

**Volusia County MPO**



**Transportation Planning**  
[www.volusiacountympo.com](http://www.volusiacountympo.com)

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

As adopted, March 27, 2007

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**FINAL**

**STATE OF FLORIDA**

**DEPARTMENT OF TRANSPORTATION**

**DISADVANTAGED BUSINESS ENTERPRISE**

**PROGRAM PLAN**

**JUNE 6, 2000**

**Equal Opportunity Office  
605 Suwannee Street, MS 65  
Tallahassee, Florida 32399**

**Phone: (850) 414-4747**

**FLORIDA DEPARTMENT OF TRANSPORTATION  
DISADVANTAGED BUSINESS ENTERPRISE PROGRAM**

**Definitions of Terms**

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

**Objectives/Policy Statement (§§ 26.1, 26.23)**

The Florida Department of Transportation (Department) has established a Disadvantaged Business Enterprise (DBE) Program in accordance with regulations of the U. S. Department of Transportation (USDOT), 49 CFR Part 26. The Department has received federal financial assistance from the U.S. Department of Transportation (USDOT), and as a condition of receiving this assistance, the Department has signed an assurance that it will comply with 49 CFR Part 26.

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

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

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

Once the policy statement is signed, the Department will disseminate it to the Executive Committee, the Florida Transportation Commission, the Governor of the State of Florida and all of the components of our organization. This statement will be distributed to DBE and non-DBE business communities that perform work for us on USDOT-assisted contracts through mailouts to all certified DBEs, prime contractors and consultants.

**Nondiscrimination. (§ 26.7)**

The Department will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract on the basis of race, color, sex, or national origin.

In administering its DBE program, the Department will not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the DBE program with respect to individuals of a particular race, color, sex, or national origin.

**DBE Program Updates (§ 26.21)**

As authorized, we will continue to carry out this program until all funds from USDOT financial assistance have been expended. We will provide to USDOT updates representing significant changes in the program.

**Quotas (§ 26.43)**

We do not use quotas in any way in the administration of this DBE Program.

**DBE Liaison Officer (DBELO) (§ 26.25)**

We have designated the following individual as our DBE Liaison Officer (DBELO): Ruth B. Dillard, Manager, Equal Opportunity Office, 605 Suwannee Street, MS 65, Tallahassee, Florida 32399, (850) 414-4747, [www.ruth.dillard@dot.state.fl.us](mailto:www.ruth.dillard@dot.state.fl.us). In that capacity, Ms. Dillard is responsible for implementing all aspects of the DBE program and ensuring that the Department complies with all provisions of 49 CFR Part 26. Ms. Dillard has direct, independent access to the Secretary of the Florida Department of Transportation concerning DBE Program matters. The Equal Opportunity Office has four sections responsible for administration: Reports and Records Management; Contract Compliance; DBE Certification; and Equal Employment Opportunity/Affirmative Action.

The DBELO is responsible for developing, implementing and monitoring the DBE program, in coordination with other appropriate officials. Duties and responsibilities include the following:

1. Gather and report statistical data and other information as required by USDOT.
2. Work with the Department's Office of the General Counsel as required in reviewing third party contracts and purchase requisitions for compliance with this program.
3. Work with all departments to set overall annual goals.
4. Work with the Contracts Administration Office to ensure that bid notices and requests for proposals are available to DBEs in a timely manner.
5. Identify contract and procurement opportunities so that DBE goals are included in solicitations (both race-neutral methods and contract specific goals) and monitor results.
6. Analyze the Department's progress toward goal attainment and identify ways to

- improve progress.
- 7. Advise the Secretary of the Florida Department of Transportation and the Department's Executive Committee on matters impacting DBE policy and achievement.
- 8. Participate with the legal counsel and project director to determine contractor compliance with good faith efforts.
- 9. Provide DBEs with information and assistance in preparing bids, obtaining bonding and insurance.
- 10. Plan and participate in DBE training seminars.
- 11. Certify DBEs according to the criteria set by USDOT and will act as liaison to the Uniform Certification Process in Florida.
- 12. Provide outreach to DBEs and community organizations to advise them of contracting opportunities.
- 13. Maintain the Department's updated directory of certified DBEs.

The Assistant Manager is responsible for the following duties with respect to administration of the DBE program:

- 1. Develop processes and procedures for gathering and reporting statistical data and other information as required by USDOT and the Department, including all new requirements under the federal regulations.
- 2. Provide DBEs with information and assistance in preparing bids, obtaining bonding financial assistance and insurance.
- 3. Plan and participate in DBE training seminars and workshops.
- 4. Maintain the Department's updated directory of certified DBEs.
- 5. Administer and coordinate the Department's DBE Supportive Service Program providing assistance in the form of managerial and technical training and providing outreach to DBEs and community organizations.
- 6. Serve as a liaison with DBEs and prime contractors.
- 7. Administer a special Native American Outreach Program to attract Native American businesses, address training needs and identify contracting opportunities.

The DBE Certification Manager is responsible for the following duties with respect to administration of the DBE program:

- 1. Ensure all applications for DBE certification are timely processed pursuant to Rule Chapter 14-78, Florida Administrative Code.
- 2. Develop policies, procedures, rules and guidelines for DBE certification.
- 3. Chair the DBE Certification Committee and make recommendations to the Manager, Equal Opportunity Office concerning certification of applicants as DBEs.
- 4. Timely assign DBE applications to the DBE Certification staff and coordinate on site reviews.
- 5. Timely review Personal Net Worth Statements and gross receipts, evaluate a firm's continued eligibility to participate in the DBE program, and make recommendations to the DBE Certification Committee and the Manager of the Equal Opportunity Office to commence decertification proceedings if the firm no longer satisfies eligibility criteria.
- 6. Timely notify certified DBEs to submit updated size standard, gross receipts and personal net worth statements annually on the anniversary date of the firm's initial certification as a

DBE.

7. Coordinate with the Department's Office of General Counsel on all DBE certification hearings.
8. Supervise the DBE Certification staff and provide guidance on certification issues.

The Contract Compliance Manager reports directly to the Manager of the Equal Opportunity Office. The Contract Compliance Manager's responsibilities include:

1. Develop policies, procedures, rules and guidelines for use in conducting comprehensive EEO compliance reviews on Department projects.
2. Maintain current information on regulations and laws concerning compliance with Federal and State DBE programs.
3. Provide District personnel with the necessary guidance, technical assistance and training on compliance issues. Project compliance is the responsibility of the District offices.
4. Monitor District compliance efforts by performing Quality Assurance Reviews (QARs) of all District Compliance Offices and select Resident Compliance Offices and /or CEI firms
5. Assist in investigations of non-compliance allegations.
6. Act as a liaison between the Department, the Federal Highway Administration (FHWA) and contractors in compliance matters.
7. Assist with overall goal setting for the Department and determine if the Department will achieve this goal using race-neutral, race conscious methods or a combination of both.

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

The Department will sign the following assurance, applicable to all USDOT-assisted contracts and their administration.

The Department shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any USDOT assisted contract or in the administration of its DBE Program or the requirements of 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of USDOT assisted contracts. The recipient's DBE Program, as required by 49 CFR part 26 and as approved by USDOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the Department of its failure to carry out its approved program, the Department may impose sanctions as provided for under part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).

