met through race/gender-neutral means. The NHDOT will adjust the estimated breakout of race/gender-neutral and race/gender-conscious participation as

needed to reflect actual DBE participation by race/gender-neutral means. That is, if actual race/gender-neutral participation exceeds projected race/gender-neutral participation, the NHDOT will reduce its use of race/gender-conscious means. Conversely, if actual race/gender-neutral participation falls short of projected race/gender-neutral participation, the NHDOT will increase its usage of race/gender-conscious means, however, only as necessary to achieve its overall goal. Race/gender-neutral and race/gender-conscious participation will be monitored and reported separately.

The following provisions apply to the use of race/gender-conscious contract goals:

- The NHDOT may include specific contract goals in certain cases to ensure DBE participation, if failure to obtain the individual project DBE goal would negatively impact the NHDOT's overall DBE goal because of the size of the contract.
- The NHDOT will use contract goals only on those Federally-funded contracts that have subcontracting possibilities; and
- The goal for a specific contract may be higher or lower than the percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. However, over the period covered by NHDOT's overall goal, the NHDOT will set contract goals so that they will cumulatively result in meeting any portion of NHDOT's overall goal not obtainable through the use of race/gender-neutral means.

#### Procedures for Contracts with Specified DBE Contract Goals

When the NHDOT has established a specific DBE contract goal, the contract will be awarded only to an apparent low bidder who makes good faith efforts to meet it. The NHDOT must determine that the apparent low bidder has done the following:

- Documents that it has obtained sufficient DBE participation to meet the goal by submitting a complete DBE Commitment form and letters of intent for each DBE firm listed, within 3 working days of the bid opening, which must detail sufficient DBE participation to attain the stated DBE project goal, or:
- Documents that it made adequate good faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so. If the apparent low bidder does document adequate good faith efforts, the NHDOT must not deny award of the contract, or find the apparent low bidder to be in non-compliance, on the basis that the apparent low bidder failed to meet the contract goal.

#### Demonstration of Good Faith Efforts

The NHDOT treats the apparent low bidder compliance with good faith efforts requirements as a matter of responsiveness. Each solicitation, for which a contract goal has been established, will require the apparent low bidder to submit the following



information to the NHDOT Bureau of Contracts within three days after the bid opening date.

1. A completed and signed NHDOT DBE Program Commitment Form. (see attachment 5)
2. Letter's of Intent, completed and signed by each DBE firm listed on the DBE Commitment Form. (see attachment 5)
3. If a percentage of the contract goal is not met through DBE utilization, evidence of good faith efforts to meet that percentage of the contract. Required good faith effort documentation is detailed in the following. (see attachment 6)

Failure to provide proper documentation confirming proposed DBE utilization and/or adequate good faith effort to meet the specified DBE goal may result in the bidder being disqualified, and the contract awarded to the next apparent low bidder who satisfies the required DBE criteria.

If at any time during the life of the contract it is determined that the Prime Contractor is not fulfilling the required DBE goals, the NHDOT may request evidence of the Prime Contractor's good faith efforts in securing DBE participation. The NHDOT will review the information provided and make a good faith determination. If it is determined the Prime Contractor has not made sufficient good faith efforts, the NHDOT DBE Special Attention, inserted into all Federally-funded contracts for Road and Bridge Construction, lists the contract remedies available to NHDOT in the events of non-compliance with the DBE regulation by a participant. (see attachment 7)

#### DBE Replacement on Federal-Assisted Contracts

In accordance to 49 CFR 26.53, contractors may not terminate for convenience, any approved DBE subcontractor and perform the work with their own forces or that of an affiliate, without prior written consent from the NHDOT DBE Coordinator. The NHDOT will require the Prime Contractor to notify the NHDOT CA/Engineer, Consultant (if applicable), Compliance Review Officer and DBE Coordinator immediately of the DBE's inability or unwillingness to perform, and provide reasonable documentation. The NHDOT CA/Engineer, Consultant (if applicable) Compliance Review Officer and DBE Coordinator must be informed of this process as it is initiated by the contractor. The NHDOT will require the Prime Contractor to make good faith efforts to replace a DBE that is terminated or has otherwise failed to complete its work on a contract with another certified DBE, to the extent needed to meet the contract goal.

