

and vehicle servicing) constructed on, over or under the right-of-way of such highways.

(v) Neither the State, any other persons subject to this part, nor its contractors and subcontractors may discriminate in their employment practices in connection with highway construction projects or other projects assisted by the Federal Highway Administration.

(vi) The State shall not locate or design a highway in such a manner as to require, on the basis of race, color, or national origin, the relocation of any persons.

(vii) The State shall not locate, design, or construct a highway in such a manner as to deny reasonable access to, and use thereof, to any persons on the basis of race, color, or national origin.

(3) *Urban Mass Transportation Administration.* (i) Any person who is, or seeks to be, a patron of any public vehicle which is operated as a part of, or in conjunction with, a project shall be given the same access, seating, and other treatment with regard to the use of such vehicle as other persons without regard to their race, color, or national origin.

(ii) No person who is, or seeks to be, an employee of the project sponsor or lessees, concessionaires, contractors, licensees, or any organization furnishing public transportation service as a part of, or in conjunction with, the project shall be treated less favorably than any other employee or applicant with regard to hiring, dismissal, advancement, wages, or any other conditions and benefits of employment, on the basis of race, color, or national origin.

(iii) No person or group of persons shall be discriminated against with regard to the routing, scheduling, or quality of service of transportation service furnished as a part of the project on the basis of race, color, or national origin. Frequency of service, age and quality of vehicles assigned to routes, quality of stations serving different routes, and location of routes may not be determined on the basis of race, color, or national origin.

(iv) The location of projects requiring land acquisition and the displacement of persons from their residences and businesses may not be determined on the basis of race, color, or national origin.

(b) *Obligations of the airport operator—* (1) *Tenants, contractors, and concessionaires.* Each airport operator shall require each tenant, contractor, and concessionaire who provides any activity, service, or facility at the airport under lease, contract with, or franchise from the airport, to covenant in a form specified by the Administrator, Federal Aviation Administration, that he will comply with the nondiscrimination requirements of this part.

(2) *Notification of beneficiaries.* The airport operator shall: (i) Make a copy of this part available at his office for inspection during

normal working hours by any person asking for it, and (ii) conspicuously display a sign, or signs, furnished by the FAA, in the main public area or areas of the airport, stating that discrimination based on race, color, or national origin is prohibited on the airport.

(3) *Reports.* Each airport owner subject to this part shall, within 15 days after he receives it, forward to the Area Manager of the FAA Area in which the airport is located a copy of each written complaint charging discrimination because of race, color, or national origin by any person subject to this part, together with a statement describing all actions taken to resolve the matter, and the results thereof. Each airport operator shall submit to the area manager of the FAA area in which the airport is located a report for the preceding year on the date and in a form prescribed by the Federal Aviation Administrator.

[35 FR 10080, June 18, 1970, as amended by Amdt. 21-1, 38 FR 5875, Mar. 5, 1973; Amdt. 21-3, 40 FR 14318, Mar. 31, 1975]

PART 23—PARTICIPATION BY MINORITY BUSINESS ENTERPRISE IN DEPARTMENT OF TRANSPORTATION PROGRAMS

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- SCHEDULE A—INFORMATION FOR DETERMINING MINORITY BUSINESS ENTERPRISE ELIGIBILITY
- SCHEDULE B—INFORMATION FOR DETERMINING JOINT VENTURE ELIGIBILITY

AUTHORITY: Sec. 905 of the Regulatory Revitalization and Regulatory Reform Act of 1978 (45 U.S.C. 803); sec. 520 of the Airport and Airway Improvement Act of 1982, as amended (49 U.S.C. APP. 2219); sec. 19 of the Urban Mass Transportation Act of 1964, as amended (49 U.S.C. 1615); sec. 106(c) of the Surface

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Transportation and Uniform Relocation Assistance Act of 1987 (49 U.S.C. App. 1601 note); sec. 505(d) and sec. 511(a)(17) of the Airport and Airway Improvement Act, as amended by the Airport and Airway Safety and Capacity Expansion Act of 1987 (Pub. L. 100-223); Title 23 of the U.S. Code (relating to highways and traffic safety, particularly sec. 324 thereof); Title VI of the Civil Rights Act (42 U.S.C. 2000d *et seq.*); Executive Order 12265; Executive Order 12138.

SOURCE: 45 FR 21184, Mar. 31, 1980, unless otherwise noted.

Subpart A—General

§23.1 Purpose.

(a) The purpose of this part is to carry out the Department of Transportation's policy of supporting the fullest possible participation of firms owned and controlled by minorities and women, (MBEs) in Department of Transportation programs. This includes assisting MBEs throughout the life of contracts in which they participate.

(b) This part implements in part section 905 of the Railroad Revitalization and Regulatory Reform Act of 1978 (45 U.S.C. 803); section 30 of the Airport and Airway Development Act of 1970, as amended (49 U.S.C. 1730); section 19 of the Urban Mass Transportation Act of 1964, as amended (Pub. L. 95-599); title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*); the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 471 *et seq.*); and title 23 of the U.S. Code (relating to highways and highway safety). This regulation supersedes all DOT regulations issued previously under these authorities, insofar as such regulations affect minority business enterprise matters in DOT financial assistance programs.

§23.2 Applicability.

This part applies to any DOT program through which funds are made available to members of the public for accomplishing DOT's purposes. Contracts and subcontracts which are to be performed entirely outside the United States, its possessions, Puerto Rico, and the North Mariana Islands, are exempted from this part.

§ 23.5 Definitions.

Affirmative action means taking specific steps to eliminate discrimination and its effects, to ensure nondiscriminatory results and practices in the future, and to involve minority business enterprises fully in contracts and programs funded by the Department.

Applicant means one who submits an application, request, or plan to be approved by a Departmental official or by a primary recipient as a condition to eligibility for DOT financial assistance; and *application* means such an application, request, or plan.

Compliance means the condition existing when a recipient or contractor has met and implemented the requirements of this part.

Contract means a mutually binding legal relationship or any modification thereof obligating the seller to furnish supplies or services, including construction, and the buyer to pay for them. For purposes of this part, a lease is a contract.

Contractor means one who participates, through a contract or subcontract, in any program covered by this part, and includes lessees.

Department or *DOT* means the Department of Transportation, including its operating elements.

DOT-assisted contract means any contract or modification of a contract between a recipient and a contractor which is paid for in whole or in part with DOT financial assistance or any contract or modification of a contract between a recipient and a lessee.

DOT financial assistance means financial aid provided by the Department or the United States Railroad Association to a recipient, but does not include a direct contract. The financial aid may be provided directly in the form of actual money, or indirectly in the form of guarantees authorized by statute as financial assistance services of Federal personnel, title or other interest in real or personal property transferred for less than fair market value, or any other arrangement through which the recipient benefits financially, including licenses for the construction or operation of a Deep Water Port.

Departmental element means the following parts of DOT:

(a) The Office of the Secretary (OST);

(b) The Federal Aviation Administration (FAA);

(c) The United States Coast Guard (USCG);

(d) The Federal Highway Administration (FHWA);

(e) The Federal Railroad Administration (FRA);

(f) The National Highway Traffic Safety Administration (NHTSA);

(g) The Urban Mass Transportation Administration (UMTA);

(h) The St. Lawrence Seaway Development Corporation (SLSDC); and

(i) The Research and Special Programs Administration (RSPA).

Joint venture means an association of two or more businesses to carry out a single business enterprise for profit for which purpose they combine their property, capital, efforts, skills, and knowledge.

Lessee means a business or person that leases, or is negotiating to lease, property from a recipient or the Department on the recipient's or Department's facility for the purpose of operating a transportation-related activity or for the provision of goods or services to the facility or to the public on the facility.

Minority means a person who is a citizen or lawful permanent resident of the United States and who is:

(a) Black (a person having origins in any of the black racial groups of Africa);

(b) Hispanic (a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race);

(c) Portuguese (a person of Portuguese, Brazilian, or other Portuguese culture or origin, regardless of race);

(d) Asian American (a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands); or

(e) American Indian and Alaskan Native (a person having origins in any of the original peoples of North America.)

(f) Members of other groups, or other individuals, found to be economically and socially disadvantaged by the Small Business Administration under section 8(a) of the Small Business Act, as amended (15 U.S.C. 637(a)).

§ 23.7

Minority business enterprise or *MBE* means a small business concern, as defined pursuant to section 3 of the Small Business Act and implementing regulations, which is owned and controlled by one or more minorities or women. This definition applies only to financial assistance programs. For the purposes of this part, owned and controlled means a business:

(a) Which is at least 51 per centum owned by one or more minorities or women or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by one or more minorities or women; and

(b) Whose management and daily business operations are controlled by one or more such individuals.

MBE coordinator means the official designated by the head of the Department element to have overall responsibility for promotion of minority business enterprise in his/her Departmental element.

Noncompliance means the condition existing when a recipient or contractor has failed to implement the requirements of this part.

Primary recipient is a recipient who receives DOT financial assistance and passes some or all of this assistance on to another recipient.

Program means any undertaking by a recipient to use DOT financial assistance, and includes the entire activity any part of which receives DOT financial assistance.

Recipient means any entity, public or private, to whom DOT financial assistance is extended, directly or through another recipient for any program.

Secretary means the Secretary of transportation or any person whom he/she has designated to act for him/her.

Set-aside means a technique which limits consideration of bids or proposals to those submitted by MBEs.

[45 FR 21184, Mar. 31, 1980, as amended at 46 FR 60459, Dec. 10, 1981]

§ 23.7 Discrimination prohibited.

No person shall be excluded from participation in, denied the benefits of, or otherwise discriminated against in connection with the award and performance of any contract covered by this part, on the grounds of race, color, national origin, or sex.

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Subpart B [Reserved]

Subpart C—Department of Transportation Financial Assistance Programs

§ 23.41 General.

(a) *Responsibilities of applicants and recipients.* (1) All applicants and recipients shall follow the requirements of § 23.43.

(2) Applicants and recipients in the following categories who will let DOT-assisted contracts shall implement an MBE program containing the elements set forth in § 23.45 (e) through (i). This program shall be submitted for approval to the DOT element concerned with the application for financial assistance or project approval.

(i) Applicants for funds in excess of \$250,000, exclusive of transit vehicle purchases, under sections, 3, 5, 9, 9A, 17 and 18 of the Urban Mass Transportation Act of 1964, as amended, and Federal-aid urban systems.

(ii) Applicants for planning funds in excess of \$100,000 under section 6, 8, 9 or 9A of the Urban Mass Transportation Act of 1964, as amended.

(iii) Applicants for Section 402 program funds of the National Highway Traffic Safety Administration;

(iv) Applicants for funds in excess of \$250,000 awarded by the Federal Aviation Administration to general aviation airports;

(v) Applicants for funds in excess of \$400,000 awarded by the Federal Aviation Administration to non-hub airports; and

(vi) Applicants for planning funds in excess of \$75,000 awarded by the Federal Aviation Administration.

(vii) Licensees or applicants for a license under the Deepwater Port Act of 1974 (33 U.S.C. 1501 *et seq.*).

(3) All applicants and recipients in the following categories who will let DOT-assisted contracts shall implement an MBE program containing all the elements set forth in § 23.45. The program shall be submitted for approval to the DOT element concerned with the application for assistance or project approval.

(i) Applicants for Federal-aid highway program funds;

(ii) Applicants for funds in excess of \$500,000, exclusive of transit vehicle purchases, under sections 3, 5, 9, 9A, 17 and 18 of the Urban Mass Transportation Act of 1964, as amended, and Federal-aid urban systems;

(iii) Applicants for planning funds in excess of \$200,000 under section 6, 8, 9 and 9A of the Urban Mass Transportation Act of 1964, as amended.

(iv) Applicants for funds in excess of \$500,000 awarded by the Federal Aviation Administration to large, medium and small hub airports; and

(v) Applicants for financial assistance programs, including loan guarantees, by the Federal Railroad Administration and the U.S. Railway Association.

(b) *Approval requirement.* Applications and funding agreements are signed and authorizations to proceed are approved only after the applicant's MBE program has been approved by the Departmental element. This requirement applies to applications, authorizations to proceed requested by Federal-aid highway program recipients, and requests for draw downs from the U.S. Railway Association submitted 90 days or more following the effective date of this part.

(c) *Effect of agreement.* The MBE program prepared by the applicant and the commitment made by the applicant to carry out the MBE program is incorporated into and becomes part of this agreement and subsequent financial assistance agreements. The agreement between the Department and the recipient shall contractually bind the recipient to the commitments made in the MBE program, as approved by the Department. Failure to keep these commitments shall be deemed noncompliance with this part. Once submitted and approved, an MBE program is applicable to all DOT-assisted contracts solicited and let by the applicant after the approval date of the MBE program regardless of the approval date of the grant or project under which the contracts are let.

(d) *Other MBE programs.* (1) Applicants meeting the criteria set forth in paragraphs (a)(2) and (3) of this section who have formulated MBE programs under previous requirements of DOT or other agencies shall revise these pro-

grams to conform to the requirements of this part prior to the approval of their next application.

(2) An MBE program approved by one Departmental element is acceptable to all Departmental elements. Applicants having an approved MBE program are not required to resubmit the program or to produce a new program for future applications, as long as all requirements for approval continue to be met and implementation of the program is achieving compliance. The Departmental element reassesses its approval of the MBE program of continuing recipients at least annually.

(e) *Transit vehicle manufacturers.* Transit vehicle manufacturers who wish to bid on UMTA-assisted transit vehicle procurement contracts shall have a UMTA-approved MBE program. Each UMTA recipient shall require these manufacturers to certify that they have such a program as a condition for bidding on UMTA-assisted contracts.

(f) *Exemptions.* The head of the Departmental element may, under appropriate circumstances, and with the concurrence of the Secretary, grant deviations or exemptions from this subpart. A request for deviation or exemption from this subpart shall be in writing and shall include a showing as to how the particular situation is exceptional and how the modified program complies substantially with this part. If the applicant asserts that State or local law prohibits it from including a particular provision in its program, the applicant shall provide copies of all legal citations supporting the claim.

[45 FR 21184, Mar. 31, 1980, as amended at 48 FR 33444, July 21, 1983]

§23.43 General requirements for recipients.

(a) Each recipient shall agree to abide by the statements in paragraphs (a) (1) and (2) of this section. These statements shall be included in the recipient's DOT financial assistance agreement and in all subsequent agreements between the recipient and any subrecipient and in all subsequent DOT-assisted contracts between recipients or subrecipients and any contractor.

§ 23.45

(1) *“Policy.* It is the policy of the Department of Transportation that minority business enterprises as defined in 49 CFR part 23 shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with Federal funds under this agreement. Consequently the MBE requirements of 49 CFR part 23 apply to this agreement.”

(2) *“MBE Obligation.* (i) The recipient or its contractor agrees to ensure that minority business enterprises as defined in 49 CFR part 23 have the maximum opportunity to participate in the performance of contracts and subcontracts financed in whole or in part with Federal funds provided under this agreement. In this regard all recipients or contractors shall take all necessary and reasonable steps in accordance with 49 CFR part 23 to ensure that minority business enterprises have the maximum opportunity to compete for and perform contracts. Recipients and their contractors shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of DOT-assisted contracts.”

(b) Each DOT financial assistance agreement shall include the following: “If as a condition of assistance the recipient has submitted and the Department has approved a minority business enterprise affirmative action program which the recipient agrees to carry out, this program is incorporated into this financial assistance agreement by reference. This program shall be treated as a legal obligation and failure to carry out its terms shall be treated as a violation of this financial assistance agreement. Upon notification to the recipient of its failure to carry out the approved program the Department shall impose such sanctions as noted in 49 CFR part 23, subpart E, which sanctions may include termination of the agreement or other measures that may affect the ability of the recipient to obtain future DOT financial assistance.”

(c) The recipient shall advise each subrecipient, contractor, or subcontractor that failure to carry out the requirements set forth in paragraph (a) of this section shall constitute a breach of contract and, after the notification of the Department, may result

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in termination of the agreement or contract by the recipient or such remedy as the recipient deems appropriate.

(d) Recipients shall take action concerning lessees as follows:

(1) Recipients shall not exclude MBEs from participation in business opportunities by entering into long-term, exclusive agreements with non-MBEs for the operation of major transportation-related activities or major activities for the provision of goods and services to the facility or to the public on the facility.

(2) Recipients required to submit affirmative action programs under §23.41 (a)(2) or (a)(3) that have business opportunities for lessees shall submit to the Department for approval with their programs overall goals for the participation as lessees of firms owned and controlled by minorities and firms owned and controlled by women. These goals shall be for a specified period of time and shall be based on the factors listed in §23.45(g)(5). Recipients shall review these goals at least annually, and whenever the goals expire. The review shall analyze projected versus actual MBE participation during the period covered by the review and any changes in factual circumstances affecting the selection of goals. Following each review, the recipient shall submit new overall goals to the Department for approval. Recipients that fail to meet their goals for MBE lessees shall demonstrate to the Department in writing that they made reasonable efforts to meet the goals.