## **DBE Financial Institutions**

It is the policy of the Department to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community, to make reasonable efforts to use these institutions, and to encourage prime contractors on USDOT-assisted contracts to make use of these institutions. The Department has contacted the following Agencies:

FEDERAL DEPOSIT INSURANCE  
CORPORATION (FDIC)  
1201 W. PEACHTREE ST. NE  
SUITE 1800  
ATLANTA, GA 30309-4515  
(404) 817-1300  
WWW.FDIC.GOV

BLACK BUSINESS INVESTMENT BOARD  
1711 S. GADSDEN ST.  
TALLAHASSEE, FL 32301  
(850) 487-4850

LEON COUNTY WOMEN & MINORITY  
BUSINESS ENTERPRISE PROGRAM (W/MBE)  
LEON COUNTY COURTHOUSE  
SUITE 502  
TALLAHASSEE, FL 32301  
(850) 488-9962

FLORIDA BANKERS ASSOCIATION  
1001 THOMASVILLE RD.  
TALLAHASSEE, FL 32303  
(850) 224-2265

To date we have identified the following such financial institutions:

METRO SAVINGS  
715 S. GOLDWIND AVE.  
ORLANDO, FL 32805  
(407) 293-7320

HAMILTON BANK N.A.  
3750 N.W. 87TH AVE.  
MIAMI, FL 33178  
(305) 717-5536

PEOPLES BANK  
3275 N.W. 79TH ST.  
MIAMI, FL 33147  
(305) 696-0700

FLORIDA A & M UNIVERSITY  
FEDERAL CREDIT UNION  
1550 MELVIN ST.  
TALLAHASSEE, FL 32301  
(850) 222-4545

Information on the current availability of such institutions can be obtained from the DBE Liaison Officer.

### **Directory (§ 26.31)**

The Department maintains a Directory identifying all firms eligible to participate as DBEs. The Directory lists the firm's name, address, telephone number, date of most recent certification, and the type of work the firm has been certified to perform as a DBE. We revise the Directory monthly. We make the Directory available as follows: by sending DBE Directories every month to all prequalified contractors and consultants; sending multiple copies of the DBE Directory every month to each of the District Contract Compliance Officers for distribution to interested contractors and consultants in their geographic districts; and by sending current DBE Directories to interested parties who contact the Department's Equal Opportunity Office requesting copies of the Directory. Interested parties may contact the Equal Opportunity Office at 605 Suwannee Street, MS 65, Tallahassee, Florida 32399, (850) 414-4747 to obtain a current copy of the DBE Directory.

### **Overconcentration (§ 26.33)**

Since the new regulations were published in February, 1999, the Department has received information raising the issue of overconcentration in the areas of geotechnical work and surveying. At this point, the Department has established the criteria for identifying overconcentration in a particular area as written notification from a contractor or consultant to the Department with specific statements of injury as defined in 49 CFR Part 26.

The Department has solicited input and has received requests from the industry to participate in a task team to review the issues relating to overconcentration of firms in the geotechnical and surveying areas. Once the task team has completed its findings and recommendations, the Department will issue its finding of whether overconcentration exists. If the Department determines that overconcentration does exist, it will make recommendations as to how the issue will be addressed in a race conscious program. Those recommendations will be submitted to USDOT for approval.

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

The Department does not currently propose a Business Development component of its DBE Plan.

### **Required Contract Clauses (§§ 26.13, 26.29)**

#### Contract Assurance

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

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

#### Prompt Payment

The Department currently has statutory requirements which state the following:



(A) Every contract let by the department for the performance of work shall contain a provision requiring the prime contractor, before receipt of any progress payment under the provisions of such contract, to certify that the prime contractor has disbursed to all subcontractors and suppliers having an interest in the contract their pro rata shares of the payment out of previous progress payments received by the prime contractor for all work completed and materials furnished in the previous period, less any retainage withheld by the prime contractor pursuant to an agreement with a subcontractor, as approved by the Department for payment. The department shall not make any such progress payment before receipt of such certification, unless the contractor demonstrates good cause for not making any such required payment and furnishes written notification of any such good cause to both the department and the affected subcontractors and suppliers.

(B) Every contract let by the Department for the performance of work shall contain a provision requiring the prime contractor, within 30 days of receipt of the final progress payment or any other payments received thereafter except the final payment to pay all subcontractors and suppliers having an interest in the contract their pro rata shares of the payment for all work completed and materials furnished, unless the contractor demonstrates good cause for not making any such required payment and furnishes written notification of any such good cause to both the Department and the affected subcontractors or suppliers within such 30-day period.

These requirements are mandated by §§ 337.11 (10)(a) and (b), Florida Statutes. While § 337.11(10)(a), Florida Statutes, addresses progress payments to subcontractors throughout the life of a contract, § 337.11(10)(b), Florida Statutes, addresses the final payment to the subcontractors upon completion and final acceptance of the project. Neither the Department nor the industry have interpreted or enforced § 337.11(10)(a) to require payment of pro rata shares of progress payments to subcontractors within 30 days after the prime contractor receives this progress payment from the Department. Contractors are required to certify payment to subcontractors prior to receipt of their next progress payment.

Both the Department and the industry have interpreted and enforced §337.11(10)(b) as requiring prime contractors to pay the pro rata shares of the final payment to subcontractors within 30 days of the receipt of this final payment from the Department.

The Department will require prompt payment by the prime contractor of both progress and final payments to subcontractors within 30 days of being paid by the Department in compliance with 49 CFR Part 26. The Department will further comply with 49 CFR Part 26.49 and have a contractual provision in its contracts with prime contractors which states that contractors will be required to pay subcontractors both progress and final payments within 30 days of being paid by the Department. Thirty days will be used since the Department pays on a 30 day cycle for billings received. The Department will seek amendments to these statutes if deemed necessary by the General Counsel's Office.

The Department will begin working on implementation of this provision in October of 1999 and will implement a monitoring process of the information on a monthly basis.

The Department will further comply with 49 CFR Part 26.29 of the federal regulations by requiring prompt payment to all subcontractors at all tiers.

### Retainage

The Department will also comply with 49 CFR Part 26.29 and have a contractual provision in its contracts with prime contractors which states that contractors will return retainage payment to all subcontractors within 30 days after the subcontractor's work has been deemed satisfactorily completed. Satisfactory completion will be determined by the Department. However it is noted that approval of the Department's Plan will be predicated on not having a broad permission of a testing and maintenance provision. The inclusion of work item specific test and maintenance provisions will be submitted to FHWA for approval prior to implementation.

As the Department revises Rule Chapter 14-78, Florida Administrative Code, to implement this Plan and 49 CFR Part 26, enforcement of this requirement will be addressed in the Rule as well as in the statute, as deemed necessary by the General Counsel's Office.

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

We will bring to the attention of the USDOT any false, fraudulent, or dishonest conduct in connection with the program, so that USDOT can take the steps (e.g., referral to the 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 § 26.109. We also will consider similar action under our own legal authorities, including responsibility determinations in future contracts, removal of firms from the prequalified bidders and consultants lists or revocation of DBE certification if applicable, pursuant to §§ 337.105; 337.16; and 339.0805, Florida Statutes.

### **Overall Goals (§ 26.45)**

#### Amount of goal

The Department's proposed overall goal for FY 2000 is 8%. The detailed exemptions for Federal Aviation Administration and Federal Transit Administration are listed in specified sections below. The goal was published on the Department's Internet Website and was provided through a faxback system, whereby individuals could call in, input their fax number and have the goal information faxed directly to their fax machine. The goal was also published in The Tallahassee Democrat and The Capitol Outlook, a minority focused newspaper. The location of the goal information was also included in all of the Personal Net Worth Statements mailed to all certified DBE companies.

## **Florida Department of Transportation**

The DBE program as defined in 49 CFR Part 23 provided a liberal definition of DBEs qualified to participate in the program. The policy of the program under that definition also provided for the maximum participation of DBEs which required goals to be set on projects where there were subcontracting opportunities and DBEs were available to work in those specialty areas and in the geographical area. Another major component of the program's goal attainment was the method of counting and reporting DBE participation which allowed for the total DBE contract to count toward the DBE goal as long as at least 51% of the work was done by a DBE.

