

Program Document

As mandated by the United States Department of Transportation and the Disadvantaged Business Enterprise Program, all U.S. DOT recipients of federal financial assistance must participate in a statewide Unified Certification Program (UCP).

Minnesota formed a UCP (MnUCP) made up of all statewide agencies that receive more than \$250,000 in USDOT funding. The MnUCP certifying members are comprised of:

- Metropolitan Airports Commission, Office of Diversity
- Metropolitan Council, Office of Equal Opportunity
- City of Minneapolis, Department of Civil Rights
- Minnesota Department of Transportation, Office of Civil Rights

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Section 1. Definitions (49 CFR 26.5)

Affiliation: This term has the same meaning as it does in the Small Business Administration (SBA) regulations, 13 CFR Part 121:

1. 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.
2. In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of Firms in the DBE program.

Assets: All the property of a person available for paying debts or for distribution, including one's respective share of jointly held assets. This includes, but is not limited to, cash on hand and in banks, savings accounts, IRA or other retirement accounts, accounts receivable, life insurance, stocks and bonds, real estate, and personal property.

Business, Business Concern or Business Enterprise: An entity organized for profit with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the United States economy through payment of taxes or through uses of American products, materials, or labor.

Certifying Agencies: Agencies that make all certification decisions on behalf of all Recipients in the state with respect to participation in the United States Department of Transportation (USDOT) DBE program. Certifying Agencies are Recipients that have an approved DBE plan or Recipients who utilize the DBE directory as a part of their contracting process. Current Certifying Agencies include the Metropolitan Airports Commission (MAC); Minnesota Department of Transportation (MnDOT); Metropolitan Council; and City of Minneapolis. Certifying Agencies perform DBE certifications pursuant to guidelines established by 49 CFR Part 26 (or 49 CFR Part 23 as applicable to airport concessions).

Compliance: A Recipient has correctly implemented the requirements of 49 CFR Part 26 (or 49 CFR Part 23 as applicable to airport concessions).

Commission: The Minnesota Unified Certification Program Commission, consisting of Certifying and Non-Certifying Agencies.

Committee or UCP Committee: The Minnesota Unified Certification Program Committee, consisting of Certifying Agencies.

Contingent Liability: A liability that depends on the occurrence of a future and uncertain event. This includes, but is not limited to, guaranty for debts owed by the applicant concern, legal claims and judgments, and provisions for federal income tax.

Certification Application Committee (CAC): The Minnesota Unified Certification Application Committee, consisting of Certifying Agency Specialists who perform certifications.

Contractor: One who participates, through a contract or subcontract, in a USDOT-assisted highway, transit, or airport Program.

Days: Calendar days unless otherwise specified. In computing any period of time described in 49 CFR Part 26.5, the day from which the period begins is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, in circumstances where the Recipient's offices are closed for all or part of the last day, the period extends to the next day on which the agency is open.

Department: United States Department of Transportation

Disadvantaged Business Enterprise (DBE): A for-profit small business concern—

- that is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and
- whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it; and
- that meets all other eligibility criteria required and is certified under 49 CFR Part 26 (or 49 CFR Part 23 as applicable to airport concessions).

Disadvantaged Business Enterprise Review Committee (DBERC): The Minnesota Unified Certification Program Review Committee, which consists of one (1) member representing each of the Certifying Agencies, who is not directly associated with the certification process; and which is the body responsible for appeals resulting from a CAC decision related to an Intent to Remove Certification, Third Party Challenge, Removal of NAICS code eligibility, failure to approve NAICS change or expansion, or any other action deemed appropriate by the MnUCP.

USDOT: United States Department of Transportation.

Firm: A for-profit small business concern.

FAA: Federal Aviation Administration.

FHWA: Federal Highway Administration.

FTA: Federal Transit Administration.

Good Faith Efforts: Efforts to achieve a DBE goal or other requirement of 49 CFR Part 26 that, by their scope, intensity and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

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

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

Liabilities: Financial or pecuniary obligations. This includes, but is not limited to, accounts payable, notes payable to bank or others, installment accounts, mortgages on real estate, and unpaid taxes.

MnUCP: The Minnesota Unified Certification Program, which certifies all DBE's participating in USDOT-assisted contracts in Minnesota.

Non-Certifying Agencies: Agencies that participate in the MnUCP by recognizing USDOT DBE certifications and have signed on to the MnUCP via a Memorandum of Agreement (MOA), but which do not perform certifications or serve as members on the CAC.

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

Principal Place of Business: The business location where the individuals who manage the Firm's day-to-day operations spend most working hours. If the offices from which management is directed and where the business records are kept are in different locations, the recipient will determine the Principal Place of Business.

Program: Any undertaking on a Recipient's part to use USDOT financial assistance, authorized by the laws to which 49 CFR Part 23 or 49 CFR Part 26 applies.

Recipient: Any entity, public or private, to which United States Department of Transportation financial assistance is extended, whether directly or through another Recipient, through the programs of the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), or Federal Transit Administration (FTA), or an entity that has applied for such assistance.

Small Business Concern: A for-profit business entity that meets the requirements of Section 3 of the Small Business Act and applicable regulations implementing it (13 CFR Part 121) and that also does not exceed the cap on average annual gross receipts specified in 49 CFR Part 26.65 (b).

Specialist: The person assigned an application for DBE certification by a Certifying Agency. Specialists are ineligible to vote as a certifying member of the CAC until they have successfully presented a Firm for certification to the CAC.

Socially and Economically Disadvantaged Individual: Any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a member of groups and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual's control.

1. Any individual whom a Recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis. An individual must demonstrate that he or she has held himself or herself out as a member of a designated group.
2. Any individual in the following groups, members of which are presumed to be socially and economically disadvantaged unless demonstrated to be otherwise:
 - a. "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;
 - b. "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
 - c. "Native Americans," which includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians;
 - d. "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau),

- Republic of the Northern Marianas Islands, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;
- e. “Subcontinent Asian Americans,” which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
 - f. Women; and
 - g. Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.
3. Being born in a particular country does not, standing alone, mean that a person is necessarily a member of one of the groups listed in this definition.

Spouse: A married person, including a person in a domestic partnership or a civil union recognized under state law.

Transit Vehicle Manufacturer: Any manufacturer whose primary business purpose is to manufacture vehicles specifically built for public mass transportation. Such vehicles include, but are not limited to buses, rail cars, trolleys, ferries, and vehicles manufactured specifically for paratransit purposes. Producers of vehicles that receive post-production alterations or retrofitting to be used for public transportation purposes (for example, so-called cutaway vehicles, vans customized for service to people with disabilities) are also considered transit vehicle manufacturers. Businesses that manufacture, mass-produce, or distribute vehicles solely for personal use and for sale “off the lot” are not considered transit vehicle manufacturers.

Unified Certification Program (UCP): As mandated by the USDOT, all statewide recipients must participate in a Unified Certification Program to provide “one-stop shopping” for DBE certification in that state. MnUCP is the UCP for Minnesota.

Additional definitions of DBE Program terms can be found in the federal regulation 49 CFR Part 26.5.

Section 2. Administration

2.1 Who must have a DBE Program?

Entities in any one of the following categories that let USDOT-assisted contracts must have a DBE program meeting the requirements of 49 CFR Part 26.21.

1. All Recipients of FHWA funds authorized by a statute to which Part 26.21 applies;
2. Recipients of FTA planning, capital, or operating assistance that will award prime contracts (excluding transit vehicle purchases) exceeding \$250,000 in FTA funds in a Federal fiscal year;
3. Recipients of FAA grants for airport planning or development that will award prime contracts exceeding \$250,000 in FAA funds in a Federal fiscal year.

2.2 Minnesota Unified Certification Program

The Minnesota Unified Certification Program (MnUCP) is established according to an agreement of the Certifying and Non-Certifying Agencies, and in accordance with 49 CFR Part 26.81(a). The MnUCP certifies all DBE's participating in USDOT-assisted contracts in Minnesota in accordance with 49 CFR Subparts D and E, and 49 CFR Part 23 as applicable to airport concessions. Businesses certified in accordance with the requirements of the MnUCP are also eligible to participate in the City of Minneapolis Small and Underutilized Business Program, City of Minneapolis Supplier Diversity Program and the Metropolitan Council's Under Utilized Business Program.

2.3 Minnesota Unified Certification Program Commission

The Minnesota Unified Certification Program Commission is established to implement and administer the Minnesota Unified Certification Program. The Commission consists of Certifying and Non-Certifying Agencies.

A. Structure of MnUCP Commission

The structure of the MnUCP Commission as a whole (both Certifying and Non-Certifying Agencies) consists of:

- Chair (elected by consensus of Certifying and Non-Certifying Agencies for a one-year term from one of the Certifying Agencies);
- Representatives from Certifying and Non-Certifying Agencies;
- Each Agency receives one vote to elect the Chair and on issues related to process and procedures of the MnUCP.

B. Non-Certifying Agencies

Non-Certifying Agencies are Agencies that participate only as recipients of the DBE certifying process. Non Certifying Agencies include but are not limited to those listed in the following table.