(3) Except as provided in this section, recipients are not required to include lessees in their affirmative action programs. Lessees themselves are not subject to the requirements of this part, except for the obligation of §23.7 to avoid discrimination against MBEs.

§23.45 Required MBE program components.

(a) *A policy statement, expressing a commitment to use MBEs in all aspects of contracting to the maximum extent feasible.* (1) The applicant’s policymaking body (Board, Council, etc.) shall issue a policy statement, signed by the chairperson, which expresses its commitment to the program, outlines the various levels of responsibility and states

the objectives of the program. The policy statement shall be circulated throughout the applicant's organization and to minority, female, and non-minority community and business organizations.

(b) *The designation of liaison officer, as well as such support staff as may be necessary and proper to administer the program, and a description of the authority, responsibility, and duties of the liaison officer and support staff.* (1) The Chief Executive Officer of the recipient shall designate an MBE liaison officer and adequate staff to administer the MBE program. The MBE liaison officer shall report directly to the Chief Executive Officer.

(2) The MBE liaison officer shall be responsible for developing, managing, and implementing the MBE program on a day-to-day basis; for carrying out technical assistance activities for MBEs; and for disseminating information on available business opportunities so that MBEs are provided an equitable opportunity to bid on the applicant's contracts.

(c) *Procedures to ensure that MBEs have an equitable opportunity to compete for contracts and subcontracts.* The recipient shall develop and use affirmative action techniques to facilitate MBE participation in contracting activities. These techniques include:

(1) Arranging solicitations, time for the presentation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation MBEs.

(2) Providing assistance to MBEs in overcoming barriers such as the inability to obtain bonding, financing, or technical assistance.

(3) Carrying out information and communications programs on contracting procedures and specific contracting opportunities in a timely manner, with such programs being bilingual where appropriate.

(d) *Opportunities for the use of banks owned and controlled by minorities or women.* (1) The recipient shall thoroughly investigate the full extent of services offered by banks owned and controlled by minorities or women in its community and make the greatest feasible use of these banks.

(2) Recipients shall also encourage prime contractors to use the services of banks owned and controlled by minorities or women.

(e) *MBE directory.* (1) The recipient shall have available a directory or source list to facilitate identifying MBEs with capabilities relevant to general contracting requirements and to particular solicitations. The recipient shall make the directory available to bidders and proposers in their efforts to meet the MBE requirements. It shall specify which firms the Department, recipient, or the Small Business Administration has determined to be eligible MBEs in accordance with procedures set forth in this subpart. Recipients subject to the disadvantaged business enterprise program requirements of subpart D of this part shall compile and update their directories annually. The directories shall include the addresses of listed firms.

(2) [Reserved]

(f) *Procedures to ascertain the eligibility of MBEs and joint ventures involving MBEs.* (1) To ensure that its MBE program benefits only firms owned and controlled by minorities or women, the recipient shall certify the eligibility of MBEs and joint ventures involving MBEs that are named by the competitors in accordance with this subpart. Recipients may, at their own discretion, accept certifications made by other DOT recipients.

(2) Recipients shall require their prime contractors to make good faith efforts to replace an MBE subcontractor that is unable to perform successfully with another MBE. The recipient shall approve all substitutions of subcontractors before bid opening and during contract performance, in order to ensure that the substitute firms are eligible MBEs.

(3) Recipients covered by the disadvantaged business program requirements of subpart D of this part shall, in determining whether a firm is an eligible disadvantaged business enterprise, take at least the following steps:

(i) Perform an on-site visit to the offices of the firm and to any job sites on which the firm is working at the time of the eligibility investigation;

(ii) Obtain the resumes or work histories of the principal owners of the

firm and personally interview these individuals;

(iii) Analyze the ownership of stock in the firm, if it is a corporation;

(iv) Analyze the bonding and financial capacity of the firm;

(v) Determine the work history of the firm, including contracts it has received and work it has completed;

(vi) Obtain or compile a list of equipment owned or available to the firm and the licenses of the firm and its key personnel to perform the work it seeks to do as part of the DBE program; and

(vii) Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program.

(g) *Percentage goals for the dollar value of work to be awarded to MBEs.* (1) Once the recipient has reviewed proposed contracting to identify those contracting activities which have the greatest potential for MBE participation, the recipient shall set goals that are practical and related to the potential availability of MBEs in desired areas of expertise.

(2) The applicant/recipient shall establish two types of MBE goals:

(i) Overall goals for its entire MBE program, for a specified period of time (e.g. one year), or for a specific project, (e.g. the construction of a facility); and

(ii) Contract goals on each specific prime contract with subcontracting possibilities, which the bidder or proposer must meet or exceed or demonstrate that it could not meet despite its best efforts.

(3)(i) Recipients shall submit their overall goals and a description of the methodology used in establishing them with their MBE program. When the overall goals expire, new overall goals shall be set and submitted to the Department for approval. Contract goals need not be submitted in the applicant's MBE program, but the program shall contain a description of the methodology to be used in establishing them. Contract goals may require approval by the Department prior to contract solicitation.

(ii) At the time the recipient submits its overall goals to the Department for approval, the recipient shall publish a notice announcing these goals, informing the public that the goals and a description of how they were selected are

available for inspection during normal business hours at the principal office of the recipient for 30 days following the date of the notice, and informing the public that the Department and the recipient will accept comments on the goals for 45 days from the date of the notice. The notice shall include addresses to which comments may be sent, and shall be published in general circulation media and available minority-focus media and trade association publications, and shall state that the comments are for informational purposes only.

(4) Recipients covered by the disadvantaged business enterprise program requirements of subpart D of this part shall establish an overall goal and contract goal for firms owned and controlled by socially and economically disadvantaged individuals. Other recipients shall establish separate overall and contract goals for firms owned and controlled by minorities and firms owned and controlled by women, respectively.

(5) The applicant shall consider the following factors in setting overall goals:

(i) Overall goals shall be based on projection of the number and types of contracts to be awarded by the applicant and a projection of the number and types of MBEs likely to be available to compete for contracts from the recipient over the period during which the goals will be in effect.

(ii) Overall goals shall also be based on past results of the applicant's/recipient's efforts to contract with MBEs and the reasons for the high or low level of those results.

(6) The applicant/recipient shall review the overall goals at least annually. The review process shall analyze projected versus actual MBE participation during the previous year. The necessary revisions shall be made based on the analysis and submitted to the Department for approval.

(7) Goals shall be set for specific contracts based on the known availability of qualified MBEs.

(8) Recipients and contractors shall, at a minimum, seek MBEs in the same geographic area in which they seek

contractors or subcontractors generally for a given solicitation. If the recipient or contractor cannot meet the goals using MBEs from this geographic area, the recipient or contractor, as part of its efforts to meet the goal, shall expand its search to a reasonable wider geographic area.

(h) *A means to ensure that competitors make good faith efforts to meet MBE contract goals.* (1) For all contracts for which contract goals have been established, the recipient shall, in the solicitation, inform competitors that the apparent successful competitor will be required to submit MBE participation information to the recipient and that the award of the contract will be conditioned upon satisfaction of the requirements established by the recipient pursuant to this subsection.

(i) The apparent successful competitor's submission shall include the following information:

(A) The names and addresses of MBE firms that will participate in the contract;

(B) A description of the work each named MBE firm will perform;

(C) The dollar amount of participation by each named MBE firm.

(ii) The recipient may select the time at which it requires MBE information to be submitted. *Provided*, that the time of submission shall be before the recipient commits itself to the performance of the contract by the apparent successful competitor.

(2) If the MBE participation submitted in response to paragraph (h)(1) of this section does not meet the MBE contract goals, the apparent successful competitor shall satisfy the recipient that the competitor has made good faith efforts to meet the goals.

(i) The recipient may prescribe other requirements of equal or greater effectiveness in lieu of good faith efforts. Any recipient choosing alternative requirements shall inform the DOT office concerned by letter of the content of the requirements it has prescribed within 30 days of the effective date of this subsection. The recipient may put these alternative requirements into effect immediately and prior DOT approval of alternative requirements is not necessary.

(ii) If the Department determines that the alternative requirements are not as or more effective than the good faith efforts provisions of this subsection, the Department may require the recipient to use the good faith efforts requirements of this subsection instead of the requirements it has prescribed.

(3) Meeting MBE contract goals, making good faith efforts as provided in paragraph (h)(2) of this section, or meeting requirements established by recipients in lieu of good faith efforts, is a condition of receiving a DOT-assisted contract for which contract goals have been established.

(i) [Reserved]

(j) *A description of the methods by which the recipient will require subrecipients, contractors, and subcontractors to comply with applicable MBE requirements.* (1) The recipient shall include in its MBE program a description and the specific language of any preconditions to subgrants or contracts pertaining to the use of MBEs, including subcontracting programs, it awards with DOT funds in addition to those required by this section. It shall specify on what size and/or type of contracts and subgrants it includes such preconditions. The description shall contain a summary of the ways the recipient provides help to its subrecipients, contractors, and subcontractors in drafting and implementing their programs for using MBEs. The description shall also include the means by which the recipient enforces the requirements placed on subrecipients, contractors and subcontractors.

(2) Any MBE subcontracting programs required by the recipient in addition to those required by this section shall be submitted to the recipient by the apparent successful bidder/proposer. The bidders/proposers shall be advised in the solicitation that failure to submit the additional MBE subcontracting program shall make the bidder/proposer ineligible for award.

(k) *Procedures by which the applicant/recipient will implement MBE set-asides.* Where not prohibited by state or local law and determined by the recipient to be necessary to meet MBE goals, procedures to implement MBE set-asides shall be established. MBE set-asides

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shall be used only in cases where at least three MBEs with capabilities consistent with contract requirements exist so as to permit competition.

APPENDIX A TO § 23.45—GUIDANCE CONCERNING GOOD FAITH EFFORTS

To determine whether a competitor that has failed to meet MBE contract goals may receive the contract, the recipient must decide whether the efforts the competitor made to obtain MBE participation were “good faith efforts” to meet the goals. Efforts that are merely *pro forma* are not good faith efforts to meet the goals. Efforts to obtain MBE participation are not good faith efforts to meet the goals, even if they are sincerely motivated, if, given all relevant circumstances, they could not reasonably be expected to produce a level of MBE participation sufficient to meet the goals. In order to award a contract to a competitor that has failed to meet MBE contract goals, the recipient must determine that the competitor’s efforts were those that, given all relevant circumstances, a competitor actively and aggressively seeking to meet the goals would make.

To assist recipients in making the required judgment, the Department has prepared a list of the kinds of efforts that contractors may make in obtaining MBE participation. It is not intended to be a mandatory checklist; the Department does not require recipients to insist that a contractor do any one, or any particular combination, of the things on the list. Nor is the list intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases. In determining whether a contractor has made good faith efforts, it will usually be important for a recipient to look not only at the different kinds of efforts that the contractor has made, but also the quantity and intensity of these efforts.

The Department offers the following list of kinds of efforts that recipients may consider:

- (1) Whether the contractor attended any pre-solicitation or pre-bid meetings that were scheduled by the recipient to inform MBEs of contracting and subcontracting opportunities;
- (2) Whether the contractor advertised in general circulation, trade association, and minority-focus media concerning the subcontracting opportunities;
- (3) Whether the contractor provided written notice to a reasonable number of specific MBEs that their interest in the contract was being solicited, in sufficient time to allow the MBEs to participate effectively;
- (4) Whether the contractor followed up initial solicitations of interest by contacting MBEs to determine with certainty whether the MBEs were interested;

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(5) Whether the contractor selected portions of the work to be performed by MBEs in order to increase the likelihood of meeting the MBE goals (including, where appropriate, breaking down contracts into economically feasible units to facilitate MBE participation);

(6) Whether the contractor provided interested MBEs with adequate information about the plans, specifications and requirements of the contract;

(7) Whether the contractor negotiated in good faith with interested MBEs, not rejecting MBEs as unqualified without sound reasons based on a thorough investigation of their capabilities;

(8) Whether the contractor made efforts to assist interested MBEs in obtaining bonding, lines of credit, or insurance required by the recipient or contractor; and

(9) Whether the contractor effectively used the services of available minority community organizations; minority contractors’ groups; local, state and Federal minority business assistance offices; and other organizations that provide assistance in the recruitment and placement of MBEs.

(Title VI of the Civil Rights Act of 1964; sec. 30 of the Airport and Airway Development Act of 1970, as amended; sec. 905 of the Railroad Revitalization and Regulatory Reform Act of 1976; sec. 19 of the Urban Mass Transportation Act of 1964, as amended; 23 U.S.C. 324; E.O. 11625; E.O. 12138)

[45 FR 21184, Mar. 31, 1980, as amended at 46 FR 23461, Apr. 27, 1981; 52 FR 39230, Oct. 21, 1987]

§ 23.47 Counting MBE participation toward meeting MBE goals.

MBE participation shall be counted toward meeting MBE goals set in accordance with this subpart as follows:

- (a) Once a firm is determined to be an eligible MBE in accordance with this subpart, the total dollar value of the contract awarded to the MBE is counted toward the applicable MBE goals.
- (b) The total dollar value of a contract to an MBE owned and controlled by both minority males and non-minority females is counted toward the goals for minorities and women, respectively, in proportion to the percentage of ownership and control of each group in the business. The total dollar value of a contract with an MBE owned and controlled by minority women is counted toward either the minority goal or the goal for women, but not to both. The contractor or recipient employing the firm may choose the goal to which the contract value is applied.

(c) A recipient or contractor may count toward its MBE goals a portion of the total dollar value of a contract with a joint venture eligible under the standards of this subpart equal to the percentage of the ownership and controls of the MBE partner in the joint venture.

(d)(1) A recipient or contractor may count toward its MBE goals only expenditures to MBEs that perform a commercially useful function in the work of a contract. An MBE is considered to perform a commercially useful function when it is responsible for execution of a distinct element of the work of a contract and carrying out its responsibilities by actually performing, managing, and supervising the work involved. To determine whether an MBE is performing a commercially useful function, the recipient or contractor shall evaluate the amount of work subcontracted, industry practices, and other relevant factors.

(2) Consistent with normal industry practices, an MBE may enter into subcontracts. If an MBE contractor subcontracts a significantly greater portion of the work of the contract than would be expected on the basis of normal industry practices, the MBE shall be presumed not to be performing a commercially useful function. The MBE may present evidence to rebut this presumption to the recipient. The recipient's decision on the rebuttal of this presumption is subject to review by the Department.

(e)(1) A recipient or contractor may count toward its MBE, DBE or WBE goals 60 percent of its expenditures for materials and supplies required under a contract and obtained from an MBE, DBE or WBE regular dealer, and 100 percent of such expenditures to an MBE, WBE, or DBE manufacturer.

(2) For purposes of this section, a manufacturer is a firm that operates or maintains a factory or establishment that produces on the premises the materials or supplies obtained by the recipient or contractor.

(3) For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials or supplies required for the performance of the contract are

bought, kept in stock, and regularly sold to the public in the usual course of business. To be a regular dealer, the firm must engage in, as its principal business, and in its own name, the purchase and sale of the products in question. A regular dealer in such bulk items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock, if it owns or operates distribution equipment. Brokers and packagers shall not be regarded as manufacturers or regular dealers within the meaning of this section.

(f) A recipient or contractor may count toward its MBE, DBE, or WBE goals the following expenditures to MBE, DBE, or WBE firms that are not manufacturers or regular dealers:

(1) The fees or commissions charged for providing a *bona fide* service, such as professional, technical, consultant or managerial services and assistance in the procurement of essential personnel, facilities, equipment, materials or supplies required for performance of the contract, provided that the fee or commission is determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(2) The fees charged for delivery of materials and supplies required on a job site (but not the cost of the materials and supplies themselves) when the hauler, trucker, or delivery service is not also the manufacturer of or a regular dealer in the materials and supplies, provided that the fee is determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(3) The fees or commissions charged for providing any bonds or insurance specifically required for the performance of the contract, provided that the fee or commission is determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar services.

[45 FR 21184, Mar. 31, 1980, as amended at 52 FR 39230, Oct. 21, 1987]

§ 23.49 Maintenance of records and reports.

(a) In order to monitor the progress of its MBE program the applicant/recipient shall develop a recordkeeping

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system which will identify and assess MBE contract awards, prime contractors' progress in achieving MBE sub-contract goals, and other MBE affirmative action efforts.

(b) Specifically, the applicant/recipient shall maintain records showing:

(1) Procedures which have been adopted to comply with the requirements of this part.

(2) Awards to MBEs. These awards shall be measured against projected MBE awards and/or MBE goals. To assist in this effort, the applicant shall obtain regular reports from prime contractors on their progress in meeting contractual MBE obligations.

(3) Specific efforts to identify and award contracts to MBEs.

(c) Records shall be available upon the request of an authorized officer or employee of the government.

(d)(1) The recipient shall submit reports conforming in frequency and format to existing contract reporting requirements of the applicable Departmental element. Where no such contract reporting requirements exist, MBE reports shall be submitted quarterly.

