

# Wyoming Department of Transportation



## Disadvantaged Business Enterprise

### Program Plan

**WYOMING DEPARTMENT OF TRANSPORTATION  
DISADVANTAGED BUSINESS ENTERPRISE PROGRAM PLAN**

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## PROGRAM OBJECTIVES

As a recipient of Federal funds, the Wyoming Department of Transportation (WYDOT) is required to administer a DBE program in compliance with all laws, regulations, Executive Orders, and guidance. WYDOT's Disadvantaged Business Enterprise (DBE) Program seeks to achieve several objectives:

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

*Ref: [49 CFR 26.1](#); [49 CFR 26.3](#)*

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**SUBPART A - GENERAL  
SECTION 1**

**DEFINITIONS**

*ACT* is the Transportation Equity Act for the 21st Century (P.L. 105-178), known as TEA-21 with respect to financial assistance programs of the FHWA.

*AFFILIATION* concerns those who are affiliates of each other when, either directly or indirectly:

1. One concern controls or has the power to control the other; or
2. A third party or parties controls or has the power to control both; or
3. An identity of interest between or among parties exists such that affiliation may be found.

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.

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

*AGREEMENT* is a mutually binding legal relationship, or any modification thereof, obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services), and the buyer to pay for them.

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

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

*ASSETS* mean 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* means 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 use of American products, materials, or labor.

*COMMERCIALLY USEFUL FUNCTION* refers to a DBE firm responsibility for execution of a distinct element of the work of the contract and carries out its responsibilities by actually performing, managing, and supervising the work involved.

If a DBE firm subcontracts a significantly greater portion of the work of a contract than would be expected on the basis of normal industry practices, the firm shall be presumed not to be performing a commercially useful function.

*COMPLIANCE* refers to a recipient or contractor that has correctly met and implemented the requirements of this part.

*CONCESSIONAIRE* is one who operates a concession.

*CONSULTANT* – see Contractor.

*CONTINGENT LIABILITY* means 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.

*CONTRACT* is a mutually binding legal relationship, or any modification thereof, obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services), and the buyer to pay for them. For purposes of this part, a lease is a contract.

*CONTRACTOR* is one who participates as a consultant or construction firm, through a contract, agreement or subcontract (at any tier), in a DOT-assisted transportation program covered by this part, and includes lessees.

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

*DISADVANTAGED BUSINESS ENTERPRISE (DBE)* is a for-profit small business concern;

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

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

*DOT-ASSISTED CONTRACT* is any contract between a recipient (i.e., WYDOT) and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

*ELECTRONIC BID SYSTEM (EBS)* is a computerized system for the receipt and tabulation of bids.

*ENVIRONMENTAL SERVICES* is an activity which involves work identified with a number of different functions including preliminary assessment, site inspection, testing, remedial investigation, feasibility studies, remedial design, containment, remedial action and security, and site closeouts.

*HOME STATE* means the state in which a DBE firm or applicant for DBE certification maintains its principal place of business.

*IMMEDIATE FAMILY MEMBER* refers to a father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, and/or father-in-law.

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

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

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

*LIABILITIES* mean 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.

*MANUFACTURER* is a firm that operates and maintains a factory or establishment open to the general public that produces on the premises the materials or supplies required for the performance of the contract.

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

*NATIVE HAWAIIAN* refers to any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.

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

*NONCOMPLIANCE* refers to that of a recipient or contractor has not correctly implemented the requirements of this part.

*OPERATING ADMINISTRATION OR OA* is 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.

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

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

*PRIMARY INDUSTRY CLASSIFICATION* means the most current North American Industry Classification System (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the North American Industry Classification Manual—United States, which is available on the Internet at the U.S. Census Bureau Web site: <http://www.census.gov/eos/www/naics/>.

*PRIMARY RECIPIENT* is a recipient which receives USDOT financial assistance and passes some or all of it on to another recipient.

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

*PROGRAM* is any undertaking on a recipient's part to use DOT financial assistance, authorized by the laws to which this part applies.