Non-Certifying Agencies in MnUCP

Albert Lea (City of)	Hutchinson (City of)	Prior Lake (City of)
Albert Lea Municipal Airport	I -494 Corridor Commission	Productive Alternatives
Alexandria (City of)	International Falls Airport	Ramsey County Regional Rail Authority
Anoka County TMO	Isanti County - Heartland Express Transit Center	Red Lake Band of Chippewa Indians
Anoka County Transit-Demand Response	Kandiyohi Area Transit Joint Powers Board	Redwood Falls Municipal Airport
Arrowhead Transit	Lac Qui Parle County Airport	Renville County
Austin (City of)	Le Sueur (City of)	RiverRider Public Transit System
Austin-Mower County Area Transit Joint Powers Board	Lincoln County	Rochester Municipal Airport
Baudette International Airport	Litchfield (City of)	Rock County
Becker County Transit	Little Falls (City of)	Roseau County Committee on Aging
Bemidji Regional Airport	Longville (City of)	Rush City
Bemidji (City of)	Mahnomen County Human Services	Scott County Public Works Division
Benson (City of)	Mankato Airport & Transit	SEMCAC
Brainerd (City of)	Mankato Regional	Southwest Metro Transit Commission
Crow Wing County Airport Brainerd Lakes Regional Airport	Maple Grove (City of)	Southwestern Minnesota Opportunity Council, Inc.
Brown County Heartland Express	Maple Grove Transit System	St. Cloud Metropolitan Transit Commission Metro Bus
Cedar Valley Services, Inc.	Marshall Airport	St. Cloud Regional Airport (City of)

Chisholm/Hibbing Airport Commission	Martin County	St. Paul (City of)
Clay County	Meeker County Transit - Ecumen	St. Paul Parks & Recreation
Community Resource Connections, Inc.	Metropolitan Airports Commission	Smart Trips
Cottonwood County	Metropolitan Council	St. Peter (City of)
Dakota Area Resources and Transportation for Seniors DARTS	Minneapolis (City of)	Steele County Area Transit
Dakota County Transit	Minneapolis Community Planning & Econ. Dev.	Stewartville (City of)
Dakota County Regional Rail Authority	Minneapolis Public Works	Southwest Transit
Dakota County Workforce Services	Minneapolis UPA	Thief River Falls (City of)
Dawson (City of)	Minneapolis Downtown TMO	Thief River Falls Airport
Duluth International Airport	Minnesota Department of Transportation	Three Rivers Community Action, Inc.
Duluth Seaway Port Authority	Minnesota Department of Transportation	Timber Trails Public Transit, Inc.
Duluth Transit Authority	Minnesota Valley Transit Authority (MVTA)	Tower (City of)
East Grand Forks	MN Workforce Center - Anoka	Trailblazer Joint Powers Board
Elbow Lake	Montevideo (City of)	Tri-County Action Program, Inc.
Ely Municipal Airport	Montevideo / Chippewa County Airport	Tri-Valley Opportunity Council, Inc.
Emerge Community Development	Moorhead Airport	Twin Cities United Way
Fairmont Municipal Airport	Moorhead-Metropolitan Area Transit	Two Harbors (City of)
Faribault (City of)	Morris (City of)	University of MN
Faribault County	Murray County	University of MN Office of Sponsored Programs
Fillmore County Airport	New Ulm (City of)	Vine Faith In Action
Flying Cloud Airport	North Suburban Lines, Inc.	Wadena (City of)
Fosston Municipal Airport	Northfield (City of)	Wadena County Social Services

Glenwood (City of)	Ortonville (City of)	Walker (City of)
Grand Rapids/Itasca County Airport	Owatonna (City of)	Washington County
Granite Falls (City of)	Paul Bunyan Transit	Watonwan County
Rainbow Rider Transit	Pine River (City of)	Western Community Action, Inc.
Hastings (City of)	Pipestone County	White Earth Reservation
Hennepin County	Plymouth Metrolink, Dial-A-Ride	Windom (City of)
Dakota County Workforce Services	PossAbilities of Southern Minnesota	Winona (City of)
Heartland Express	Prairie Five CAC, Inc.	Winsted (City of)
Human Services Inc.	Princeton (City of)	Worthington Regional Airport

Certifying Agencies

Certifying Agencies are Agencies that receive and process DBE applications on behalf of all Recipients in the state to determine eligibility for participation in the USDOT DBE program. Certifying Agencies certify DBE's under 49 CFR Part 26 (or 49 CFR Part 23 as applicable to airport concessions). All certifying agencies receive USDOT funding in excess of \$250,000 annually.

Certifying Agencies currently include the Metropolitan Airports Commission, the Metropolitan Council, the Minnesota Department of Transportation and the City of Minneapolis.

The Certifying Agencies shall:

- Receive DBE applications at each of the individual Agencies;
- Process the applications and conduct all pre-certification activities, including document collection, analysis of application data, on site reviews, etc.;
- Conduct CAC meetings at least twice every month (or as deemed necessary) to review and vote upon current DBE applications and related issues such as certification removals, NAICS code changes and 3rd party challenges;
- Ensure that only Firms certified as eligible DBEs under the applicable regulations participate as DBE's. This does not require the CAC to monitor the Recipients;
- Make certification decisions by CAC vote that shall be binding on all Recipients within the state;

- Provide “one-stop shop” to applicants for certification, such that an applicant is required to apply only once for a DBE certification that will be honored by all Recipients in the state;
- Perform all obligations of Recipients with respect to certifications, reviews and Affidavits of DBE Eligibility (aka No Change Affidavits);
- Maintain a Unified DBE directory reflecting all Firms certified by the CAC as specified in 49 CFR Part 26.31;
- Make updated directory information available to contractors and the public on request;
- Provide public access to the directory electronically, via the Internet and in hard-copy print;
- Update the electronic version of the directory with new certifications, deletions, changes and corrections on a bi-weekly basis;
- Follow all certification procedures and standards of this UCP;
- Cooperate fully with oversight, review, and monitoring activities of the USDOT and its operating administrations;
- Implement all USDOT directives and guidance concerning certification matters; and
- Make all decisions regarding administration and implementation of the UCP.

All applications and certification materials relevant to DBE Firms certified by the CAC will be maintained by and stored in secured areas of the Agency that processed the file.

Structure of Unified Certification Application Committee (CAC)

The Certification Application Committee is not required to process an application for certification from a Firm having its principal place of business outside the State of Minnesota if the Firm is not certified by the UCP in the state in which it maintains its principal place of business. The “home state” UCP shall share its information and documents concerning the Firm with other UCPs certifying under 49 CFR Part 26 (or 49 CFR Part 23 as applicable to airport concessions). If Minnesota is the “home state” the MnUCP will cooperate with Agencies from other states that request such information. Effective January 2, 2012 and pursuant to the 49 CFR Part 26 DBE Program Improvements final rule issued on January 28, 2011, the UCP will implement and comply with all mandatory procedures outlined in Section 26.85 concerning Interstate Certifications.

The CAC may accept the certification of any UCP or USDOT Recipient pursuant to 49 CFR Part 26 (or 49 CFR Part 23 as applicable to airport concessions). The MnUCP may also enter into written reciprocity agreements with other UCPs.

The MnUCP shall ensure that the CAC has sufficient resources and expertise to perform the requirements of this Program. Each Certifying Agency maintains staff to support the UCP sufficiently through IS Support, Legal Counsel, Meeting Facilities, Administrative Staff, Certification Specialists, and Committee Chair responsibilities.

This UCP includes an implementation schedule ensuring that the UCP is operational no later than 18 months following the approval of the UCP agreement by the Secretary.

2.4 Non-Applicable Contracts

This UCP does not apply to a contract let by a Recipient that is to be performed entirely outside the United States, its territories and possessions, Puerto Rico, Guam, or the Northern Marianas Islands.

If a Recipient is letting a contract in which USDOT financial assistance does not participate, this UCP does not apply to the contract.

Section 3. Procedures (49 CFR Part 26.83)

3.1 Application and Decision

A. Application for Certification

A Firm located in Minnesota requesting to become a DBE must complete the application for certification under the Minnesota Unified Certification Program (MnUCP) Disadvantaged Business Enterprise (DBE) Program, and submit the application to a Certifying Agency.

If the application indicates that the firm has previously applied, the MnUCP will assign the application to the agency in which the firm originally applied. The Firm has the option to dispute the assignment. The reasons for the dispute must be submitted in writing to the MnUCP Chair within 10 days. The Chair will make the final decision as to which agency the application will be assigned. The Chair's decision is not appealable.

The Firm seeking certification has the burden of demonstrating to the Specialist, by a preponderance of the evidence, that it meets the requirements of 49 CFR Part 26.61(b).

B. Certification Decision Within 90 Days

The CAC must make decisions on applications for certification within 90 days of receiving from the applicant all information required under this part. If all of the information is not received within 90 days of the application being submitted, the Certifying Agency may:

- With written notice to the applicant, extend this time period once for no more than 60 days and report the extension to the CAC;
- Return the file to the applicant within the 90 days stating specifically what information was not included in the application.

The Certifying Agency's failure to submit a recommendation to the CAC, return the file, or provide written notice of an extension, by the applicable deadline is deemed a constructive denial of the application, on the basis of which the Firm may appeal to U.S. Department of Transportation.

C. Specialist Responsibilities

The Specialist will perform the following functions:

1. Review the application and all supporting documents. Ensure the application is complete by verifying that all attachments and forms are properly signed and notarized. An application is not complete until all applicable supporting documentation has been received. When applying this process to an online

application, the application must be in “Complete” status and show a submission date.

2. Notify the applicant of any missing information within 30 business days of receiving the application. The applicant has 10 business days from the date of the notification to send the requested information or provide a written explanation of why it is not available. An applicant may request in writing an extension of the 10 business day period to provide the requested information.
3. If the requested information is not received within 10 business days from the date of the notification and an extension has not been granted, the Specialist will send a certified letter informing the applicant of the Specialist’s intent to deny the application. The letter will give the applicant an additional 5 business days from the receipt date to submit the information. If the applicant fails to respond or provide the requested information after the second request the applicant will be deemed to have failed to cooperate under Section 6.1. The Specialist will initiate the denial process. The application and documents submitted by the applicant will be returned. All letters sent to the applicant including electronic communication will be retained according to each agency retention policy.
4. An applicant may voluntarily withdraw their pending DBE application at any point before the Specialist makes a recommendation to the CAC. The applicant must voluntarily withdraw in writing. The Specialist must notify the CAC of the change in the applicant’s status and return all documents. A record of the request to withdraw must be kept as part of the Certifying Agency’s tracking system. The applicant is eligible to reapply at any time for DBE certification.
5. Ensure that the applicant attests to the accuracy and truthfulness of the information on the application form. This must be done in the form of an affidavit sworn to by an authorized representative of the applicant before a person who is authorized by state law to administer oaths.