(2) These reports shall include as a minimum:

(i) The number of contracts awarded to MBEs;

(ii) A description of the general categories of contracts awarded to MBEs;

(iii) The dollar value of contracts awarded to MBEs;

(iv) The percentage of the dollar value of all contracts awarded during this period which were awarded to MBEs; and

(v) An indication of whether and the extent of which the percentage met or exceeded the goal specified in the application.

(3) The records and reports required by this section shall provide information relating to firms owned and controlled by minorities separately from information relating to firms owned and controlled by women. If the records and reports include any section 8(a) contractors that are not minorities or women, information concerning these contractors shall also be recorded and reported separately.

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§ 23.51 Certification of the eligibility of minority business enterprises.

(a) To ensure that this part benefits only MBEs which are owned and controlled in both form and substance by one or more minorities or women, DOT recipients shall use Schedules A and B (reproduced at the end of this part) to certify firms who wish to participate as MBEs in DOT under this part.

(b) Except as provided in paragraph (c) of this section, each business, including the MBE partner in a joint venture, wishing to participate as a MBE under this part in a DOT-assisted contract shall complete and submit Schedule A. Each entity wishing to participate as a joint venture MBE under this part in DOT-assisted contracts shall in addition complete and submit Schedule B. The schedule(s) shall be signed and notarized by the authorized representative of the business entity. A business seeking certification as an MBE shall submit the required schedules with its bid or proposal for transmission to the contracting agency involved.

(c) Under the following circumstances, a business seeking to participate as an MBE under this subpart need not submit schedule A or B:

(1) If a DOT recipient has established a different certification process that DOT has determined to be as or more effective than the process provided for by this section. Where such a process exists, potential MBE contractors shall submit the information required by the recipient's process.

(2) If the potential MBE contractor states in writing that it has submitted the same information to or has been certified by the DOT recipient involved, any DOT element, or another Federal agency that uses essentially the same definition and ownership and control criteria as DOT. The potential MBE contractor shall obtain the information and certification (if any) from the other agency and submit it to the recipient or cause the other agency to submit it. The recipient may rely upon such a certification. Where another agency has collected information but not made a determination concerning eligibility, the DOT recipient shall make its own determination based on

the information it has obtained from the other agency.

(3) If the potential MBE contractor has been determined by the Small Business Administration to be owned and controlled by socially and economically disadvantaged individuals under section 8(a) of the Small Business Act, as amended.

§23.53 Eligibility standards.

(a) The following standards shall be used by recipients in determining whether a firm is owned and controlled by one or more minorities or women and shall therefore be eligible to be certified as an MBE. Businesses aggrieved by the determination may appeal in accordance with procedures set forth in §23.55.

(1) Bona fide minority group membership shall be established on the basis of the individual's claim that he or she is a member of a minority group and is so regarded by that particular minority community. However, the recipient is not required to accept this claim if it determines the claim to be invalid.

(2) An eligible minority business enterprise under this part shall be an independent business. The ownership and control by minorities or women shall be real, substantial, and continuing and shall go beyond the *pro forma* ownership of the firm as reflected in its ownership documents. The minority or women owners shall enjoy the customary incidents of ownership and shall share in the risks and profits commensurate with their ownership interests, as demonstrated by an examination of the substance rather than form of arrangements. Recognition of the business as a separate entity for tax or corporate purposes is not necessarily sufficient for recognition as an MBE. In determining whether a potential MBE is an independent business, DOT recipients shall consider all relevant factors, including the date the business was established, the adequacy of its resources for the work of the contract, and the degree to which financial, equipment leasing, and other relationships with nonminority firms vary from industry practice.

(3) The minority or women owners shall also possess the power to direct

or cause the direction of the management and policies of the firm and to make the day-to-day as well as major decisions on matters of management, policy, and operations. The firm shall not be subject to any formal or informal restrictions which limit the customary discretion of the minority or women owners. There shall be no restrictions through, for example, bylaw provisions, partnership agreements, or charter requirements for cumulative voting rights or otherwise that prevent the minority or women owners, without the cooperation or vote of any owner who is not a minority or woman, from making a business decision of the firm.

(4) If the owners of the firm who are not minorities or women are disproportionately responsible for the operation of the firm, then the firm is not controlled by minorities or women and shall not be considered an MBE within the meaning of this part. Where the actual management of the firm is contracted out to individuals other than the owner, those persons who have the ultimate power to hire and fire the managers can, for the purposes of this part, be considered as controlling the business.

(5) All securities which constitute ownership and/or control of a corporation for purposes of establishing it as an MBE under this part shall be held directly by minorities or women. No securities held in trust, or by any guardian for a minor, shall be considered as held by minority or women in determining the ownership or control of a corporation.

(6) The contributions of capital or expertise by the minority or women owners to acquire their interests in the firm shall be real and substantial. Examples of insufficient contributions include a promise to contribute capital, a note payable to the firm or its owners who are not socially and economically disadvantaged, or the mere participation as an employee, rather than as a manager.

(b) In addition to the above standards, DOT recipients shall give special consideration to the following circumstances in determining eligibility under this part.

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(1) Newly formed firms and firms whose ownership and/or control has changed since the date of the advertisement of the contract are closely scrutinized to determine the reasons for the timing of the formation of or change in the firm.

(2) A previous and/or continuing employer-employee relationship between or among present owners is carefully reviewed to ensure that the employee-owner has management responsibilities and capabilities discussed in this section.

(3) Any relationship between an MBE and a business which is not an MBE which has an interest in the MBE is carefully reviewed to determine if the interest of the non-MBE conflicts with the ownership and control requirements of this section.

(c) A joint venture is eligible under this part if the MBE partner of the joint venture meets the standards for an eligible MBE set forth above and the MBE partner is responsible for a clearly defined portion of the work to be performed and shares in the ownership, control, management responsibilities, risks, and profits of the joint venture.

(d) A joint venture is eligible to compete in an MBE set-aside under this part if the MBE partner of the joint venture meets the standards of an eligible MBE set forth above, and the MBE partner's share in the ownership, control, and management responsibilities, risks, and profits of the joint venture is at least 51 percent and the MBE partner is responsible for a clearly defined portion of the work to be performed.

(e) A business wishing to be certified as an MBE or joint venture MBE by a DOT recipient shall cooperate with the recipient in supplying additional information which may be requested in order to make a determination.

(f) Once certified, an MBE shall update its submission annually by submitting a new Schedule A or certifying that the Schedule A on file is still accurate. At any time there is a change in ownership or control of the firm, the MBE shall submit a new schedule A.

(g) Except as provided in §23.55, the denial of a certification by the Department or a recipient shall be final, for that contract and other contracts

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being let by the recipient at the time of the denial of certification. MBEs and joint ventures denied certification may correct deficiencies in their ownership and control and apply for certification only for future contracts.

(h) Recipients shall safeguard from disclosure to unauthorized persons information that reasonably may be regarded as confidential business information, consistent with Federal, state and local law.

§23.55 Appeals of denials of certification as an MBE.

(a) *Filing.* Any firm which believes that it has been wrongly denied certification as an MBE or joint venture under §§23.51 and 23.53 by the Department or a recipient of DOT financial assistance may file an appeal in writing, signed and dated, with the Department. The appeal shall be filed no later than 180 days after the date of denial of certification. The Secretary may extend the time for filing or waive the time limit in the interest of justice, specifying in writing the reasons for so doing. Third parties who have reason to believe that another firm has been wrongly denied or granted certification as an MBE or joint venture may advise the Secretary. This information is not considered an appeal pursuant to this section.

(b) *Decision to investigate.* The Secretary ensures that a prompt investigation is made pursuant to prescribed DOT title VI investigation procedures.

(c) *Status of certification during the investigation.* The Secretary may at his/her discretion, deny the MBE or joint venture in question eligibility to participate as an MBE DOT-assisted contracts let during the pendency of the investigation, after providing the MBE or joint venture in question an opportunity to show cause by written statement to the Secretary why this should not occur.

(d) *Cooperation in investigation.* All parties shall cooperate fully with the investigation. Failure or refusal to furnish requested information or other failure to cooperate is a violation of this part.

(e) *Determinations.* The Secretary makes one of the following determinations and informs the MBE or joint

venture in writing of the reasons for the determination:

(1) The MBE or joint venture is certified; or

(2) The MBE or joint venture is not eligible to be certified and is denied eligibility to participate as an MBE in any direct or DOT-assisted contract until a new application for certification is approved by the recipient.

Subpart D—Implementation of Section 105(f) of the Surface Transportation Assistance Act of 1982

SOURCE: 48 FR 33442, July 21, 1983, unless otherwise noted.

§ 23.61 Purpose.

(a) The purpose of this subpart is to implement section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Pub. L. 100-17) and section 105(f) of the Airport and Airway Safety and Capacity Expansion Act of 1987 (Pub. L. 100-223) so that, except to the extent the Secretary determines otherwise, not less than ten percent of the funds authorized by the Act for the programs listed in § 23.63 of this subpart is expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.

(b) The ten percent level of participation for disadvantaged businesses established by section 106(c) and section 105(f) will be achieved if recipients under the programs covered by this subpart set and meet overall disadvantaged business goals of at least ten percent.

[48 FR 33442, July 21, 1983, as amended at 52 FR 39230, Oct. 21, 1987; 53 FR 18286, May 23, 1988]

§ 23.62 Definitions.

The following definitions apply to this subpart. Where these definitions are inconsistent with the definitions of § 23.5 of this part, these definitions control for all other purposes under this part.

Act means the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Pub. L. 100-17), with respect to financial assistance pro-

grams of the FHWA and UMTA, and the Airport and Airway Safety and Capacity Expansion Act of 1987 (Pub. L. 100-223), with respect to FAA programs.

Disadvantaged business means a small business concern: (a) Which is at least 51 percent owned by one or more socially and economically disadvantaged individuals, or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals; and (b) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

Small business concern means a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto except that a small business concern shall not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals which has annual average gross receipts in excess of \$14 million over the previous three fiscal years. The Secretary shall adjust this figure from time to time for inflation.

Socially and economically disadvantaged individuals means those individuals who are citizens of the United States (or lawfully admitted permanent residents) and who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans and any other minorities or individuals found to be disadvantaged by the Small Business Administration pursuant to section 8(a) of the Small Business Act. Recipients shall make a rebuttable presumption that individuals in the following groups are socially and economically disadvantaged. Recipients also may determine, on a case-by-case basis, that individuals who are not a member of one of the following groups are socially and economically disadvantaged.

(a) *Black Americans* which includes persons having origins in any of the Black racial groups of Africa;

(b) *Hispanic Americans* which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or

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other Spanish or Portuguese culture or origin, regardless of race;

(c) *Native Americans* which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;

(d) *Asian-Pacific Americans* which includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the U.S. Trust Territories of the Pacific, and the Northern Marianas; and

(e) *Asian-Indian Americans* which includes persons whose origins are from India, Pakistan, and Bangladesh.

[48 FR 33442, July 21, 1983, as amended at 52 FR 39230, Oct. 21, 1987; 53 FR 18286, May 23, 1988]

§ 23.63 Applicability.

This subpart applies to all DOT financial assistance in the following categories that recipients expend in DOT-assisted contracts:

(a) Federal-aid highway funds authorized by title I of the Act;

(b) Urban mass transportation funds authorized by title I or III of the Act or the Urban Mass Transportation Act of 1964, as amended; and

(c) Funds authorized by title I, II (except section 203) or III of the Surface Transportation Assistance Act of 1982 (Pub. L. 97-424) and obligated on or after April 2, 1987.

(d) Funds authorized under section title I of the Airport and Airway Safety and Capacity Expansion Act of 1987 (Pub. L. 100-223).

[52 FR 39231, Oct. 21, 1987, as amended at 53 FR 18286, May 23, 1988]

§ 23.64 Submission of overall goals.

(a) Each recipient of funds to which this subpart applies that is required to have an MBE program under § 23.41 of this part shall establish an overall goal for the use of disadvantaged businesses.

(b) Each recipient required to establish an overall goal shall calculate it in terms of a percentage of one of the following bases, as applicable:

(1) For recipients of Federal-aid highway funds, all such funds that the recipient will expend in DOT-assisted contracts in the forthcoming fiscal year; or

(2) For recipients of urban mass transportation or airport funds, all

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such funds (exclusive of funds to be expended for purchases of transit vehicles) that the recipient will expend in DOT-assisted contracts in the forthcoming fiscal year. In appropriate cases, the UMTA or FAA Administrator may permit recipients to express overall goals as a percentage of funds for a particular grant, project, or group of grants and/or projects.

(c) Each recipient of Federal-aid highway funds, urban mass transportation funds, or airport funds shall submit its overall goal to FHWA or UMTA or FAA, as appropriate, for approval 60 days before the beginning of the Federal fiscal year to which the goal applies. An UMTA or FAA recipient calculating its overall goal as a percentage of funds for a particular grant, project, or group of grants or projects shall submit its overall goal to UMTA or FAA at a time determined by the UMTA or FAA Administrator.

(d) Recipients submitting a goal of ten percent or more shall submit the goal under the procedures set forth in § 23.45(g) of this part.

(e) If an FHWA or UMTA or FAA recipient requests approval of an overall goal of less than ten percent, the recipient shall take the following steps in addition to those set forth in § 23.45(g) of this part:

(1) Submit with its request a justification including the elements set forth in § 23.65;

(2) Ensure that the request is signed, or concurred in, by the Governor of the state (in the case of a state transportation agency), the Mayor or other elected official(s) responsible for the operation of a mass transit agency; or, with respect to an airport sponsor, the elected official, head of the board, or other official responsible for the operation of the sponsor, and

(3) Consult with minority and general contractors' associations, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged businesses and the adequacy of the recipient's efforts to increase the participation of such businesses. If it appears to the Administrator that the recipient has failed to consult with a relevant person or organization, the Administrator may direct

the recipient to consult with that person or organization.

[48 FR 33442, July 21, 1983, as amended at 53 FR 18286, May 23, 1988]

§ 23.65 Content of justification.

An FHWA or UMTA or FAA recipient requesting approval of an overall goal of less than ten percent shall include information on the following points in its justification. Guidance concerning this information is found in appendix D.

(a) The recipient's efforts to locate disadvantaged businesses;

(b) The recipient's efforts to make disadvantaged businesses aware of contracting opportunities;

(c) The recipient's initiatives to encourage and develop disadvantaged businesses;

(d) Legal or other barriers impeding the participation of disadvantaged businesses at at least a ten percent level in the recipient's DOT-assisted contracts, and the recipient's efforts to overcome or mitigate the effects of these barriers;

(e) The availability of disadvantaged businesses to work on the recipient's DOT-assisted contracts;

(f) The size and other characteristics of the minority population of the recipient's jurisdiction, and the relevance of these factors to the availability or potential availability of disadvantaged businesses to work on the recipient's DOT-assisted contracts; and

(g) A summary of the views and information concerning the availability of disadvantaged businesses and the adequacy of the recipient's efforts to increase the participation of such businesses provided by the persons and organizations consulted by the recipient under § 23.64(f)(3).

[48 FR 33442, July 21, 1983, as amended at 53 FR 18286, May 23, 1988]

§ 23.66 Approval and disapproval of overall goals.

(a) The Administrator reviews and approves any overall goal of ten percent or more submitted by a recipient as provided in § 23.45(g) of this part.

(b) The Administrator of the concerned Departmental element approves a requested goal of less than ten percent if he or she determines, on the

basis of the recipient's justification and any other information available to the Administrator, that

(1) The recipient is making all appropriate efforts to increase disadvantaged business participation in its DOT-assisted contracts to a ten percent level; and

(2) Despite the recipient's efforts, the recipient's requested goal represents a reasonable expectation for the participation of disadvantaged businesses in its DOT-assisted contracts, given the availability of disadvantaged businesses to work on these contracts.

(c) Before approving or disapproving a requested goal of less than ten percent, the Administrator provides the Director of the DOT Office of Small and Disadvantaged Business Utilization with an opportunity to review and comment on the request.

(d) If the Administrator does not approve the goal the recipient has requested, the Administrator, after consulting with the recipient, establishes an adjusted overall goal. The adjusted overall goal represents the Administrator's determination of a reasonable expectation for the participation of disadvantaged businesses in the recipients DOT-assisted contracts, and is based on the information provided by the recipient and/or other information available to the Administrator.

(e) The Administrator may condition the approval or establishment of any overall goal on any reasonable future action by the recipient.

§ 23.67 Special provision for transit vehicle manufacturers.

(a) Each UMTA recipient shall require that each transit vehicle manufacturer, as a condition of being authorized to bid on transit vehicle procurements in which UMTA funds participate, certify that it has complied with the requirements of this section. This requirement shall go into effect on October 1, 1983.

(b) Each manufacturer shall establish and submit for the UMTA Administrator's approval an annual percentage overall goal. The base from which the goal is calculated shall be the amount of UMTA financial assistance participating in transit vehicle contracts to

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be performed by the manufacturer during the fiscal year in question. Funds attributable to work performed outside the United States and its territories, possessions, and commonwealths shall be excluded from this base. The requirements and procedures of § 23.64 (d) and (e)(1) and §§ 23.65—23.66 of this subpart shall apply to transit vehicle manufacturers as they apply to recipients.