In this situation, the NHDOT will require the Prime Contractor to obtain NHDOT prior approval of the substitute DBE and to provide copies of new or amended subcontracts, or documentation of good faith efforts. The NHDOT DBE Special Attention, inserted into all Federally-funded contracts for Road and Bridge Construction, lists the contract

remedies available to NHDOT in the events of non-compliance with the DBE regulation by a participant. (see attachment 7)

## **6. DBE Program Personnel Responsibilities**

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The NHDOT Chief of Labor Compliance directs the Office of Federal Compliance and is the designated DBE Liaison Officer (DBELO) and has direct, independent access to the NHDOT Commissioner concerning DBE program matters. The NHDOT DBELO is responsible for oversight, administration and implementation of all aspects of the NHDOT DBE program. Duties and responsibilities include, but are not limited to:

1. Providing guidance and oversight to the DBE Coordinator, Compliance Review Officers and Program Assistant, on implementing all aspects of the NHDOT's DBE Program.
2. Advising the NHDOT Commissioner and Directors on DBE matters and achievements.
3. Consulting with FHWA to ensure DBE program compliance, obtain program guidance or rules interpretations, as needed and ensure proper Federal reporting.
4. Consulting with the legal counsel and Director of Project Development to determine contractor compliance with good faith efforts.
5. Consulting with Prime Contractor and Department personnel to resolve DBE contract performance problems.
6. Identify contracts and procurements so that DBE goals are included in solicitations and monitor results.
7. Oversight of the DBE certification and re-certification process.
8. Reviewing the DBE Goal methodology and overall DBE annual goals.

### **DBE Coordinator Responsibilities**

The DBE Coordinator reports to the DBELO and is responsible for daily administration, oversight and function of the DBE program. The DBE Coordinator must manage DBE program components related to certification, program goals, and oversight of contracted DBE project work through NHDOT and prime contractors. Other duties include but are not limited to:

1. Certify and recertify DBEs according to the criteria set by the USDOT.
2. Conduct on-site reviews of DBEs for certification requests.

3. Maintain the NHDOT's DBE Directory and make available online.
4. Maintain and update the NHDOT DBE website, DBE forms and information.
5. Set overall DBE goals according to the US DOT and DBELO's guidance.
6. Confer with project engineers to set individual project goals as necessary, review and perform stated DBE specified goal procedures, investigations and determinations.
7. Perform CUF reviews and make CUF determinations.
8. Perform prompt pay reviews, investigate prompt pay complaints.
9. Respond to requests for information from USDOT or other certifying agencies regarding DBEs.
10. Gather and report statistical data and other information as required by the USDOT.
11. Provide outreach to DBEs, ensure prime contractors are aware of DBE capabilities and make efforts to utilize the DBE workforce.
12. Promote the DBE Program through presentations to potential DBEs, community based organizations, and other Federal agencies.
13. Recruit firms to participate in the DBE Program.

#### Compliance Review Officer Responsibilities

Compliance Review Officers have general oversight of Federally-assisted projects with respect to FHWA compliance and EEO issues. In addition, they provide assistance to the DBE coordinator by monitoring and enforcing DBE rules and regulations. The Compliance Review Officer does the following:

1. Performs in-depth DBE CUF reviews when on-site, to include reviews of DBE management, personnel, equipment, contracts and activities. Places these CUF reports in project file, reports irregularities to Contract Administrator (CA)/Engineer or Consultant with project oversight and to the DBE Coordinator for proper follow-up and investigation.
2. Reviews DBE utilization to ensure DBE contractual obligations are being fulfilled.

## Contract Administrators/Engineer or Consultant Responsibilities

NHDOT CA's, Engineers or Hired Consultants with daily project oversight must perform a modified CUF review form (see attachment 8) for every DBE contracted to work on their Federally-assisted project, at least once during the life of each project. Records of these reviews must be kept at the construction site office. Reports of CUF issues necessitating investigation and follow-up must be forwarded to the DBE Coordinator for proper review and follow-up.

## **7. Required Contract Provisions**

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### Nondiscrimination Assurances

49 CFR 26.13 states each financial assistance agreement the NHDOT signs with a USDOT operating administration (or a primary recipient) will include the following assurance:

*The NHDOT shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any Federally assisted contract or in the administration of its DBE Program or the requirements of 49 CFR § 26. The recipient shall take all-necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of Federally-assisted contracts. The NHDOT's DBE program, as required by 49 CFR § 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 NHDOT of its failure to carry out its approved program, the USDOT may impose sanctions as provided for under part 26 and may, in appropriate cases, refer the matter for enforcement under 18 USC. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 USC. 3801 et seq.).*

Each contract signed by the NHDOT with a contractor (**and each subcontract the prime contractor signs with a subcontractor**) will include the following assurance:

*The contractor, sub-recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR § 26 in the award and administration of Federally-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 NHDOT deems appropriate.*

## Prompt Payment

**\*\*\*This prompt payment specification is pending final review and approval from the NHDOT Spec. Committee\*\*\***

The NHDOT has established the following Prompt Payment Specification and is included in every Federally-assisted contract.