Under 49 CFR Part 26, all of these major components have changed and potentially affects the availability of DBEs in Florida's market area. In reviewing the options provided by USDOT for the calculation of the overall DBE goal and reviewing the data available, Florida has eliminated utilization of these proposed options for the current year.

## **Federal Highway Administration (FHWA)**

The Department expects to let approximately \$1.4 billion for Federal Fiscal Year 1999-2000. The proposed 8% DBE goal equates to \$112 million.

## **Method of Attainment**

Florida will implement a race neutral program beginning January 1, 2000. Prior to that date, the Department proposes to review the construction projects for October through November using the same goal setting methodology as is currently used. October 1, 1999 begins the new federal fiscal year. Lettings are scheduled for October 27, 1999 and December 2, 1999. Proposals for professional and contractual services due from October through December would be evaluated using preference points.

Race neutral under the construction program would be defined as not setting race or gender specific goals on the individual projects, but counting all participation of DBE subcontractors utilized by contractors on projects. Race neutral under the consultant or professional services program would be defined as not assigning race or gender preference points on projects for prime consultants who were either DBEs or who utilized DBEs for a certain percentage of work but counting all participation of DBE subconsultants utilized by consultants on projects.

## **Analysis of Goal for Federal Highway Administration**

### **Methodology**

**Step One** - The Department utilized a two tier calculation process in determining availability.

**Subcontracting** - The following analysis was used in calculating subcontractor availability.

In 1997 the Department commissioned a Disparity Study for the purpose of determining if disparity and discrimination existed in the Department's market area and if a program was needed to remedy identified discrimination. The disparity study included an availability analysis of DBE

businesses which are available to participate as subcontractors on Department state-funded projects. The availability analysis is relevant to the market area for federal funded construction projects and therefore is one documented source of information for the Department to establish the availability of DBE's in the transportation industry.

The availability of construction firms was based on the following composition:

- Firms prequalified by the Department
- Firms listed on the Department's DBE vendor list
- Contractors and subcontractors who were utilized by the Department during the study period
- Construction firms that are members of the Florida Transportation Builders Association

The availability analysis provided the following finding which was used in step one of the goal setting methodology: 31% of all available subcontractors were DBEs.

**Personal Net Worth** - A new regulation regarding Personal Net Worth (PNW) has been added to the criteria of being a qualified DBE. The disadvantaged owner(s) of DBE firms must have a PNW of \$750,000 or less in order to be considered economically disadvantaged. Company owners are allowed to deduct their primary residence and their business to calculate PNW. The Department examined the resources available for calculating this financial criteria. Prequalification was examined to determine the extent of information available for consideration. In October of 1999 the Department had approximately 1100 certified DBE firms. By April 2000, the Department had compiled a list of 127 firms who had elected not to return to the DBE program. There had been 14 new firms certified in the same time period for a net loss of 113 firms. This was an increase of firms not reapplying for the same time period the previous year of 62. None of the 113 firms have returned to the program.

Construction: Prequalification of construction firms is governed by § 337.14, Florida Statutes, and Rule Chapter 14-22, Florida Administrative Code. While applicant firms are required to submit audited financial statements pursuant to the statutes and regulations governing prequalification, these statements apply to the applicant firm itself. These statements do not include personal financial information for each of any such firms' owners. Therefore, the Department does not have a pre-existing database of personal net worth information for prequalified road construction contractors.

Consultants: Prequalification of consultant firms which provide professional services to the Department is governed by § 337.105, Florida Statutes, and Rule Chapter 14-75, Florida Administrative Code. While applicant firms are required to submit audited statements of their indirect costs, these audits only apply to the applicant firm. These statements do not include personal financial information for each of the firms' owners. Therefore, the Department does not have a pre-existing database of personal net worth information for prequalified consultants. It should be noted that professional services are defined in § 287.055, Florida Statutes, as architecture, professional engineering, landscape architecture, or registered surveying and mapping. Such professional services do not include contractual services such as bridge tending, security guards, reprographics, janitorial services, etc. There are no Prequalification requirements set forth by the statutes or the Florida Administrative Code for such contractual services.

The Department therefore does not have specific information on the PNW of its currently

certified DBEs. However, the research of the DBE prequalified programs does indicate that in order for prime construction contractors to bid on contracts over \$250,000, they must be prequalified by the Department pursuant to §337.14, Florida Statutes, and Rule Chapter 14-22, Florida Administrative Code. Consultants have two types of prequalification. Technical prequalification is required of all consultants in particular categories such as surveying or geotechnical engineering. As required by Florida law, the second type of prequalification is administrative which requires all companies with contracts over \$250,000 to be prequalified.

In the construction program, with a small business definition allowing gross receipts to average between \$7.5M and \$16.6M over a three year period, the Department has 42 prequalified DBE prime contractors. In Fiscal Year 1998/1999, this group of 42 DBE prime contractors received approximately \$5M in prime contracts. A conservative estimate is that 50% of DBE primes will exceed the new \$750,000 PNW cap. Therefore, it is estimated that the potential loss of these contractors to the Department in DBE dollars would be \$2.5M annually. Although the gross receipts cap is less for DBE consultants, the potential for loss based on PNW is also an issue in the consulting category.

**Additional DBEs Who Will Be Lost** - In addition to the above, it is estimated that DBEs will be lost because of what will be perceived as intrusive requirements of the new regulations. This includes the requirement of the spouse's PNW information and the proof of the irrevocable transfer of assets where there is legal authority for joint ownership. DBEs may also be lost because they feel the amount of additional information they submit is not warranted compared to the benefits they derive from the program.

Based on current information available regarding the number of DBEs which have been lost from the DBE program, the overall availability base was adjusted to a comparable percentage. The availability for subcontractors was therefore calculated at 20%.

Historical data from the Department's Bid Analysis Management Systems supports subcontract work to be 25% of dollars awarded. Using the availability analysis, the Department calculated its proposed goal based on approximately 20% of the dollars awarded to subcontractors being awarded to DBE subcontractors. This is represented by the following calculation:

$$.20 \times .25 = .05 \text{ or } 5\%$$

**Prime Contracting** - The following analysis was used in calculating DBE prime contractor availability.

**WORK TYPE** - The Department considered the number of prequalified contractors based on the factor of "work type". In each "work type," a determination was made of the percentage of prequalified DBE prime contractors. This calculation was made based on a comparison of all prequalified prime contractors to all Department prequalified contractors.

The Department's Production Management Office sampled a seven month letting period. A calculation was completed of the amount of work (based on the dollar volume of lettings) let in construction in each of the "work types". This percentage breakdown was then converted to "work type" of actual lettings by the Department.

Using those two percentages, the percentage of work available to prequalified DBE prime

contractors using "work type" was calculated. This analysis makes a direct connection between the volume of work available and percentage of available DBE prime contractors.

**Bridge**

26.8% of the planned 99/00 letting

3.4% of DBE prime contractors

**Expected awards to DBEs as prime bridge contractors: .034 x .268 = .009**

**Grading**

13.5% of the planned 99/00 letting

5.6% of DBE prime contractors

**Expected awards to DBEs as prime grading contractors: .056 x .135 = .008**

**Flexible Base**

8.5% of the planned 99/00 letting

5% of DBE prime contractors

**Expected awards to DBEs as flexible base prime contractors: .05 x .085 = .004**

**Cement**

4.2% of the planned 99/00 letting

4.3% of DBE prime contractors

**Expected awards to DBEs as cement prime contractors: .043 x .042 = .002**

**Asphalt**

27.4% of planned 99/00 letting

3.2% DBE prime contractors

**Expected awards to DBEs as asphalt prime contractors: .032 x .274 = .009**

**Drainage**

16.3% of planned 99/00 letting

5.6% DBE prime contractors

**Expected awards to DBEs as drainage prime contractors: .056 x .163 = .009**

**TOTAL 4.1%**

The Department then weighted the DBE prime contractor availability. Since 25% was noted as total work available for subcontractors, 75% was weighted as total work available for prime contractors.

$$.041 \times .75 = .03075 \text{ or } 3.1\%$$

## Step One Results:

<b>Subcontractor Availability</b>	<b>5.0%</b>
<b>Prime Contractor Availability</b>	<b>+3.1%</b>

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**Baseline Goal**                      **8.1% = Rounded to 8% availability**

The results of Step One indicate that 8% is a valid baseline goal under current rules and processes for the determination of availability.

