

IDAHO TRANSPORTATION  
DEPARTMENT

**DISADVANTAGED  
BUSINESS  
ENTERPRISE  
PROGRAM**

**IDAHO TRANSPORTATION DEPARTMENT  
DISADVANTAGED BUSINESS ENTERPRISE PLAN**

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# **POLICY STATEMENT**

## **IDAHO TRANSPORTATION DEPARTMENT DISADVANTAGED BUSINESS ENTERPRISE PROGRAM**

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

1. To ensure non-discrimination in the award and administration of USDOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs;
2. To create a level playing field on which DBEs can compete fairly for USDOT-assisted contracts;
3. To ensure that the DBE Program is narrowly tailored 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 USDOT-assisted contracts; and
6. To assist the development of firms that can compete successfully in the marketplace outside the DBE Program.

The Equal Employment Opportunity (EEO) Manager has been designated the DBE Liaison Officer. In that capacity, the EEO Manager is responsible for implementing all aspects of the DBE Program. Implementation of the DBE Program is accorded the same priority as compliance with all other legal obligations incurred by ITD in its financial assistance agreements with USDOT.

This policy statement has been reviewed by the Idaho Transportation Board and all the components of ITD. In addition, ITD has published this statement for reference by ITD employees, DBE and non-DBE businesses that perform work for ITD on USDOT-assisted contracts, in newspapers, newsletters, and on ITD's website.

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DAVID S. EKERN, P.E.  
Director

## I) **INTRODUCTION**

The Idaho Transportation Department (ITD) recognizes its responsibility to ensure that Disadvantaged Business Enterprises (DBEs) have equal opportunity to participate in the performance of USDOT-assisted contracts and subcontracts administered by ITD. As part of its continuing effort to fulfill this responsibility, ITD has revised the DBE Program Plan to reflect the requirements and guidance contained in 49 CFR 26 (*Exhibit A*).

Significant changes in the Plan will be submitted to the local FHWA office for approval.

### A. **PURPOSE**

The purpose of the DBE Program Plan is to provide guidance for ITD personnel in implementing 49 CFR Part 26 and provide DBEs and other contractors information on their responsibilities on USDOT-assisted contracts and ITD's implementing procedures. It further assures USDOT that ITD will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR 26 on the basis of race, color, sex, or national origin.

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

### B. **SCOPE**

The DBE Program applies to all USDOT-assisted transportation-related contracts administered by ITD and authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) and Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21). Also included are federal transit funds authorized by Titles I, III, V, and VI of ISTEA or by federal transit laws in Title 49, USC or Titles I, III and V of TEA-21. Also included are airport funds authorized by 49 USC 47101, et seq. This program remains in effect until all such funds from USDOT have been expended.

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

- Professional Service Agreements (training, computer, etc.)
- Architectural/Engineering Contracts
- Maintenance Agreements

- Supply Contracts

Other ITD Divisions that receive USDOT funds include the Division of Aeronautics and the Division of Public Transportation. These Divisions have reviewed, adopted, and assure compliance with the conditions of the ITD DBE Plan. As appropriate, these Divisions will develop an annual DBE participation goal using the methodology established in the ITD DBE Plan. This goal will be provided by each Division to the appropriate USDOT administration.

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

Subrecipients who receive USDOT funds through FTA and FAA as noted above and award more than \$250,000 in prime contracts in a fiscal year are required to comply with the provisions of 49 CFR Part 26 and develop their own DBE Program Plan.

Additionally, agreements between ITD and all subrecipients will contain assurances that subrecipients will not discriminate on the basis of race, color, national origin, or sex in the performance of this contract as well as language that obligates subrecipients to develop, and implement, their own DBE Plan or to adopt, and implement, the provisions of the ITD DBE Program.

### **C. AUTHORITY AND APPLICABLE LAWS**

USDOT regulations, 49 CFR Part 23 (revised) and Part 26 (new), published in the Federal Register, Volume 68, No. 115, dated February 2, 1999, June 16, 2003, revised the Disadvantaged Business Enterprise Program established in 1980 until the year 2004.

### **D. FEDERAL FINANCIAL ASSISTANCE AGREEMENT ASSURANCE**

ITD has signed the following assurance, applicable to all USDOT-assisted contracts and their administration. Agreements with subrecipients will also include this assurance:

*The Idaho Transportation Department shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any USDOT-assisted contract or in the administration of its DBE Program or the requirements 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. ITD'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 Idaho Transportation Department 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.).*

Any person who believes that ITD has failed to comply with its obligations under this program may file a written complaint with the appropriate USDOT Modal Administration as listed under 49 CFR 26.103 and 26.105.

ITD will not intimidate, threaten, coerce, or discriminate against any individual or firm for any reason.

#### **E. DEFINITION OF TERMS**

*Exhibit B* of this program plan contains the definition of terms used in conjunction with the DBE Program.

## **II) ADMINISTRATION**

### **A. OBJECTIVES OF THE DBE PROGRAM**

1. To ensure nondiscrimination in the award and administration of USDOT-assisted contracts in the Department's highway, transit and airport financial assistance programs;
2. To create a level playing field on which DBEs can compete fairly for USDOT-assisted contracts;
3. To ensure that the DBE program is narrowly tailored in accordance with applicable law;
4. To ensure that only firms that fully meet eligibility standards are permitted to participate as DBEs;
5. To help remove barriers to the participation of DBEs in USDOT-assisted contracts;
6. To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and
7. To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

In meeting these objectives, ITD will not use quotas in any way.

## **B. DBE LIAISON OFFICER (DBELO)**

1. DBE program objectives are implemented and monitored by EEO Office personnel under the direction of the EEO Manager who is designated as the DBE Liaison Officer with overall responsibility for the program. While the EEO Manager reports to the Division Administrator for the Division of Administrative Services, he/she has direct independent access to the Director concerning DBE program matters as reflected on the *Exhibit C Organization Chart*. Duties and responsibilities include:
  - Advising the Director and the ITD Board on DBE matters and achievements; and
  - Providing direction and guidance to the CCO and other staff on implementing all aspects of ITD's DBE Program.
  
2. The CCO, responsible for administering the day-to-day operation of the program, reports to the EEO Manager. Duties and responsibilities include:
  - Gathering and reporting statistical data and other information required by USDOT;
  - Working with all internal and external entities to set overall annual goals;
  - Identifying contracts and procurements so that DBE goals are included, when necessary, in solicitations and monitors results;
  - Analyzing ITD's progress toward goal attainment and identifies ways to improve progress;
  - Participating in pre-bid meetings;
  - Chairing the DBE Certification Committee;
  - Participating with legal counsel and project directors to determine contractor compliance with good faith efforts; and
  - Certifying DBEs according to the criteria set by USDOT and acts as liaison to the Uniform Certification Process in Idaho.

DBE tasks account for forty (40) percent of the CCO's work time.
  
3. The DBE Coordinator reports to the CCO and is responsible for:
  - Ensuring that bid notices and requests for proposals are available to DBEs in a timely manner;

- Providing DBEs with information and assistance in preparing bids, obtaining bonding, and insurance;
- Planning and participating in DBE training seminars;
- Providing outreach to DBEs and community organizations to advise them of opportunities;
- Maintaining ITD's directory of certified DBEs; and
- Providing information to ITD's DBE Certification Committee when requested.