### **109.09 Prompt Payment to Subcontractors.**

The Prime Contractor shall pay all subcontractors for the work performed no later than 21 calendar days from the date the Prime Contractor received payment from the Department for said work, including materials in accordance with 109.07 and/or 109.08 paid for in the progress payments. Subcontractors, at any tier, are required to pay their subcontractors and/or material suppliers, within 21 calendar days from the date they receive payment for satisfactory work performed or supplies received. This Prompt Pay requirement shall be made part of all subcontracts and agreements.

If the Prime Contractor believes that any portion of the payment should be withheld from the subcontractor, the Prime Contractor shall notify the NHDOT Contract Administrator, or Resident Engineer, in writing, prior to the estimate being processed. The NHDOT Office of Federal Compliance shall be made part of this notification. The NHDOT may withhold payment for the portion of work in dispute pending resolution.

This prompt payment provision is a requirement of 49 CFR 26.29 and does not confer third-party beneficiary right or other direct right to a subcontractor against the Department. This provision applies to both DBE and non-DBE subcontractors.

**A. Satisfactory Completion.** Progress and Partial payments for contract work are made based on this assessment; and satisfactory completion is defined for purposes of this prompt payment provision as:

1. Upon review, the Engineer finds the work completed in accordance with the contract, plans and specifications, and;
2. Required paperwork, for Progress and Partial payments, including material certifications and payrolls, have been received.

The determination of whether work meets the standards of satisfactory completion is the responsibility of the Engineer. If the subcontractor becomes insolvent after satisfactory completion of its obligations but before payment is due, the obligation to pay is not extinguished.

The prime Contractor must include in all subcontract agreements notices to subcontractors of their right to prompt payment, and of the Department's prohibiting prime Contractors from holding retainage from subcontractors under 49 CFR 26.29.

Failure of a Contractor to comply with these prompt payment provisions may result in sanctions. Sanctions may include, but not limited to, withholding of estimates on projects where prompt payment violations are confirmed, changes in pre-qualification status, and or/withdrawal of bidding privileges.

**B. Non-Payment Claims.** All notifications of failure to meet prompt payment provisions shall be referred by subcontractors to the prime Contractor. Notifications must be made in writing with a copy to the respective NHDOT Federal Compliance Officer and contract administrator/resident engineer. The prime Contractor must respond, in writing, to the subcontractor with a copy sent to the respective NHDOT Federal Compliance Officer and contract administrator/resident engineer, within 7 calendar days of receipt of the notification of failure to meet prompt payment provisions. Failure of the prime Contractor to respond may result in sanctions. The subcontractor is responsible for notifying the NHDOT Federal Compliance Officer, in writing, anytime a prime Contractor has not complied with these provisions.

**C. Prompt Payment Verifications.** The NHDOT Office of Federal Compliance may, at their discretion, perform prompt payment verifications to ensure compliance with this section.

**Monthly Payment Certifications.** When a contractor is found to be in violation of this special provision and evidence suggests a pattern of violations, NHDOT Office of Federal Compliance shall, at their discretion, require the submission of monthly payment certifications. These steps are outlined in the Department's written Prompt Payment Enforcement Process.

## **8. Information Collecting and Reporting**

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### Bidders List

Per 49 CFR 26.11 The NHDOT collects the required data for a bidders list from all bidders by conducting surveys that will result in a statistically sound estimate of the universe of DBE and non-DBE contractors and subcontractors who seek to perform work on Federal-aid construction projects in New Hampshire. This information is vital to the calculation of the NHDOT overall DBE goal.

The NHDOT will create a bidders list, consisting of information about all DBE and non-DBE firms that bid or quote on Federally-assisted contracts. The bidders list must include:

- Company name;
- Company address;
- Company's status as a DBE or non-DBE;
- The age of the company;
- The annual gross receipts of the company; and
- Type of work performed.

The NHDOT will collect this information in the following ways:

- The prime contractors list information will be obtained through the NHDOT Contract Office.
- The bidders list information will be obtained utilizing direct mailings to prime and subcontractors.