The Specialist must take all the following steps in determining whether an applicant meets the standards of Section 3 of this document:

1. Perform an on-site visit to the applicant Firm’s office. The Certifying Agency’s Specialist must utilize the MnUCP approved On-Site Review Form during the visit to record responses and findings. The On-Site Review Form must be signed by the applicant applying for DBE status during the on-site visit and by the Specialist. It will be retained in the applicant’s file as the official record of the on-site visit. The Specialist must:
 - a. Interview the disadvantaged majority principal officer(s) of the Firm and all essential personnel the Firm (all persons who are necessary to the Firm’s

business functions); review the resumes, salary schedules, and work histories of all officers; and

- b. At the discretion of the Specialist, perform an on-site visit to any job site, if there are such sites, on which the Firm is currently working. If the Firm is a supplier, the Specialist will verify the stock on hand, the space available for storage, a list of manufacturers from which materials are purchased, and the hours of operation. The Specialist will also confirm the warehouse is open to the public and that signage is clearly visible. The CAC may rely upon the on-site report performed by another U.S. Department of Transportation Recipient with respect to certifying an out-of-state DBE applying for certification to the MnUCP;
- c. Analyze the ownership of stock in the Firm, examine all stock certificates and share transfers, and the capital investments made to obtain said stock, Articles of Incorporation, Bylaws, and Minutes;
 - i. Analyze the bonding and financial capacity of the Firm;
 - ii. Determine the work history of the Firm, including contracts it has obtained and work recently completed or currently underway;
 - iii. Obtain a statement from the Firm of the type of work it intends to perform as part of the DBE program and its preferred geographic locations for performing the work, if any;
 - iv. Obtain a complete list of all equipment and vehicles owned by or used by the Firm, Titles or Proof of Ownership and any necessary licenses the Firm and its essential personnel possess to perform the work it seeks to perform as part of the DBE program, review lease agreements and bank signature cards;
 - v. Examine the operational structure of the Firm paying particular attention to who performs key tasks; confirm what specific daily responsibilities are carried out by the majority disadvantaged owner; examine contracts, purchase orders, and bank documents to determine who signs on behalf of the Firm; confirm that all equipment required to operate the business is visible and clearly displays the Firm's logo; evaluate the expertise and experience of the disadvantaged owner to operate and control the Firm as well as assess the owner's reliance on any other key personnel; and establish that the Firm is independently owned and operated.
 - vi. Review and verify all asset and liability information contained on the disadvantaged owner's Personal Net Worth (PNW) statement, tax returns and supporting documentation. The spouse of a disadvantaged owner who is involved in the operation of the Firm must also submit a PNW form with the application. Confirm real estate holdings, retirement assets, stocks, trusts, personal property, etc. If available, examine the past three years of business tax returns for the Firm and determine an average of the Firm's gross receipts

to ensure the Firm meets both the SBA and DBE size standards. If the Specialist has a reasonable basis to believe that the PNW statement is incomplete or inaccurate, the Specialist may seek further information or conduct an investigation to obtain clarification. The Firm seeking certification has the burden of demonstrating to the Specialist, by a preponderance of the evidence, that it meets the requirements of §26.61(b).

- vii. Prepare a written memo outlining, in the format adopted by the CAC, the company history, expertise of disadvantaged and non-disadvantaged owners, company structure, percent ownership, initial capital investment, management, gross receipts, independence, physical property (for example, office or warehouse space and whether it is leased or owned), equipment, personnel and banking information. The Specialist must recommend either certification or denial based on a thorough review of all information. The CAC may question any portion of the recommendation or documentation it deems necessary to render a decision and may ask the Specialist to contact the Firm to obtain more clarification or evidence.
- viii. Prepare a transmittal signature sheet, in the format agreed upon by the CAC, to accompany the recommendation on which the CAC will officially record its approval or denial. Recommendations, motions and outcomes will be documented in the CAC meeting minutes.

D. Meetings of the Certification Application Committee

1. The meetings of the Certification Application Committee will be conducted under the following guidelines:
 - a. The Chair is the facilitator of the CAC meeting and is eligible to vote if there is a split decision by the designated voters. The Chair only signs the transmittal signature sheet required to cast a vote because of a split decision and may not be a designated voter for a Certifying Agency.
 - b. Each Certifying Agency will identify its designated voter at the beginning of the CAC meeting. The designated voters will be identified in the meeting minutes.
 - c. A Specialist will abstain from the discussion only when there is a conflict of interest. Any person on the CAC should disclose a conflict of interest prior to any discussion about the Firm's application status. The Chair will request the Specialist to leave the meeting until the discussion is complete.
 - d. Discussions regarding the recommendations will occur during the CAC meeting.
 - e. Each Certifying Agency will have a vote.

- f. A Certifying Agency designated voter or Specialist may request to table a file, request additional information, or request to recess the meeting to discuss the application with staff.
 - g. A designated voter should be staff who regularly performs the duties of a Specialist. Agency discussion of a pending application prior to the CAC meeting is discouraged. The value of the CAC includes individual perspectives, opinions and expertise.
 - h. Each designated voter for a Certifying Agency must sign the transmittal signature sheet.
2. Once the CAC reaches a decision by a majority vote, the Specialist who presented the application will prepare the Denial or Certification letter.

If the decision is to certify the Firm, the letter will include the NAICS Code(s), a description of the Firm's area of work, and the date of the CAC decision. The Certification letter will not include an expiration date. The Director or Manager of the Certifying Agency or designee, responsible for the application will sign the letter. A DBE may be sent a new letter when there is a change to the NAICS codes, or description of work performed.
 3. The agency responsible for the DBE directory will ensure that information on newly certified Firms is added to the MnUCP online directory within two weeks of the date of certification.
 4. When denying any application or decertifying a DBE, the CAC will enter the information into the Ineligibility Determination Online Database of the Department of Transportation Office of Civil Rights (DOCR). The following information will be entered into the database:
 - The name of the DBE;
 - The name(s) of the DBEs owner(s);
 - The type and date of the action; and
 - The reason for the action.

Specialists will regularly check the DOCR Ineligibility Determination Database to determine whether any Firm applying to Minnesota for certification or a DBE that is already certified is on the DOCR's ineligibility list.

1. Any information regarding the DBE listed on the DOCR's ineligibility list will be placed on the CAC meeting agenda under New Business by any Specialist reviewing the list.

2. If applicable, the Specialist responsible for processing the DBE's application will request from the DBE all information relating to a previous determination of ineligibility. If the MnUCP receives a request for information from another state's UCP, the responsible Certifying Agency will provide a copy of the decision and notify the CAC of the request for information.
3. If the MnUCP receives information from another state's UCP, the Certifying Agency responsible for the DBE's file will review the file along with the out-of-state UCP decision and make a recommendation to the CAC regarding the DBE status of the Firm in Minnesota.

E. Interstate Certification

When a Firm currently certified in Minnesota applies to another state for DBE certification, the DBE must contact the other state's DOT office and follow the other state's interstate DBE certification process.

When out-of-state DBEs apply for interstate certification in Minnesota, the MnUCP has adopted the following procedure:

1. The DBE must provide a copy of their certification approval letter from their home state.
2. The DBE will complete the MnUCP's "Request for Interstate Certification" form (found at www.mnucp.org), which must be completed in its entirety, signed, and notarized.
3. If the DBE submits their home state certification letter and a completed MnUCP Request for Interstate Certification, the Specialist will then proceed with processing their request as follows:
 - a. Check the home state DBE directory and contact the home state to verify certification, and
 - b. Check federal and state websites for debarments and previous appeals or denials.
4. If no concerns arise, the DBE's request will be presented to the CAC for final approval.

In the event of clear discrepancies that may compromise a Firm's eligibility, a previous denial, or an appealed denial, the Specialist may request additional information as outlined in 49 C.F.R. Part 26.85(c).

If a DBE fails to submit all required documents, the Specialist will notify the DBE. The DBE will be given 30 days in which to submit the missing information. If the missing

information is not received within 30 days, the Specialist will send a certified letter allowing an additional 10 business days.

If the DBE does not respond by the date given in the certified letter, the Specialist will give an additional 5 day extension before returning the all submitted documents by the Firm.

F. Confidential Information

The Certification Application Committee, or its authorized designee, must safeguard information gathered as part of the certification process that may reasonably be regarded as proprietary or as other confidential business information from disclosure to unauthorized persons, consistent with applicable federal, state, and local law. This includes other departments, divisions or administration within the Certifying Agency.

G. Written Notice of No Change and Application Process

1. Once the Certification Application Committee has certified a DBE, the DBE will remain certified unless its certification is removed through the procedures of Subsections 3.3 ("Suspensions) and 3.4 ("Removals") of this Program Document. The CAC will review a DBE's eligibility annually, and may conduct an on-site visit as needed. The CAC may not require DBEs to reapply for certification as a condition of continuing to participate in the program.
2. All certified DBEs must provide written notice to the Certifying Agency to which it originally applied, stating any changes in circumstances affecting its ability to meet size, personal net worth requirements, disadvantaged status, ownership, or control requirements or any other changes deemed a material change. Failure to notify the Certifying Agency of changes may result in "Intent to Remove" for failure to cooperate. Changes in management responsibility among key staff members, directors or officers are covered by this requirement. The DBE must attach supporting documentation describing in detail the nature of such changes.

The DBE majority owner must inform the Certifying Agency of the changes in writing within 30 days of the date of the changes. If the DBE fails to notify the Certifying Agency within 30 days, it may be deemed to have failed to cooperate under Section 6.1 of these procedures. If the Certifying Agency requests information from a DBE related to Personal Net Worth (PNW) and the DBE does not respond, an Intent to Remove will be initiated.

3. Annually, all DBEs must provide to the Certifying Agency an affidavit sworn to by the DBE owner(s) before a person who is authorized by state law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This DBE Affidavit of Eligibility (a/k/a No Change Affidavit) must affirm there have been no changes in the DBE's circumstances affecting its ability to

meet size, disadvantaged status, ownership, personal net worth or control requirements of Section 3 of this Program Document or any material changes in the information provided in its application form, except for changes about which the DBE has notified the Certifying Agency.

4. The affidavit shall specifically state that the DBE continues to meet the business size standards and the overall gross receipts cap. The DBE must send supporting documentation that, at a minimum, includes the DBE's federal income tax returns and federal personal tax returns of the 51% DBE owner(s). Personal Net Worth Statements must be submitted in even-numbered years.

After being reviewed and approved by the Specialist and presented to the CAC as an Information Item, this documentation will be kept in the DBE's file. The DBE will be sent a No Change Affidavit and given 30 days to return the affidavit along with accompanying documents. If documents are unavailable (for example, tax returns), the DBE must return the No Change Affidavit and state in writing what document(s) are not included with the No Change Affidavit.