These tasks account for one hundred (100) percent of the DBE Coordinator's work time.

4. The DBE Assistant provides administrative support to the DBE Coordinator, accounting for eighty (80) percent of this position's work time.

Additional professional services are contracted as needed.

5. In addition to the EEO Office staff in Boise, District and other Headquarters staff assist in collecting data, conducting on-site interviews, and monitoring compliance with the DBE program.

A list, with names, addresses, telephone numbers, and e-mail addresses of all EEO Office personnel is attached as *Exhibit E*.

**C. DBE DIRECTORY OF CERTIFIED FIRMS**

1. EEO Office personnel solicit potential DBE transportation-related contractors for certification by:
  - a) Outreach to ethnic and minority groups and DBE organizations throughout Idaho;
  - b) Exchanging DBE directories and monthly newsletters with surrounding states; and
  - c) Outreach through business fairs and statewide program presentations.
2. ITD compiles and maintains a directory of firms currently certified as eligible to participate in transportation-related contracts under the DBE Program. The directory is available on the Internet at [www.itd.idaho.gov/civil/external.htm](http://www.itd.idaho.gov/civil/external.htm), by e-mail, and on diskette for contractors, cities, counties, or anyone interested in obtaining DBE services or supplies, by contacting the DBE Coordinator, Idaho Transportation Department, P.O. Box 7129, Boise, ID 83707-1129,

(208)-334-8567). The directory is also updated quarterly, and mailed per written request.

3. The Directory contains: firm name, address, telephone number(s) and the types of work that the firm has been certified to perform as a DBE.
4. The Department of Finance, State of Idaho, has determined that there are no financial institutions owned and controlled by socially or economically disadvantaged individuals in the State of Idaho. ITD will check on the availability of DBE financial institutions on an annual basis. If any financial institutions owned and controlled by socially or economically disadvantaged individuals are identified, ITD will make reasonable efforts to use these institutions and encourage prime contractors to use such institutions.

### **III) DBE CERTIFICATION PROCESS**

ITD's certification process attempts to identify those existing, for-profit, transportation-related firms that meet the eligibility criteria while ensuring that the benefits of the program are not extended to ineligible applicants.

#### **A. CERTIFICATION COMMITTEE**

On recommendations of the EEO Manager, the Division Administrator of the Division of Administrative Services appoints three ITD employees outside the EEO Office who are familiar with Department operations and the purpose and operation of the DBE Program to function as the Certification Committee. Committee appointees must demonstrate expertise in the disciplines of business, finance, engineering or construction. Members are appointed by and serve at the pleasure of the Division Administrator of the Division of Administrative Services. Decisions of the committee on certification and denial of certification are final (except for appeal to USDOT). A request for an informal hearing regarding decisions to decertify may be made to the EEO Manager and appeals regarding decertification may be made to the USDOT.

The CCO chairs the Certification Committee and the DBE Coordinator serves in an advisory capacity to the committee on the details of the applicant firms.

The Certification Committee currently consists of the Supply Services Manager, a Right-of-Way Agent and a Construction Associate Senior. The Committee meets monthly or more frequently as necessary to provide timely processing of applications.

Applications for certification are scrutinized by the DBE Certification Committee to determine that all requirements have been met and that adequate, accurate information has been provided on which to determine eligibility. Firms applying for certification have the burden of demonstrating to the Committee, by a preponderance of the evidence, that they meet the requirements of presumptively disadvantaged groups (or individual disadvantage), business size, ownership, and control.

**B. CERTIFICATION ELIGIBILITY REQUIREMENTS**

The U.S. Department of Transportation provided approval dated November 26, 2002, on ITD’s Unified Certification Program (UCP).

The following criteria are used by ITD and all its subrecipients in determining whether a firm is owned and controlled by one or more disadvantaged individuals and whether the firm is eligible to be certified as a DBE (49 CFR 26 Subparts D and E and Appendix A to Part 26).

- 1. The size of the applicant firm, including its affiliates, cannot exceed the following limits:

<u>Type of Firm</u>	<u>Average Annual Gross Receipts Three Preceding Fiscal Years*</u>
General Contractor	\$20.41 Million
Special Trade Contractor (excavating, painting, etc.)	\$12.0 Million
Engineering, Architectural, (Surveying and Mapping)	\$4.0 Million
Environmental Consultant	\$6.0 Million
Landscape Architect	\$6.0 Million
Appraisers	\$1.5 Million

*\*Additional guidance on gross receipts limits and "number of employees" limits for specific types of businesses is contained in Small Business Administration regulations, 13 CFR 121, and is used by ITD in determining eligibility. Copies are available through the CCO.*

SBA 8(a)-certified firms that lose their SBA certification are simultaneously removed from ITD's DBE Program. Idaho SBA office in Boise advises ITD of its actions to remove eligibility for any reason; ITD reciprocates, providing the reason for removal.

Firms will not be totally decertified due to exceeding the size standard for one or more of its activities. If a firm meets the size

standard for one type of work (e.g., as a general contractor), it will continue to be certified and receive DBE credit for that type of work, even if it has exceeded the size standard for another type of work (e.g., as a specialty subcontractor).

2. Economic and Social Disadvantage can be determined in three ways:

a) The applicant firm's majority owner(s) must be citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Subcontinent Asian Americans or other minorities found to be disadvantaged by the SBA. These applicants, presumed to be disadvantaged, must also submit a signed, notarized certificate with its application attesting to its actual social and economic disadvantage. In addition to proving ancestry, the applicant owner(s) must document that they are recognized in their communities as members of one of these groups if there is reason to question eligibility. ITD will make a written request explaining when additional evidence is needed. The presumption of disadvantage may be rebutted by ITD or third parties.

- **"Black Americans"** (persons having origins in any of the black racial groups of Africa)
- **"Hispanic Americans"** (persons of Mexican, Puerto Rican, Cuban, Dominican, Central and South American, or other Spanish or Portuguese culture or origin, regardless of race)
- **"Native Americans"** (persons who are American Indians, Eskimos, Aleuts or Native Hawaiians)
- **"Asian-Pacific Americans"** (persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the US 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)
- **"Subcontinent Asian Americans"** (persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka)
- **Women**

- Any additional groups whose members are designated as socially and economically disadvantaged by the Small Business Administration.
- b) The applicant firm's owners have been certified by the Small Business Administration as being socially and economically disadvantaged under Section 8(a) of the Small Business Act as amended [15 USC 637(A)].
  - c) The applicant firm's owners do not meet criteria in 2 a. or b. above, but can demonstrate, by a preponderance of the evidence that they are socially and economically disadvantaged. The DBE Certification Committee will evaluate each applicant (including those whose qualifications under 2.a. are in question) against the criteria established in 49 CFR 26 Appendix E.

Applicant's personal net worth (excluding his or her ownership interest in the firm; his or her equity in a primary residence; assets held in vested pensions plans, retirement accounts, 401 (k) account, or other retirement saving or investment programs with adverse tax or interest consequences if distributed at the present time) cannot exceed \$750,000. All applicants must submit a signed notarized certificate regarding their personal net worth accompanied by appropriate supporting documentation. Relevant information from the applicant's spouse may be requested on a case by case basis when there is a specific reason to look into the spouse's finances.