#### Monitoring and Enforcement Mechanism

Per 49 CFR 26.37 The NHDOT will notify the USDOT of any false, fraudulent, or dishonest conduct in connection with the program, so that USDOT can take the steps (e.g., referral to the U.S. Department of Justice for criminal prosecution, referral to the USDOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in 26.107. The NHDOT also will consider similar action under its own legal authorities, including termination of the contract of such remedy as the NHDOT deems appropriate.

The NHDOT Standard Specifications for Road and Bridge Construction- Amendment to Section 103.06- DBE Program Requirements, (see attachment 9), lists the contract remedies available to the NHDOT in the event of non-compliance with the DBE regulation by a participant in our procurement activities.

In addition to regular monitoring of DBE participation on the project site by the Contract Administrator, monthly field visits will be conducted by a Compliance Review Officer to inspect the participation of DBEs to fulfill DBE participation requirements on projects with contract goals. Interviews will be conducted with supervisors, and employees of the prime contractor and subcontractors.

For prequalifications-based selection projects with DBE goal requirements, the consultants will submit a list of DBE firms intended to be used on the project with the Letter of Interest. Upon completion of the selection process, the successful consultant will have 15 days from the notice of selection to submit executed subcontract agreements identifying the type of work and its value. These agreements will be reviewed for compliance with the State and Federal laws and with the DBE Program Plan.

### Reporting to the USDOT

Per 49 CFR 26.11 The NHDOT will report DBE awards or commitments and payments biannually using the Uniform Report of DBE Awards or Commitments and Payments. The report due June 1 will cover data from October 1 – March 31 and the report due December 1 will cover data from April 1 – September 30. All dollar amounts reported reflect the Federal share of such contracts. The NHDOT will report separately the dollar amount awarded to certified DBEs through the use of race/gender-conscious methods and race-neutral methods.

### Record Keeping

The NHDOT will maintain records of committed DBE goals and actual payments by contract. Information relating to basic program data will be retained for a minimum of three years. Prime contractors are also required to maintain record and documents of payments to DBEs three years following the performance of the contract. These records will be made available for inspection upon request by any authorized representative of the NHDOT or USDOT.

### Confidentiality

Notwithstanding any provision of Federal or state law, the NHDOT will not release information that may be reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting documentation. However, The NHDOT must transmit this information to USDOT in any certification appeal proceeding under §26.89 in which the disadvantaged status of the individual is in question, or to any other state to which the individual's firm has applied for certification.



## **Attachment 1: Definition of Terms**

**Affiliation** has the same meaning as referenced in the Small Business Administration (SBA) regulations, 13 CFR § 121.

- 1) Except as otherwise provided in 13 CFR § 121, concerns are affiliates of each other when, either directly or indirectly:
  - (i) One concern controls or has the power to control the other; or
  - (ii) A third party or parties controls or has the power to control both; or
  - (iii) An identity of interest between or among parties exists such that affiliation may be found.
  
- 2) In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

**Alaska Native** means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

**Alaska Native Corporation (ANC)** means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, et seq.).

**Compliance** means that a recipient has correctly implemented the requirements of this part.

**Contract** means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them. For purposes of this part, a lease is considered a contract.

**Contractor** means one who participates, through a contract or subcontract (at any tier), in a Federally-assisted highway, transit, or airport program.

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

**Disadvantaged Business Enterprise or DBE** means a for-profit small business concern –

- 1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and
- 2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

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

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

**Immediate Family Member** means father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, or father-in-law.

**Indian Tribe** means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. See definition of “tribally-owned concern” in this section.

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

**NAICS Code** refers to the six digit code which best describes the primary business of a firm. These codes and the attached business descriptions are available in the North American Industrial Classification System (NAICS), which are available on the Small Business Administration website ([www.sba.gov](http://www.sba.gov))

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

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

**NHDOT** means the New Hampshire Department of Transportation

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

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

**Personal Net Worth** means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include: The individual's ownership interest in an applicant or participating DBE firm or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

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

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

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

**Race-Conscious Measure** or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

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

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

**Secretary** means the Secretary of Transportation or his/her designee.

**Set-Aside** means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

**Small Business Administration** or SBA means the United States Small Business Administration.

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

**Socially and Economically Disadvantaged Individual** means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is:

- 1) Any individual whom the UCP finds to be a socially and economically disadvantaged on a case-by-case basis, after a thorough investigation, or,
- 2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
  - (i) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;
  - (ii) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
  - (iii) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
  - (iv) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;
  - (v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
  - (vi) Women;
  - (vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

**Tribally-Owned Concern** means any concern at least 51 percent owned by an Indian tribe as defined in this section.

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