(c) The manufacturer may make the certification called for in paragraph (a) if it has submitted the goal required by paragraph (b) and the UMTA Administrator has either approved it or not disapproved it.

§ 23.68 Compliance.

(a) Compliance with the requirements of this subpart is enforced through the provisions of this section, not through the provisions of subpart E of this part.

(b) Failure of a recipient to have an approved MBE program, including an approved overall goal, as required by § 23.64 of this subpart, is noncompliance with this subpart.

(c) If a recipient fails to meet an approved overall goal, it shall have the opportunity to explain to the Administrator of the concerned Department element why the goal could not be achieved and why meeting the goal was beyond the recipient's control.

(d)(1) If the recipient does not make such an explanation, or if the Administrator determines that the recipient's explanation does not justify the failure to meet the approved overall goal, the Administrator may direct the recipient to take appropriate remedial action. Failure to take remedial action directed by the Administrator is noncompliance with this subpart.

(2) Before the Administrator determines whether a recipient's explanation justifies its failure to meet the approved overall goal, the Administrator gives the Director, Office of Small and Disadvantaged Business Utilization, an opportunity to review and comment on the recipient's explanation.

(e)(1) In the event of noncompliance with this subpart by a recipient of Federal-aid highway funds, the FHWA Administrator may take any action provided for in 23 CFR 1.36.

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(2) In the event of noncompliance with this subpart by a recipient of funds administered by UMTA or FAA, the UMTA or FAA Administrator may take appropriate enforcement action. Such action may include the suspension or termination of Federal funds or the refusal to approve projects, grants, or contracts until deficiencies are remedied.

[48 FR 33442, July 21, 1983; 48 FR 41163, Sept. 14, 1983, as amended at 53 FR 18286, May 23, 1988]

§ 23.69 Challenge procedure.

(a) Each recipient required to establish an overall goal under § 23.64 shall establish a challenge procedure consistent with this section to determine whether an individual presumed to be socially and economically disadvantaged as provided in § 23.62 is in fact socially and economically disadvantaged.

(b) The recipient's challenge procedure shall provide as follows:

(1) Any third party may challenge the socially and economically disadvantaged status of any individual (except an individual who has a current 8(a) certification from the Small Business Administration) presumed to be socially and economically disadvantaged if that individual is an owner of a firm certified by or seeking certification from the recipient as a disadvantaged business. The challenge shall be made in writing to the recipient.

(2) With its letter, the challenging party shall include all information available to it relevant to a determination of whether the challenged party is in fact socially and economically disadvantaged.

(3) The recipient shall determine, on the basis of the information provided by the challenging party, whether there is reason to believe that the challenged party is in fact not socially and disadvantaged.

(i) If the recipient determines that there is not reason to believe that the challenged party is not socially and economically disadvantaged, the recipient shall so inform the challenging party in writing. This terminates the proceeding.

(ii) If the recipient determines that there is reason to believe that the challenged party is not socially and economically disadvantaged, the recipient shall begin a proceeding as provided in paragraphs (b) (4), (5), and (6) of this section.

(4) The recipient shall notify the challenged party in writing that his or her status as a socially and economically disadvantaged individual has been challenged. The notice shall identify the challenging party and summarize the grounds for the challenge. The notice shall also require the challenged party to provide to the recipient, within a reasonable time, information sufficient to permit the recipient to evaluate his or her status as a socially and economically disadvantaged individual.

(5) The recipient shall evaluate the information available to it and make a proposed determination of the social and economic disadvantage of the challenged party. The recipient shall notify both parties of this proposed determination in writing, setting forth the reasons for its proposal. The recipient shall provide an opportunity to the parties for an informal hearing, at which they can respond to this proposed determination in writing and in person.

(6) Following the informal hearing, the recipient shall make a final determination. The recipient shall inform the parties in writing of the final determination, setting forth the reasons for its decision.

(7) In making the determinations called for in paragraphs (b) (3), (5), and (6) of this section, the recipient shall use the standards set forth in appendix C to this subpart.

(8) During the pendency of a challenge under this section, the presumption that the challenged party is a socially and economically disadvantaged individual shall remain in effect.

(c) The final determination of the recipient under paragraphs (b)(3)(i) and (b)(6) may be appealed to the Department by the adversely affected party to the proceeding under the procedures of § 23.55 of this part.

APPENDIX A TO SUBPART D—SECTION-BY-SECTION ANALYSIS

This section-by-section analysis describes the provisions of the final rule. This material is normally published in the preamble to the final rule. However, the Department believes that it may be useful to recipients, contractors, and the public to publish this information in an appendix to the final regulation. As a result, this information will be available to users of the Code of Federal Regulations as well as to persons who have access to the FEDERAL REGISTER print of the regulation.

Section 23.61 Purpose.

This section states that the purpose of subpart D is to implement section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 and section 105(f) of the Airport and Airway Safety and Capacity Expansion Act of 1987. The rest of the section restates the text of the statute and states that the ten percent level of disadvantaged business participation established by the statute will be achieved if recipients set and meet goals of at least ten percent. The Department of Transportation is committed to carrying out section 106(c) and section 105(f) and achieving its objectives, and intends to enforce the obligations of the recipients and contractors under section 106(c) and section 105(f) and 49 CFR part 23.

Section 23.62 Definitions.

As used in subpart D, the word *Act* means the Surface Transportation and Uniform Relocation Assistance Act of 1987 Airport and Airway Safety and Capacity Expansion Act of 1987. The definition of the term *disadvantaged business* in subpart D is very similar to the definition of the term *minority business enterprise* used for other purposes in 49 CFR part 23. A different term is employed in recognition of the fact that a slightly different set of individuals is eligible to own and control a disadvantaged business than is eligible to own and control a minority business enterprise. In either case, at least 51 percent of the business must be owned by one or more of the eligible individuals, and the firm's management and daily business operations must be controlled by one or more of the eligible individuals who own it. It is important to note that the business owners themselves must control the operations of the business. Absentee ownership, or titular ownership by an individual who does not take an active role in controlling the business, is not consistent with eligibility as a disadvantaged business under this regulation. In order to be an eligible disadvantaged business, a firm

must meet the criteria of §23.53 of this regulation and must be certified as 49 CFR part 23 provides.

Small business concern is defined as a small business meeting the standards of section 3 of the Small Business Act and relevant regulations that implement it. These regulations are summarized in appendix B to the subpart. It should be emphasized that any business which fails to qualify under the standards as a small concern, including a firm certified by SBA under the 8(a) program, cannot be certified as a disadvantaged business, even though it is owned and controlled by socially and economically disadvantaged individuals. Since the small business status of a firm can change over the years, we recommend that recipients make a point of reviewing periodically the small business status of firms with existing certifications periodically to make sure that they still qualify.

Congress determined, in order to ensure that the DBE program meets its objective of helping small minority businesses become self-sufficient and able to compete in the market with non-disadvantaged firms, that DBE firms should "graduate" from the program once their average annual receipts reached \$14 million.

In implementing this provision, recipients should note that a firm is not "graduated" from the program, and hence no longer an eligible DBE, until its average annual gross receipts over the previous three-year period exceed \$14 million. The fact that a firm exceeds \$14 million in gross receipts in a single year does not necessarily result in "graduation." For example, suppose a firm has the following history:

1985—\$11 million
 1986—\$13 million
 1987—\$14 million
 1988—\$14 million
 1989—\$15 million

The firm makes \$14 million in 1987. However, the firm's average annual gross receipts for 1985-87 are \$12.67 million, so the firm remains eligible in 1988. This hypothetical firm would remain eligible in 1989 as well, since its average annual gross receipts for 1986-88 would be \$13.67 million. However, the firm's average annual gross receipts for 1987-89 would be \$14.3 million. As a result, the firm would not be an eligible DBE in 1990.

It should also be pointed out the \$14 million ceiling, like small business size limits under section 3 of the Small Business Act, includes revenues of "affiliates" of the firm as well as the firm itself. This is the import of the "any concern or group of concerns" language. In addition, firms still are subject to applicable lower limits on business size established by the Small Business Administration in 13 CFR part 121. For example, if SBA regulations say that \$7.5 million average gross annual revenues is the size limit

for a certain type of business, that size limit, rather than the overall \$14 million ceiling, determines whether the firm qualifies in terms of its size to be a DBE.

Socially and economically disadvantaged individuals is the term that defines the persons eligible to own and control a disadvantaged business. The term includes the following people: First, anyone found to be socially and economically disadvantaged by SBA under the 8(a) program is regarded as socially and economically disadvantaged for the purpose of DOT-assisted programs. Second, any individual who is a member of one of the designated groups (Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and Asian Indian-Americans or women) is rebuttably presumed to be socially and economically disadvantaged. By *rebuttably presumed*, we mean that the socially and economically disadvantaged status of any individual who is a member of one of the groups is normally assumed by the recipient. With the exception of persons whose origins are from Burma and Thailand the members of these presumed groups are exactly the same persons who are considered to be minorities for purposes of the §23.5 definition of "minority."

Individuals whose origins are from Burma and Thailand are not presumed to be socially and economically disadvantaged individuals for purposes of subpart D. This means that firms owned and controlled by such individuals are eligible to be considered as MBEs for purposes of FRA, NHTSA and other DOT financial assistance programs but not as disadvantaged businesses for purposes of FHWA, UMTA and FAA programs (unless their owners are determined to be socially and economically disadvantaged on an individual basis). If SBA determines any additional groups to be presumptively socially and economically disadvantaged, these groups will become eligible for consideration as owners of disadvantaged businesses on the same basis as Black Americans, Hispanic Americans, and members of the other presumptive groups.

A recipient may, through its certification program, determine that individuals who are not members of any of the presumptive groups are socially and economically disadvantaged. On this basis, for example, disabled Vietnam veterans, Appalachian white males, Hasidic Jews, or any other individuals who are able to demonstrate to the recipient that they are socially and economically disadvantaged may be treated as eligible to own and control a disadvantaged business, on the same basis as a member of one of the presumptive groups. It must be emphasized that these individuals are not determined to be socially and economically disadvantaged on the basis of their group membership. Rather, the social and economic disadvantage of each must be determined on an individual,

case-by-case basis. Guidance for making these determinations is found in appendix C.

Section 23.63 Applicability.

This section provides that subpart D applies to all DOT financial assistance in a number of categories that recipients expend "in DOT-assisted contracts." This last phrase is very important. The base from which goals are calculated is not the total amount of money which each recipient receives from FHWA or FAA or UMTA. It is the amount of money that the recipient expends in DOT-assisted contracts. Funds that the recipient does not expend in contracts (i.e., funds spent by an FHWA or FAA recipient to acquire right-of-way or otherwise acquire land or pay its own employees to supervise construction; funds used by an UMTA recipient to pay salaries of bus drivers) not part of the base from which the overall goal is calculated. Only those funds to be expended by the recipient in contracts are available to create contracting opportunities for disadvantaged businesses, so only these funds comprise the base from which goals for the use of disadvantaged businesses are calculated.

The first category of program funds to which subpart D applies is Federal-aid highway funds authorized by title I of the Act. The second category is urban mass transportation funds authorized by title I (i.e., interstate transfer and substitution funds) or title III of the Act. The third category is funds authorized by title I, title II (except section 203), or title III of the Surface Transportation Assistance Act of 1982 which were obligated on or after April 2, 1987 (the enactment date of the STURAA). The provisions of subpart D also apply to the FAA-administered airport funds authorized by the Airport and Airway Safety and Capacity Expansion Act of 1987.

Section 23.64 Submission of Overall Goals.

This section concerns the procedures for submission of overall goals to be used by recipients of funds covered by this subpart. Paragraph (a) is intended to avoid the imposition of new administrative burdens on recipients of relatively low amounts of DOT financial assistance. This paragraph provides that only those recipients who are required to have MBE programs under 49 CFR part 23 must comply with the goal setting requirements of subpart D. This includes all state transportation agencies who receive FHWA funds and UMTA recipients who receive at least \$250,000 in UMTA capital and operating funds, exclusive of funds for transit vehicle purchases, or \$100,000 in UMTA planning funds. Recipients of FAA airport program funds who receive planning funds in excess of \$75,000 or more than \$250,000 (general aviation airports), \$400,000 (non-hub airports), or

\$500,000 (hub airports) in FAA assistance also must submit overall goals. UMTA or FAA recipients who are not required to have an MBE program by §23.41 need not comply with the goal setting provisions of subpart D.

Paragraph (b) describes how recipients calculate their overall goals. Recipients of FHWA funds use as the base for calculating their percentage goal all Federal-aid funds that the recipient will expend in DOT-assisted contracts in the forthcoming fiscal year. Funds authorized by section 202 of the STAA are considered to be Federal-aid highway funds for this purpose. For UMTA or FAA funds, the base is all Federal funds (exclusive of funds to be expended for transit vehicle purchases) that the recipient will expend in DOT-assisted contracts in the forthcoming fiscal year. The UMTA or FAA Administrator may, however, allow recipients to base their goals on Federal funds received for a particular grant, project, or group of grants or projects.

The Department is aware that recipients may not be aware of the exact amount of Federal funds to be received or to be used in Federally-assisted contracts in the forthcoming fiscal year. However, it is reasonable to expect that recipients will have a close enough projection so that they can determine a reasonable expectation for disadvantaged business participation expressed in percentage terms.

Paragraph (c) provides that, with the exception of UMTA or FAA recipients calculating their goals on a grant or project basis, each UMTA, FHWA, or FAA recipient which must submit an overall goal is required to do so by the August 1 preceding the beginning of the fiscal year to which the goals apply. For example, goal submissions pertaining to fiscal year 1985 are due August 1, 1984. In the case of Fiscal Year 1984, DOT expects recipients to submit their overall goals for approval as close to August 1 as possible.

Paragraph (d) provides that, if the recipient is submitting a goal of ten percent or more, the recipient simply submits the goal under the procedures of §23.45(g) of this part, exactly in the manner that goals have been required to be submitted under the existing regulation.

Paragraph (e) concerns the situation in which a recipient is requesting approval of an overall goal of less than ten percent. Such a recipient is required to comply with the steps set forth in §23.45(g). However, it is required to take three additional steps. First, it must submit a justification for its request containing the information listed in §23.65.

Second, it must ensure that the request is signed or concurred in by the Governor of the state (in the case of a state transportation agency) or the Mayor or other elected official responsible for the operation of a

mass transit agency. If the official responsible for the operation of a mass transit agency or airport sponsor is not a Mayor, another appropriate elected official or officials should provide the signature or concurrence (e.g., a County Executive, the Chairman of a Board of Directors for a transit authority consisting of elected officials, etc.). The reason for this requirement is to ensure that a request for a goal of less than ten percent has the backing of the responsible elected official. This should help to prevent frivolous requests or requests based solely on the views of the non-elected staff of a state or local agency. It is also intended to protect the Department from becoming involved in a disagreement between, for example, a state transportation agency and a governor over disadvantaged business policy. It will also signal to the Department that a request for a lower goal has the backing of the highest responsible elected official involved with the jurisdiction.

The third requirement is that, before making a request for a goal of less than ten percent, the recipient must consult with minority and general contracting associations, community organizations (particularly minority community organizations) and other officials or organizations which can be expected to have information concerning the availability of disadvantaged businesses and the adequacy of recipients' efforts to increase the participation of such businesses. This consultation need not involve a formal public comment period. However, it should involve contact between responsible official(s) of the recipient and representatives of the organizations consulted, which should also have the opportunity to provide written information.

The provision is based on the belief that the organizations consulted are likely to be in a position to give the recipient useful information concerning the availability of disadvantaged businesses and the effectiveness of and problems with the recipient's efforts to increase disadvantaged business participation. The information sought in the consultation is intended to include the views of the consulted parties on the points listed in paragraph (a)–(f) of §23.65. Such information is important to the recipient in formulating a request for a goal of less than ten percent, the Department in evaluating such a request, and to both the recipient and the Department in attempting to determine what additional steps would be appropriate to increase disadvantaged business participation in the future.

There may be some circumstances in which a recipient will have failed to consult with a party whose information could be very useful to the formulation and evaluation of a request for a goal less than ten percent. If the Administrator becomes aware of such a case, the Administrator has the discretion to tell

the recipient to go back and consult with that party. Pending this further consultation, the Administrator would not approve the request for a goal of less than ten percent.

Section 23.65 Content of Justification.

Section 23.65 lists the types of information that a recipient seeking a goal of less than ten percent must provide to the Administrator. The purpose of this information is to enable the Department to make an informed determination of what the reasonable expectation for the recipient's disadvantaged business participation level is for the forthcoming fiscal year. These items of information are discussed in greater detail in appendix D. In the absence of a justification, the FHWA, UMTA, or FAA Administrators will not be able to consider a request for a goal of less than ten percent.

Section 23.66 Approval and Disapproval of Overall Goals.