3. Ownership - To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.
  - a) At least 51 percent ownership of each class of voting stock outstanding and at least 51 percent of the aggregate of all stock outstanding must be held by the disadvantaged owner(s) (in corporations); 51 percent of each class of partnership interest (as reflected in partnership agreements); or 51 percent of each class of member interest (in limited liability companies) must be held by socially and economically disadvantaged individuals.
  - b) 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 interests, as demonstrated by the substance, not merely the form, of arrangements.

- i) Securities that constitute ownership must be held directly by disadvantaged persons. Under limited circumstances, securities held in trust by and for disadvantaged owners may be counted toward ownership.
- ii) The contributions of capital or expertise by the disadvantaged owners to acquire ownership interests must be real and substantial.
  - Promises to contribute capital, unsecured notes payable to the firm or non-disadvantaged owners, or participation in the firm as an employee do not constitute adequate contributions; debt instruments from financial institutions normally are considered adequate contributions.
  - A significant financial investment in the firm must also accompany the disadvantaged owner's contributions of expertise. Expertise must be in a specialized field, of outstanding quality, critical to the firm's operations, indispensable to the firm's potential success, specific to the type of work the firm performs, and documented in the records of the firm.
- iii) Ownership interests obtained through property settlements, inheritance, gifts or transfers must be evaluated against specific criteria contained in 49 CFR 26.69(g).
- iv) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. ITD does not count a greater portion of joint or

community property assets toward ownership than state law recognizes as belonging to the socially or economically disadvantaged owner of the applicant firm.

A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.

4. Control of the firm will be determined by considering all the facts in the record viewed as a whole.
  - a) Whether the firm is independent and viable - one that does not depend on its relationship with another firm. The following areas will be examined:
    - The relationship between the disadvantaged owner(s) and non-DBE firm in the areas of personnel, facilities, equipment, financial or bonding support, and other resources;
    - Recent employer/employee relationships between the disadvantaged owner(s) and a non-DBE firm;
    - Patterns of exclusive or primary dealings with a prime contractor; and
    - Normal industry practices related to the consistency of relationships between disadvantaged owner(s) and non-DBE firms.
  - b) Whether the disadvantaged firm is subject to formal or informal restrictions in the areas of: corporate charter provisions, by-law provisions, contracts, cumulative voting rights, voting powers accompanying different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions of precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights that prohibit the disadvantaged owner(s) from making independent business decisions. Spousal co-signature on documents is not precluded.
  - c) Whether the disadvantaged owner(s) possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long term

decisions on matters of management, policy and operations.  
The disadvantaged owner(s):

- Must hold the highest officer position in the company;
  - Must control the Board of Directors in a corporation; and
  - Must be a general partner in partnerships, with control over all partnership decisions.
- d) Whether non-disadvantaged participants (owners, managers, etc.) have the power to control the firm or are disproportionately responsible for its operations.
- e) Whether disadvantaged owners retain the power to hire and fire or revoke the authority of non-disadvantaged persons to whom authority has been delegated. The disadvantaged owners must actually exercise control over the firm's operations, management, and policy.
- f) Whether the disadvantaged owners possess the experience, managerial and technical competence, and overall understanding of the firm's business; whether they can intelligently and critically evaluate information presented by other participants in the firm's activities and use the information to make independent decisions. (Generally, office management, administration, or bookkeeping activities by themselves do not demonstrate control.)
- g) Whether the disadvantaged owner holds the required license(s) - craft or professional - for the firm's primary type of business as required by state or local law. Lack of licensure, by itself, does not disqualify the firm, but should be considered in evaluating whether the disadvantaged owner(s) controls the firm.
- h) Whether differences in remuneration between the disadvantaged and non-disadvantaged owners (or other participants) is significant (or explainable) vis-à-vis duties and responsibilities, normal industry practices, and the firm's reinvestment practices. All management positions will be evaluated to determine actual control of the applicant firm.
- i) Whether the disadvantaged owner engages in outside employment or other business interests that conflict with full-time management of the applicant firm during the firm's normal operating hours.

- j) Whether the presence of non-disadvantaged family members as owners, managers, or employees jeopardizes the disadvantaged owner's control of the firm. Participation by non-disadvantaged family members will be evaluated without regard to whether they are immediate family members. If it is not clear that the disadvantaged owner - as distinct from the family as a whole - controls the firm, then the applicant has failed to prove eligibility for certification.
- k) Whether the disadvantaged applicant can demonstrate that the transfer of ownership and control from a non-disadvantaged owner (family or not) to a disadvantaged owner by providing clear and convincing evidence that:
  - The transfer of ownership and control was not made solely to obtain DBE certification; and
  - The transfer was accompanied by real management, policy and operational control.
- l) Whether the applicant firm owns equipment necessary to perform the work, or leases (if standard industry practice) equipment from a source that does not jeopardize the firm's independence.
- m) Whether the applicant has the ability to control the specific type(s) of work identified in the application. When additional types of work are added to the certification, the applicant must demonstrate control of those operations also.
- n) Whether the applicant operates under a franchise or license agreement and the extent to which the relationship impairs the applicant's ability to control the management and operation of the firm and assume the risks commensurate with ownership.
- o) Whether the non-disadvantaged partner in the applicant firm has the power to arbitrarily bind the partnership or subject it to contract or tort liability.
- p) Whether the disadvantaged owners who lease employees from leasing firms assume responsibility for hiring, firing, training, assigning and otherwise controlling the on-the-job activities of the leased employees and pay wage and tax obligations for these employees.

5. In addition, ITD will consider the following requirements:

- a) Whether the firm has exhibited a pattern of conduct attempting to evade or subvert the requirements of the DBE program;
  - b) Whether the applicant firm currently meets the requirements of the program. New firms will not automatically be denied certification, nor will firms that previously failed ownership and control criteria be rejected without full evaluation;
  - c) Whether the applicant firm has cooperated and furnished all information required by ITD for certification; and
  - d) Whether an applicant firm that is an eligible subsidiary of a parent or holding company or is owned by an Indian Tribe as described in 49 CFR 26.73 (e)(1) and (2) and 49 CFR 26.73(h).
  - e) Special rules that apply to the certification of firms related to Alaska Native Corporations (ANCs) as stated in 49 CFR 26.73(i).
6. Detailed guidance on evaluating information presented by applicant firms is contained in Section III) B. Certification Eligibility Requirements.

### **C. APPLICATION PROCEDURE FOR CERTIFICATION**

#### **1. Forms**

A business applying to ITD for certification as a DBE is required to submit the following completed forms and documents (to the extent they apply). Forms are available from the DBE Coordinator in the EEO Office or from the Equal Employment Opportunity Safety Training Coordinators in the ITD District offices or on ITD's website [www.itd.idaho.gov/civil/external.htm](http://www.itd.idaho.gov/civil/external.htm).

ITD Disadvantaged Business Enterprise Uniform Certification Application (*Exhibit D*) with all supporting documentation as requested.

Statement from the firm of the type of work it prefers to perform as part of the DBE program and its preferred location for performing the work, if any.

Failure of the applicant to supply all necessary information and documentation is grounds for denying certification.

SBA 8(a) - or SDB-certified firms applying for ITD DBE status may submit the SBA certification application form and documentation in lieu of the Unified Certification Application form. An on-site review will still be required prior to certification approval. When SBA and USDOT certification standards conflict, USDOT standards will prevail.