- a. If the documents are not received within 30 days, the Specialist will send a certified letter allowing an additional 10 business days to submit the affidavit and documents.
- a. If the DBE does not respond by the date given to submit information, the Specialist will send a certified letter of the "Intent to Remove" allowing 5 additional business days to respond. The Intent to remove certified mail letter will include the process to appeal to the DBERC. If the information is not received by the date given; the DBE will be presented for removal of eligibility.
- b. A DBE that fails to provide the No Change Affidavit by the required date will be deemed to have failed to cooperate under Section 6.1 of these procedures.

H. On-site Visit by Specialist

In addition to the submittal of annual affidavits of DBE eligibility following a DBE's certification, the Specialist may conduct an on-site visit as appropriate. The Specialist will review the findings of the previous on-site visit, all supporting documents submitted with the current year's no change affidavit, and any other documentation the specialist deems necessary to confirm that the DBE continues to meet all eligibility requirements of 49 CFR Part 26 or 49 CFR Part 23. The Specialist cannot request documents submitted with the application during a no-change affidavit process or an onsite review. If the DBE continues to meet the eligibility requirements, the Specialist will prepare a "review memorandum" for presentation to the CAC along with a transmittal signature sheet. The Specialist will present his/her recommendation to the CAC.

Upon approval, an updated certification letter will be sent to the DBE reflecting a current approval date and no expiration date.

If the CAC votes to issue “Intent to Remove” to an existing DBE, the process outlined in Section 3.3 (“Removals”) applies.

3.2 Denials (49 CFR Part 26.86)

A. Denial of DBE Application

The CAC may, by majority at the meeting, vote to deny a Firm’s DBE application for certification.

1. If the Specialist processing the application discovers, during the application evaluation process, significant facts and evidence that the applicant does not meet the requirements of 49 CFR Part 26 (or 49 CFR Part 23 as applicable to airport concessions), the Specialist may:
 - a. Discuss concerns with the applicant and give the applicant an opportunity to “voluntarily withdraw” or
 - b. Process the application and make a recommendation to the CAC.
2. If the applicant voluntarily withdraws per item 1(a) of this section, the Specialist must request that the applicant send a request to withdraw by email or on company letterhead. In response, the Specialist will inform the CAC about the request to withdraw by the applicant. The Specialist is required to send a letter to the applicant stating they are being voluntarily withdrawn and that they can reapply at any time.
3. If the applicant does not voluntarily withdraw, the Specialist will process the application per 1-B of this section, and make a recommendation to the CAC by presenting the facts supporting the recommendation. If the CAC has questions or concerns the Specialist is unable to address, the CAC may request the Specialist to go back and get additional information.
4. The applicant will be given 10 days to respond to the CAC’s request for any additional information. If the applicant fails to respond, the CAC will proceed in processing the application based upon the information available.

B. Written Explanation for Denial

1. When the CAC denies a Firm’s application for DBE status, the Specialist must provide the applicant a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. The

Specialist must send the draft “Denial of Certification” letter out to all members of the CAC for comments. All documents and other information on which the denial is based must be made available to the applicant, on request. The Certifying Agency will sign the denial letter on behalf of the MnUCP. The denial letter must be sent by certified mail, return receipt requested.

2. The applicant must be informed that they may make a written appeal of the decision directly to the U. S. Department of Transportation (USDOT), Office of Civil Rights within 90 days of the receipt of the denial letter.
3. The applicant’s request for an appeal to USDOT must be in writing and must address each point outlined in the denial letter.

C. Reapplication After Denial

When an applicant is denied certification, the MnUCP has established a time period of 12 months before the Firm may reapply. The clock will start ticking from the date of the final denial letter from the CAC.

D. No Right to Appeal to Disadvantaged Business Enterprise Review Committee

An applicant has no right to appeal to the Disadvantaged Business Enterprise Review Committee (DBERC). The CAC’s decision constitutes the administratively final decision of the MnUCP.

3.3 Suspensions (49 CFR Part 26.88)

A. Suspension Status

Suspension is a temporary status of ineligibility pending an expedited show cause hearing/proceeding under 49 CFR Part 26.87 to determine whether the DBE is eligible to participate in the program and consequently should be removed. The suspension takes effect when the DBE receives, or is deemed to have received, the Notice of Suspension.

B. Suspension in Event of Death or Incarceration

1. The MnUCP shall immediately suspend a DBE's certification without adhering to the requirements in 49 CFR Part 26.87 (d) when an individual owner whose ownership and control of the Firm are necessary to the Firm's certification dies or is incarcerated.
2. The concerned Operating Administration may direct the MnUCP to take action if it determines that information available to it is sufficient to warrant immediate suspension.
3. When a Firm is suspended, the MnUCP shall immediately notify the DBE of the suspension by certified mail, return receipt requested, to the last known address of the owner(s) of the DBE.

C. During Suspension

While suspended, the DBE may not be considered to meet a contract goal on a new contract, and any work it does on a contract received during the suspension shall not be counted toward a recipient's overall goal. The DBE may continue to perform under an existing contract executed before the DBE received a Notice of Suspension and may be counted toward the contract goal during the period of suspension as long as the DBE is performing a commercially useful function under the existing contract.

D. Voluntary Withdrawal

Following receipt of the Notice of Suspension, if the DBE believes it is no longer eligible, the DBE may voluntarily withdraw from the program, in which case no further action is required. If the DBE believes that its eligibility should be reinstated, it must provide Recipient with information demonstrating that the Firm is eligible notwithstanding its changed circumstances. Within 30 days of receiving this information, the Recipient must either lift the suspension and reinstate the Firm's certification or commence a decertification action under 49 CFR Part 26.87. If the Recipient commences a decertification proceeding, the suspension remains in effect during the proceeding.

E. Appealable and Not Appealable Regarding Suspension

- A. The decision to immediately suspend a DBE under this section is not appealable to the U.S. Department of Transportation. The failure of a Recipient to either lift the suspension and reinstate the Firm or commence a decertification proceeding, as required by paragraph (A) of this section, is appealable to the U.S. Department of Transportation under 49 CFR Part 26.89, as a constructive decertification.

3.4 Removals (49 CFR Part 26.87)

A DBE will lose its eligibility to participate in the DBE Program if it no longer complies with the certification requirements of 49 CFR Part 26 (or 49 CFR Part 23 as applied to airport concessions). Procedures to assess whether a DBE should lose its eligibility to participate in the DBE Program can be initiated by a third party, the certifying agency, or the USDOT.

A. Third Party Challenge to DBE Certification

1. Any person may file a written complaint with a Certifying Agency alleging that a DBE is ineligible to participate in the DBE program. The agency receiving the complaint will bring it to the CAC, and the CAC Chair will provide written confirmation to the complainant that the complaint has been received and is being reviewed by the CAC. The complaint must provide specific reasons to support the allegation that the DBE is no longer eligible. The CAC is not required to accept a general allegation or an anonymous complaint. Confidentiality of complainants' identities will be protected as provided in Section 5.2 of this program document.
2. All third party written complaints must be presented to the CAC as an agenda item. The CAC is responsible to review the written complaint and determine the certifying agency. The CAC Chair will assign an individual, not associated with the certifying agency, to investigate the complaint. Such investigation may include a review of documents concerning the DBE, information contained in the complaint, and other available information. The individual assigned to investigate the complaint may request additional information from the DBE or conduct any other investigation as he or she deems necessary. The investigation may include performing an onsite review at the DBE's place of business or conducting interviews with key personnel involved in the operation of the DBE. The investigator will report the facts back to the CAC, and make a recommendation. The Certifying Agency will send the final determination letter to the Firm.
3. If the CAC determines, after receiving the report, that there is reasonable cause to remove the DBE's eligibility, the investigating agency must provide written notice to the DBE of this determination and the specific reasons for it as documented by

evidence in the record. The written notice must also inform the DBE that it may request a review to respond to the reasons for the proposed removal of its eligibility.

If the CAC determines, after receiving the report, that there is not reasonable cause to remove the DBE's eligibility, the agency which received the Third Party Complaint must notify the DBE in writing of this determination and the reasons for it as documented in the record. The agency which received the complaint must also notify the complainant in writing that the CAC has investigated the allegations, taken action if warranted, and closed the complaint file.

B. CAC Review After Change in DBE Circumstances

1. If the Certifying Agency is notified by the DBE of a change in its circumstances or other information, it may conduct an eligibility review of that Firm. If after the review, it is determined there is reasonable cause to believe that the DBE is ineligible, a Specialist from the Certifying Agency must provide written notice to the DBE of "Intent to Remove," setting forth the reasons for the proposed determination. All findings on the issue of reasonable cause must specifically reference the evidence in the record for each reason. The notice must also inform the DBE, the opportunity to appeal the decision to the DBERC.
2. The investigator will provide all documentation to the Certifying Agency for maintaining a complete original record supporting its decision. If the DBE appeals to the USDOT following a decision by the DBERC, the Certifying Agency must provide a copy of the record to USDOT.
3. A DBE that fails to provide the No Change Affidavit by the required date will be deemed to have failed to cooperate under Section 6.1 of this Program Document.

C. Determination That Certified Firm Not Meeting Eligibility Criteria

1. If the concerned Operating Administration determines that information in the recipient's certification records or other information available to the concerned operating administration, provides reasonable cause to believe that a Firm which the Recipient certified does not meet the eligibility criteria in 49 CFR Part 26, the concerned Operating Administration may direct the Recipient to initiate a proceeding to remove the Firm's certification.
2. The concerned Operating Administration must provide the recipient and the Firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.
3. The Recipient must immediately hold a proceeding to remove eligibility as provided by paragraph (b) of 49 CFR Part 26.87.

D. DBE Request for Review of Removal Determination

1. If the DBE wants to request a review of the proposed determination to remove its eligibility, it must notify the MnUCP Chair within 8 business days after receiving written notice of the CAC's determination. In its request, the DBE must specify whether:
 - a. The DBE wants to appear at an informal hearing, or
 - b. The DBE wants to submit information and arguments in writing instead of attending a hearing. If the DBE elects to have a hearing, the DBE must also notify the MnUCP Chair whether the DBE will be represented by legal counsel or other representatives.
2. If the DBE does not request a review in the manner described in this section within the time specified, the CAC will proceed with the removal of the DBE firm and make a final determination regarding eligibility.