**Step Two** - In the second tier of its calculation process, the Department assessed the impact of specific factors requiring narrowly tailoring of the DBE program.

### Impact to Goal

1.     **Counting Work Which Is Subcontracted By a Subcontractor/Subconsultant to Non-DBEs**- Under 49 CFR Part 23, a DBE was allowed to subcontract up to 49% of its contract to a non-DBE while still allowing the agency to report 100% of that amount as DBE participation. Under 49 CFR Part 26, only the amount of work actually performed by the DBE or the amount subcontracted to another DBE may be counted and reported toward DBE participation. The Department conservatively estimates that 25% was subcontracted to non-DBEs which under the new regulations would not be eligible for counting.

### Impact to Goal

#### Work Subcontracted to Non-DBE Second Tier Contractors

5% to Subcontractors  
DBEs subcontracted to non-DBEs 25%  
.05 x .25 = 1.25 or 1.3%

**Subcontract work impact to baseline goal:            less 1.3%**

2.     **Trucking** - In addition to losing participation based on the above counting issues, the new trucking provisions will eliminate a significant amount of participation. Under the new regulations, the work done by independent owner/operators who are not certified as DBEs will not be able to contribute to the DBE s participation amount. The new regulations also require that trucks owned by the DBE must be operating on the project for DBE credit to be given. The Department is unable to ascertain the specific dollar amount of the impact of this change through accessible information; therefore, it will not attempt to assign a specific impact amount. However, it has been determined through industry and Department comments that trucking will be a major factor in DBE participation. A number of industry comments from DBEs as well as prime contractors are included in the transcripts of the DBE statewide meetings which are available for review.

Under the new reporting and tracking requirements, this information should be more available next year for review and to make any necessary adjustments to the Department's overall DBE participation goal.

**Impact to Goal**

At this time, data is unavailable to support the specific calculation loss.

3. **Over Concentration** - Another change which has the potential to impact the goal is the issue of over concentration. Under 49 CFR Part 26, when the Department determines that DBE firms are so over concentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work, the Department must devise appropriate measures to address this over concentration.

To date, this issue has been raised with the Department in the areas of geotechnical work and surveying. The impact and findings are unclear at this point. However, since the Department has been put on notice regarding these areas, it is raised as a potential issue affecting the goal. Since an amount, nor potential remedies, if the allegation is substantiated, are available, the Department will not assign an estimate to this potential factor, but will include it in the previous potential factors. Section 26.33 of the Department's DBE Plan explains this issue in more detail and explains how this issue will be addressed.

**Impact to Goal**

At this time, data is unavailable to support the specific calculation loss.

4. **Under Reporting Utilization** - The issue of under reporting practices has been reviewed in the goal setting process. Reports from industry as well as past comparisons of some utilization commitments compared to actual utilization support that contractors are using DBEs more than is actually reported. The industry reports that DBEs are often used and not reported to the Department for the purpose of counting toward the DBE participation goal. With the new reporting system in place, ALL DBE primes, subcontractors and subconsultants will be reported and this participation will count toward the Department's overall goal and increase the Department's ability to meet the new goal through race neutral means.

**Impact to Goal**

1% - comparisons of actual to reported and anecdotal

**Under reporting impact to baseline goal: plus 1.00%**

**SUMMARY**

Baseline Goal:	8.1%
Goal Adjustments:	
Non DBE Subcontracting	- 1.3%
Under Reporting Utilization	<u>+1.00%</u>
	<b>7.8%*</b>



## Proposed DBE Goal

**8.00% (\*The Department proposes rounding to 8%)**

## ELIMINATED ALTERNATIVES

In setting the goal for the Department, it is required that the goal setting process is begun by determining a base figure for the relative availability of DBEs. The overall goal must be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on USDOT-assisted contracts. The goal must reflect the determination of the level of DBE participation expected absent the effect of discrimination. The Department has reviewed the alternatives listed in 49 CFR Part 26 and eliminated them for the current year based on the following reasons.

### Setting Goals - Analysis - Alternative 1

**Use DBE directories and Census Bureau Data. Determine the number of ready, willing and able DBEs in your market from your DBE directory. Using the Census Bureau's County Business Pattern (CBP) data base, determine the number of all ready, willing and able businesses available in your market that perform work in the same SIC codes. Divide the number of DBEs by the number of all businesses to derive a base figure for the relative availability of DBEs in your market.**

The Department has some concerns with this methodology which will require extensive evaluation prior to possible utilization. Similar methodology was used by MGT of America, Inc. in a disparity study it prepared for the Department in 1993 for the Department's DBE program for wholly state funded contracts. During the *Phillips & Jordan, Inc.*, court challenge, the court stated the analysis was not narrowly tailored to the actual geographic locations within the Department's Districts, failed to consider contract data from the Department's Central Office and the Districts, failed to identify how firms were categorized in various SIC codes and failed to adequately explain if DBE firms were double and triple counted in the SIC codes. The court in *Phillips & Jordan, Inc.*, implied the methodology employed in that disparity study was flawed for these reasons. Because there was an adverse court ruling specifically related to the Department, this methodology will not be utilized until a review of the court decision, current court opinions and other options are explored. That process will take longer than the time allocated by FHWA for a program to be developed.

### Setting Goals - Analysis -Alternative 2

**Use a bidders list. Determine the number of DBEs that have bid or quoted on your USDOT-assisted prime contracts or subcontracts in the previous year. Determine the number of all businesses that have bid or quoted on prime or subcontracts in the same time period. Divide the number of DBE bidders and quoters by the number for all businesses to derive a base figure for the relative availability of DBEs in your market.**

While this analysis would be more likely to withstand the strict scrutiny analysis under the *Phillips & Jordan, Inc.*, and *Adarand Constructors, Inc.*, decisions, the information necessary to complete this analysis is not readily available to the Department through its contracting offices. Without this data, any goals set under this approach would be vulnerable to constitutional challenges or

possibly deemed arbitrary and capricious. The Department, prime contractors, prime consultants, DBE subcontractors nor DBE subconsultants have retained this information. A complete bidder's list would require obtaining information on all successful and unsuccessful prime bidders and all of their successful and unsuccessful subcontractors. The Department will implement a process to gather bidder information under the new program. Initially, the Department will gather and monitor this information manually until a new computer program is acquired and implemented to electronically gather this data.

### **Setting Goals - Analysis - Alternative 3**

**Use data from a disparity study. Use a percentage figure derived from data in a valid, applicable disparity study.**

The Department is unable to develop a DBE goal based on data from a disparity study because no study has been performed which examines contractor utilization on federally funded contracts. Although Florida has a recently completed disparity study conducted by MGT of America, Inc., that study only focused on non-federally funded contracts.

The Department has also reviewed the fact that while there are a number of other disparity studies that have been conducted in the state of Florida, none have focused on federal construction contracts.

### **Setting Goals - Analysis - Alternative 4**

**Use the goal of another USDOT recipient. If another USDOT recipient in the same, or substantially similar, market has set an overall goal in compliance with this rule, you may use that goal as a base figure for your goal.**

The Department is not aware of other USDOT recipients in the same or substantially similar markets. Because this is a new process, other states are still trying to determine the extent of their information and there is insufficient time to review what they have gathered and do an analysis to compare their market with the market of the Department.