ITD will not deny certification to an SBA-certified firm in the absence of additional information that leads ITD to a different conclusion. If ITD does discover additional information from which it could reasonably conclude that the SBA-certified firm is not an eligible DBE, it may decline the firm (See III D below).

If ITD denies certification or recertification to a firm certified by the SBA, ITD is required to notify the SBA in writing. The notification must include the reason for denial.

Upon receipt of a signed, written request from a certified DBE firm, ITD will transfer to the SBA a copy of the firm's application package. This information will be transferred by ITD within the required thirty days from receipt of the request.

The SBA, if necessary, may make a written request to ITD for additional material (e.g., on-site review report). Copies of the requested material will be provided by ITD to the SBA within the required forty-five days of the request.

## 2. Certification Assistance by DBE Coordinator

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

Completed forms and documentation are returned to the DBE Coordinator for review to determine completeness and adequacy. If clarification or additional information is required, the DBE Coordinator contacts the applicant firm. When necessary, the DBE Coordinator assists the applicant through the application process.

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

When the DBE Coordinator is satisfied that an application is complete and all documentation has been provided, a summary of

the information contained in the application (and relevant documents), along with a brief description of areas of concern, is sent to the appropriate District EEO/Safety Training (EEO/ST) Coordinator requesting that an on-site review of the applicant firm be conducted.

3. On-Site Reviews (*ITD-2420 – Exhibit F*)

- a) Before the review is conducted, Reviewers should become familiar with the application material and develop any additional questions that will help clarify the applicant's status vis-à-vis eligibility standards.
- b) The EEO/ST Coordinator contacts the DBE firm advising the owner(s) that a review will be scheduled within approximately two weeks. If the applicant owner(s) is unable to be contacted, unreasonably delays the review date, or fails to appear for the review, the EEO/ST Coordinator advises the DBE Coordinator who investigates the situation.
- c) The EEO/ST Coordinator and one other District employee when feasible (preferably knowledgeable in the applicant's areas of expertise), meet with the applicant firm at the arranged time to interview owners, verifying that the application information is correct and up-to-date. It is important that Reviewers describe what they observe during the review; if there is reason to suspect the owner(s) is not completely forthright in his/her answers, the circumstances and suspicions should be described and the rationale for conclusions reached as documented on the ITD-2420 form.
- d) If the applicant firm is currently working within a reasonable distance of the District Office, the EEO/ST Coordinator must visit the worksite(s) to determine if job-site operations are consistent with information obtained in interviews and meet requirements for DBE certification.
- e) The completed form ITD-2420 is forwarded to the DBE Coordinator for presentation to the Certification Committee at the next meeting. The following situations warrant special attention:
  - The firm in which the woman owner's husband (or male relative) has extensive experience in the same line of work and may also be actively involved in the applicant's firm;

- The firm in which the disadvantaged owner has close ties with a prime contractor (e.g. previously worked only for that contractor), or in which a prime contractor owns 49% of the applicant's firm; and
  - The equipment listed on the application form does not match the registration(s) or leasing information on file with the DBE firm.
- f) On-site reviews from out-of-state applicants will be accepted from the applicant's home state.

#### 4. Certification Committee Review

- a) The Certification Committee meets at the call of the CCO every thirty (30) days or more frequently if necessary.
- b) The committee evaluates the application documentation and the information obtained from the On-Site Review against the eligibility criteria contained in III. B. of this Plan.

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

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

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

Decisions on eligibility will be made within 90 days of receipt of all required information. This time period may be extended once for an additional sixty (60) days with written notice to the firm. ITD's failure to make a decision during this time frame constitutes constructive denial of the application. Applicants may appeal to USDOT.

5. Certification Responsibilities.

- a) ITD certifies DBEs for three years unless and until certification has been removed (i.e., by SBA, another state, or ITD).
- b) When requested for purposes of certification, ITD will make available to states or other financial recipients of USDOT funds, all relevant information pertaining to an applicant's eligibility, including all application materials and reports of on-site reviews within thirty (30) days of receipt of the request, provided the DBE has signed written authorization for transfer of the application, including tax forms and statements of personal net worth, to the requesting agency.
- c) DBEs must inform ITD in a sworn affidavit of any change in circumstances affecting its ability to meet size, disadvantaged status, ownership and control requirements, management changes or any material change in the information provided in the application form within thirty days of the change. Supporting documentation describing in detail the nature of the changes must be attached. If a DBE fails to make timely notification of such changes, it will be deemed to have failed to cooperate under 49 CFR 26.109(c).

**D. APPEAL TO USDOT ON DENIAL OF INITIAL CERTIFICATION**

1. Applicants who believe they have been wrongly denied certification as a DBE may file an appeal in writing to: Department of Transportation, Office of Civil Rights, 400 7th Street, SW, Room 2401, Washington, DC 20590, within ninety (90) days after

certification has been denied. The process for appealing, and content of the appeal, are described in 49 CFR 26.89. (Exhibit A)

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

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

- a) If the USDOT determines that ITD erroneously certified a firm, ITD must remove the firm's eligibility upon receipt of the determination. Removal of the firm's eligibility will be effective as of the date of the receipt of the USDOT determination.
- b) If the USDOT determines that ITD erroneously failed to find reasonable cause to remove a firm's eligibility, ITD must expeditiously commence procedures to determine if the firm's eligibility should be removed.
- c) If the USDOT determines that ITD erroneously declined to certify or removed the eligibility of a firm, ITD must certify the firm effective on the date ITD received the USDOT determination.
- d) If the USDOT determines that ITD erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, ITD must take appropriate corrective action as determined by the USDOT.
- e) If the USDOT affirms ITD's determination, then no further action is necessary.

## **E. RECERTIFICATION**

All firms are required to submit at the conclusion of the firm's 3-year eligibility, a recertification application form, with all accompanying documentation and participate in an on-site review (when warranted). Continuation of the firms' eligibility is determined based on the requirements of 49 CFR 26.

## **F. "NO CHANGE" AFFIDAVIT**

Annually, the CCO will advise DBEs they must complete a sworn affidavit, declaring that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or

in its application form, except for changes about which the DBE has notified ITD. (*Exhibit G, No Change Affidavit*)

Documentation of the firm's size and gross receipts must accompany the affidavit.

## **G. REMOVAL OF DBE CERTIFICATION**

ITD will initiate actions for removal of a DBE firm certification:

- If it is determined that it does not meet one or more of the eligibility standards listed in III) B. of this plan; or
- If an investigation shows that the DBE has failed to perform a "Commercially Useful Function (CUF) *and that failure constitutes part of a pattern of relationships with non-minority businesses that brings the DBE's independence and control into question*; or
- A DBE "fails to cooperate" or is "unresponsive" to requests for annual "no change" affidavit, or fails to submit an application form at the end of a 3-year eligibility period.

ITD will initiate an investigation and removal from the program proceedings when notified by third parties, knowledgeable ITD employees, or USDOT that they are in possession of evidence which questions the eligibility of currently certified DBE firm(s) vis-à-vis the standards and acceptable operating procedures contained in this plan and 49 CFR 26.

The DBE firm remains eligible to participate on ITD contracts during the pendency of ITD removal of certification proceedings but not during appeals to USDOT.