E. Review Procedure for Removal Determination

1. Procedure If DBE Chooses to Have a Hearing
 - a. The DBE has the right to be represented by counsel or other representative at the DBE's expense. The Certifying Agency and DBERC each may be represented by counsel.
 - b. The Chair will open the hearing by introducing the DBERC members. The Chair will then explain the procedure for the hearing. Both the DBE and the Certifying Agency will have a maximum time of one hour each to present documents and argument to the DBERC. The DBE may reserve any of its allotted time for rebuttal following the Certifying Agency presentation. All documents and arguments that the DBERC is asked to consider must be provided to the other party and DBERC at least 4 business days in advance. The Certifying Agency has the burden of proving by a preponderance of the evidence that the DBE does not meet the certification standards of 49 CFR Part 26 (or 49 CFR Part 23, if applicable).
2. Following the presentations by the parties, the DBERC will have the opportunity to ask question. The Chair will close the record and adjourn the hearing. The Chair is responsible to ensure that a complete record of the hearing is prepared and maintained. Procedure If DBE Chooses to Submit Written Information and Arguments

The DBE may provide written submittals, contesting the proposed removal in lieu of a hearing. In such cases, the DBERC will decide the issues based on the written submittals from the DBE and the Specialist. The Certifying Agency has the burden of proving, by a preponderance of the evidence, that the DBE does not meet the certification standards of 49 CFR Part 26 (or 49 CFR Part 23, if applicable).

3. Procedure If DBE Does Not Appear at Scheduled Hearing

If the DBE does not appear at a scheduled review, the DBERC may direct the Specialist to reschedule the review; determine that the DBERC will decide the issues based on the written submittals and other evidence available at the scheduled hearing; or direct the Specialist to attempt to contact the DBE to determine why the DBE did not appear at the review and report back to the Chair. The Chair may choose to reconvene the hearing. If the Chair determines that the DBERC will decide the issues based on the written submittals and any other evidence available at the scheduled hearing, the CAC has the burden of proving, by a preponderance of the evidence, that the DBE does not meet the certification standards of 49 CFR Part 26 (or 49 CFR Part 23, if applicable).

F. Decision of Disadvantaged Business Enterprise Review Committee (DBERC)

1. Decisions of the DBERC must be reached by majority vote of those present at the review. In the event of a tie vote, the DBE will remain certified. The DBERC Chair or designee will prepare a written decision stating the DBERC's findings and the reasons for its decision. The written decision must explain the basis for determination and must include specific references to the evidence in the record upon which the decision is based. The DBERC must give written notice of its decision to the DBE, the MNUCP Chair and Certifying Agency. The Certifying Agency is responsible to ensure the appropriate actions are presented at the CAC.

G. Transmission and Maintenance of Record

The Certifying Agency must maintain the complete original record of the review, including the audio recording or prepared transcript of the in-person hearing. If there is an appeal to the USDOT the Certifying Agency must provide a transcript of the review to the USDOT and, on request, to the DBE. The Certifying Agency may charge the DBE only for the cost of copying the record.

H. Grounds for Decision

1. The Certifying Agency or DBERC must not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to the Certifying Agency at the time of the Certifying Agency's certification of the DBE. The Certifying Agency or

DBERC may base a decision to remove eligibility only on one or more of the following:

- a. Changes in the DBE's circumstances since the certification of the DBE by the Certifying Agency that render the DBE unable to meet the eligibility standards of 49 CFR Part 26 (or 49 CFR Part 23, if applicable);
- b. Information or evidence not available to the Certifying Agency at the time the DBE was certified;
- c. Information that was concealed or misrepresented by the DBE in previous certification actions by the Certifying Agency;
- d. A change in the certification standards or requirements of the USDOT since the Certifying Agency certified the DBE; or
- e. A documented finding that the Certifying Agency's determination to certify the DBE was factually erroneous.

I. Notice of Decision

1. If the DBE does not request a review, the Certifying Agency should provide its written decision within 15 business days after making such decision. If the DBE requests a review, the DBERC should provide its written decision to the DBE and to the Certifying Agency within 15 business days after making such decision. Written decisions will be sent to the Firm DBE by certified mail.
2. A written decision by the Certifying Agency or DBERC must inform the applicant or DBE of the consequences of the decision and of the availability of an appeal to the USDOT under 49 CFR Part 26.89.
3. Additionally, if the process to assess ongoing eligibility and was initiated by a third-party complaint, the Certifying Agency must inform the complainant of the decision. If the process was initiated by the concerned Operating Administration of the USDOT, the Certifying Agency must send a copy of the written decision to the concerned Operating Administration.

J. Status of DBE During and After Proceeding

1. A DBE remains an eligible DBE during the proceeding to remove its eligibility. The DBE does not become ineligible until the issuance of the notice. The DBE's removal is effective even though the DBE's name may remain in the MnUCP directory until the next update.

3.5 Appeals (49 CFR Part 26.89)

A right to appeal to the USDOT may result from certification denials, removal of certification, or ineligibility complaints.

A. Appeals Directly to USDOT

A Firm that has been denied certification may make only an administrative appeal directly to the USDOT.

1. Firms are to send all appeals to the following address:
U.S Department of Transportation
Office of the Secretary
Department Office of Civil Rights (S-30)
1200 New Jersey Avenue SE
Suite W78-101
Washington, D.C. 20590-0001
2. If a Firm denied certification wants to file an appeal, it must send a letter to the USDOT within 90 days of the date of the Certifying Agency's administratively final decision. The Firm must also send a copy of the appeal to the Certifying Agency and the MnUCP Chair. The appeal must contain information and arguments concerning why the decision should be reversed. The USDOT may accept an appeal filed later than 90 days after the date of the decision if the USDOT determines that there was good cause for the late filing of the appeal, or may do so in the interest of justice.
3. Pending the USDOT's decision in the matter, the Certifying Agency's decision remains in effect. The USDOT does not stay the effect of the Certifying Agency's decision while it is considering an appeal.
4. When an appeal is received, the USDOT requests a copy of the Certifying Agency's complete administrative record in the matter. The Certifying Agency must provide the administrative record within twenty (20) days of the USDOT's request. The USDOT may extend this time period on the basis of the Certifying Agency's showing of good cause. To facilitate the USDOT's review of a decision, the Certifying Agency must ensure that such administrative records are well organized, indexed, and paginated. An appeal may concern a certification decision in which the Certifying Agency relied on the decision and/or administrative record of another USDOT Recipient or UCP. In such a case, this requirement applies to both the Certifying Agency and the Recipient or UCP involved.

5. The USDOT makes its decision based solely on the entire administrative record. The USDOT does not make a *de novo* review of the matter and does not conduct a review. The USDOT may supplement the administrative record by adding relevant information made available by the USDOT Office of Inspector General; Federal, state, or local law enforcement authorities; officials of a USDOT operating administration or other appropriate USDOT office; a Recipient; or a Firm or other private party.
6. If the UCP provides supplementary information to the USDOT, the Certifying Agency shall also make this information available to the Firm, consistent with Federal and applicable state laws concerning freedom of information and privacy. The USDOT makes available, on request by the Firm, any supplementary information it receives from any source.
 - a. The USDOT affirms the Certifying Agency's decision unless it determines, based on the entire administrative record, that the decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this 49 CFR Part 26 concerning certification.
 - b. If the USDOT determines, after reviewing the entire administrative record, that the decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of 49 CFR Part 26 concerning certification, the USDOT reverses the decision and directs the Certifying Agency to certify the Firm, or take other action as appropriate. The Certifying Agency, must take the action directed by the USDOT's decision immediately upon receiving written notice of it.
 - c. The USDOT is not required to reverse the decision if the USDOT determines that a procedural error did not result in fundamental unfairness to the appellant or substantially limit the opportunity of the appellant to present its case.
 - d. If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the USDOT may return the record to the Certifying Agency with instructions seeking clarification of the record before making a finding. The USDOT may also return a case to the Certifying Agency for further proceedings consistent with USDOT instructions concerning the proper application of the provisions of this Program Document.
 - e. The USDOT does not uphold the decision based on grounds not specified in the decision.
 - f. The USDOT's decision is based on the status and circumstances of the Firm as of the date of the decision being appealed.
 - g. The USDOT provides written notice of its decision to the Certifying Agency and the Firm. A copy of the notice is also sent to any other Recipient or UCP whose administrative record or decision has been involved in the proceeding (see

- paragraph (d) of this section). The notice includes the reasons for the USDOT's decision, including specific references to the evidence in the record that supports each reason for the decision.
- h. The USDOT's policy is to make its decision within 180 days of receiving the complete administrative record. If the USDOT does not make its decision within this period, the USDOT provides written notice to concerned parties, including a statement of the reason for the delay and a date by which the appeal decision will be made.
 7. A Firm whose eligibility has been removed or a third-party in an ineligibility complaint to the Certifying Agency, including the concerned Operating Administration in the circumstances explained in 49 CFR Part 26.87(c), may appeal to the DBERC or USDOT. DBERC determinations may be appealed to USDOT. The Firm or third-party complainant may not appeal to the DBERC if it has first appealed directly to USDOT.

All USDOT decisions under this section are administratively final and are not subject to petitions for reconsideration.

3.6 Result of Appeal (49 CFR Part 26.91)

A. Effect of Appeal Decision

The decision of an appeal under is binding on the Certifying Agency or DBERC whose decision was appealed. It is not binding on other Recipients or UCPs.

USDOT Determinations

1. If the USDOT determines that the Certifying Agency or DBERC erroneously certified an applicant, the Certifying Agency must remove the DBE's eligibility on receipt of the determination without further proceedings.
2. If the USDOT determines that the Certifying Agency or DBERC erroneously failed to find reasonable cause to remove the DBE's eligibility, the Certifying Agency must expeditiously commence a proceeding to determine whether the DBE's eligibility should be removed.
3. If the USDOT determines that the Certifying Agency or DBERC erroneously declined to certify or removed the eligibility of the Firm, the Certifying Agency must certify the DBE effective on the date of the Certifying Agency's receipt of the written notice of USDOT's determination.

4. If the USDOT determines that the Certifying Agency erroneously determined that the presumption of social and economic disadvantage either should or should not be considered rebutted, the Certifying Agency must take appropriate corrective action as determined by USDOT.
5. If the USDOT affirms the Certifying Agency's or DBERC determination, no further action is necessary.