However, a poll was conducted of the former Region 4 states and as of July 19, 1999, of the seven southern states, North Carolina, South Carolina, Tennessee, Kentucky, Alabama, nor Mississippi had their goals and methodologies completed, reviewed and adopted by their agency heads. Only Georgia had an approved goal and methodology and that was based on a disparity study conducted specifically for their state; however, that study was conducted over a 13 month time period.

### **Analysis of Goal for Federal Aviation Administration (FAA)**

The Department's overall goal for FY 2000 is the following:

\*In reviewing the anticipated dollars for FY 2000 from the FAA, the Department has determined that no dollars are anticipated for new projects.

\*0 Dollars for Fiscal Year 2000

## Previously Approved Projects

10% for Project: Florida Aviation System Plan (FASP) (From previous approved contract)

36% for Project: Statewide Airport - Storm Water Study (From previous approved contract)

## **Method of Attainment**

The Department anticipates receiving additional funds for the FASP Project, but no commitments have been received from FAA as of the September 1999. This project was submitted to FAA for approval in 1998 with a 10% DBE goal. That goal was approved. The contract is not completed and the anticipated additional funds will be applied to that same contract. The contractor continues to be contractually liable for the 10% goal.

The Department anticipates receiving an additional \$500,000 in fiscal year 2000 for the Storm Water Study. This project was submitted to FAA for approval in 1998 with a 36% DBE goal. That goal was approved. The contract is not completed and the anticipated additional funds will be applied to that same contract. The contractor continues to be contractually liable for the 36% goal.

The Department does not anticipate receiving any funds in fiscal year 2000 which are not already committed to those projects. Therefore there can be no analysis for goal setting. If new funds become available, the Department will complete the methodology process pursuant to 49 CFR Part 26 and submit the analysis and proposed goal to the FAA for review and approval.

## **Analysis of Goal for Federal Transit Administration (FTA)**

The Department's overall goal for Fiscal Year 2000 is the following: 8% of the federal financial assistance we will expend in USDOT-assisted contracts exclusive of FTA funds to be used for the purchase of transit vehicles and of other exempt services.

The Department expects to let \$11,033,673 this fiscal year. Because of the nature of the expenditures for the various categories, it is uncertain about the specific amount of dollars which will be eligible for DBE goal setting opportunities.

## Method of Attainment

The following is a summary of the method we used to calculate this goal:

The Department reviewed and evaluated the following Federal programs for which we have to report progress to the Federal Transit Administration: 5303, 5310, 5311 and 5313(b).

### **5303 - The estimated funds for FY 2000 in this category are \$0.**

It was noted that 5303 program dollars are allocated to Metropolitan Planning Organizations (MPOs). Because MPOs report directly to the FHWA and capture transit expenditures, those dollars were not counted as potential DBE expenditures. FTA has explained during training that if FTA dollars are captured by another entity, they may be deemed as exempt from the Department's

calculations of potential DBE goals. Those dollars were not calculated in the base FTA dollars.

**5310 - The estimated funds for FY 2000 in this category are \$4,613,044.**

The 5310 program primarily consists of vehicle purchases made by private, nonprofit transit providers. All other capital costs are considered towards potential DBE contracting. The review concluded that traditionally those other capital costs consisted of purchases of radios and computer purchases. Approximately 97% of those expenditures have historically been used for vehicle purchases. Vehicle purchases are exempt based on the above stated information relating to manufacturers.

**5311 - The estimated funds for FY 2000 in this category are \$5,797,875.**

The 5311 program primarily consists of capital or operating expenses made by local governments or public transit providers. Vehicle purchases are allowed under this program also. The review concluded that traditionally these funds have been used for administration and labor costs, which are exempt from assigning DBE goals. It is noted that if the provider were to change what has been done historically and contract the transportation service with a private business, the contract would become open to DBE goal setting opportunity.

**5313(b)- The estimated funds for FY 2000 in this category are \$611,543.**

The 5313(b) program primarily consists of funding for statewide transit planning. Contracts entered into with Universities are exempt from DBE reporting requirements in this program. However, any contracts with private consulting firms will be considered open to DBE goal setting opportunities.

Estimated FTA Total for FY 2000 - \$11,033,572

In reviewing the historical data, the Department anticipates being able to achieve approximately 10% of DBE participation. Based on the dollars which must be exempted from the FTA programs and the new DBE program certification and reporting criteria, the Department anticipates being able to expend 8% of non-exempt dollars with DBEs under its new DBE program.

Transit Vehicle Manufacturers (TVM) (§ 26.49)

The Department will require each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, to certify that it has complied with the requirements of this section. Alternatively, the Department may, at its discretion and with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of the TVM complying with this element of the program.

## Overall Goal Setting Process

The Department submits its overall goal to USDOT on August 31st of each year except September 1, 1999, and in cases where the Department submits a project goal.

Before establishing the overall goal each year, the Department will consult with minority, women s and general contractor groups, community organizations and other officials or organizations to obtain information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and the Department s efforts to establish a level playing field for the participation of DBEs.

Following this consultation, we 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 Equal Opportunity Office for 30 days following the date of the notice, and informing the public that the Department and USDOT will accept comments on the goals for 45 days from the date of the notice. The Department s goal for the current year was published on the Department s internet web page at <http://www.dot.state.fl.us>, as well as in following newspapers: The Tallahassee Democrat and The Capitol Outlook. Normally we will issue this notice by June 1 of each year. The notice must include addresses to which comments may be sent and addresses (including offices and websites) where the proposal may be reviewed.

Our overall goal submission to USDOT will include a summary of information and comments received during this public participation process and our responses.

We will begin using our overall goal on October 1 of each year, unless we have received other instructions from USDOT.

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

Under its method of attainment (pg. 9) Florida has proposed that construction projects and consulting proposals from October 1, 1999 through December 31, 1999 be evaluated for goal setting opportunities. Beginning January 1, 2000, the Department would begin a race neutral program. FHWA has requested that the contracts for which goals were set be assessed a race conscious participation amount.

The Department estimates that, in meeting the overall goal of 8%, we will obtain 1% from race conscious participation. This 1% is based on goals which have been established on construction contracts and preference points which have been assigned to consulting proposals.

The Department estimates that, in meeting our overall goal of 8%, we will obtain 7% from race-neutral participation.

Based upon industry and Department comparatives and input from DBEs, the Department estimates it can achieve 7% of its overall goal using only race neutral means. Since we will use race conscious strategies prior to January 1, 2000, and we will track and report actual race-neutral and race-conscious participation separately. For reporting purposes, race-neutral DBE participation includes, but is not necessarily limited to, the following: DBE participation through a prime contract which a DBE obtains through customary competitive procurement procedures;

DBE participation through a subcontract on a prime contract that does not carry a DBE goal; DBE participation on a prime contract exceeding a contract goal; and DBE participation through a subcontract from a prime contractor that did not consider a firm's DBE status in making the award.

In proposing to meet 7% of its 8% goal through race neutral means beginning January 1, 2000, the Department considered the following information:

1. The Department has reviewed its available construction and consultant contracts reporting information comparing commitment dollars versus actual dollars paid to DBEs. FHWA has allowed states the option of choosing either commitment or actual utilization reporting. Like most states, Florida reports the prime contractor and prime consultants commitments to use DBEs. However, the Department did have access to some database information gathered on previous projects comparing commitment to actual utilization. For example, information was gathered for a public records request in which it was noted that there were DBE payments which exceeded amounts listed on the initial DBE utilization forms. Another example was information regarding DBE utilization on consultant contracts. A review was completed of consultant contracts which indicated additional instances where prime consultants expended more than the 10% goal for which most prime consultants received preference points.