*RACE-CONSCIOUS MEASURE OR PROGRAM* is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

*RACE-NEUTRAL MEASURE OR PROGRAM* is one that is, or can be, used to assist all small businesses. For the purposes of this part, race-neutral includes gender-neutrality.

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

*REGULAR DEALER (MATERIAL SUPPLIER)* is a firm that owns, operates, and maintains a store, warehouse, or other establishment in which the materials or supplies required for performance of the contract are bought, kept in stock, and regularly sold to the public in the usual course of business. To be a regular dealer, the firm must engage in, as its principal business, and in its own name, the purchase and sale of the products in question. A regular dealer in such bulk items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock, if it owns or operates distribution equipment. Brokers and packagers shall not be regarded as manufacturers or regular dealers.

Note: Regular Dealer (Material Supplier), as defined must be classified as such by the Wyoming Department of Transportation. Expenditures for supply and delivery of materials by DBE regular dealers will be counted at 60% toward the contract DBE participation goal. DBE regular dealers in such bulk items as steel, cement, gravel, stone, and petroleum products, not kept in stock, must deliver the products to the worksite using equipment owned or operated by them.

*SECRETARY* is the Secretary of the United States Department of Transportation or his/her designee.

*SET-ASIDE* is a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

*SMALL BUSINESS ADMINISTRATION OR SBA* refers to the United States Small Business Administration.

*SBA CERTIFIED FIRM* refers to firms that have a current, valid certification from or recognized by the SBA under the 8(a) BD or SDB programs.

*SMALL BUSINESS CONCERN* - with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to Section 3 of the Small Business Act and Small Business Administration regulations implementing it ([13 CFR Part 121](#)) that also does not exceed the cap on average annual gross receipts specified in §26.65(b), currently set at \$26.29 million average annual gross receipts over the previous three fiscal years. The Secretary shall adjust this figure from time to time for inflation.

*SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUAL* is 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 members 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 who 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 if you require it.
2. Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
  - a. "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;
  - b. "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, 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, Kirbati, 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;
  - 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* means a married person, including a person in a domestic partnership or a civil union recognized under State law.

*SUBCONTRACTOR* is one who participates, through a subcontract (at any tier), in a DOT-assisted transportation program covered by this part, and includes lessees. This includes a person, firm, or corporation to whom the Contractor sublets part of the contract

*TRIBALLY-OWNED CONCERN* is any concern at least 51% owned by an Indian tribe as defined in this section.

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

*WYDOT* refers to the Wyoming Department of Transportation, including its operating elements.

*Ref: 49 CFR 23.89 as amended and [49 CFR 26.5](#)*

**SUBPART A - GENERAL  
SECTION 2**

**RECORD RETENTION**

In order to monitor the progress of its DBE program, WYDOT will develop and maintain a record keeping system which will identify and assess DBE prime contract and subcontract commitments and awards, prime contractors' progress in achieving DBE participation, and other DBE affirmative action efforts. The mechanism for record gathering and retention may include, but not be limited to, utilization of the *Electronic Bid System (EBS)*, *Disadvantaged Business Enterprise Participation Certification (Form E-91)*, *Certification of Subcontract Payments*, *DBE Notification of Intent to Subcontract on Federal-aid Projects (Form DBE-2)*, *DBE Federal-aid Subcontract Payments Report (Form DBE-3)*, and *Architect-Engineer and Related Services Questionnaire (Standard Form 254)*.

Specifically, WYDOT will maintain records showing:

1. Procedures which have been adopted to monitor the progress of its DBE program.
2. Awards of prime contracts and subcontracts to DBEs.
3. Specific efforts to identify and award subcontracts to DBEs.
4. Bidders list, consisting of all firms bidding on any type of contract, and bidding or quoting subcontracts, including suppliers, technical services, consulting services, etc., on DOT-assisted projects. For every firm, the following information will be included:
  - a. Firm name;
  - b. Firm address;
  - c. Firm's status as a DBE or non-DBE;
  - d. The age of the firm; and
  - e. The annual gross receipts of the firm.