1. Third party complaints submitted to ITD must be written and contain specific reasons why the complainant believes the DBE is ineligible to participate in the DBE Program. General allegations or anonymous complaints will not be addressed. Complaints should be directed to the Contract Compliance Officer, Idaho Transportation Department, P.O. Box 7129, Boise, ID 83707-1129.
  - a) If the complainant(s) request their identities be kept confidential, ITD will honor that request unless it hinders the investigation, hearing, or denies due process to other parties. In these circumstances, complainants will be requested to waive confidentiality and advised that failure to do so may result in closure of the investigation or dismissal of the hearing.

- b) After investigation by the CCO, the ITD Certification Committee will consider allegations in the complaint and evaluate additional information from the DBE firm or other sources. After a thorough review of the record, the Committee instructs the CCO to either:
- Advise the complainant and the DBE firm in writing that it finds no reasonable cause to believe that the firm is ineligible, the specific reasons for that determination, and the evidence on which the reasons are based; or
  - Advise the DBE firm in writing that it proposes to find the firm ineligible, specifying the reasons for its determination, and the evidence on which those reasons are based. The letter will further offer the DBE firm an opportunity to respond to ITD's decision at an informal hearing described in III) G.4. below.

The complainant or DBE firm may appeal the decision by ITD to the USDOT. Appeals need to be sent to the U.S. Department of Transportation, Office of Civil Rights, 400 7<sup>th</sup> Street, S.W., Room 5414, Washington, D.C. 20590.

2. ITD-initiated proceedings may be based on notification by the DBE firm that its circumstances have changed or by information received from ITD employee(s) that suggests the DBE is ineligible and should be investigated for potential removal of certification.
- a) The ITD employee who becomes aware of a DBE firm's questionable circumstances or practices collects all relevant information and submits it to the CCO for further investigation. If the CCO believes there is reasonable cause to find the firm ineligible for the DBE Program, the information is presented to the Certification Committee for evaluation and decision.
- b) If the Committee concludes that the evidence points to ineligibility, they instruct the CCO to advise the DBE firm in writing that ITD proposes to find the firm ineligible, specifying the reasons for its determination, and the evidence on which those reasons are based. The letter will further offer the DBE firm an opportunity to respond to ITD's decision at an informal hearing described in III) G. 4. below.
3. USDOT-initiated proceedings begin when FHWA advises ITD that information in a DBE's certification records or other information in their possession gives them reason to believe that an ITD certified

firm does not meet the eligibility criteria, and further directs ITD to initiate proceedings to remove the firm's certification.

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

4. Informal Hearing Procedures (In these proceedings, ITD bears the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards.)

*Note: No hearing is necessary if the DBE firm exceeds the \$750,000 personal net worth cap and does not dispute that fact.*

- a) The EEO Manager is designated as the coordinator for the identification of a Hearing Officer and is responsible for arranging a time and place for the hearing in coordination with the CCO, the DBE Firm and the Hearing Officer. The identified Hearing Officer is responsible for evaluating written arguments and information if the DBE elects to respond to the certification removal notice in that manner. The identified Hearing Officer must be knowledgeable about the certification requirements of the DBE program. (Reasonable extensions of time may be allowed in any step of the following procedure.)
- b) The DBE firm is advised in the Notice of Intent to Remove Certification that it has 10 working days in which to request a hearing and the hearing options available - oral or written - and the procedures accompanying each option:
  - i) Oral hearings are scheduled approximately thirty days from the receipt of the DBE's request for hearing, contingent on the schedules of the Hearing Officer, CCO, and DBE owners.

Oral hearings will be audio taped. In addition, the DBE owner(s), witnesses and the DBE's attorney may be present but no witnesses will be sworn in and the rules of evidence will not apply. The CCO and ITD legal counsel (if appropriate) will present the position of the Certification Committee. ITD will retain the original record of the hearing. Verbatim transcripts will be available on appeal to USDOT.

- ii) If the DBE requests that arguments be submitted in written form, all arguments and information must be submitted within 30 calendar days from receipt of request for hearing. The Hearing Officer will make a decision within 30 calendar days of receipt of all written information.

Written arguments and information from the DBE are evaluated against the written arguments and information presented by the CCO.

- c) If the DBE fails to attend the scheduled oral hearing (without reason and notification) or to submit written arguments within time limits established, the firm will forfeit eligibility.
- d) The decision by the Hearing Officer on the arguments in either oral or written arguments will be based on any one or more of the following conditions:
- Changes in the DBE's circumstances since certification that render the DBE ineligible;
  - Receipt of information or evidence not available at the time of certification;
  - Receipt of information that was concealed or misrepresented before or during certification proceedings;
  - Changes in USDOT standards for certification; and/or
  - Documented findings that certification was factually erroneous.
- e) ITD notifies the DBE by certified mail of the Hearing Officer's decision and reasons for it, including specific references to the evidence in the record that supports each reason for the decision.

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

If the applicant appeals to USDOT, ITD will provide USDOT (within 20 days of request) the administrative record, including a hearing transcript. The record will be well

organized, indexed and paginated. Upon notification by USDOT, ITD will immediately take action as directed.

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

5. Effects of Removal of Certification on Contracts

- a) If ITD has made a commitment to use an ineligible DBE prime contractor, or a prime contractor has committed to using an ineligible DBE, but a contract or subcontract has not been executed before the removal of certification notice has been issued, the ineligible firm does not count toward the contract or overall goal. The prime contractor must meet the contract goal with an eligible DBE firm or demonstrate that it has made good faith effort to do so.
- b) If ITD has executed a contract with a subsequently ineligible DBE prime contractor, or a prime contractor has executed a subcontract with a subsequently ineligible DBE firm, ITD and the prime contractor will receive credit toward the DBE goals. However, in either case, that portion of the DBE's contract remaining after Notice of Removal of Certification will not count toward ITD's overall goal, but will count toward the contract goal, EXCEPT if the ineligibility stems solely from having exceeded the size standard during the performance of the contract, the DBE's performance will be counted toward both contract and overall goals.

**IV) OVERCONCENTRATION**

If the DBE Liaison Officer, in coordination with other ITD personnel, determines that DBEs in one or more areas of work are so overconcentrated as to unduly burden the opportunity of non-DBE firms to participate in this type of work, a request will be submitted to FHWA for approval of the determination and the remedial action proposed as provided in 49 CFR 26.33.

**V) DBE GOALS**

**A. OVERALL GOALS (for FHWA, FTA, and FAA-funded programs)**

- 1. ITD will use the following process each year to determine its overall goals:
  - a) In April, the EEO Office and members of Public Transportation and Aeronautics (if appropriate) will consult with minority, women's and contractor groups, community

organizations, and other organizations or officials to obtain information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and ITD's efforts to establish a level playing field for the participation of DBEs. Concerns and comments will be considered in developing the goals.