This information supports the ability of the Department and contractors to meet DBE goals outside of race conscious measures.

2. The Department reviewed its DBE utilization from 1989 through 1993 on non federally funded contracts during which its state DBE program was suspended. The suspension of Florida's state DBE program was based on the legal decision of *Cone vs. Florida Department of Transportation* in which the court stated that the use of race conscious measures must be supported by specific findings of disparity by the Legislature before implementing those race conscious measures. During that time period, the Department set no goals on non federally funded contracts, nor was there any attempt in the outreach area to encourage the use of DBEs on those particular contracts. However, the Department still recorded the following amounts as expenditures to DBEs on non federally funded contracts:

1989-1990	\$ 9,361,316	6.5%
1990-1991	\$18,508,469	6.9%
1991-1992	\$18,783,253	5.34%
1992-1993	\$18,858,178	6.57%

The Department therefore averaged 6.3% of documented DBE participation during a time period when goals were not being assigned to projects. This information supports the ability of the Department and contractors to meet DBE goals outside of race conscious measures.

3. The Department reviewed its current non federally funded program. Based on a completed disparity study, the Department reimplemented a state program. In January 1994, the Department's districts were allowed to voluntarily begin setting goals on non

federally funded projects. In July of 1994, which began a new state fiscal year, the Department required each district to review all non federally funded contracts for goal setting opportunities under the guidelines of the disparity study. The Department phased in its program as recommended by setting 4% goals for all areas from 1994 through 1996.

In July of 1996, it phased in the remaining recommended percentages of 8% for Non-minority females and 4% for Blacks in the construction program. Since the program has been in place, the Department has achieved the following with targeted DBEs through race conscious means and has achieved DBE participation through race neutral means with other DBEs who either obtained contracts as primes under the low bid system or who were used by primes as subcontractors **for which no DBE credit was given:**

1994-1995	<u>Race Conscious</u>		<u>Goal</u>	<u>Actual</u>
	Construction			
	Blacks	\$14,831,491	4%	3.98%
	Non-Minority Females	\$31,454,945	4%	8.44 %
	<u>Race Neutral</u>			
	Construction	\$ 1,704,285	<u>0%</u>	<u>4.44%</u>
			8%	16.86%

The Department exceeded its 8% expenditure goal by 8.86%. No efforts were being made by the Department during that time period to solicit race neutral participation.

1995-1996	<u>Race Conscious</u>		<u>Goal</u>	<u>Actual</u>
	Construction			
	Blacks	\$23,486,408	4%	4.41%
	Non-Minority Females	\$45,608,286	4%	8.57%
	<u>Race Neutral</u>			
	Construction	\$ 581,309	<u>0%</u>	<u>.11%</u>
			8%	13.09%

The Department exceeded its 8% expenditure goal by 5.09%. No efforts were being made by the Department during that time period to solicit race neutral participation.

1996-1997	<u>Race Conscious</u>		<u>Goal</u>	<u>Actual</u>
	Construction			
	Blacks	\$16,954,200	4%	4.44%
	Non-Minority Females	\$36,125,191	8%	9.46%
	<u>Race Neutral</u>			
	Construction	\$ 801,430	<u>0%</u>	<u>.21%</u>
			12%	14.11%

With an 8% goal, the Department would have exceeded its goal by 6.11%. With a 12% goal, the Department expended an additional 2.11% over its goal.

1997-1998	<u>Race Conscious</u>		<u>Goal</u>	<u>Actual</u>
	Construction			
	Blacks	\$ 9,359,374	4%	1.93%
	Non-Minority Females	\$53,210,383	8%	10.96%
	<u>Race Neutral</u>			
	Construction	\$ 6,850,859	<u>0%</u>	<u>1.41%</u>
			12%	14.30%

With an 8% goal, the Department would have exceeded its goal by 6.3%. With a 12% goal, the Department expended an additional 2.3% over its goal.

1998-1999	<u>Race Conscious</u>		<u>Goal</u>	<u>Actual</u>
	Construction			
	Blacks	\$21,156,622	4%	4.62%
	Non-Minority Females	\$34,246,740	8%	6.90%
	<u>Race Neutral</u>			
	Construction	\$2,037,373	<u>0%</u>	<u>.41%</u>
			12%	11.93%

With an 8% goal, the Department would have exceeded its goal by 3.9%. The Department met its 12% goal expenditures.

This information supports the ability of the Department and contractors to meet DBE goals outside of race conscious measures. Whether the State's DBE program had goals or no goals, the utilization of DBEs remained somewhat consistent.

During the time period the Department's goal was 8%, which is the Department's currently proposed federal DBE goal, it did 16.86% and 13.09%, which was 8.86% and 5.09%, respectively, above the goal. When the goal increased to 12% overall the utilization remained consistent, which supports that the goals themselves were not overriding factor in DBE utilization and expenditures. The Department has found that greatly deviating DBE utilization amounts are linked primarily to non-goal oriented factors such as lack of available DBEs based on prior work comments, limited DBEs in particular work specialty areas needed for contracts let and bonding ability. (See achievement for Blacks in Construction at 1.93% in 1997-1998 and for Non minority Females in 1998-1999 during which their DBE expenditure was 6.9%). The time period of 1994-1999 supports race neutral participation at a level of 6-7%.

4. The Department considered the pledges of support it has received by its external construction and consulting customers as well as all of its internal staff to monitor the race neutral program and to keep its primary goals of the programs six objectives as a priority. Title VI has also been discussed with contractors and will be integrated into the Department's training components. This training will reiterate the Assurances of the



Department and its contractors to ensure nondiscrimination in all phases of its contracting under Title VI.

This information supports the ability of the Department and contractors to meet DBE goals outside of race conscious measures.

The Department will meet the maximum feasible portion of its overall goal by using race-neutral means of facilitating DBE participation. The Department will use the following race-neutral means to increase DBE participation:

1. Arranging solicitations, times for the presentation of bids, quantities, specifications and delivery schedules in ways that facilitate DBE and other small business participation;
2. Providing assistance in overcoming limitations such as inability to obtain bonding or financing;
3. Providing technical and managerial assistance and other services in:
  - a. Reading plans and specifications
  - b. Identifying jobs comparable to the DBE s work specialties
  - c. Preparing bid packages
  - d. Scheduling
  - e. Completing take off estimates
  - f. Marketing
  - g. Setting up books to track revenues and expenses
  - h. Interpreting financial statements
  - I. Completing applications for loans or bonding
4. Carrying out information and communication programs on contracting procedures and specific contract opportunities. These information and communication programs may include, but are not limited to:
  - a. Annually, the Department will provide all small businesses which have bid on contracts during the last fiscal year a summary on major policy manuals or important changes in contracting procedures;
  - b. The Department shall supply the same information to all firms applying for DBE certification;
  - c. The Department shall provide a summary of key DBE policies to persons responsible for contracting activities in the Department s Central Office and Districts;
  - d. The Department shall provide DBEs with job listings and listings of the potential prime bidders.
5. Implementing a supportive services program to develop and improve immediate and long term business management, record-keeping and financial and accounting capabilities for DBEs and other small businesses.
6. Providing services to help DBEs and other small businesses improve long term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects and achieve eventual self sufficiency. These services may include but are not limited to:

- a. Providing semi-annual workshops for newly certified businesses to explain contracting and business processes;
  - b. Conducting conferences at least six (6) times a year in order to bring together DBEs, the Department and prime contractors.
7. Establishing a program to assist new and start-up firms, particularly in fields in which DBE participation has been historically low.

### **Contract Goals (§ 26.51)**

The Department may use contract goals to meet any portion of the overall goal which it does not project being able to meet using race and gender neutral means. The purpose of establishing contract goals is so that, over the period to which the overall goal applies, the goals will cumulatively result in meeting any portion of the overall goal that is not projected to be met through the use of race and gender neutral means.