Initially, this information will be collected by a letter of request to be sent to all firms listed on the Invitation to Bid (prime/subcontractors, DBEs, suppliers, etc.) and Prequalified Contractors lists, along with any additional information available from the EBS or E-91. The bidders list in entirety is reviewed yearly; however, the relevant data is maintained throughout the year.

WYDOT will commit to providing any data or required reports concerning the progress of its DBE program as directed by the Operating Administration (OA), to include:

1. WYDOT will submit the *Uniform Report of DBE Commitments/Awards and Payments* bi-annually, for the periods of October 1 through March 31 and April 1 through September 30, for each fiscal year. The reports may include:
  - a. The number of subcontracts committed to DBEs;
  - b. The number of contract and subcontract awarded to DBEs;
  - c. A description of the general categories of contracts and subcontract awarded to DBEs; and
  - d. The dollar value of work performed by DBEs.
2. WYDOT will provide, by January 1 of each year, information regarding the percentage and location of DBE firms controlled by the following:
  - a. Women;
  - b. Socially and economically disadvantaged individuals (other than women); and

- c. Individuals who are women and are otherwise socially and economically disadvantaged individuals.

The foregoing records and reports will provide information relating to DBE'S owned and controlled by minorities separately from information relating to firms owned and controlled by women. If the records and reports include any information relating to firms owned and controlled by individuals found to be disadvantaged by the Small Business Administration pursuant to Section 8(a) of the Small Business Act that are not minorities or women, this information also will be recorded and reported separately.

In responding to requests for information concerning the foregoing records or information concerning any aspect of the DBE program, WYDOT complies with provisions of the Wyoming Public Records Law (§16-4-2) and the Federal Freedom of Information (5 U.S.C. 552) and Privacy Acts (5 U.S.C. 552a). WYDOT may make available to the public any information concerning the DBE program, release of which is not prohibited by State or Federal law. WYDOT shall safeguard from disclosure to unauthorized persons information that may reasonably be considered as confidential business information, consistent with Federal, state, and local law.

*Ref: [49 CFR 26.11](#)*

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**SUBPART A - GENERAL  
SECTION 3**

**ASSURANCE STATEMENTS**

Each financial assistance agreement WYDOT signs with a DOT operating administration (or a primary recipient) must include the following assurance:

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

Each contract WYDOT signs with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance:

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

- (1) Withholding monthly progress payments;*
- (2) Assessing sanctions;*
- (3) Liquidated damages; and/or*
- (4) Disqualifying the contractor from future bidding as non-responsible.*

**FORBIDDEN ACTIONS**

WYDOT must never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by this part on the basis of race, color, sex, or national origin.

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

*Ref: [49 CFR 26.13](#) and [49 CFR 26.7](#)*

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**SUBPART B - ADMINISTRATIVE REQUIREMENTS  
SECTION 1**

**POLICY AND APPLICABILITY STATEMENT**

WYDOT's Disadvantaged Business Enterprise (DBE) Program Plan seeks to achieve several objectives:

1. To ensure nondiscrimination in the award and administration of United States Department of Transportation (USDOT) funded contracts in the Department's highway, transit, and airport financial assistance programs; and
2. To create a level playing field on which DBEs can compete fairly for USDOT funded contracts; and
3. To ensure that the Wyoming Department of Transportation (WYDOT) DBE program is tailored in accordance with applicable law; and
4. To ensure that only firms that fully meet the eligibility standards are permitted to participate as DBEs; and
5. To help remove barriers to the participation of DBEs in USDOT funded contracts; and
6. To promote the use of DBEs in all types of federally-assisted contracts and procurements activities; and
7. To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and
8. To provide appropriate flexibility to USDOT related highway, transit and airport agencies which receive Federal financial assistance in establishing and providing opportunities for DBEs.

WYDOT has established the policy that DBEs will be provided opportunity to participate in the performance of contracts financed in whole or in part with Federal funds. Responsibility for enforcement of this policy is vested with WYDOT and will be carried out by the Director of WYDOT.

WYDOT, its contractors, subcontractors and other sub-recipients of FHWA, FTA and FAA Federal funds will ensure that DBEs are provided opportunity to compete for and participate in the performance of Federal-aid contracts awarded to them. WYDOT, its contractors, subcontractors and other sub-recipients of FHWA, FTA and FAA Federal funds will not discriminate against DBEs on the basis of race, color, national origin or sex in the award, administration or performance of subcontracts.