- b) On or about June 1, ITD will publish a notice in major Idaho newspapers, minority-focus media, and trade publications advising the public of the proposed overall goal, and that the rationale for its development is available for inspection during normal business hours in the EEO Office, Idaho Transportation Department, 3311 West State, Boise, ID for 30 calendar days following publication. The notice will further inform readers that comments will be received for 45 calendar days from the date of publication at the above address.
  - c) Proposed goals and a summary of public comments are sent to each USDOT operating administration by August 1 of each year. Included with the goals are descriptions of the methodologies used, the base figures, and the evidence relied on for adjustments.
  - d) The new annual goals take effect on October 1 of each year. The goals provide for participation by all certified DBEs and are not subdivided into group-specific goals.
2. ITD uses the statistical analysis in *Exhibit H* to develop and establish the annual goals, and to determine percentages of race-neutral and race-conscious participation. [49 CFR 26.45]
  3. ITD will adjust the estimated breakout of race-neutral and race-conscious participation to reflect actual DBE participation and will track and report race-neutral and race-conscious participation separately. (NOTE: The Division of Public Transportation will be responsible for tracking and reporting DBE participation in FTA-funded programs. The Division of Aeronautics will track and report for FAA-funded programs.) For reporting purposes, race-neutral DBE participation includes, but is not limited to:
    - DBE participation through a prime contract that a DBE obtains through customary competitive procurement procedures;
    - DBE participation through a subcontract on a prime contract that does not have a DBE goal; and

- DBE participation through a subcontract on a prime contract that exceeds a contract goal.

## **B. CONTRACT GOALS**

Contract goals will be used to meet that portion of the overall goal not projected to be met by race-neutral means and will be expressed as a percentage of the federal portion of USDOT-assisted contracts. If during the course of the year it becomes apparent that ITD will exceed its overall goal based on race-neutral means, contract goals will be reduced to the extent required so as not to exceed the overall goal. If it appears the race-neutral portion will not be met, ITD will increase the amount of contract goals. (NOTE: The Divisions of Public Transportation and Aeronautics will be responsible for setting individual goals on FTA- and FAA-funded contracts respectively.)

Before soliciting bids, Roadway Design personnel and EEO personnel will review each contract to determine the percentage goal, if any, that will be assigned to the contract. Those contracts with limited or no subcontracting potential will have a zero goal. Criteria for developing goals on the remaining contracts includes:

- Location of the project;
- Type of project;
- Availability of qualified DBEs;
- Estimated total cost of the project, or portions of the project; and
- Number of contract line items with the most DBE subcontracting, service, or supplier potential.

Contract goals can be met by all certified DBEs; goals will not be subdivided into group-specific goals.

## **C. RACE-NEUTRAL METHODS**

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

- Publicizing construction project notices and consulting requests for proposal in order to encourage DBEs and other small businesses to participate;
- Implementing a supportive services program for DBE and other small businesses to develop record-keeping and business management skills;
- Providing training to DBE and other small businesses to improve management, record keeping, financial and accounting capabilities;

- Providing services to DBE and other small businesses to improve long-term development, ability to handle increasingly significant projects, and achieve eventual self-sufficiency;
- Assisting DBE and other small businesses to develop their capability by utilizing emerging technology and conducting business through electronic media; and
- Providing other technical assistance to DBE and other small businesses as needed.

#### **D. DESIGN-BUILD CONTRACTING**

If ITD uses design-build contracting, DBE goals will be established as outlined in 49 CFR 26.53(e).

### **VI) PRE-BID, CONTRACT, AND AWARD PROCEDURES**

#### **A. CONTRACT ASSURANCE**

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

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

#### **B. DBE NOTIFICATION**

The DBE Coordinator notifies certified DBE firms of contract opportunities by:

- Assisting DBEs to be placed on the mailing list for "Invitation for Bids";
- Providing non-bidding "Plans, Specifications, and Requests for Proposals" to DBE firms upon request at no charge;
- Sending the "Plan Holders" list to DBEs upon request.

**C. PRIME CONTRACTOR NOTIFICATION**

1. When a contract contains a DBE goal, the goal is included in the "Notice to Contractors." Respondents to the "Notice" receive the proposal and a copy of the Civil Rights Special Provisions, Part III. (*Exhibit I*)
2. As stated in the DBE Directory, contractors may contact the DBE Coordinator (208-334-8567) for assistance in meeting the goal.

**D. AWARD OF CONTRACT**

1. The apparent successful bidder is the bidder (DBE or non-DBE) who submits the lowest bid, is qualified and responsible, and who signs the proposal document accompanying the bid stating that the firm will perform the work of the contract and comply with the various regulations and special provisions, including the Civil Rights Special Provisions and the DBE goal, when applicable. These provisions further require the contractor to identify, before the contract is awarded, the DBE(s) that will be used, or document its good faith efforts to do so.

After bids are opened and analyzed, ITD sends an "Intent to Award" letter to the apparent low bidder contingent on completion of all pre-award conditions. These conditions include completion and submission of the Bidders Registration Form (*Exhibit N*), if not already submitted, and the ITD-2396, DBE Commitments (*Exhibit J*), which includes the following information:

- Names of DBE and non-DBE firms that were solicited or that volunteered quotations;
- Identification of DBE firms and non-DBE firms that the contractor intends to use in the execution of this contract. A YES entry in the "Commit to Use" column after a DBE firm constitutes a commitment to use that firm for the work items listed;
- Description of the work that each DBE and non-DBE offered to perform;
- Dollar amount of the work each DBE and non-DBE offered to perform;
- Dollar amount of the participation of each DBE firm to be utilized and total DBE dollar participation anticipated;
- Signed commitment to use the DBE subcontractor(s) identified on the form - for the contract items specified - to meet the contract goal;

- Signed confirmation from the DBE(s) on the DBE(s) company letterhead stating that they are participating in the contract as specified in the prime contractor's commitment; and
- Documentation of good faith efforts if the goal cannot be met.

The apparent low bidder must submit the ITD-2396 with all requested information within fifteen (15) days of receipt of the "Intent to Award" letter from ITD.

2. Completed Form ITD-2396 is reviewed by the CCO to determine whether the apparent low bidder has committed to meet the DBE contract goal by utilizing certified DBEs who will be performing (or supplying) specific contract items for which they are licensed and certified to perform and will be performing commercially useful functions. If the goal will be met, the Roadway Design Engineer issues the "Notice to Proceed" to the contractor.

For FTA- and FAA- funded contracts, the Division of Public Transportation or Aeronautics will be responsible for ensuring the apparent successful bidder meets all qualifications/conditions concerning any DBE goals.

#### **E. GOOD FAITH EFFORTS (GFE) TO CONTRACT WITH DBEs**

The following procedures apply to FHWA-funded programs. If it becomes necessary to evaluate good faith efforts on an FTA- or FAA-funded contract, the appropriate ITD Division will contact the CCO for assistance/guidance.