USDOT Upholding of Denial

Where USDOT has upheld another Recipient or UCP denial of certification or removal of eligibility from a DBE, or directed the removal of a DBE's eligibility, the Certifying Agency may commence a proceeding to remove the DBE's eligibility. The Certifying Agency must not remove the Firm's eligibility absent such a proceeding.

USDOT Reversal of Denial

Where USDOT has reversed a denial of certification or removal of eligibility from a Firm, the Certifying Agency must take the USDOT action into account in any certification action involving the Firm. However, the Certifying Agency shall not be required to certify the Firm based on the USDOT decision.

3.7 Over-Concentration (49 CFR Part 26.33)

The Certifying Agency may make regular assessments of whether DBE Firms are becoming over-concentrated in certain types of work as to unduly burden the opportunity of non-DBE Firms to participate in this type of work. If the Certifying Agency determines that DBE Firms are so over-concentrated in a certain type of work as to unduly burden the opportunity of non-DBE Firms to participate in this type of work, it must devise appropriate measures to address this over-concentration.

These measures may include the use of incentives, technical assistance, business development programs, Mentor Protégé programs, and other appropriate measures designed to assist DBE's in performing work outside of the specific field in which you have determined that non-DBE's are unduly burdened. The Certifying Agency may also consider varying its use of contract goals, to the extent consistent with 49 CFR Part 26.51, to ensure that non-DBE's are not unfairly prevented from competing for subcontracts

The Certifying Agency must obtain the approval of the USDOT for its determination of over-concentration and the measures it devises to address it. Once approved, the measures become part of the MnUCP.

Section 4. Certification Standards

4.1 General (49 CFR Part 26.73)

In determining whether to certify a Firm as eligible to participate as a DBE, the Certifying Agency shall apply the standards set forth below.

A. Commercially Useful Function

Consideration of whether a Firm performs a commercially useful function or is a regular dealer pertains solely to counting toward DBE goals the participation of Firms that have already been certified as DBE's. The Certifying Agency shall not consider commercially useful function issues in any way in making decisions about whether to certify a Firm as a DBE.

B. Firm's Pattern of Conduct

The Certifying Agency may consider, in making certification decisions, whether a Firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program.

C. Firm's Present Circumstances

1. The Certifying Agency must evaluate the eligibility of a Firm on the basis of present circumstances.
2. The Certifying Agency must not refuse to certify a Firm based solely on historical information indicating a lack of ownership or control of the Firm by socially and economically disadvantaged individuals at some time in the past, if the Firm currently meets the ownership and control standards of 49 CFR Part 26
3. The Certifying Agency must not refuse to certify a Firm solely on the basis that it is a newly formed Firm.

D. Firm's Cooperation

DBE Firms and Firms seeking DBE certification shall cooperate fully with the Certifying Agency's requests for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial or removal of certification.

E. For-Profit Organization

Only Firms organized for profit may be eligible DBE's. Not-for-profit organizations, even though controlled by socially and economically disadvantaged individuals, are not eligible to be certified as DBE's.

F. Ownership by Disadvantaged Individuals

An eligible Firm must be owned by individuals who are socially and economically disadvantaged. Except as provided in this paragraph, a Firm that is not owned by such individuals but which is instead owned by another Firm - even a DBE Firm - cannot be an eligible DBE.

1. If socially and economically disadvantaged individuals own and control a Firm through a parent or holding company, established for tax, capitalization or other purposes that are consistent with industry practices, and the parent or holding company in turn owns and controls an operating subsidiary, the Certifying Agency may certify the subsidiary if it otherwise meets all the requirements for certification set forth in 49 CFR Part 26.73. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.
2. The Certifying Agency may certify a subsidiary only if there is cumulatively 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals. The Certifying Agency should refer to the examples provided in at 49 CFR Part 26.73(e)(2) to illustrate cumulative ownership.

G. Separate Entity

Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a Firm is an independent business, owned and controlled by socially and economically disadvantaged individuals.

H. Prequalification Not Required

The Certifying Agency must not require a DBE Firm to be prequalified as a condition for certification.

I. Ownership by Indian Tribe or Native Hawaiian Organization

A Firm that is owned by an Indian tribe or Native Hawaiian organization, rather than by Indians or Native Hawaiians as individuals, may be eligible for certification. Such a Firm must meet the size standards of 49 CFR Part 26.65. Such a Firm must be controlled by socially and economically disadvantaged individuals, as provided in 49 CFR Part 26.71.

J. Rules Applying to Alaska Native Corporation Firms

1. The following special rules apply to the certification of Firm s related to Alaska Native Corporations (ANCs).

- c. Notwithstanding any other provisions of this subpart, a direct or indirect subsidiary corporation, joint venture, or partnership entity of an ANC is eligible for certification as a DBE if it meets all of the following requirements:
 - d. The Settlement Common Stock of the underlying ANC and other stock of the ANC held by holders of the Settlement Common Stock and by Natives and descendants of Natives represents a majority of both the total equity of the ANC and the total voting power of the corporation for purposes of electing directors;
 - e. The shares of stock or other units of common ownership interest in the subsidiary, joint venture, or partnership entity held by the ANC and by holders of its Settlement Common Stock represent a majority of both the total equity of the entity and the total voting power of the entity for the purpose of electing directors, the general partner, or principal officers; and
 - f. The subsidiary, joint venture, or partnership entity has been certified by the Small Business Administration under the 8(a) or small disadvantaged business program.
2. A Recipient to whom an ANC-related entity applies for certification does not use the USDOT uniform application form. You must obtain from the Firm documentation sufficient to demonstrate that entity meets the requirements of paragraph (i)(1) of this section. The Recipient must also obtain sufficient information about the Firm to allow it to administer its program (for example, information that would appear in the Recipient's DBE Directory).(3) If an ANC-related Firm does not meet all the conditions of paragraph (i)(1) of this section, then it must meet the requirements of paragraph (h) of this section in order to be certified, on the same basis as Firms owned by Indian Tribes or Native Hawaiian Organizations.

4.2 Burdens of Proof (49 CFR Part 26.61)

A. Applicants

1. The Firm seeking certification has the burden of demonstrating to the Certifying Agency, by a preponderance of the evidence, that it meets the requirements of this section concerning group membership or individual disadvantage, business size, ownership, and control.
2. Individuals who are not presumed to be socially and economically disadvantaged, and individuals whose presumption of disadvantage has been rebutted, have the burden of proving to the Certifying Agency, by a preponderance of the evidence, that they are socially and economically disadvantaged. (See Section 4.5 and Appendix A of this Program Document; see also Appendix E to 49 CFR Part 26.1).

B. Certifying Agency

1. The Certifying Agency must presume, unless demonstrated otherwise, that members of the designated groups identified in Section 4.5(a)(1) of this Program Document are socially and economically disadvantaged. However, Applicants have the obligation to provide the Certifying Agency information concerning their economic disadvantage (see Section 4.5).
2. The Certifying Agency must make determinations concerning whether individuals and Firms have met their burden of demonstrating group membership, ownership, control and social and economic disadvantage, (where disadvantage must be demonstrated on an individual basis), by considering all the facts in the record viewed as a whole.

4.3 Group Membership (49 CFR Part 26.63)

A. If Group Membership Questioned

1. If, after reviewing the signed notarized statement of membership in a presumptively disadvantaged group (see 49 CFR Part 26.61(c)) the Certifying Agency has a well-founded reason to question the individual's claim of membership in that group, the Certifying Agency must require the individual to present additional evidence that he or she is a member of the group.
2. The Certifying Agency must provide the individual a written explanation of the reasons for questioning his or her group membership and a written request for additional evidence.

B. No Undue Burden on Group Members

1. In implementing Section 4.3, the Certifying Agency must take special care to ensure that it does not impose a disproportionate burden on members of any particular designated group. Imposing a disproportionate burden on members of a particular group could violate 49 CFR Part 26.7(b) and/or Title VI of the Civil Rights Act of 1964 and 49 CFR Part 21.
2. In making such a determination, the Certifying Agency must consider whether the person has held himself out to be a member of the group over a long period of time prior to application for certification and whether the person is regarded as a member of the group by the relevant community. The Certifying Agency may require the applicant to produce appropriate documentation of group membership.
3. If the Certifying Agency determines that an individual claiming to be a member of a group presumed to be disadvantaged is not a member of a designated

disadvantaged group, the individual must demonstrate social and economic disadvantage on an individual basis.

4. The Certifying Agency's decision concerning membership in a designated group is subject to the certification appeals procedure of Section 3.4 of this Program Document.

4.4 Business Size (49 CFR Part 26.65)

A. Type of Work

To be an eligible DBE, a Firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. The Certifying Agency must apply current SBA business size standard(s) found in 13 CFR Part 121 appropriate to the type(s) of work the Firm seeks to perform in United States Department of Transportation (USDOT)-assisted contracts.

B. Gross Receipts

Even if it meets the requirements of paragraph (A) of this section, a Firm is not an eligible DBE in any Federal fiscal year if the Firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations (see 13 CFR Part 121.402), over the Firm's previous three fiscal years, in excess of \$23.98 million. The USDOT Secretary adjusts this amount for inflation from time to time.

Airport Concessionaires will be evaluated according to 49 CFR Part 23.

4.5 Social and Economic Disadvantaged Persons (49 CFR Part 26.67)

A. Presumption of Disadvantage

1. Unless demonstrated otherwise, the Certifying Agency must presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. The Certifying Agency must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.
2. The Certifying Agency must require each individual owner of a Firm applying to participate as a DBE, whose ownership and control are relied upon for DBE

certification, to submit a signed, notarized statement of personal net worth, with appropriate supporting documentation. Such statement and documentation shall certify that he or she has a personal net worth that does not exceed \$1,320,000.

3. Notwithstanding any provision of state law, the Certifying Agency and/or any member of MnUCP must not release an individual's personal net worth statement nor any documentation supporting it to any third party without the written consent of the submitter. However, the Certifying Agency can transmit this information to USDOT in any certification appeal proceeding under Section 3.4 (see also, 49 CFR Part 26.89) in which the disadvantaged status of the individual is in question.
4. In determining net worth, the Certifying Agency must exclude an individual's ownership interest in the applicant Firm and the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant Firm). A contingent liability does not reduce an individual's net worth.