In utilizing the goal setting method, we will establish contract goals only on those USDOT assisted contracts that have subcontracting possibilities. We need not establish a contract goal on every such contract, and the size of the contract goals will be adapted to the circumstances of each such contract. Factors which will be taken into consideration are type and location of work, availability of DBEs to perform that particular type of work and subcontracting opportunities on the contract.

The Department anticipated having its DBE program approved by October 1, 1999. Because of the advertisement process, projects to be let through December will have been published. Therefore projects let from October through December of 1999 will be evaluated under the goal setting strategies listed above. Consultant proposals will also be evaluated under race and gender conscious criteria through December of 1999. Letters of Interest due to the Department through December 31, 1999 will be evaluated for preference points based on utilization of DBEs.

Beginning January 1, 2000, the Department's DBE program will be implemented through race and gender neutral means. Prime Contractors and prime consultants will submit voluntary commitments and actual expenditures with DBEs.

The Department currently has project review processes in place for construction and consulting projects. Those processes, i.e., Goal Setting Committee and the district planning review, will remain as mechanisms for monitoring the results of the race and gender neutral program. The purpose of keeping these processes is to have a baseline of comparison for potential subcontracting opportunities for DBEs. The Department also plans to use this as a component of its outreach program. Each project goal will be set separately. If projected DBE subcontracting opportunities are exceeded or not met, the contracting participants can be contacted to try to determine the factors involved.

The Department will express the contract goal or potential goal as a percentage of the total amount of a USDOT assisted contract.

The Department does not anticipate using any race or gender conscious means of obtaining DBE participation other than contract goals if race and gender neutral means are deemed insufficient

for attaining DBE participation.

### **Good Faith Efforts (§ 26.53)**

#### Information to be submitted

The Department treats bidder/proposers compliance with good faith efforts requirements as a matter of responsiveness. However, under the Department's race neutral program which will be effective January 1, 2000, a bid will not be rejected as non-responsive based on DBE information.

Bidders will, however, be required to submit DBE utilization information. The Department will also request that contractors maintain Good Faith Efforts documentation to allow the Department to measure and monitor DBE participation on federally funded contracts. This information will also allow the Department to evaluate the number of ready, willing, available and able DBEs for future goal setting.

Each solicitation for which a contract goal has been established will require the bidders/proposers to submit the following information within the time frames established by Rule 14-78.003, Florida Administrative Code, which is currently within three days of the bid submission:

1. The names and addresses of DBE firms that will participate in the contract;
2. A description of the work that each DBE will perform;
3. The dollar amount of the participation of each DBE firm participation;
4. Written and signed documentation of commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;
5. Written and signed confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment; and,
6. If the contract goal is not met, evidence of good faith efforts.

#### Demonstration of good faith efforts

The obligation of the bidder/offeror is to make good faith efforts. The bidder/proposer can demonstrate that it has done so either by meeting the contract goal or documenting good faith efforts.

The following personnel are responsible for determining whether a bidder/proposer who has not met the contract goal has documented sufficient good faith efforts to be regarded as responsive: this responsibility will be handled by the Department's Contract Compliance Manager for the initial good faith efforts review.

We will ensure that all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before we commit to the performance of the contract by the bidder/offeror.

## Administrative Reconsideration

Within 48 hours of determining whether good faith efforts have been met, the State Contract Compliance Manager of the Equal Opportunity Office will notify the contractor of the initial finding and will further inform the contractor of the date, time and place of the Central Office Good Faith Efforts Reconsideration Committee meeting. A bidder/offeror may or may not choose to attend the meeting. Those bidders/offerors electing to attend the meeting may do so in person or by teleconference. The Good Faith Efforts Reconsideration Committee will review all good faith efforts findings. This Committee will be comprised of a Chairperson, appointed by the Director of Administration, the Manager of the Equal Opportunity Office, a representative from the Construction Office and two alternates. The Committee will make the final recommendation to the Technical Review Committee taking into consideration the findings of the Contract Compliance Manager. The Technical Review Committee will follow its procedure in reviewing the recommendations regarding the project. The Award Committee will follow its procedure in reviewing the recommendations regarding the project.

The good faith efforts and reconsideration guidelines will be established and implemented as of January 1, 2000. A task team consisting of industry and Department personnel will be established to make recommendations to the Department.

## Good Faith Efforts when a DBE is replaced on a contract

Where goal or preference points have been assigned to projects, we will require a 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. We will require the prime contractor or prime consultant to notify the District Compliance Manager immediately of the DBE's inability or unwillingness to perform and provide reasonable documentation. Replacing a DBE because of the DBE's inability or unwillingness to perform requires the signature of the District Compliance Manager or other individuals as delegated by the appropriate District Secretary.

In this situation, we will require the prime contractor to obtain our prior approval of the substitute DBE and to provide copies of new or amended subcontracts, or documentation of good faith efforts. If the contractor fails or refuses to comply in the time specified, our contracting office will issue an order stopping all or part of payment/work until satisfactory action has been taken. If the contractor still fails to comply, the District Construction Engineer may issue a notice of default.

## **Counting DBE Participation (§ 26.55)**

We will count DBE participation toward overall and contract specific goals as provided in 49 CFR § 26.55.

## **Certification (§§ 26.61 - 26.91)**

The Department will use the certification standards of Subpart D of Part 26 and the certification procedures of Subpart E of part 26 as adopted by Rule Chapter 14-78, Florida Administrative Code, to determine the eligibility of firms to participate as DBEs in USDOT-assisted contracts.

To be certified as a DBE, a firm must meet all certification eligibility standards. We will make our certification decisions based on the facts as a whole. The Department will initiate the rule-making process prescribed by § 120.54, Florida Statutes, to amend Rule Chapter 14-78, Florida Administrative Code and adopt 49 CFR Part 26. The Department has commenced implementation of the certification requirements contained in 49 CFR Part 26 pending the completion of the rule-making process as authorized by Chapter 120, Florida Statutes.

### Process

For information about the certification process or to apply for certification, firms should contact: Ruth B. Dillard, Manager, Equal Opportunity Office, 605 Suwannee Street, MS 65, Tallahassee, Florida 32399, (850) 414-4747; E-mail: [www.ruth.dillard@dot.state.fl.us](mailto:www.ruth.dillard@dot.state.fl.us) or John Goodeman, DBE Certification Consultant, 605 Suwannee Street, MS 65, Tallahassee, Florida 32399, (850) 414-4747, E-Mail: [www.john.goodeman@dot.state.fl.us](mailto:www.john.goodeman@dot.state.fl.us).

In the event we propose to remove a DBE's certification, we will follow procedures consistent with § 26.87, Rule 14-78.008, Florida Administrative Code, and Chapter 120, Florida Statutes. To ensure separation of functions in a decertification, we have determined that an Administrative Law Judge of the Division of Administrative Hearings (DOAH) will serve as the decision maker in decertification proceedings which are contested by the DBE, pursuant to § 120.57, Florida Statutes. We have established an administrative "firewall" to ensure that the Administrative Law Judge of the Division of Administrative Hearings will not have participated in any way in the decision to commence a decertification proceeding against the firm. The Division of Administrative Hearings is a separate agency from the Department. Administrative Law Judges of the Division of Administrative Hearings are rotated on each case pending before it.

If we deny a firm's application or decertify it, it may not reapply until six months have passed from our action pursuant to § 339.0805, Florida Statutes.

### Unified Certification Program

As required under 26.81, the Department and all other DOT recipients who certify DBEs, will participate in a Unified Certification Program. Within three years of January 29, 1999, the Department and other recipients in the State of Florida will endeavor to sign an agreement establishing the UCP for the State of Florida and submit the agreement to the Secretary of the USDOT for approval.