1. If the apparent low bidder's DBE commitment(s) do not commit to meet the contract goal, the bidder must complete pages 5 and 6 of ITD-2396 (*Exhibit J*) and provide documentation verifying good faith efforts to meet the goal.
2. The CCO will evaluate information submitted by the bidder to determine what efforts were made, when they were made, and how intensely those efforts were undertaken. (*Exhibit K, Evaluation of Contractor's Good Faith Efforts to Meet the Contract DBE Requirement*) This evaluation includes, but is not limited to:
  - a) Whether the bidder solicited DBEs through all reasonable and available means, allowing adequate time for response, and following up on initial solicitations;

- b) Whether the bidder selected portions of the work to be performed by DBEs in order to increase the likelihood of meeting the DBE goals (including, where appropriate, breaking down contracts into economically feasible units to facilitate DBE participation);
  - c) Whether the bidder provided interested DBEs with information about the plans, specifications, and requirements of the contract in a timely manner;
  - d) Whether the bidder negotiated in good faith with interested DBEs, not rejecting DBEs as unqualified without sound reasons based on a thorough investigation of their capabilities;
  - e) Whether the bidder made efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance required by ITD or the bidder;
  - f) Whether the bidder made efforts to assist interested DBEs in obtaining equipment, supplies, materials, or related assistance or services; and
  - g) Whether the bidder effectively used the services of available minority/women community organizations, contractors groups, government business assistance offices, or others that might assist in identifying DBE firms.
3. After evaluation of the bidder's good faith efforts, the CCO with the approval of the EEO Manager advises the Roadway Design Engineer, who will notify the bidder that either:
- The bidders explanation/documentation has been accepted and will forward the "Notice to Proceed"; or
  - The bidder's good faith effort, has been rejected and state the reason(s) for the rejection, in writing, and offer the bidder an opportunity for administrative reconsideration by providing written documentation or argument to, the Chief Engineer, P.O. Box 7129, Boise, ID, 83707-1129, within five (5) working days of being informed of ITD's decision. (See 49 CFR 26.53)
4. If the apparent low bidder fails to respond within five (5) days from the date of the rejection, the bid will be considered non-responsive. ITD will then follow Department procedures regarding non-responsive bids.

5. If the bidder requests reconsideration, a meeting with the Chief Engineer may be scheduled at a time and place convenient for both participants.
6. The Chief Engineer will advise the bidder in writing of his/her decision within two (2) working days of the meeting. If the Chief Engineer determines that good faith effort was not made, the letter will state the reasons for that decision. The decision of the Chief Engineer is final.

**F. GOOD FAITH EFFORTS WHEN REPLACING DBEs**

Prime contractors cannot terminate for convenience a DBE subcontractor without the written consent of the Resident/Regional Engineer (RE).

1. If a DBE, selected by the contractor on ITD-2396 to be used on the project, is unwilling or unable to perform, the contractor notifies the RE. The RE forwards the request to the CCO with recommendation for approval or denial. The CCO then requests written release from the defaulting DBE and then notifies the RE on whether the commitment is or is not terminated.
2. The contractor must replace the defaulting DBE with another DBE to the extent needed to meet the contract goal, or make and document good faith efforts (listed above) to do so.
3. The contractor must obtain the approval of substitute DBE(s) from the RE and the CCO before signing and submitting copies of the revised or new subcontracts.
4. If the contractor is unable to obtain substitute DBEs, he must submit documentation of good faith efforts (listed above) in obtaining substitute DBEs to complete the unfinished work, or break out other contract items to subcontract. ITD may waive or adjust the goal as appropriate, depending on project circumstances.

**G. COUNTING DBE PARTICIPATION TOWARD CONTRACT GOALS**

1. Only the value of the work actually performed by and paid to DBEs is creditable toward the DBE goal, including the cost of supplies and materials obtained by the DBE for work on the contract (except supplies and equipment purchases or leases from the prime contractor or their affiliate).
2. When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward

DBE goals only if the DBE's subcontractor is itself a DBE; work contracted to a non-DBE firm does not count toward the goals.

3. A DBE must be certified when the ITD-2396 is submitted to be considered toward the goal. If a DBE is declared ineligible after the execution of a contract or subcontract, the DBE may complete the work. The DBE's participation will be counted toward the contract goal, if applicable. However, the work remaining after ITD's Notice of Removal of Certification will not count toward the overall goal. If the DBE firm's certification is removed before the DBE has signed a contract, the ineligible firm does not count toward the contract goal or overall goal. The prime contractor will be directed to meet the contract goal with an eligible DBE firm or demonstrate good faith efforts to do so.

4. Credit toward DBE goals varies with the type of DBE firm:

- **Joint Ventures between DBE and Non-DBE Firms** .....  
That portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals. Joint venture agreements must be approved by the DBELO and ITD Legal Counsel before contracts are signed. (*Exhibit L, ITD-646b*)
- **Professional, Technical, Consultant, or Managerial, Bonding or Financial Services** (provided a determination is made that the fees are reasonable)..... 100%
- **Construction Firms** (supply labor and materials to perform a distinct element of the work)..... 100%
- **Manufacturers** (must operate a factory that produces, on the premises, the materials, supplies, articles or equipment required under the contract and of the general character described in the specifications) ..... 100%
- **Regular Dealer** (must own, operate or maintain a store or warehouse that regularly sells materials or supplies to the general public)..... 60%

*(NOTE: To be a regular dealer, the firm must be an established business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A regular dealer in bulk products (petroleum, steel, etc.) does not need to maintain a place of business, but must own and operate distribution equipment for the products. Any supplementing of a dealer's own distribution equipment shall be by a long-term lease agreement)*

- **Packagers, Brokers, Manufactures' Representatives** (no credit for materials or supplies themselves)  
 .....Net Fee (if reasonable)
- **Trucking Firm:**
  - Must own and operate at least one fully licensed, insured, and operational truck used on the contract;
  - Will receive credit for total value of transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs;
  - May lease trucks from another DBE firm, including an owner/operator who is certified as a DBE and receive credit for the total value of the transportation services; or
  - May lease trucks from a non-DBE firm, including an owner/operator. A DBE who leases trucks from a non-DBE is entitled to credit for the total value of the services provided by the non-DBE firm not to exceed the value of the services provided by the DBE-owned trucks. Additional participation by non-DBE firms receives credit only for fees or commission received.

*Example: 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 by Firm X and Firm Y, and may also be awarded for the total value of transportation services provided by four of the six trucks provided by Firm Z. In all, full credit would be allowed for the participation of eight trucks. In 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.*

A lease must indicate that the DBE has exclusive use of and control over the truck being leased. This does not preclude the lease truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.

5. The contractor may count toward its DBE goal only those expenditures to certified DBE firms that provide a Commercially Useful Function on the project. *(See Section VII below.)*
6. Second-tier DBE subcontracts (whether with a DBE or non-DBE subcontractor) may be counted toward the prime contractor's DBE goal. However, if the first-tier subcontractor is unable or unwilling to perform for any reason, the prime contractor should be prepared to assume responsibility for utilizing the second-tier contractor if the second-tier DBE contractor is listed on the ITD-2396 and the prime contractor has received credit for the second-tier contract.
7. If all or part of the work committed to a DBE subcontractor is eliminated from the project, the CCO will determine whether the contractor will be required to make up the deficiency if it reduces the creditable amount below the contract goal. The decision will be based on all circumstances, including time left in the contract and availability of DBE firms to do the work.

## **VII) CONTRACT PERFORMANCE**

### **A. COMMERCIALLY USEFUL FUNCTION (CUF)**

In order for DBE contractor payments to be counted toward DBE goals, the DBE contractors must perform a commercially useful function, i.e., it must be responsible for execution of the work of the contract and must carry out its responsibilities by actually performing, managing and supervising the work involved, consistent with standard industry practices.