Paragraph (a) of this section concerns the situation in which a recipient submits for approval an overall goal of ten percent or more. In response to such a request, the Administrator follows the review and approval procedure provided in §23.45(g) of the existing rule. The FHWA, UMTA, or FAA Administrators will review and approve goals submitted under this paragraph in the same manner and in accordance with the same policies as they have reviewed and approved overall goals under the existing 49 CFR part 23.

Paragraph (b) concerns a situation in which a recipient has requested approval of a goal of less than ten percent. In order to approve the goal the recipient has requested, the Administrator must make two determinations. First, the Administrator must determine that the recipient is making all appropriate efforts to increase disadvantaged participation on its DOT-assisted contracts to at least a ten percent level. Second, the Administrator must determine that, despite the recipient's efforts, the goal requested by the recipient is the reasonable expectation, short of ten percent, for the participation of disadvantaged businesses in its DOT-assisted contracts, given the availability of disadvantaged businesses to work on these contracts.

Both of these determinations are very important. The concept of a goal as the reasonable expectation for the recipient's performance recognizes the possibility that there may be limits, related to the availability of disadvantaged businesses, that prevent the attainment of a ten percent goal. Before granting a request for a goal below ten percent, the Administrator must determine that such a limit does in fact exist. However, the idea of a reasonable expectation also assumes that the recipient is doing everything

it can to increase disadvantaged business participation, both by seeking to increase the availability of disadvantaged businesses and seeking to increase the ability of available disadvantaged businesses to work on its contracts. If the recipient is not taking all appropriate steps to increase disadvantaged business participation, then the goal it has requested is not its reasonable expectation for disadvantaged business participation.

If the Administrator does not approve the goal the recipient has requested, the Administrator, after consulting with the recipient, establishes an adjusted overall goal, which represents his or her determination of the reasonable expectation for recipient's disadvantaged business participation. This adjusted overall goal is on information provided by the recipient or any other information available to the Administrator from other sources, including input from interested groups and the past performance of the recipient or other recipients whose situation is analogous to that of the recipient in question. In approving either the goal requested by the recipient or in establishing an adjusted overall goal, the Administrator may always condition the approval or establishment of an overall goal on any reasonable future action by the recipient.

Section 23.67 Special Provision for Transit Vehicle Manufacturers.

This section addresses the special situation of the purchase of transit vehicles by UMTA recipients. The intent of this section is to provide a simplified method by which transit vehicle manufacturers and UMTA recipients can meet disadvantaged business obligations. The Department does not directly regulate transit vehicle manufacturers, since they are not the recipients of Federal financial assistance from UMTA. Rather, they are contractors to UMTA recipients. Consequently, paragraph (a) imposes the basic obligation of this section on UMTA recipients themselves.

Paragraph (a) is a requirement that UMTA recipients condition the authority of manufacturers to bid on UMTA-assisted transit vehicle procurements on a certification by the manufacturer that it has complied with the other provisions of this section. In order to permit manufacturers reasonable start-up time, and to avoid disruption of the whole procurement process, this requirement does not go into effect until October 1, 1983.

Paragraph (b) requires that, in order to make this certification, manufacturers have UMTA-approved overall goal. The base for calculating these goals is the amount of UMTA financial assistance participating in transit vehicle contracts to be performed by the manufacturer during the fiscal year in question. The Department is aware that UMTA recipients order some vehicles from foreign manufacturers and that the vehicles

produced by domestic manufacturers use foreign components in some cases. The Department's regulation does not, of course, have extraterritorial application. Consequently, the manufacturer may exclude from the base from which the goal is calculated the value of the work performed abroad. For example, suppose an UMTA recipient buys a bus from a Canadian manufacturer for \$100,000. Fifty percent of the work on the bus is performed in Canada. In this case, the amount of funds contributing toward the base from which the manufacturer's goal is calculated is \$40,000 (i.e., eighty percent of the \$50,000 of the value of the bus attributable to work performed in the United States).

In submitting an overall goal for the UMTA Administrator's approval, the manufacturer is required to follow the same procedures as recipients with respect to timing, justification of goals, etc. The Administrator follows the same criteria and has the same authority with respect to approval and conditioning of recipient's overall goals as he or she does with respect to recipient's goals. The UMTA Administrator may issue additional guidance with respect to procedures for the submission of overall goals and the content or justification of overall goals that take into account special circumstances of transit vehicle manufacturers, if this appears appropriate.

Paragraph (c) provides that the manufacturer may make the certification to recipients required by paragraph (a) if it has submitted the goals provided for by this section and the UMTA Administrator has either approved them or not disapproved them. This provision is intended to prevent delays in transit vehicle procurements.

Section 23.68 Compliance.

Paragraph (a) points out that compliance with subpart D, as distinguished from compliance with other portions of the regulation, is enforced through §23.68 rather than through subpart E of the regulation. For example, a recipient's failure to have an approved overall goal as required by subpart D would be treated under §23.68. A complaint of discrimination against a recipient by a particular disadvantaged business would be handled under the procedures of subpart E. Paragraphs (b) and (d)(1) list the three circumstances in which a recipient may find itself in noncompliance with subpart D. These are the only three circumstances in which a recipient may be found in noncompliance with subpart D. While a recipient may be in noncompliance with 49 CFR part 23 for other reasons, these other types of noncompliance are handled through the procedures of subpart E.

Paragraph (b) names the first two situations in which a recipient may be found in noncompliance with subpart D. First, the recipient can be in noncompliance by failing to

have an approved overall goal as required by §23.64. This includes not only the situation in which the recipient does not submit a goal to the Department for approval, but also situations in which a recipient does not accept an adjusted overall goal established by the Administrator or fails or refuses to carry out conditions established by the Administrator under §23.66(e).

Second, a recipient may be in noncompliance if it does not have an approved disadvantaged business program. Subpart D does not, in itself, require the creation of such a program. However, such a program, as prescribed by other provisions of 49 CFR part 23, is essential if a recipient is to comply with the disadvantaged business participation requirements of subpart D. Consequently, the failure to have a program, or failure to have a program which fully meets the requirements of 49 CFR part 23, is noncompliance with subpart D.

For example, 49 CFR part 23 requires that, before a recipient awards a contract, it ensure that the apparent successful bidder has met the contract goal or has demonstrated good faith efforts to do so. If a recipient's program does not provide for making this determination before the award of contract, but instead provides for checking the disadvantaged business participation efforts of the contractor only after the award of the contract, the recipient has a program that does not conform to 49 CFR part 23. The recipient may therefore be found in noncompliance with subpart D.

Paragraphs (c) and (d)(1) concern the procedure that recipients and the Department must follow when a recipient is falling or has fallen short of its approved overall goal. The goal-setting process is intended to determine, in advance, the reasonable expectation for the recipient's disadvantaged business participation. These paragraphs are intended to provide for the situation in which the recipient's performance does not meet this expectation. At any time the Administrator requests it, or at the recipient's own initiative, the recipient would make an explanation to the Administrator concerning why the goal could not be achieved. This explanation, if it is to be satisfactory to the Administrator, must demonstrate that recipient's failure to meet the goal is for reasons beyond the recipient's control.

For example, if the recipient expected substantial disadvantaged business participation in a major project, and the project was postponed by litigation or a natural disaster, the recipient could make a case that its failure to meet the goal was attributable to factors beyond its control. A situation that might arise more frequently concerns the failure of contractors to meet contract goals. Under the Department's regulation, recipients may award contracts to contractors who do not meet contract goals if these con-

tractors demonstrate to the recipient that they have made good faith efforts to do so. It is conceivable that a recipient would have set contract goals commensurate with its overall goal, would have given appropriate scrutiny to the claims of contractors that they made unsuccessful but good faith efforts to meet these contract goals, and awarded contracts to contractors who did not meet contract goals in a number of instances. Collectively, these contract awards would cause the recipient to fall below its overall goal.

The Administrator may take circumstances of this kind into account in determining whether a recipient's failure to meet its overall goal was because of factors beyond the recipient's control. In doing so, however, the Administrator also would consider the degree of scrutiny by the recipients of contractors' claims of unsuccessful good faith efforts and the efforts the recipient made in order to make up for shortfalls in particular contracts and prevent such shortfalls in other contracts.

If the recipient's explanation that factors beyond its control prevented achievement of the overall goal is determined by the Administrator to justify the failure to reach the goal, the matter is closed. If the recipient does not provide an explanation or if the Administrator determines that the recipient's explanation is not adequate, the Administrator may take the additional step of directing the recipient to take appropriate remedial action. Remedial action includes prospective steps to improve disadvantaged business participation, such as additional outreach, assistance to disadvantaged businesses or, where not inconsistent with state or local law, the use of set-asides. In order to take the remedial steps which the Administrator prescribes, the recipient may have to devote additional resources to the task.

Failure or refusal by the recipient to take these remedial steps is the third form of noncompliance with subpart D. The Department wants to make it very clear that failure to meet an overall goal, as such, does not constitute noncompliance with subpart D. However, if the recipient fails to meet the goal, does not satisfactorily explain its failure to meet the goal as being beyond its control, and then fails or refuses to take remedial steps prescribed by the Administrator, it would be in noncompliance.

Paragraph (e) sets forth the sources of sanctions for recipient noncompliance under subpart D. These sanctions are the same measures that are available to the FHWA, UMTA or FAA Administrator with respect to the failure of a recipient to carry out any condition of receiving Federal financial assistance.

Section 23.69 Challenge Procedure.

The proposal in the NPRM to make the presumption of social and economic disadvantage rebuttable caused some confusion among recipients who commented. They asked whether this meant that they had to investigate the social and economic status of each business owner that sought certification for programs covered by subpart D. They also asked by what criteria, and through what procedure, the rebuttable presumption would be applied.

This section is intended to answer these questions. First, the basic meaning of a presumption of social and economic disadvantage is that the recipient *assumes* that a member of the designated groups is socially and economically disadvantaged. In making certification decisions, the recipient relies on this presumption, and does not investigate the social and economic status of individuals who fall into one of the presumptive groups.

However, saying that the presumption is rebuttable means that a third party may challenge the actual social and/or economic disadvantage of a business owner who has received or is seeking certification for his firm from the recipient. The procedures for making such a challenge are spelled out in this section. They are set forth in detail in §23.69 and are basically self-explanatory. Two points deserve emphasis. First, the procedures are intended to be informal. Recipients are not required to establish elaborate court-like tribunals, use strict rules of evidence, etc. Second, while a challenge is in progress, the presumption of social and economic disadvantage remains in effect. Therefore, if a firm has been certified, and the social and economic disadvantage of its owner is under challenge, the firm continues to be certified and eligible to be considered a disadvantaged business for purposes of the recipient's DOT-assisted contracting activities.

Amendments to §23.41(a)

The NPRM proposed to make technical amendments to §23.41(a)(2)(i) and §23.41(a)(3)(ii). These amendments added additional UMTA funding sources (e.g. Section 9A) to the list of sources from which funds would contribute toward the threshold amounts for determining whether UMTA recipients had to have MBE programs. There were no comments on these proposed changes. These amendments are adopted unchanged from the NPRM. The final rule makes similar amendments to §23.41 (a)(2)(ii) and (a)(3)(iii).

Relationship Between Subpart D and the Remainder of 49 CFR Part 23

In order to prevent uncertainty, the Department wishes to restate the relationship between subpart D and the remainder of 49

CFR part 23. Under 49 CFR part 23, certain recipients are required to have MBE programs. It is only these recipients who are required to follow the provisions of subpart D. Recipients who must implement subpart D do so only with respect to their FHWA and UMTA programs cited in subpart D. For example, a state department of transportation receiving funds from FHWA, UMTA, NHTSA, FRA, and FAA would be required to follow the subpart D goal procedures with respect only to its FHWA and UMTA funds. It would not be required to do so for its FAA, NHTSA, and FRA funds. The recipient would continue to follow all applicable procedures of 49 CFR part 23 with respect to the FAA, FRA, and the NHTSA funds.

With respect to FHWA and UMTA-assisted programs, recipients will now set only one DBE goal, at both the overall and contract goal level. There are no longer separate DBE and WBE goals. Rather, the single DBE goal applies to all DBEs, whether they are owned and controlled by minorities or by women.

The contract award procedures of 49 CFR part 23 apply to contracts under subpart D just as they do to contracts under other provisions of 49 CFR part 23. Recipients may award contracts to those successful bidders who meet contract goals or demonstrate that they made good faith efforts to do so.

Recipients must certify the eligibility of firms to participate under subpart D programs just as they do with respect to programs covered by other provisions of 49 CFR part 23. For businesses owned and controlled by members of the presumptive groups listed in the definition of socially and economically disadvantaged individuals in subpart D, the certification process is, with one exception, exactly the same as the certification process that has existed all along under 49 CFR part 23. The exception is that individuals with origins in Burma, Thailand, and Portugal are presumed to be socially and economically disadvantaged. They can be eligible under subpart D only if they successfully demonstrate to the recipient that they are socially and economically disadvantaged as individuals.

However, businesses owned and controlled by individuals with origins in these countries continue to be eligible minority businesses under other provisions of 49 CFR part 23. The result is that these firms may be certified for participation in FAA, FRA, NHTSA, or other DOT-assisted programs as before, but must make an individual showing of social and economic disadvantage in order to be regarded as eligible to participate in FHWA and UMTA programs as disadvantaged businesses. The same requirement for an individual determination of social and economic disadvantage applies to any individual who is not a member of one of the presumptive groups, such as a nonminority woman, a handicapped person, etc.

Decertification Procedures

Substantial concern has been expressed about the infiltration of DOT-assisted programs by “fronts”—businesses that claim to be owned and controlled by minorities, women, or other disadvantaged individuals, but which, in fact are ineligible for participation in DOT-assisted programs as MBEs, WBEs or disadvantaged businesses.

The Department wants to take this opportunity to reemphasize the importance of scrutiny of all firms seeking to participate in DOT-assisted programs. We believe strongly that recipients should take prompt action to ensure that only firms meeting the eligibility criteria of 49 CFR part 23 participate as MBEs, WBEs, or disadvantaged businesses in DOT-assisted programs. This means not only that recipients should carefully check the eligibility of firms applying for certification for the first time, but also that they should review the eligibility of firms with existing certifications in order to ensure that they are still eligible. A firm’s circumstances, organization, ownership or control can change over time, resulting in a once-eligible firm becoming ineligible. A second look at a firm previously found to be eligible may reveal factors leading, on renewed consideration, to a determination that it is ineligible.

49 CFR part 23 does not, as presently drafted, prescribe any particular procedures for actions by recipients to remove the eligibility of firms that they have previously treated as eligible. When a recipient comes to believe that a firm with a current certification is not eligible, the Department recommends that the recipients take certain steps before removing the firm’s eligibility. The recipient should inform the firm in writing of its concerns about the firm’s eligibility, give the firm an opportunity to respond to these concerns in person and in writing, and provide the firm a written explanation of the reasons for the recipient’s final decision. This process may be brief and informal. For example, the firm’s opportunity to respond to the recipient’s concerns need not involve a formal court-type hearing. However, in the interest of ensuring that eligibility removal decisions are made fairly, these steps should take place before a firm’s eligibility is removed. The Department believes that such a procedure in so-called “decertification” cases will make the procedure fairer and better administratively, as well as help prevent unnecessary procedural litigation. Procedures of this kind are not a regulatory requirement, but the Department believes that, as a matter of policy, that they are advisable for recipients to use.

Once a recipient has made a final decision on certification, that determination goes into effect immediately with respect to the

recipient’s DOT-assisted contracts (see §23.53(g)). If a firm that has been denied certification or has been decertified appeals the recipient’s action to the Department under §23.55, or if a third party challenges the recipient’s decision to certify the firm under §23.55, the recipient’s action remains in effect until and unless the Department makes a determination under §23.55 reversing the recipient’s action. The recipient’s action is not stayed during the pendency of a §23.55 appeal.

For example, if a recipient has decertified a firm and the firm appeals the decertification to DOT, the firm remains ineligible for consideration as a disadvantaged business with respect to the recipient’s DOT-assisted programs until and unless the Department finds that the firm is eligible. Likewise, if the recipient has certified the firm as eligible, the firm remains eligible while the Department’s consideration of a third party’s challenge to its eligibility is pending. The Department has followed this policy and interpretation of its regulations consistently under the existing rule, and we will continue to do so with respect to subpart D.

There is only one exception to this rule. Section 23.55(c) provides that, in appropriate cases, the Secretary may deny the firm in question eligibility to participate as an MBE (or disadvantaged business) on DOT-assisted contracts let during the pendency of the investigation, after providing the firm an opportunity to show cause by written statement to the Secretary why this should not occur. This paragraph is intended, and has been consistently interpreted and applied by the Department, to cover only a situation in which the recipient has decided that a firm is eligible and a third party has challenged the correctness of the recipient’s determination. As a matter of policy, the Department believes that the award of contracts to ineligible firms is a very serious blow to the integrity of the Department’s program. Consequently, if it appears to the Department that a challenged firm’s eligibility is in serious doubt, the Department, under §23.55(c), can administratively “enjoin” the firm’s participation pending a final determination on the merits of the challenge to its certification. This provision does not, however, authorize the Department to maintain a firm’s certification in effect pending the outcome of the §23.55 Appeal, when the recipient has refused to certify or has decertified the firm.