The Department will take the lead with other municipal, local and county DBE programs to develop and implement a Uniform Certification Program. The Department has already dedicated staff to this project.

## Certification Appeals

Any firm or complainant may appeal our decision in a certification matter to the Department for referral of the matter to the Division of Administrative Hearings for resolution or to USDOT. Such appeals may be sent to:

Mr. James Myers  
Clerk of Agency Proceedings  
Florida Department of Transportation  
605 Suwannee Street, MS 58  
Tallahassee, Florida 32399-0458

or

Department of Transportation  
Office of Civil Rights  
Certification Appeals Branch  
400 7th Street, SW, Room 2104  
Washington, DC 20590

We will promptly implement any USDOT certification appeal decisions affecting the eligibility of DBEs for our USDOT-assisted contracting (e.g., certify a firm if USDOT has determined that our denial of its application was erroneous).

DBEs may also appeal certification decisions to the Department and commence the administrative hearing process prescribed by § 120.57, Florida Statutes.

According to § 120.57, Florida Statutes, a DBE may request a formal or informal administrative hearing if it decides to challenge a certification decision. The Department's Office of General Counsel treats all hearing requests from DBEs as requests for formal hearing and refers these requests to the Division of Administrative Hearings for an Administrative Law Judge to be assigned to and preside over the case. In the administrative hearing process, each party may present its case to the Administrative Law Judge and submit proposed recommended orders. The Administrative Law Judge enters a recommended order and each party may file objections to the recommended order. After considering the recommended order and any objections to that order, the Secretary of the Florida Department of Transportation may accept or reject the recommended order as his Final Order. If the DBE disagrees with the Department's Final Order, it may appeal the Final Order to the First District Court of Appeal.

## "Recertifications"

We will review the eligibility of DBEs that we certified under former part 23, to make sure that they meet the standards of Subpart D of part 26. We will complete this review no later than three years from the most recent certification date of each firm. The Department has requested Personal Net Worth Statements, Statements of Social Disadvantage and updated specialty code requests from each DBE currently certified by the Department. When the Department receives all of the requested information and determines a DBE satisfies the eligibility criteria set forth in 49 CFR Part 26, the Department will grant a three-year certification to the DBE. This three year

certification will run from the expiration date currently listed for the DBE in the Department's DBE Directory. If a firm fails to submit the requested information or if it submits information which reflects the firm is no longer eligible to participate in the DBE program, the Department will commence decertification proceedings. Approximately one-third of all Personal Net Worth statements and Social and Economic Disadvantage requests have been received and are being reviewed. A second mailout will be sent out. With DBE companies being allowed 45 days from receipt of the request to submit the information.

For firms that we have certified or reviewed and found eligible under part 26, we will again review their eligibility every three years on or before the anniversary date of the firm's initial certification. Each of the DBEs will be notified 120 days before the certification anniversary date on the third year that it must have its certification reviewed and renewed. These reviews will include the following components: the DBEs must complete a new Schedule A application for certification with updated documentation concerning ownership, size standards, gross receipts, social and economic disadvantage. An on-site review of these firms will be conducted on a case-by-case basis as determined by the DBE Certification Manager.

#### Affidavit of Continuing Eligibility

We require all DBEs to inform us, in a written affidavit, of any change in its circumstances affecting its ability to meet size, disadvantaged status, ownership or control criteria of 49 CFR part 26, and Rule Chapter 14-78, Florida Administrative Code, or of any material changes in the information provided with the DBE's application for certification.

We will also require all owners of all DBEs we have certified to submit, on the anniversary date of their certification, an Affidavit of Continued Eligibility with supporting documentation.

We require DBEs to submit this affidavit with documentation of the firm's size and gross receipts and updated Personal Net Worth Statements for each of the firm's Disadvantaged Owners and their spouses.

We will notify all currently certified DBE firms of these obligations 120 days before the anniversary date of the firm's initial certification by certified letter. This notification will inform DBEs that to submit the "no change" affidavit, their owners must swear or affirm that they meet all regulatory requirements of part 26, including personal net worth. Likewise, if a firm's owner knows or should know that he or she, or the firm, fails to meet a part 26 eligibility requirement (e.g., personal net worth), the obligation to submit a notice of change applies.

#### Notices of Change

If a certified DBE experiences a change in ownership affecting the 51 percent majority ownership, and control of the firm by the disadvantaged owners on record with the Department, the DBE must submit a notice of this change to the Department. If the DBE fails to timely file this notice of change, the Department shall commence decertification proceedings pursuant to Rule 14-78.008, Florida Administrative Code.

A DBE shall also timely notify the Department of any change in address, telephone number,

contact person for the firm, change in the firm's officers, or change in the firm's name so that the Department may properly update this information for its DBE Directory.

### Personal Net Worth

We will require all disadvantaged owners of applicant firms and currently-certified DBEs whose eligibility under part 26 we review, to submit a statement of personal net worth. The Department has already requested PNW statements from the disadvantaged owners of all currently certified DBEs and required new applicants to submit PNW statements with their initial applications for certification. The Department will require updated PNW statements from the firm's disadvantaged owners and their spouses annually with the firm's Affidavit of Continued Eligibility along with the firm's documentation of its size and annual gross receipts. The Department will request updated PNW statements to track the economic disadvantaged status of the firm's disadvantaged owners.

## **Information Collection and Reporting**

### Bidders List

The Department will create a bidders list, consisting of information about all DBE and non-DBE firms that bid or quote on USDOT-assisted contracts. The purpose of this requirement is to allow use of the bidders list approach to calculating overall goals. The bidders list will include the name, address, DBE/non-DBE status, age, and annual gross receipts of firms. A sample of the form is attached for manual submission by contractors. A copy of the Department's database format is also included.

We will collect this information in the following ways:

Until a new software system is procured and installed, the Department will manually collect this information through contract clauses, requiring all bidders to report the names and addresses of firms furnishing them quotes. The information will be requested from all prime contractors within three days of their bid submission. They will also be allowed to submit the information with their bids. The Department will follow up on any information required under 49 CFR Part 26 which the contractor is not able to provide. When the new software system is acquired and implemented, the Department will electronically collect this data. The Department will begin gathering this information with the October 1999 bid letting.

### Monitoring Payments to DBEs

We will require prime contractors to maintain records and documents of payments to DBEs for three years following the performance of the contract. These records will be available for inspection upon request by any authorized representative of the Department or USDOT. This reporting requirement also extends to any certified DBE subcontractor.



We will keep a running tally of actual payments to DBE firms for work committed to them at the time of contract award. Florida proposes to utilize its monthly payment certifications from contractors. Currently contractors submit the certifications for their monthly progress payments. The Department proposes to add the names of subcontractors who have been paid and how much. This form would have to be signed by the contractor with all of the statutory requirements enforced for false submissions. The Department will monitor the contractor information through sampling with subcontractors on a regular basis and a full review upon the discovery of inconsistent information. The Department further proposes a monitoring process which will include project personnel monitoring the work done by DBEs to ascertain DBE credit.

We will perform interim audits of contract payments to DBEs. The audit will review payments to DBE subcontractors to ensure that the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts stated in the schedule of DBE participation.

#### Reporting to USDOT

We will report DBE participation to USDOT as follows:

We will submit annually USDOT Form 4630, as modified for use by FAA recipients.

We will report DBE participation on a quarterly basis, using USDOT Form 4630. These reports will reflect payments actually made to DBEs on USDOT assisted contracts.

#### Confidentiality

We will safeguard from disclosure to third parties information that may reasonably be regarded as confidential business information, consistent with Federal, state, and local law. Pursuant to § 339.0805, Florida Statutes, all information submitted by applicant firms with their applications for certification and affidavits of continued eligibility, including their personal net worth statements, are confidential and exempt from the requirements of Florida's public records laws.