Guidelines providing opportunity for DBE participation will be included in the contracts for selected Federal-aid projects. Contractors will be required to demonstrate Bona-Fide efforts to meet the guidelines. WYDOT will require the submission of written documentation of the contractor's efforts.



William T. Panos, Director



Date

WYDOT recognizes and fully accepts the provisions of Title VI of the Civil Rights Act of 1964, as amended, which provide, in part, that no person in the United States shall, on the basis of race, color, sex or national origin, be excluded from participation in any program or activity receiving Federal financial assistance. Accordingly, nothing in WYDOT's DBE eligibility certification process is intended to prevent any otherwise qualified individual, business or joint venture from competing for and/or participating in any project, program or activity. The only effect of the certification process is that any person, business or joint venture wishing to participate as an eligible DBE in WYDOT Federal-aid contracts must have their eligibility certified by WYDOT in accordance with 49 CFR 26, and 49

CFR 23 as amended, before expenditures to them for work of a contract can be counted toward fulfillment of contract DBE participation. Businesses that choose not to apply for certification, or businesses that apply but do not fully meet the eligibility criteria for certification, may nevertheless bid on and participate in WYDOT, FHWA, FTA and FAA contracts, but will not be recognized as DBEs.

#### **PROCEDURE FOR WYDOT FHWA CONTRACTS**

The WYDOT Resident Engineer responsible for administration of a specific contract will enforce compliance with contract requirements for utilization of DBEs. WYDOT's External EEO Officer will conduct compliance reviews on selected projects each year during the construction season to verify compliance by the prime contractors, subcontractors and material suppliers with contract requirements for DBE utilization as well as other EEO requirements.

WYDOT will require each contractor, subcontractor and material supplier to prepare and maintain a DBE program document as part of its regular affirmative action program which sets forth its affirmative action plan for utilization of DBEs in the performance of Federal-aid contracts. Or, as an alternative, the program developed by WYDOT may be adopted by signing the acceptance certification statement at the end of the EEO Affidavit when submitting the required *Equal Employment Opportunity Affidavit (Form FR-2200)*. The FR-2200 must be completed and submitted annually by each prime bidder as a requisite document for prequalification, and by each DBE as a requisite document for certification of eligibility. The FR-2200 must be submitted with each subcontract request for subcontractors that are not prequalified bidders or WYDOT-certified DBEs. The State Construction Engineer will not approve a subcontract request that is not accompanied by a properly completed FR-2200, unless WYDOT has a currently valid FR-2200 on file for the proposed subcontractor. Prime bidders and subcontractors that elect not to adopt the WYDOT program will be required to submit a copy of their own DBE program document with the FR-2200 for approval by WYDOT.

WYDOT will require that each contractor and subcontractor designate a DBE Liaison Officer to administer their DBE program. The designee must be listed in the FR-2200 with a brief description of the procedures established for compliance with their DBE program and the specific efforts made to provide opportunity for DBEs to participate in the performance of Federal-aid projects. Prequalified bidders and WYDOT certified DBEs that submit the FR-2200 annually will be required to submit a revision to the FR-2200 immediately upon the designation of a replacement DBE Liaison Officer. Failure to submit the revision could result in disqualification of bidders and suspension of eligibility certification for DBEs.

#### **PROCEDURE FOR WYDOT FAA CONTRACTS**

The WYDOT Aeronautics Administrator responsible for administration of a specific agreement will enforce compliance with contract requirements for utilization of DBEs. WYDOT Internal Review Services will conduct compliance reviews on selected agreements each year to verify compliance by the prime consultants and subconsultants with agreement requirements for DBE utilization as well as other EEO requirements.