[48 FR 33442, July 21, 1983, as amended at 52 FR 39231, Oct. 21, 1987; 53 FR 18287, May 23, 1988]

APPENDIX B TO SUBPART D—
DETERMINATIONS OF BUSINESS SIZE

In determining the eligibility of businesses for purposes of 49 CFR part 23, recipients

must determine whether or not a business is a small business concern as defined by section 3 of the Small Business Act. If a business is not a small business concern according to these standards, then it is not eligible to participate as an MBE, WBE, or disadvantaged business under 49 CFR part 23. This is true even though the business may be owned and controlled by minorities, women, or socially and economically disadvantaged individuals and is eligible in all other respects. Even a firm certified by the SBA under the 8(a) program is not eligible under this regulation if it is not a small business.

In determining whether a business is a small business concern, recipients should apply the standards established by the Small Business Administration in 13 CFR part 121. In particular, recipients should refer to §121.3-8 (Definition of Small Business for Government Procurement) and §121.3-12 (Definition of Small Business for Government Subcontractors). This appendix lists the most frequent applications of these sections to the kinds of contracting done by FHWA and UMTA recipients. For information on types of businesses not listed in this appendix (e.g., manufacturers), recipients should consult §121.3-8 and the appendices to 13 CFR part 121.

Recipients should apply the following size standards:

1. *Subcontracts of \$10,000 or less:* A business is small if, including its affiliates, it does not have more than 500 employees.

2. *Subcontracts over \$10,000 and prime contracts:*

A business is regarded as small if it meets the following criteria:

(a) *Construction.*

(1) General Construction (in which less than 75 percent of the work falls into one of the categories in paragraph (2)): The firm's average annual receipts for the three preceding fiscal years do not exceed \$12 million.

(2) Special trade contractors:

Type of firm	Maximum average annual receipts in preceding 3 fiscal years
Plumbing, heating (except electric) and air-conditioning.	\$5 million for all types of contractors on this list.
Painting, paperhanging, and decorating	
Masonry, stone setting, and other stonework.	
Plastering, drywall, acoustical and insulating work.	
Terazzo, tile, marble, and mosaic work	
Carpentering and flooring	
Floor laying and other floorwork	
Roofing and sheet metal work	
Concrete work	
Water well drilling	
Structural steel erection	
Glass and glazing work	
Excavating and foundation work	

Type of firm	Maximum average annual receipts in preceding 3 fiscal years
Wrecking and demolition work	
Installation or erection of buildings equipment.	
Special trade contractors, not elsewhere classified.	

(b) *Suppliers of manufactured goods:* The firm, including its affiliates, must not have more than 500 employees.

(c) *Service contractors:*

Type of firm	Maximum average annual receipts in preceding 3 fiscal years (in millions of dollars)
Engineering	\$7.5
Janitorial and custodial	4.5
Computer programming or data processing	4
Computer Maintenance	7
Protective Services	4.5
Others not mentioned in 13 CFR 121.3-8(e)	2

APPENDIX C TO SUBPART D—GUIDANCE FOR MAKING DETERMINATIONS OF SOCIAL AND ECONOMIC DISADVANTAGE

Before making any determination of social and economic disadvantage, the recipient should always determine whether a firm is a small business concern. If it is not, then the firm is not eligible to be considered a disadvantaged business, and no further determinations need be made.

Under the definition of "socially and economically disadvantaged individual" used in subpart D of this part, members of the named groups (Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and Asian-Indian Americans) and persons certified as socially and economically disadvantaged by the Small Business Administration (SBA) under the SBA's section 8(a) program are presumed to be both socially and economically disadvantaged. This presumption is rebuttable. This means that, as part of a challenge to the eligibility of a firm a recipient has certified under §23.69 of this regulation, a third party may present evidence that the firm's owners are not truly socially and/or economically disadvantaged, even though they are members of one of the presumptive groups. Recipients must follow the challenge procedure in §23.69 when a challenge is made, using this appendix for guidance in making determinations under that procedure.

Under the regulation, anyone who has been certified by SBA under its 8(a) program as socially and economically disadvantaged is automatically considered to be a socially and economically disadvantaged individual

for purposes of this regulation. However, the absence of an 8(a) certification does not mean that an individual or firm is ineligible under this regulation.

Recipients should continue the existing practice of making their own judgments about whether an individual is in fact a member of one of the presumptive groups. If an individual has not maintained identification with the group to the extent that he or she is commonly recognized as a group member, it is unlikely that he or she will in fact have suffered the social disadvantage which members of the group are presumed to have experienced. If an individual has not held himself or herself out to be a member of one of the groups, has not acted as a member of a community of disadvantaged persons, and would not be identified by persons in the population at large as belonging to the disadvantaged group, the individual should be required to demonstrate social disadvantage on an individual basis.

For example, an individual could demonstrate that he had a Chinese ancestor. However, this hypothetical person has never lived in a Chinese-American community, has held himself out to be white for driver's license or other official records purposes, has not previously claimed to be a Chinese-American, and would not be perceived by others in either the Chinese-American community or non-minority community to be a Chinese-American (or any other sort of Asian-Pacific American) by virtue of his appearance, culture, language or associations. The recipient should not regard this individual as an Asian-Pacific American.

Individuals who are not presumed to be socially and economically disadvantaged by virtue of membership in one of these groups may, nevertheless, be found to be socially and economically disadvantaged on a case-by-case basis. If an individual requests that his or her business be certified as an eligible disadvantaged business under subpart D, the recipient, as part of its certification process, is responsible for making a determination of social and economic disadvantage.

In making determinations of social and economic disadvantage, recipients should be guided by the following standards, which have been adopted from materials prepared by the SBA.

A. SOCIAL DISADVANTAGE

(1) *Elements of Social Disadvantage.* In order to determine that an individual is socially disadvantaged, the recipient must conclude that the individual meets the following standards:

(i) The individual's social disadvantage must stem from his or her color; national origin; gender; physical handicap; long-term residence in an environment isolated from the mainstream of American society; or other similar cause beyond the individual's

control. The individual cannot establish social disadvantage on the basis of factors which are common to small business persons who are not socially disadvantaged. For example, because of their marginal financial status, many small businesses have difficulty obtaining credit through normal banking channels. An individual predicating a social disadvantage claim on denial of bank credit to his or her firm would have to establish that the denial was based on one or more of the listed causes, or similar causes—not simply on the individual's or the firm's marginal financial status.

(ii) The individual must demonstrate that he or she has personally suffered social disadvantage, not merely claim membership in a non-designated group which could be considered socially disadvantaged. This can be achieved, for example, by describing specific instances of discrimination which the individual has experienced, or by recounting in some detail how his or her development in the business world has been thwarted by one or more of the listed causes or similar causes. As a general rule, the more specific an explanation of how one has personally suffered social disadvantage, the more persuasive it will be. In assessing such facts, the recipient should place substantial weight on prior administrative or judicial findings of discrimination experienced by the individual. Such findings, however, are not necessarily conclusive evidence of an individual's social disadvantage; nor are they a prerequisite for establishing social disadvantage.

(iii) The individual's social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries.

(iv) The individual's social disadvantage must be chronic, longstanding, and substantial, not fleeting or insignificant. Typically, a number of incidents illustrating a person's social disadvantage, occurring over a substantial period of time, would be necessary to make a successful claim. Usually, only by demonstrating a series of obstacles which have impeded one's progress in the business world can an individual demonstrate chronic, longstanding, and substantial social disadvantage.

(v) The individual's social disadvantage must have negatively affected his or her entry into, and/or advancement in, the business world.

The closer the individual can link social disadvantage to impairment of business opportunities, the stronger the case. For example, the recipient should place little weight on annoying incidents experienced by an individual which have had little or no impact on the person's career or business development. On the other hand, the recipient

should place greater weight on concrete occurrences which have tangibly disadvantaged an individual in the business world.

(2) *Evidence of Social Disadvantage.* The recipient should entertain any relevant evidence in support of an individual's claim of social disadvantage. In addition to a personal statement from the individual claiming to be socially disadvantaged, such evidence may include, but is not limited to: third party statements; copies of administrative or judicial findings of discrimination; and other documentation in support of matters discussed in the personal statement. The recipient should particularly consider and place emphasis on the following experiences of the individual, where relevant: education, employment, and business history. However, the individual may present evidence relating to other matters as well. Moreover, the attainment of a quality education or job should not absolutely disqualify the individual from being found socially disadvantaged if sufficient other evidence of social disadvantage is presented the recipient.

(i) *Education.* The recipient should consider, as evidence of an individual's social disadvantage, denial of equal access to business or professional schools; denial of equal access to curricula; exclusion from social and professional association with students and teachers; denial of educational honors; social patterns or pressures which have discouraged the individual from pursuing a professional or business education; and other similar factors.

(ii) *Employment.* The recipient should consider, as evidence of an individual's social disadvantage: discrimination in hiring; discrimination in promotions and other aspects of professional advancement; discrimination in pay and fringe benefits; discrimination in other terms and conditions of employment; retaliatory behavior by an employer; social patterns or pressures which have channelled the individual into non-professional or non-business fields; and other similar factors.

(iii) *Business History.* The recipient should consider, as evidence of an individual's social disadvantage, unequal access to credit or capital; acquisition of credit under unfavorable circumstances; discrimination in receipt (award and/or bid) of government contracts; discrimination by potential clients; exclusion from business or professional organizations; and other similar factors which have retarded the individual's business development.

B. ECONOMIC DISADVANTAGE

Recipients should always make a determination of social disadvantage before proceeding to make a determination of economic disadvantage. If the recipient determines that the individual is not socially disadvantaged, it is not necessary to make the economic disadvantage determination.

As a general rule, economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities, as compared to others in the same or similar line of business and competitive market area who are not socially disadvantaged. In determining the degree of diminished credit and capital opportunities of a socially disadvantaged individual, consideration will be given to both the disadvantaged individual and the applicant concern with which he or she is affiliated.

In considering the economic disadvantage of firms and owners, it is important for recipients to understand that they are making a comparative judgment about relative disadvantage. Obviously, someone who is destitute is not likely to be in any position to own a business. The test is not absolute deprivation, but rather disadvantage compared to business owners who are not socially disadvantaged individuals and firms owned by such individuals.

It is the responsibility of applicant firms and their owners to provide information to the recipient about their economic situation when they seek eligibility as disadvantaged businesses. Recipients are encouraged to become as knowledgeable as they can about the types of businesses with which they deal, so that they can make a reasonably informed comparison between an applicant firm and other firms in the same line of business. Recipients are not required to make a detailed, point-by-point, accountant-like comparison of the businesses involved. Recipients are expected to make a basic judgment about whether the applicant firm and its socially disadvantaged owner(s) are in a more difficult economic situation than most firms (including established firms) and owners who are not socially disadvantaged.

OTHER ELIGIBILITY CONSIDERATIONS

It is very important for recipients to realize that making a determination of social and economic disadvantage, standing alone, does not mean that a firm is eligible. The recipient must also determine that the firm is 51 percent owned by socially and economically disadvantaged individuals and that these individuals control the firm. In making these latter determinations, recipients should continue to follow 23.51-23.53 of subpart C of 49 CFR part 23.

If a firm or other party believes that any recipient's social and economic disadvantage determination is in error, the firm or party may make an administrative certification appeal to the Department as provided in 49 CFR 23.55

APPENDIX D TO SUBPART D—JUSTIFICATION FOR REQUESTS FOR APPROVAL OF OVERALL GOALS OF LESS THAN TEN PERCENT

The purpose of a justification for a request for approval of an overall goal of less than ten percent is to explain why the goal requested by the recipient is the reasonable expectation for the participation of disadvantaged businesses in the recipient's DOT-assisted contracts. The justification has two basic elements. First, the recipient should show that it is doing as much as it can to increase disadvantaged business participation to at least a ten percent level. Second, the recipient should show that, given the availability of disadvantaged businesses, the requested goal is the reasonable expectation for the level of disadvantaged business participation that these efforts are likely to obtain.

With respect to the specific elements of the justification listed in § 23.65, the Department offers the following guidance, usually in the form of questions the answers to which will help the Department make an informed decision. It should be emphasized that this material is guidance, and is not intended to create a regulatory requirement or a mandatory list of the contents for recipient's submissions. However, it will help the Department to make expeditious and well-informed decisions if recipients provide reasonably complete and detailed information. Doing so will also facilitate suggestions by the Department on additional ways recipients can increase disadvantaged business participation.

(a) *Efforts to locate disadvantaged businesses.* What contacts has the recipient made with sources of information about disadvantaged businesses (such as minority contractors, associations, the Commerce Department's Minority Business Development Administration, DOT Office of Small and Disadvantaged Utilization (and its Program Management Centers), and other recipients' directories of disadvantaged businesses)? In what geographic areas has it sought to locate additional disadvantaged businesses? Have these or other information sources produced additional names of disadvantaged businesses potentially available to work on the recipient's DOT-assisted contract? What follow-up was done with respect to these firms?

(b) *Efforts to make disadvantaged businesses aware of contracting opportunities.* What steps does the recipient take through publications, advertising, pre-bid conferences, direct contact, putting disadvantaged businesses in touch with firms that may bid on prime contracts, and other means to let disadvantaged businesses know about specific contracting and subcontracting opportunities as they arise? (Activity of this kind by the recipient

is important because, in many cases, disadvantaged businesses may not be in a position to learn of contracting opportunities through informal communications networks available to non-disadvantaged firms.)

(c) *Initiatives to encourage and develop disadvantaged businesses.* What is the recipient doing to assist the formation and growth of disadvantaged firms, by means such as training, technical assistance, financial assistance and involvement of other sources of support (such as the FHWA Supportive Services Program and other Federal, state, or local agencies and associations)? What has the recipient done to facilitate the ability of disadvantaged businesses to perform contracts (e.g., splitting a large contract or project into smaller segments that disadvantaged businesses can more readily perform)?

(d) *Legal or other barriers to disadvantaged business participation.* What specific barriers to disadvantaged business participation has the recipient identified? (Common barriers include bonding, prequalification and licensing requirements; difficulty in obtaining financing; any state or local residency requirement or preference, or any other formal or informal limitations on the area from which disadvantaged businesses are sought; and the reluctance of some members of the non-disadvantaged contracting community to use firms owned and controlled by socially and economically disadvantaged persons.) What is the recipient doing about the barriers it has identified? (Examples of efforts to overcome or mitigate the effect of these barriers include changes to or exceptions from state or local requirements as they affect disadvantaged businesses, technical or financial assistance to disadvantaged businesses to help them meet existing requirements, or cooperative efforts with financial institutions and non-minority contractors' associations.)

(e) *The availability of disadvantaged businesses.* How many disadvantaged businesses are available to perform work for the recipient on DOT-assisted contracts? The starting point for the recipient's information should be its directory or list of certified disadvantaged businesses. The number of firms in this directory may not give a complete picture, however. Disadvantaged firms in other jurisdictions, not currently certified by the recipient, may be willing and able to work on the recipient's contracts. On the other hand, firms in the directory may have limited availability (e.g., lack of interest in the recipient's work, other commitments, limitations of the amount of work they can handle). In some cases (e.g., where a state spends a large portion of its funds on a single large project requiring very specialized contractors), the availability of work that disadvantaged firms can perform could be a limitation. The recipient, as appropriate, should

discuss these factors as they affect a determination of the reasonable expectation for disadvantaged business participation in its DOT-assisted contracts.

The recipient should not only advise the Department how many disadvantaged firms exist, but also analyze the dollar volume of the recipient's work the available firms are likely to be able to perform in the fiscal year (or other period) in question.

(f) *Size and other characteristics of the recipient's jurisdiction's minority population.* What is the size of the minority population of the recipient's jurisdiction? (In some cases, not only the size but also the composition or residence pattern of the minority population may be relevant). Where relevant, what is the size of the minority population of nearby jurisdictions?

Minority population is usually not an exact index of the availability of disadvantaged businesses. In some cases, disadvantaged business participation levels for various recipients have ranged well above or below the minority population of the jurisdictions involved. In any event, recipients should tie any assertions they make on the basis of minority population to the effect they believe it has on disadvantaged business availability.

(g) *Views and information from the consultation process.* With whom has the recipient consulted and what did the consulted parties say with respect to anything in paragraph (a)-(f)? In particular, what were the views of and information provided by the disadvantaged business community concerning the availability of such firms, barriers to their participation and what is needed to overcome them, the efficacy of the recipient's efforts to increase disadvantaged business participation and what could be done to improve these efforts?

Subpart E—Compliance and Enforcement

§ 23.73 Complaints.