B. Rebuttal of Presumption of Disadvantage

1. As shown in A (2) above, if the individual's personal net worth exceeds \$1,320,000, the individual's presumption of economic disadvantage is rebutted. The Certifying Agency is not required to have a proceeding under paragraph B (2) below in order to rebut the presumption of economic disadvantage in this case.
2. If the statement of personal net worth and supporting documentation that an individual submits demonstrates that the individual is able to accumulate substantial wealth, the individual's presumption of economic disadvantage is rebutted per 49 CFR Part 26.67 (D)(ii)(A).
3. If the Certifying Agency has a reasonable basis to believe that an individual, who is a member of one of the designated groups, is not, in fact, socially and/or economically disadvantaged, the Certifying Agency may at any time start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. The proceeding shall follow the procedures of Section 3.4 of this Program Document.
4. In such a proceeding, the Certifying Agency has the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. The Certifying Agency may require the individual to produce information relevant to the determination of his or her disadvantage.
5. When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the Firm in question cannot be used for purposes of DBE eligibility under this section unless and until he or she makes an individual showing of social and/or economic disadvantage. If the basis for

rebutting the presumption is a determination that the individual's personal net worth exceeds \$1,320,000, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage.

6. Airport concessionaires will be evaluated according to 49 CFR Part 23 without regard to Personal Net Worth.

C. Individual Determinations of Social and Economic Disadvantage

1. Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. The Certifying Agency must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant Firm has the burden of demonstrating to the Certifying Agency, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged.
2. An individual whose personal net worth exceeds \$1,320,000 shall not be deemed to be economically disadvantaged. In making these determinations, use the guidance found in the Appendix of this Program Document. The Certifying Agency shall require that applicants provide sufficient information to permit determinations under the guidance of the Appendix.

4.6 Ownership (49 CFR Part 26.69)

A. Factors to Be Considered

In determining whether the socially and economically disadvantaged participants in a Firm own the Firm, the Certifying Agency must consider all the facts in the record viewed as a whole, including the origin of all assets and how and when they were used in obtaining the Firm. All transactions for the establishment and ownership (or transfer of ownership) must be in the normal course of business, reflecting commercial and arms-length practices.

B. Majority Ownership

To be an eligible DBE, a Firm shall be at least 51 percent owned by socially and economically disadvantaged individuals.

1. In the case of a corporation, such individuals shall own at least 51 percent of the each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding.

- a. In the case of a partnership, socially and economically disadvantaged individuals shall own 51 percent of each class of partnership interest. Such ownership shall be reflected in the Firm's partnership agreement.
- b. In the case of a limited liability company, at least 51 percent of each class of member interest must be owned by socially and economically disadvantaged individuals.

C. Real, Substantial and Continuing Ownership

The Firm's ownership by socially and economically disadvantaged individuals, including their contribution of capital or expertise to acquire their ownership interests, must be real, substantial, and continuing, going beyond pro forma ownership of the Firm as reflected in ownership documents. Proof of contribution of capital should be submitted at the time of the application. When the contribution of capital is through a loan, there must be documentation of the value of assets used as collateral for the loan.

1. Insufficient contributions include a promise to contribute capital, an unsecured note payable to the Firm or an owner who is not a disadvantaged individual, mere participation in a Firm's activities as an employee, or capitalization not commensurate with the value for the Firm.
 - a. The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and be entitled to the profits and loss commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements. Any terms or practices that give a non-disadvantaged individual or Firm a priority or superior right to a Firm's profits, compared to the disadvantaged owner(s), are grounds for denial.
 - b. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a Firm ineligible, even if the debtor's ownership interest is security for the loan.

D. Ownership Securities Held by Disadvantaged Person

All securities that constitute ownership of a Firm shall be held directly by disadvantaged persons. Except as provided below, no securities or assets held in trust, or by any guardian for a minor, are considered as held by disadvantaged persons in determining the ownership of a Firm. However, securities or assets held in trust are regarded as held by a disadvantaged individual for purposes of determining ownership of the Firm, if:

1. The beneficial owner of securities or assets held in trust is a disadvantaged individual, and the trustee is the same or another such individual; or
 - a. The beneficial owner of a trust is a disadvantaged individual who, rather than the trustee, exercises effective control over the management, policy-making, and daily

operational activities of the Firm. Assets held in a revocable living trust may be counted only in the situation where the same disadvantaged individual is the sole grantor, beneficiary, and trustee.

E. Contributions of Capital or Expertise

The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests shall be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the Firm or an owner who is not a disadvantaged individual, or mere participation in a Firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a Firm ineligible, even if the debtor's ownership interest is security for the loan.

F. Requirements for Owner's Expertise

The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership:

1. The owner's expertise must be:
 - a. In a specialized field;
 - b. Of outstanding quality;
 - c. In areas critical to the Firm's operations;
 - d. Indispensable to the Firm's potential success;
 - e. Specific to the type of work the Firm performs; and
 - f. Documented in the records of the Firm. These records must clearly show the contribution of expertise and its value to the Firm.
- a. The individual whose expertise is relied upon must have a significant financial investment in the Firm.

G. Ownership Assets Considered Held by Individual

The Certifying Agency must always consider as held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual:

1. As the result of a final property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce decree is inconsistent with this section; or

2. Through inheritance, or otherwise because of the death of the former owner.

H. Ownership Assets Presumed Not to Be Held by Individual

The Certifying Agency must presume as not being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE Firm who is –

1. Involved in the same Firm for which the individual is seeking certification, or an affiliate of that Firm;
2. Involved in the same or a similar line of business; or
3. Engaged in an ongoing business relationship with the Firm, or an affiliate of the Firm, for which the individual is seeking certification.

To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate to the Certifying Agency, by clear and convincing evidence, that:

1. The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
2. The disadvantaged individual actually controls the management, policy, and operations of the Firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.

I. Marital Assets

The Certifying Agency must apply the following rules in situations in which marital assets form a basis for ownership of a Firm:

1. When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, the Certifying Agency must deem the ownership interest in the Firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the Firm is domiciled. The Certifying Agency shall not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant Firm.

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

The Certifying Agency may consider the following factors in determining the ownership of a Firm. However, the Certifying Agency must not regard a contribution of capital as failing to be real and substantial, or find a Firm ineligible, solely because:

1. A socially and economically disadvantaged individual acquired his or her ownership interest as the result of a gift, or transfer without adequate consideration.
2. There is a provision for the co-signature of a spouse who is not a socially and economically disadvantaged individual on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents; or
3. Ownership of the Firm in question or its assets is transferred for adequate consideration from a spouse who is not a socially and economically disadvantaged individual to a spouse who is such an individual. In this case, the Certifying Agency must give particularly close and careful scrutiny to the ownership and control of a Firm to ensure that it is owned and controlled, in substance as well as in form, by a socially and economically disadvantaged individual.

4.7 Control (49 CFR Part 26.71)

In determining whether socially and economically disadvantaged owners control a Firm, the Certifying Agency must consider all the facts in the record, viewed as a whole.

A. Only Independent Businesses Eligible

Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another Firm or Firms. The Certifying Agency must:

1. In determining whether a potential DBE is an independent business, scrutinize relationships with non-DBE Firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources;
- b. Consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE Firms or persons associated with non-DBE Firms compromise the independence of the potential DBE Firm;

- c. Examine the Firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE Firm; and
- d. In considering factors related to the independence of a potential DBE Firm, consider the consistency of relationships between the potential DBE and non-DBE Firms with normal industry practice.

B. Not Limited in Customary Discretion

A DBE Firm must not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the Firm. This does not preclude a spousal co-signature on documents.

C. Power to Direct Management and Policies

The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the Firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.

1. A disadvantaged owner must hold the highest officer position in the company (for example., chief executive officer or president).
 - a. In a corporation, disadvantaged owners must control the Board of directors.
 - b. In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.

Individuals who are not socially and economically disadvantaged may be involved in a DBE Firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the Firm, or be disproportionately responsible for the operation of the Firm.

D. Delegation of Responsibilities

The socially and economically disadvantaged owners of the Firm may delegate various areas of the management, policymaking, or daily operations of the Firm to other participants in the

Firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the Firm's overall affairs must be such that the Certifying Agency can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the Firm's operations, management and policy.

E. Managerial Competence and Experience

The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the Firm is engaged and the Firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the Firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the Firm's activities and to use this information to make independent decisions concerning the Firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the Firm is insufficient to demonstrate control.

F. Licensure and Credentials

If state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of Firm, then the socially and economically disadvantaged persons who own and control a potential DBE Firm of that type must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a Firm, the Certifying Agency must not deny certification solely on the ground that the person lacks the license or credential. However, the Certifying Agency may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the Firm.

The Certifying Agency may consider:

1. Differences in remuneration between the socially and economically disadvantaged owners and other participants in the Firm in determining whether to certify a Firm as a DBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the Firm's policy, and practice concerning reinvestment of income, and any other explanations for the differences proffered by the Firm. The Certifying Agency may determine that a socially and economically

disadvantaged owner controls a Firm although that owner's remuneration is lower than that of some other participants in the Firm.

- a. In a case where a non-disadvantaged individual formerly controlled the Firm, and a socially and economically disadvantaged individual now controls it, the Certifying Agency may consider a difference between the remuneration of the former and current controller of the Firm as a factor in determining who controls the Firm, particularly when the non-disadvantaged individual remains involved with the Firm and continues to receive greater compensation than the disadvantaged individual.

G. Interference with Control of Firm

In order to be viewed as controlling a Firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the Firm or prevent the individual from devoting sufficient time and attention to the affairs of the Firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time Firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.

H. Involvement of Other Persons

- A. A socially and economically disadvantaged individual may control a Firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the Firm as a manager, employee, owner, or in another capacity. The Certifying Agency must make a judgment about the control the socially and economically disadvantaged owner exercises vis-à-vis other persons involved in the business as the Certifying Agency does in other situations, without regard to whether or not the other persons are immediate family members.
 1. If the Certifying Agency cannot determine that the socially and economically disadvantaged owners - as distinct from the family as a whole - control the Firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the Firm's activities.
 - a. Where a Firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged

individual, and the non-disadvantaged individual remains involved with the Firm in any capacity, the disadvantaged individual now owning the Firm must demonstrate to the Certifying Agency, by clear and convincing evidence, that:

- a. The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
- b. The disadvantaged individual actually controls the management, policy, and operations of the Firm, notwithstanding the continuing participation of a non-disadvantaged individual who formerly owned and/or controlled the Firm.