This means that:

1. The DBE must also be responsible for ordering its own materials and supplies, determining quantity and quality, negotiating price, installing (where applicable) and paying for the material itself;
2. The DBE must perform work commensurate with the amount of its contract;
3. The DBE's contribution cannot be that of an extra participant or a conduit through which funds are passed in order to obtain the appearance of DBE participation;
4. The DBE must exercise responsibility for at least fifty (50) percent of the total cost of its contract with its own workforce;
5. None of the DBE's work can be subcontracted back to the prime contractor, nor can the DBE employ the prime's, or other subcontractor's supervisors currently working on the project;

6. The DBE's labor force must be separate and apart from that of the prime contractor or other subcontractors on the project. Transferring crews between primes, subcontractors, and DBE contractors is not allowed;
7. The DBE owner must hold a Public Works license and any other professional or craft licenses required for the type of work he/she performs on the project;
8. The DBE may rent or lease, at competitive rates, equipment needed on the project from customary leasing sources or from other subcontractors on the project ; and
9. The DBE trucking firm must be responsible for management and supervision of the entire trucking operation for which it is responsible. The following rules also apply to DBE trucking firms:
  - a) must own and operate at least one fully licensed, insured and operational truck used on the contract. Owner/operators must have an agreement with the contractor or subcontractor that contains:
    - Owner/operator's name
    - Social security number
    - Copy of vehicle registration receipt
    - Current vehicle license number
    - Vehicle identification number
    - Method of payment (hour, ton or load)
  - b) Leases must indicate that the DBE has exclusive use of and control over the truck, but does not preclude the leased truck from working for others during the term of the lease with consent of the DBE, provided the lease gives the DBE absolute priority for the use of the leased truck.
  - c) Leased trucks must display the name and identification number of the DBE.
  - d) Lease/rental/contract agreements must be approved by the Resident/Regional Engineer

## **B. MONITORING COMPLIANCE**

ITD 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 Justice Department or USDOT Inspector

General) provided in 26.109. ITD also will consider similar action under its own legal authority.

A copy of the contract Civil Rights Special Provisions, Part III containing provisions and contract remedies is attached as *Exhibit I*.

When the DBE subcontractor begins work on the project, the Resident/Regional Engineer reviews the DBE's operation and completes ITD-1701, Commercial Useful Function Determination. (*Exhibit M*)

1. The Resident/Regional Engineer ensures that DBE owners, supervisory personnel and employees are distinguishable from other personnel on the job.
2. If the Resident/Regional Engineer determines that a DBE firm is not performing a commercially useful function, he/she will notify the prime contractor in writing, specifying those actions which violate the terms of the contract. The contractor is given five (5) days to eliminate the infraction(s).
3. If the contractor fails to remedy the violation, the Resident/Regional Engineer shall impose one or more sanctions (*Part D below*), and the payments made to that DBE will not be credited toward the contract goal.
4. At the request of the Resident/Regional Engineer, the CCO will investigate the non-performing DBE to determine if its job performance contains a pattern of relationships with non-minority businesses that brings the DBE's independence and control, and therefore its eligibility to participate, into question. (*Part III, G, Removal of DBE Certification*)

**C. RECORD KEEPING** (*Part III, 10, Contract Civil Rights Special Provisions*)

1. Contractors and Subcontractors
  - a) All contract records relating to DBE participation must be maintained by contractors and subcontractors during the project and from three years after the completion of the contract. ITD and FHWA employees must be allowed to interview contractors and DBE employees as necessary. (If claim, audit, or investigation is underway, records must be retained until final resolution.)
  - b) All DBE records maintained by contractors and subcontractors must be made available to ITD or FHWA personnel for inspection, copying or transcription for three (3) years after completion of the contract. ITD and FHWA

employees must be allowed to interview contractors and DBE employees, as necessary.

- c) Failure to comply with a) and b) above may result in the imposition of sanctions.

## 2. Idaho Transportation Department

- a) ITD obtains through a Bidder Registration Form (*Exhibit N*), and maintains a Bidders List, of all prime and subcontractors bidding on USDOT-assisted contracts. It contains the following information:

- Firm Name
- Firm Address
- Firm's Status as a DBE or Non-DBE
- Age of the Firm
- Annual Gross Receipts of the Firm

- b) ITD maintains a database to monitor a running tally of payments made to DBE firms and as to whether the DBE participation was race-neutral or race-conscious. The prime contractor provides a certified notice that payment has been made to the DBE firms including DBE suppliers for input into the database. Credit toward overall and contract goals is given only upon receipt of this certified document.
- c) ITD reports DBE participation semi-annually to FHWA and to other USDOT modal administrations as directed.

## D. SANCTIONS

1. After investigating and obtaining evidence that the contractor (or DBE subcontractor) is not complying with the terms of the contract (*Part III, Civil Rights Special Provisions*) the Resident/Regional Engineer will take the following action:
  - a) Advise the contractor, in writing, that specific (listed) infractions have been observed which must be corrected within five (or fewer) days, and that failure to take corrective action will result in withholding all or part of progress payments;
  - b) If deficiencies are not corrected, the Resident/Regional Engineer will withhold progress payments; and

- c) If violations persist, the Resident/Regional Engineer, in coordination with the District Engineer and the CCO develop a proposed course of action. After consultation with the EEO Manager and legal counsel, the Resident/Regional Engineer may take any of the following actions, as provided in the contract:
- Continue to withhold progress payments until the contractor is in compliance;
  - Suspend the contract, in whole or in part, until the contractor is in compliance. No progress payment is made during this time and no time extension made;
  - Cancel or terminate the contract for cause as authorized under Section 108.08 of the Contract Specifications;
  - Assess against the contractor's final payment on this contract or any progress payments on current or future Idaho Federal-Aid projects an amount equal to the value of the DBE committed work items that were not performed by the committed DBE firm. However, if the failure is the first by the contractor, and ITD determines that the failure was an unintentional error or oversight, the amount to be deducted may be reduced to one-half (1/2) of the value of the un-obtained DBE participation based on the committed work items. In addition to any other sanctions, willful failure of the contractor or a DBE to comply with this contract or with the Federal DBE regulations may result in disqualification from further contracting, subcontracting, or other participation in Idaho Transportation Department Federal-Aid projects.

## **E. PAYMENTS TO SUBCONTRACTORS**

ITD includes the following clause in each USDOT-assisted contract:

*The contractor shall pay each subcontractor for satisfactory performance of its contract items no later than twenty (20) calendar days from receipt of each payment the contractor receives from the Department. The contractor shall return retainage payments to each subcontractor within twenty (20) calendar days after the subcontractor's work is satisfactorily completed. The contractor shall certify that payment to each subcontractor has been made on certification forms provided by the Department.*

These requirements shall also apply to first or lower tier subcontracts.

In accordance with 49 CFR 26.29, a subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented.

# EXHIBITS

## DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

- A. 49 CFR 26, June 16, 2003 - Federal Register
- B. Definition of Terms
- C. ITD Organization Chart - Names and Phone Numbers
- D. Application for Certification
- E. Contacts at ITD and USDOT
- F. ITD-2420, DBE On-Site Review
- G. "No Change" Affidavit
- H. Methodology for Determination of APG Goals (detailed)
- I. Civil Rights Special Provisions, Part III
- J. ITD-2396, DBE Commitment Form
- K. Evaluation of Contractor's Good Faith Efforts to Meet the Contract DBE Requirement
- L. ITD-646b, Schedule B - Information for Determining Joint Venture Eligibility
- M. ITD-1701, Commercially Useful Function Determination
- N. Bidder Registration
- O. Certification of Payment