(a) *Filing.* Any person who believes himself or herself, another person, or any specific class of individuals to be subjected to a violation of this part may file a complaint in writing, signed and dated, with the Department. The complaint shall be filed no later than 180 days after the date of an alleged violation or the dates on which a continuing course of conduct in violation of this part was disclosed. The Secretary may extend the time for filing or waive the time limit in the interest of justice, specifying in writing the reason for so doing.

(b) *Investigations.* The Secretary ensures that a prompt investigation is made pursuant to prescribed DOT Title VI investigation procedures.

(c) *Cooperation in investigation.* The respondent to the complaint shall cooperate fully with the investigation. Failure or refusal by the respondent to furnish requested information or other failure to cooperate is a violation of this part.

(d) *Determinations.* Upon completion of the investigation, the Secretary informs the recipient or contractor and complainant of the results of the investigation in writing. If the investigation indicates a failure to comply with this part, the conciliation procedures of § 23.81 and, if necessary, the enforcement procedures of § 23.83 are followed.

(e) *Intimidation or retaliation acts prohibited.* No recipient, contractor, or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by this part, or because he or she made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of complainants shall be kept confidential at their election during the conduct of any investigation, proceeding, or hearing under this part. But when such confidentiality is likely to hinder the investigation the complainant shall be advised for the purpose of waiving the privilege.

§ 23.75 Compliance reviews of recipients.

(a) *Desk audit.* All compliance reviews conducted after financial assistance has been approved or contracts have been awarded begin with a desk audit. The desk audit is a review of all material and information concerning the recipient's MBE performance.

(b) *On-site review.* An on-site review includes interviews, visits to project or facility sites receiving DOT funds, and inspection of any statistical or documentary materials relevant to the recipient's performance which were not available for review during the desk audit.

(c) *Cooperation.* The recipient shall cooperate fully with these reviews. Failure or refusal to furnish requested

§ 23.81

information or failure to cooperate is a violation of this part.

(d) *Determination.* As a result of its review of the recipient, the Departmental element civil rights staff makes one of the following determinations:

(1) The recipient is in compliance with its MBE obligations; or

(2) There is reasonable cause to believe that the recipient is not in compliance with its MBE obligations in certain specified respects. Proceedings shall be begun in accordance with § 23.81 and, if necessary, § 23.83.

§ 23.81 Conciliation procedures for financial assistance programs.

(a) *Reasonable cause notice.* Whenever the responsible office of civil rights makes a determination of reasonable cause to believe that a recipient is in noncompliance, a notice is sent promptly and in writing by registered mail, return receipt requested, describing the areas of noncompliance requiring the applicant or recipient to show cause within 30 days why enforcement proceedings or other appropriate action to ensure compliance should not be instituted and offering the recipient an opportunity to conciliate. The responsible office of civil rights shall pursue conciliation efforts for at least 30 days from the date of the reasonable cause notice.

(1) *Successful conciliation.* If a conciliation agreement is signed by the Departmental element's office of civil rights and recipient, it is approved or disapproved by the head of the Departmental element within 20 days of receiving it. If the head of the Departmental element disapproves the agreement, the reasons therefor are stated in writing. The head of the Departmental element may propose amendments to the agreement which are forwarded to the recipient, requesting the recipient's acceptance or rejection of the amended agreement within 20 days of receipt.

(2) *Unsuccessful conciliation.* If no agreement is signed within 120 days of the notice of reasonable cause enforcement proceedings set forth in § 23.83 begin. The head of the responsible office of civil rights, upon a written determination that an additional 30 days

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are needed to complete conciliation, may extend the conciliation period for 30 days. Subsequent extensions may be made upon such written determinations. The determinations shall include reasons for the extension and shall be provided to the complainant and respondent.

(b) *Effect of conciliation agreement.* If a conciliation agreement is approved, the existence of the determination of noncompliance does not act as a bar to the provision of financial assistance as long as the terms of the agreement are fulfilled. A compliance review is conducted by the Department element within nine months of the approval of an agreement.

§ 23.83 Enforcement proceedings for financial assistance programs.

(a) Whenever conciliation efforts pursuant to § 23.81 are unsuccessful, enforcement proceedings begin. These proceedings are conducted in accordance with the Department's procedures for enforcing title VI (49 CFR part 21).

(b) A finding of noncompliance and the imposition of any sanction pursuant to these proceedings is binding on all other Departmental elements. Sanctions are limited to the recipient with respect to whom the noncompliance finding has been made and to the particular program or activity, or part thereof, in which noncompliance has been found.

§ 23.85 Emergency enforcement procedure.

(a) *General.* Whenever the Secretary determines that the conciliation and enforcement proceedings set forth in §§ 23.81 and 23.83 will not result in the timely and adequate enforcement of the provisions of this part, he/she initiates special enforcement procedures to obtain compliance.

(b) *Emergency reasonable cause notice.* A notice is sent, registered mail, return receipt requested, describing the areas of alleged noncompliance, setting forth the reasons why the normal course of conciliation and enforcement pursuant to §§ 23.81 and 23.83 will not result in timely and adequate enforcement, and requiring the recipient to show cause, within a specified period of time, generally not to exceed 15 days,

why appropriate action, described in the notice, to ensure compliance should not be taken. The notice states that the recipient must respond in writing or orally on the record before an official appointed by the Secretary or the proposed action will be taken.

(c) *Decision.* If the Secretary, after reviewing the recipient's oral or written response, determines that such action is necessary, he/she orders that all or any part of the contracting activities of the recipient affected by the recipient's alleged noncompliance be halted until the matter is resolved under § 23.81 or § 23.83. The Secretary's action under this paragraph may not affect any contract already awarded. When the Secretary makes an order under this paragraph, resolution of the matter shall proceed on an expedited basis.

§ 23.87 Suspension and debarment; referral to the Department of Justice.

(a) If, at any time, any person has reason to believe that any person or firm has willfully and knowingly provided incorrect information or made false statements, or otherwise acted in a manner subjecting that person or firm to suspension or debarment action under 49 CFR part 29, he or she may contact the appropriate DOT element concerning the existence of a cause for suspension or debarment, as provided in 49 CFR 29.17.

(b) Upon the receipt of information indicating a violation of 18 U.S.C. 1001, or any other Federal criminal statute, the Department may refer the matter to the Department of Justice for appropriate legal action.

[50 FR 18494, May 1, 1985]

Subpart F—Implementation of Section 511(a)(17) of the Airport and Airway Improvement Act of 1982, as Amended

SOURCE: Amdt. 1, 57 FR 18410, Apr. 30, 1992, unless otherwise noted.

§ 23.89 Definitions.

Affiliation has the same meaning the term has in regulations of the Small Business Administration, 13 CFR part 121. Except as otherwise provided in 13 CFR part 121, concerns are affiliates of

each other when, either directly or indirectly

(a) One concern controls or has the power to control the other, or

(b) A third party or parties controls or has the power to control both, or

(c) An "identity of interest" between or among parties exists such that affiliation may be found.

In determining whether affiliation exists, consideration shall be given to all appropriate factors, including common ownership, common management, and contractual relationships.

Concession means a for-profit business enterprise, located on an airport subject to this subpart, that is engaged in the sale of consumer goods or services to the public under an agreement with the sponsor, another concessionaire, or the owner of a terminal, if other than the sponsor. Businesses which conduct an aeronautical activity are not considered concessionaires for purposes of this subpart. Aeronautical activities include scheduled and non-scheduled air carriers, air taxis, air charters, and air couriers, in their normal passenger or freight-carrying capacities; fixed base operators, flight schools; and sky-diving, parachute-jumping, flying guide services, and helicopter or other air tours.

(a) Appendix A to this subpart contains a listing of the types of businesses that are frequently operated as concessions.

(b) Examples of entities that do not meet the definition of a concession include suppliers, flight kitchens and in-flight caterers servicing air carriers, government agencies, industrial plants, farm leases, individuals leasing hangar space, custodial and security contracts, individual taxis with permits, telephone and electric utilities, skycap services under contract with an air carrier, and management contracts.

(c) Concessions may be operated under the following types of agreements:

- (1) Leases.
- (2) Subleases.
- (3) Permits.
- (4) Contracts.
- (5) Other instruments or arrangements.

Concessionaire means one who operates a concession.

Disadvantaged business shall have the same meaning as set forth in §23.61 of subpart D of this part, except it shall be a small business concern, as defined in this subpart, not as defined in §23.61.

Material amendment means a substantial change to the basic rights or obligations of the parties to a concession agreement. Examples of material amendments include an extension to the term not provided for in the original agreement or a substantial increase in the scope, of the concession privilege. Examples of nonmaterial amendments include a change in the name of the concessionaire or a change to the payment due dates.

Primary airport means a commercial service airport which is determined by the Secretary to have more than 10,000 passengers enplaned annually.

Small business concern means a firm, including all its domestic and foreign affiliates, that qualifies under the applicable size standard set forth in appendix A to this subpart. In making a size determination, all affiliates, regardless of whether organized for profit, must be included. A firm qualifying under this definition that exceeds the size standard after entering a concession agreement, but that otherwise remains eligible, may continue to be counted as DBE participation until the current agreement, including the exercise of options, expires.

(a) The Secretary may periodically adjust the size standards in appendix A to this subpart for inflation.

(b) A firm that was certified as a minority/woman/or disadvantaged business enterprise (MBE/WBE/DBE) prior to the effective date of this subpart, pursuant to a requirement in §23.43(d) or FAA guidance implementing section 511(a)(17) of the Airport and Airway Improvement Act of 1982, as amended, that has exceeded the size standard, may be counted as DBE participation until the current agreement, including the exercise of options, expires, provided that the firm remains otherwise eligible.

Socially and economically disadvantaged individuals shall have the same meaning as set forth in §23.61 of subpart D of this part.

Sponsor means the recipient of an FAA grant.

§23.91 Applicability.

This subpart applies to any sponsor that has received a grant for airport development authorized by the Airport and Airway Improvement Act of 1982, as amended by the Airport and Airway Safety and Capacity Expansion Act of 1987.

§23.93 Requirements for airport sponsors.

(a) *General requirements.* (1) Each sponsor shall abide by the non-discrimination requirements of §23.7 with respect to the award and performance of any concession agreement covered by this subpart.

(2) Each sponsor shall take all necessary and reasonable steps to foster participation by DBE's in its airport concession activities.

(3) The following statements shall be included in all concession agreements executed between the sponsor and any firm after the effective date of this subpart.

(i) "This agreement is subject to the requirements of the U.S. Department of Transportation's regulations, 49 CFR part 23, subpart F. The concessionaire agrees that it will not discriminate against any business owner because of the owner's race, color, national origin, or sex in connection with the award or performance of any concession agreement covered by 49 CFR part 23, subpart F.

(ii) "The concessionaire agrees to include the above statements in any subsequent concession agreements that it enters and cause those businesses to similarly include the statements in further agreements."

(b) *Additional requirements for primary airports* (1) Sponsors of primary airports shall implement a disadvantaged business enterprise (DBE) concession plan containing the elements listed in §23.95. Sponsors of more than one primary airport shall implement a separate plan for each location that has received assistance for airport development. The plan shall be submitted to the appropriate FAA Regional Office for approval.

(2) The sponsor shall review and update the plan at least annually. The updated plan shall include any information required under §23.95 that was

not available to the sponsor when the previous submission was made. Updated plans shall be submitted to the appropriate FAA Regional Office for approval.

(c) *Additional requirements for nonprimary airports.* Sponsors of commercial service airports (except primary), general aviation and reliever airports are not required to implement a DBE concession plan but shall take appropriate outreach steps to encourage available DBE's to participate as concessionaires whenever there is a concession opportunity.

§ 23.95 Elements of Disadvantaged Business Enterprise (DBE) concession plan.

(a) *Overall annual DBE goals.* (1) The sponsor shall establish an overall goal for the participation of DBE's in concessions for each 12-month period covered by the plan. The goals shall be based on the factors listed in § 23.45(g)(5).

(2) Sponsors shall calculate the overall DBE goal as a percentage of one of the following bases:

(i) The estimated gross receipts that will be earned by all concessions operating at the airport during the goal period. (Where the terms of a concession agreement do not provide for the sponsor to know the gross receipts, the sponsor shall use the net payment to the airport for such agreements and combine these figures with the estimated gross receipts from other agreements, for purposes of making this calculation. The plan shall indicate which concession agreements do not provide for the sponsor to know the gross receipts.)

(ii) The total number of concession agreements operating at the airport during the goal period.

(3) The plan shall state which base the sponsor proposes to use for calculating the overall goals. Sponsors proposing to use the base described in paragraph (a)(2)(i) of this section shall submit a rationale as required by § 23.99.

(4) Sponsors who will employ the procedures of paragraph (a)(2)(i) of this section shall exclude from the overall goal any portion of a firm's estimated

gross receipts that will not be generated from a concession activity.

Example. A firm operates a restaurant in the airport terminal which services the travelling public and under the same lease agreement, provides in-flight catering service to the air carriers. The projected gross receipts from the restaurant are included in the overall goal calculation, while the gross receipts to be earned by the in-flight catering service are excluded.

(5) Sponsors who will employ the procedures of paragraph (a)(2)(i) of this section shall use the net payment to the airport for banks and banking services, including automated teller machines (ATM) and foreign currency exchanges.

(6) To the extent practicable, sponsors shall seek to obtain DBE participation in all types of concession activities and not concentrate participation in one category or a few categories to the exclusion of others.

(7) Airport sponsors may establish an overall annual goal exceeding 10 percent.

(b) *Goal methodology.* (1) The plan shall contain a description of the methodology used in establishing each of the overall DBE goals. The methodology shall include information on the concessions that will operate at the airport during the period covered by the plan and the potential for DBE participation. For each concession agreement, the sponsor shall provide the following information, together with an additional information requested by the Regional Civil Rights Officer:

(i) Name of firm.

(ii) Type of business (e.g. bookstore, car rental, baggage carts).

(iii) Beginning and expiration dates of agreement, including options to renew.

(iv) For new agreements, method of solicitation proposed by sponsor (e.g. request for proposals, invitation for bids).

(v) Dates that material amendments will be made to the agreement (if known).

(vi) Estimated gross receipts for each goal period established in the plan.

(vii) Identification of those concessionaires that have been certified under this subpart as DBE's.

(viii) An indication of those concessions having potential for participation by DBE's.

(2) The plan shall include a narrative description of the types of efforts the sponsor intends to make, in accordance with paragraph (h) of this section, to achieve the overall annual goals.

(3) Sponsors who will include a DBE contract goal or other requirements in solicitations for concession agreements shall state those requirements in the plan.

(4) If none of the overall goals set under paragraph (a)(2)(i) or (a)(2)(ii) of this section is 10 percent or more, the sponsor shall submit the information and follow the procedures outlined in § 23.101.

(c) *DBE set-asides.* (1) Where not prohibited by state or local law and determined by the sponsor to be necessary to meet DBE goals, procedures to implement DBE set-asides shall be established. The DBE plan shall specify the concessions to be set-aside.

(2) If a state or local law prohibits the use of set-asides in the award of concessions, a citation of the appropriate authority shall be included in the plan.

(d) *Accomplishments in achieving DBE goals.* The plan shall contain an analysis of the accomplishments made by the sponsor toward achieving the previous year's goal. The plan shall show the effect of those results on the overall level of DBE participation in the airport's concessions.

(e) *Explanation for not achieving a goal.* (1) If the analysis required under paragraph (d) of this section indicates that the sponsor failed to meet the previous year's overall goal, the plan shall include a statement of the reasons demonstrating why failure to meet the goal was beyond the sponsor's control.

(2) If the FAA determines that the reasons given by the sponsor are not sufficient justification, or if the sponsor fails to state any reasons, the FAA may require the sponsor to implement appropriate remedial measures. Such measures may include an adjustment to the overall goals of the concession plan.

(f) *Certification procedures.* (1) The certification procedures set forth in § 23.51 are applicable to this subpart.

Sponsors may count toward their overall goals only those firms that have been certified in accordance with the procedures of that section.

(2) Except as provided in § 23.51(c), each business, including the DBE partner in a joint venture, wishing to participate as a DBE under this subpart in a concession shall complete and submit Schedule A. Each entity wishing to participate as a joint venture DBE under this subpart shall in addition complete and submit Schedule B. (Schedules A and B are reproduced at the end of this part.)

(3) Sponsors shall take at least the following steps in determining whether a firm is an eligible DBE:

(i) Obtain the resumes or work histories of the principal owners of the firm and personally interview these individuals;

(ii) Analyze the ownership of stock in the firm, if it is a corporation;

(iii) Analyze the bonding and financial capacity of the firm;

(iv) Determine the work history of the firm, including any concession contracts it may have received;

(v) Obtain or compile a list of the licenses of the firm and its key personnel to perform the concession contracts it wishes to receive; and

(vi) Obtain a statement from the firm of the type of concession it prefers to operate.

(4) Prior to making a certification determination, the sponsor shall perform an on-site visit to the offices of the firm and to any of its facilities that may be necessary to validate the certification information obtained from the firm.

(5) The challenge procedure set forth in § 23.69 are applicable to this subpart.