B. In determining whether it's socially and economically disadvantaged owners control a Firm, the Certifying Agency may consider whether the Firm owns equipment necessary to perform its work. However, the Certifying Agency must not determine that a Firm is not controlled by socially and economically disadvantaged individuals solely because the Firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the Firm.

C. The Certifying Agency must grant certification to a Firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the Firm. To become certified in an additional type of work, the Firm need demonstrate to the Certifying Agency only that it's socially and economically disadvantaged owners are able to control the Firm with respect to that type of work. The Certifying Agency may not, in this situation, require that the Firm be re-certified or submit a new application for certification, but the Certifying Agency must verify the disadvantaged owner's control of the Firm in the additional type of work.

1. A Firm may request an expansion to their NAICS certification into additional specific types and areas of work. The Firm must make a request in writing and must include detailed information on exactly which additional NAICS codes the Firm desires to be certified in. The certifying Specialist must then confer with the Firm and determine whether the Firm has the requisite capacity, expertise, personnel and equipment necessary to perform in the expanded categories. The Specialist must request documentation of the Firm's ability to perform in the additional areas. That documentation may include (but is not limited to) equipment lists, employee rosters, resumes, relevant licensing, leases, work references, bonding and insurance limits, and training. The Specialist (particularly in the area of suppliers and heavy equipment operation) should perform a new On-Site visit. The Specialist must then bring a recommendation to the Certifying Agency outlining the specifics and rationale for the NAICS expansion. Approval of NAICS expansions is subject to a majority vote by the Certifying Agency. If a NAICS expansion is denied by the Certifying Agency the Firm is entitled to the same appeal process outlined in the Denials section 3.2 of this program document.

- D. A business operating under a franchise or license agreement may be certified if the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the Certifying Agency should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided that the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.
- E. In order for a partnership to be controlled by socially and economically disadvantaged individuals, any non-disadvantaged partners must not have the power, without the specific written concurrence of the socially and economically disadvantaged partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.
- F. The socially and economically disadvantaged individuals controlling a Firm may use an employee leasing company. The use of such a company does not preclude the socially and economically disadvantaged individuals from controlling their Firm if they continue to maintain an employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.
- G. For other rules affecting certification, reference 49 CFR Part 26.73.

Section 5. Availability and Confidentiality of Records, Cooperation, and Intimidation or Retaliation (49 CFR Part 26.109 (a, b, c, d))

5.1 Availability of Records

In responding to requests for information concerning any aspect of the DBE program, the MnUCP complies with provisions of the Federal Freedom of Information (5 U.S.C. 552) and Privacy Acts (5 U.S.C. 552a). The USDOT may make available to the public any information concerning the DBE program release of which is not prohibited by Federal law.

Notwithstanding any provision of Federal or state law, the MnUCP must not release information that may be reasonably be construed as confidential business information to any third party without the written consent of the Firm that submitted the information. This includes applications for DBE certification and supporting information. However, the MnUCP must transmit this information to USDOT in any certification appeal proceeding under 49 CFR Part 26.89 or to any other state to which the individual's Firm has applied for certification under 49 CFR Part 26.85.

5.2 Confidentiality of Information on Complainants

Notwithstanding the provisions of paragraph 5.1 of this section, the identity of complainants shall be kept confidential, if they so choose. If such confidentiality will hinder the investigation, proceeding, or review, or result in a denial of appropriate administrative due process to other parties, the complainant must be advised for the purpose of waiving the privilege. Complainants are advised that, in some circumstances, failure to waive the privilege may result in closing the investigation or dismissing the proceeding or review. FAA follows the procedures of 14 CFR Part 16 with respect to confidentiality of information in complaints.

Section 6. Cooperation and Intimidation (49 CFR 26.109 (c) and (d))

6.1 Cooperation

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

6.2 Intimidation and Retaliation

The Certifying Agency, Recipients, contractors, or any other participant in the Unified Certification Program shall not intimidate, threaten, coerce, or discriminate against any individual or Firm for the purpose of interfering with any right or privilege, secured by 49 CRF 26 or because the individual or Firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or review under 49 CFR Part 26. If this Part is violated, any participant in the UCP is in noncompliance of 49 CFR Part 26.

Section 7. Mentor Protégé Program (49 CFR Part 26, Appendix D)

Mentor/Protégé Statement

One of the functions of the MnUCP is to help establish business partnerships between prime contractors and DBE Firms. Appendix D of 49 CFR Part 26 (A) states in part: “The purpose of this program element is to further the development of DBE’s, including but not limited to assisting them to move into non-traditional areas of work and/or compete in the marketplace outside the DBE program, via the provision of training and assistance from other firms.”

To this end, the Mentor/Protégé Program will assist DBE’s to become more proficient in their respective area of work. The program will focus on increasing the volume of work that emerging DBE’s are capable of winning and to broaden the base of their activity, increasing the number and long-term stability of certified DBE Firms.

A Mentor/Protégé arrangement exists when an experienced company or individual (Mentor) provides assistance and training to a DBE (Protégé). The Mentor/Protégé arrangement can range from technical through management assistance to the creation of a new, jointly-owned Firm or agreement. All application for the Mentor/Protégé program will be reviewed on a case-by-case basis.

Common types of assistance that a mentor may provide a protégé include:

- Business Planning
- Record Keeping
- Technical Assistance
- Capital Formation
- Financial Counseling
- Bonding
- Equipment Utilization

A Mentor may provide a Protégé with working capital. Time notes, loans and stocks are acceptable methods of assuring payment in exchange for working capital. Demand notes are not acceptable. In no case can the day-to-day control of the Firm be relinquished by the DBE as a requirement of the loan.

Part ownership in a DBE Firm by a non-disadvantaged entity, including a Mentor, is permitted. However, any property, equipment, supplies, or other services that are sold, rented, or donated to the DBE, as well as any investment by non-disadvantaged individuals, must be reported to the MnUCP in the Mentor/Protégé development plan and must be covered by bills

of sale, lease agreements, etc. Furthermore, any financial investment by the mentor cannot provide the mentor with control over the protégé.

The Mentor/Protégé relationship may include, when not in conflict with state law, an arrangement by mutual consent in which an independent third party, such as a bank or an accountant, is designated as an agent for the DBE. In arrangements where the Mentor/Protégé is working solely on an FHWA-funded contract, agents may receive progress payments for work accomplished by the DBE, made out jointly to the agent and the DBE, and agents can make payments on behalf of the DBE to material suppliers or for federal and state payroll taxes, etc.

For further information and to review the Mentor/Protégé program process refer to document *MnUCP Mentor Protégé Program Guidelines (revised July 2015)*.

Appendix. Individual Determinations of Social and Economic Disadvantage

The following is excerpted from 49 CFR Part 26.61, Appendix E, which is adapted, with minor modifications, from SBA regulations concerning social and economic disadvantage determinations (see 13 CFR Part 124.103(c) and 13 CFR Part 124.104).

A. Social Disadvantage

1. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. Social disadvantage must stem from circumstances beyond their control. Evidence of individual social disadvantage must include the following elements:
 - a. At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;
 - b. Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and
 - c. Negative impact on entry into or advancement in the business world because of the disadvantage. The Certifying Agency will consider any relevant evidence in assessing this element. In every case, however, the Certifying Agency will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.
 - d. Education. The Certifying Agency will consider such factors as denial of equal access to institutions of higher education and vocational training, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures, which discouraged the individual from pursuing a professional or business education.
 - e. Employment. The Certifying Agency will consider such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer or labor union; and social patterns or pressures which have channeled the individual into non-professional or non-business fields.

- f. **Business History.** The Certifying Agency will consider such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.
2. With respect to paragraph A(1) and following (above), the USDOT notes that people with disabilities have disproportionately low incomes and high rates of unemployment. Many physical and attitudinal barriers remain to their full participation in education, employment, and business opportunities available to the general public. The Americans with Disabilities Act (ADA) was passed in recognition of the discrimination faced by people with disabilities. It is plausible that many individuals with disabilities--especially persons with severe disabilities (for example, significant mobility, vision, or review impairments)--may be socially and economically disadvantaged.
3. Under the laws concerning social and economic disadvantage, people with disabilities are not a group presumed to be disadvantaged. Nevertheless, the Certifying Agency should look carefully at individual showings of disadvantage by individuals with disabilities, making a case-by-case judgment about whether such an individual meets the criteria of this appendix. As public entities subject to Title II of the ADA, The Certifying Agency must also ensure their DBE programs are accessible to individuals with disabilities. For example, physical barriers or the lack of application and information materials in accessible formats cannot be permitted to thwart the access of potential applicants to the certification process or other services made available to DBE's and applicants.

B. Economic Disadvantage

1. **General.** Economically disadvantaged individuals are socially disadvantaged individuals whose ability to complete 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 that are not socially disadvantaged.
2. **Submission of narrative and financial information.** Each individual claiming economic disadvantage must describe the conditions, which are the basis for the claim in a narrative statement, and must submit personal financial information.
3. **Factors to be considered.** In considering diminished capital and credit opportunities The Certifying Agency will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including personal income for the past two years (including bonuses and the value of company stock given in lieu of cash), personal net worth, and the fair market value of all assets, whether encumbered or not. The Certifying Agency will also consider the financial

condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification, or, if not available, in similar lines of business, which are not owned and controlled by socially and economically disadvantaged individuals in evaluating the individual's access to credit and capital. The financial profiles that the Certifying Agency will compare include total assets, net sales, pre-tax profit, sales/working capital ratio, and net worth.

4. Asset transfers within two years.

- a. Except as set forth in paragraph 4(b) below, the Certifying Agency will attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member or to a trust, a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to a concern's application for participation in the DBE program. An exception is where the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.
- b. The Certifying Agency will not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.
- c. In determining an individual's access to capital and credit, the Certifying Agency may consider any assets that the individual transferred within such two-year period that are not considered in evaluating the individual's assets and net worth (for example, transfers to charities).