(g) *Certification standards.* (1) Sponsors shall use the same standards for ownership and control as contained in § 23.53 in determining whether a firm may be certified as a DBE.

(2) Businesses operating under the following structures may be eligible for certification as DBE's under this subpart:

(i) Sole proprietorships.

(ii) Corporations.

(iii) Partnerships.

(iv) Other structures that provide for ownership and control by the socially

and economically disadvantaged owners.

(3) A business operating under a franchise (or license) agreement may be certified if it meets the standards in this section and the franchisor is not affiliated with the franchisee.

In determining whether affiliation, as defined in §23.89, exists, the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on a franchisee by its franchise agreement generally shall not be considered, provided that the franchisee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee may not be controlled by the franchisor by virtue of such provisions in the franchise agreement, control, and, thus, affiliation could arise through other means, such as common management or excessive restrictions upon the sale of the franchise interest.

(4) Joint ventures described in §23.53(d) are eligible for certification as DBE's under this subpart.

(h) Businesses operating under the following arrangements are not eligible for certification as DBE's under this subpart:

(1) Limited partnerships, in which a non-DBE is the general partner.

(2) Other arrangements that do not provide for ownership and control by the socially and economically disadvantaged owners.

(i) *Good faith efforts.* The sponsor shall make good faith efforts to achieve the overall goals of the approved plan. The efforts shall include:

(1) Locating and identifying DBE's who may be interested in participating as concessionaires;

(2) Notifying DBE's and other organizations of concession opportunities and encouraging them to compete, when appropriate;

(3) Informing competitors for concession opportunities of any DBE requirements during pre-solicitation meetings;

(4) Providing information concerning the availability of DBE firms to competitors to assist them in meeting DBE requirements; and

(5) When practical, structuring contracting activities so as to encourage

and facilitate the participation of DBE's.

§23.97 Appeals of certification denials.

The procedures concerning the appeal of a denial of certification set forth in §23.55 are applicable to this subpart.

§23.99 Rationale for basing overall goals on the number of concession agreements.

(a) A sponsor who proposes to calculate the overall DBE goals as a percentage of the number of concession agreements shall submit information with the DBE plan to demonstrate that one of the following applies to the airport:

(1) In order to attain an overall DBE goal of 10 percent on the basis of gross receipts, the airport would need to award a disproportionate percentage of the opportunities to DBE's. This rationale may address a time period that extends beyond that covered by the current plan; or

(2) Other circumstances at the airport exist that do not make it feasible to use gross receipts as the basis for calculating the goals.

(b) If the FAA approves of the request, the sponsor shall not be required to provide further justification during subsequent years of the plan, unless requested by the FAA to do so.

(c) If the FAA determines that the information submitted by the sponsor fails to justify the requested goal-setting procedure, the sponsor shall resubmit the plan. The goals in the revised plan shall be calculated as a percentage of gross receipts, as outlined in paragraph (a)(2)(i) of §23.95.

§23.101 Information required when none of the overall annual goals is 10 percent or more.

(a) A sponsor requesting approval for a concession plan in which none of the overall annual DBE goals is 10 percent or more shall provide information on the following points:

(1) The sponsor's efforts to locate DBE's in the relevant geographic area that are capable of operating the concessions that will become available;

(2) The sponsor's efforts to notify DBE's of concession opportunities and to encourage them to compete;

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(3) Any consideration given by the sponsor, when practical, to structuring contracting procedures so as to encourage and facilitate DBE participation. For example, a sponsor may consider using competitive means to award a concession that would otherwise be renegotiated without competition.

(4) If appropriate, an explanation why the nature of a particular concession makes DBE participation through a sublease, joint venture, partnership, or other arrangement not economically feasible.

(b) The FAA regional civil rights officer approves a plan which does not contain any overall goals of at least 10 percent if he or she determines that based on the information submitted by the sponsor under paragraph (a) of this section and any other available information;

(1) The sponsor is making all appropriate efforts to increase DBE participation in its concessions to a level of 10 percent; and

(2) Despite the sponsor's efforts, the goals submitted by the sponsor represent the reasonable expectation for DBE participation, given the availability of DBE's.

§ 23.103 Obligations of concessionaires and competitors.

(a) Sponsors may impose requirements on competitors for concession agreements as a means of achieving the DBE goals or a portion of the goals established under paragraph (a) of § 23.91 of this subpart, provided that the DBE participation specified in the solicitation or other request is an eligible arrangement, as defined in this subpart.

(b) Nothing in this subpart shall require any sponsor to modify or abrogate an existing concession agreement (one executed prior to the date the sponsor became subject to this subpart) during its term. When options to renew such agreements are exercised or when a material amendment is made to the agreement, the sponsor shall assess the potential for DBE participation and include any opportunities in the goals established under paragraph (a) of § 23.95.

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§ 23.105 Privately-owned terminal buildings.

(a) Awards of concession agreements that are made by private owners of terminal buildings are covered by this subpart. Airport sponsors subject to this subpart shall levy the applicable requirements on the terminal owner through the agreement with the owner or by other means, except that certification shall, in the case of primary airports, be performed by the airport sponsor. The sponsor shall ensure that the terminal owner complies with these requirements.

(b) If the terminal building is at a primary airport, the sponsor shall obtain from the terminal owner the overall goals and other elements of the DBE concession plan required under § 23.95. This information shall be incorporated into the concession plan and goals established by the sponsor and submitted to the FAA in accordance with this subpart.

(c) If the terminal building is at a commercial service airport (except primary), general aviation, or reliever airport, the sponsor shall ensure that the owner complies with the requirements in paragraph (c) of § 23.93.

§ 23.107 Prohibition on long-term, exclusive concession agreements.

(a) Except as provided in paragraph (b) of this section, sponsors shall not enter into long-term, exclusive agreements for the operation of concessions. For purposes of this section, a long-term agreement is one having a term in excess of five years. Guidelines for determining whether an agreement is exclusive, as used in this section, have been included in the FAA's "DBE Program Development Kit for Airport Grant-in-Aid Recipients." This publication can be obtained from any FAA Regional Civil Rights Officer or from the FAA Office of Civil Rights, 800 Independence Avenue, SW., Washington, DC 20591, Attention, ACR-4.

(b) A long-term, exclusive agreement is permitted under this subpart, provided that:

(1) Special local circumstances exist that make it important to enter such agreement, and

(2) The responsible FAA regional civil rights officer approves of a plan for ensuring adequate DBE participation throughout the term of the agreement.

(c) Approval of the plan referenced in paragraph (b)(2) of this section relieves the sponsor of the need to obtain an exemption under the procedures of §23.41(f) and the Notice of Policy (45 FR 45281, July 3, 1980). The Notice of Policy can be obtained from the FAA Office of Civil Rights at the address given in paragraph (a) of this section.

(d) Sponsors shall submit the following information with the plan referenced in paragraph (b)(2) of this section:

(1) A description of the special local circumstances that warrant a long-term, exclusive agreement, e.g., a requirement to make certain capital improvements to a leasehold facility.

(2) A copy of the draft and final leasing and subleasing or other agreements. The long-term, exclusive agreement shall provide that:

(i) One or more DBE's will participate throughout the term of the agreement and account for at least 10 percent of the annual estimated gross receipts.

(ii) The extent of DBE participation will be reviewed prior to the exercise of each renewal option to consider whether an increase is warranted. (In some instances, a decrease may be warranted.)

(iii) A DBE that is unable to perform successfully will be replaced by another DBE, if the remaining term of the agreement makes this feasible.

(3) Assurances that the DBE participation will be in an acceptable form, such as a sublease, joint venture, or partnership.

(4) Documents used by the sponsor in certifying the DBE's.

(5) A description of the type of business or businesses to be operated, location, storage and delivery space, "back-of-the-house facilities" such as kitchens, window display space, advertising space, and other amenities that will increase the DBE's chance to succeed.

(6) Information on the investment required on the part of the DBE and any unusual management or financial ar-

rangements between the prime concessionaire and DBE.

(7) Information on the estimated gross receipts and net profit to be earned by the DBE.

§23.109 Compliance procedures.

In the event of noncompliance with this subpart by a sponsor, the FAA Administrator may take any action provided for in section 519 of the Airport and Airway Improvement Act of 1982, as amended.

§23.111 Effect on §23.43(d).

Except for commitments made prior to issuance of this subpart as a condition of receiving an exemption from §23.43(d)(1), which prohibits certain long-term, exclusive agreements, the provisions of §23.43(d) shall not apply to any airport, its lessees, concessionaires, or other organizations, if the airport sponsor is covered by the requirements in this subpart. Leasing goals established in accordance with §23.43(d)(2) and approved by the FAA prior to the effective date of this subpart shall terminate as set forth below:

(a) For primary airports, upon FAA approval of a DBE concession plan required under §23.93(b).

(b) For nonprimary airports, at the conclusion of the period to which the leasing goal applies.

APPENDIX A TO SUBPART F—SIZE STANDARDS FOR AIRPORT CONCESSIONAIRES

MAXIMUM AVERAGE ANNUAL GROSS RECEIPTS IN PRECEDING 3 YEARS
[In millions of dollars]

Concession	Amount
Food and beverage	30.00
Book stores	30.00
Auto rental	40.00
Banks	100.00
Hotels and motels	30.00
Insurance machines and counters	30.00
Gift, novelty, and souvenir shop	30.00
Newstands	30.00
Shoe shine stands	30.00
Barber shops	30.00
Automobile parking	30.00
Jewelry stores	30.00
Liquor stores	30.00
Travel agencies	30.00
Drug stores	30.00
Pastries and baked goods	30.00
Luggage cart rental	30.00
Coin-operated T.V.'s	30.00

MAXIMUM AVERAGE ANNUAL GROSS RECEIPTS
IN PRECEDING 3 YEARS—Continued
[In millions of dollars]

Concession	Amount
Game rooms	30.00
Luggage and leather goods stores	30.00
Candy, nut, and confectionery stores	30.00
Toy stores	30.00
Beauty shops	30.00
Vending machines	30.00
Coin-operated lockers	30.00
Florists	30.00
Advertising	30.00
Taxicab	30.00
Limousines	30.00
Duty free shops	30.00
Pay telephones	21,500
Gambling machines	30.00
Other concessions not shown above	30.00

¹ As measured by total assets
² As measured by number of employees.

SCHEDULE A—INFORMATION FOR DETERMINING
MINORITY BUSINESS ENTERPRISE ELIGIBILITY

- Name of firm _____
- Address of firm _____
- Phone Number of firm _____
- Indicate whether firm is sole proprietorship, partnership, joint venture, corporation or other business entity (please specify) _____
- Nature of firm's business _____
- Years firm has been in business _____
- Ownership of firm: Identify those who own 5 percent or more of the firm's ownership. Columns e and f need be filled out only if the firm is less than 100 percent minority owned.

a—Name	b—Race	c—Sex	d—Years of ownership	e—Ownership percentage	f—Voting percentage

With firms less than 100 percent minority owned, list the contributions of money, equipment, real estate, or expertise of each of the owners.

8. Control of firm: (a) Identify by name, race, sex, and title in the firm those individuals (including owners and non-owners) who are responsible for day-to-day management and policy decisionmaking, including, but not limited to, those with prime responsibility for:

- Financial decisions _____
- Management decisions, such as—
 - Estimating _____
 - Marketing and sales _____
 - Hiring and firing of management personnel _____
 - Purchases of major items or supplies _____
 - Supervision of field operations _____

9. For each of those listed in question 8, provide a *brief* summary of the person's experience and number of years with the firm, indicating the person's qualifications for the responsibilities given him or her.

10. Describe or attach a copy of any stock options or other ownership options that are outstanding, and any agreements between owners or between owners and third parties which restrict ownership or control of minority owners.

11. Identify any owner (see item 7) or management official (see item 8) of the named firm who is or has been an employee of another firm that has an ownership interest in or a present business relationship with the named firm. Present business relationships include shared space, equipment, financing, or employees as well as both firms having some of the same owners.

12. What are the gross receipts of the firm for each of the last two years?

Year ending _____
\$ _____

Year ending _____
\$ _____

13. Name of bonding company, if any: _____
Bonding limit _____
Source of letters of credit, if any _____

14. Are you authorized to do business in the state as well as locally, including all necessary business licenses?

15. Indicate if this firm or other firms with any of the same officers have previously received or been denied certification or participation as an MBE and describe the circumstances. Indicate the name of the certifying authority and the date of such certification or denial.

AFFIDAVIT

"The undersigned swears that the foregoing statements are true and correct and include all material information necessary to identify and explain the operations of _____ (name of firm) as well as the ownership thereof. Further, the undersigned agrees to provide through the prime contractor or, if no prime, directly to the grantee current, complete and accurate information regarding actual work performed on the project, the payment therefor and any proposed changes, if any, of the foregoing arrangements and to permit the audit and examination of books, records and files of the named firm. Any material misrepresentation will be grounds for terminating any contract which may be awarded and for initiating action under Federal or State laws concerning false statements."

NOTE: If, after filing this Schedule A and before the work of this firm is completed on the contract covered by this regulation,

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there is any significant change in the information submitted, you must inform the grantee of the change through the prime contractor or, if no prime contractor, inform the grantee directly.

Signature _____
Name _____
Title _____
Date _____
Corporate Seal (where appropriate).
Date _____
State of _____
County of _____

On this — day of —, 19—, before me appeared (Name) —, to me personally known, who, being duly sworn, did execute the foregoing affidavit, and did state that he or she was properly authorized by (Name of firm) — to execute the affidavit and did so as his or her free act and deed.

[Seal]
Notary Public _____
Commission expires _____

SCHEDULE B—INFORMATION FOR DETERMINING JOINT VENTURE ELIGIBILITY

(This form need not be filled in if all joint venture firms are minority owned.)

- 1. Name of joint venture _____
2. Address of joint venture _____
3. Phone number of joint venture _____
4. Identify the firms which comprise the joint venture. (The MBE partner must complete Schedule A.) _____
(a) Describe the role of the MBE firm in the joint venture. _____

(b) Describe very briefly the experience and business qualifications of each non-MBE joint venturer: _____

5. Nature of the joint venture's business _____

6. Provide a copy of the joint venture agreement.

7. What is the claimed percentage of MBE ownership? _____

8. Ownership of joint venture: (This need not be filled in if described in the joint venture agreement, provided by question 6.)

- (a) Profit and loss sharing.
(b) Capital contributions, including equipment.
(c) Other applicable ownership interests.

9. Control of and participation in this contract. Identify by name, race, sex, and "firm" those individuals (and their titles) who are responsible for day-to-day management and policy decisionmaking, including, but not limited to, those with prime responsibility for:

- (a) Financial decisions _____
(b) Management decisions, such as:
(1) Estimating _____
(2) Marketing and sales _____

- (3) Hiring and firing of management personnel _____
(4) Purchasing of major items or supplies _____

(c) Supervision of field operations

NOTE: If, after filing this Schedule B and before the completion of the joint venture's work on the contract covered by this regulation, there is any significant change in the information submitted, the joint venture must inform the grantee, either directly or through the prime contractor if the joint venture is a subcontractor.

AFFIDAVIT

"The undersigned swear that the foregoing statements are correct and include all material information necessary to identify and explain the terms and operation of our joint venture and the intended participation by each joint venturer in the undertaking. Further, the undersigned covenant and agree to provide to the grantee current, complete and accurate information regarding actual joint venture work and the payment therefor and any proposed changes in any of the joint venture arrangements and to permit the audit and examination of the books, records and files of the joint venture, or those of each joint venturer relevant to the joint venture, by authorized representatives of the grantee or the Federal funding agency. Any material misrepresentation will be grounds for terminating any contract which may be awarded and for initiating action under Federal or State laws concerning false statements."

Table with 2 columns: Name of Firm, Signature, Name, Title, Date. It is a form for recording the signatures and names of the joint venturers.

Date _____
State of _____
County of _____

On this — day of —, 19—, before me appeared (Name) —, to me personally known, who, being duly sworn, did execute the foregoing affidavit, and did state that he or she was properly authorized by (Name of firm) — to execute the affidavit and did so as his or her free act and deed.

Notary Public _____
Commission expires _____
[Seal]
Date _____
State of _____
County of _____

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On this — day of —, 19—, before me appeared (Name) —, to me personally known, who, being duly sworn, did execute the foregoing affidavit, and did state that he or she was properly authorized by (Name of firm) — to execute the affidavit and did so as his or her free act and deed.

Notary Public _____
Commission expires _____
[Seal]

PART 24—UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION FOR FEDERAL AND FEDERALLY ASSISTED PROGRAMS

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- 24.601 Purpose.
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APPENDIX A TO PART 24—ADDITIONAL INFORMATION

APPENDIX B TO PART 24—STATISTICAL REPORT FORM

AUTHORITY: 42 U.S.C. 4601 *et seq.*; 49 CFR 1.48(cc).

SOURCE: 54 FR 8928, Mar. 2, 1989, unless otherwise noted.

Subpart A—General

§24.1 Purpose.

The purpose of this part is to promulgate rules to implement the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as