WYDOT will require each consultant and subconsultant to prepare and maintain a DBE program document as part of its regular affirmative action program which sets forth its affirmative action plan for utilization of DBEs in the performance of Federal-aid contracts. Or, as an alternative, the program developed by WYDOT may be adopted by signing the acceptance certification statement at the end of the EEO Affidavit when submitting the required *Equal Employment Opportunity Affidavit (Form CS-9)*. The CS-9 must be completed and submitted bi-annually by each prime consultant and subconsultant as a requisite document for prequalification. The Aeronautics Administrator will not approve a subcontract request that is not accompanied by a properly completed CS-9, unless WYDOT has a currently valid CS-9 on file for the proposed subconsultant. Prime consultants and subconsultants that elect not to adopt the WYDOT program will be required to submit a copy of their own DBE program document with the CS-9 for approval by WYDOT.

WYDOT will require that each consultant and subconsultant designate a DBE Liaison Officer to administer their DBE program. The designee must be listed in the CS-9 with a brief description of the procedures established for compliance with their DBE program and the specific efforts made to provide opportunity for DBEs to participate in the performance of Federal-aid projects. Prime consultants prequalified through Engineering Services and WYDOT certified DBEs that submit the CS-9 bi-annually will be required to submit a revision to the CS-9 immediately upon the designation of a replacement DBE Liaison Officer. Failure to submit the revision could result in disqualification of consultants and DBEs.

#### **PROCEDURE FOR WYDOT FTA CONTRACTS**

The WYDOT Local Government Coordinator will follow the procedures outlined under FHWA contracts.

#### **FOR ALL CONTRACTS**

Each FHWA, FTA and FAA sub-recipient will be required to prepare and maintain a DBE program. This program will be required as a part of the sub-recipient's regular affirmative action plan. The sub-recipient will have the option of adopting the plan generated by WYDOT or initiating their own plan which will be subject to the approval of WYDOT. In either event, the sub-recipient shall appoint their own disadvantaged business liaison officer.

*Ref: [49 CFR 26.23](#)*

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**SUBPART B - ADMINISTRATIVE REQUIREMENTS  
SECTION 2**

**DBE LIAISON OFFICER**

The Wyoming Department of Transportation (WYDOT) DBE Liaison Officer is appointed by the Director of the Wyoming Department of Transportation, to administer the DBE program. The DBE Liaison Officer shall have direct, independent access to the Director of the Wyoming Department of Transportation (*organizational chart*) and is responsible for implementing all aspects of WYDOT's DBE program.

For all program administration, contact: DBE Liaison Officer, Lisa Fresquez, Wyoming Department of Transportation, 5300 Bishop Blvd., Cheyenne WY 82009-3340; phone: (307) 777-4457.

*Ref: [49 CFR 26.25](#)*

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**SUBPART B - ADMINISTRATIVE REQUIREMENTS  
SECTION 3**

**USE OF BANKS OWNED AND CONTROLLED BY DISADVANTAGED INDIVIDUALS**

WYDOT will periodically determine if there are any Wyoming financial establishments owned, operated and controlled by women or minorities. WYDOT will provide information to all contractors and subcontractors of each financial institution which is certified as a DBE.

*Ref: [49 CFR 26.27](#)*

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**SUBPART B - ADMINISTRATIVE REQUIREMENTS  
SECTION 4**

**PROMPT PAYMENT MECHANISMS**

This applies to all WYDOT funded projects. The term “Engineer” as used herein means the Resident Engineer for FHWA projects, Engineering Services for FAA agreements, or Local Government Coordinator for FTA projects, as appropriate. The term “contractor” means a prime contractor or prime consultant. The term “subcontractor” means a subcontractor or subconsultant, and includes a person, firm, or corporation to whom the contractor sublets part of the contract. “Contract” means a construction contract or consultant agreement. “Subcontract” means any portion of the contract that the contractor has sublet.

The contractor shall make full and prompt payment for satisfactory subcontract work. After the initial partial payment, the Engineer will not make any progress payments for work performed by the contractor until the contractor certifies that payment has been disbursed to all subcontractors having an interest in the contract their full pro rata share of the previous progress payment. The contractor shall process, prior to the next partial payment, an executed *Certification of Subcontractor Payments* for each subcontractor, processed in WYDOT’s construction management system (CMS). Each subcontractor will be paid their full pro rata share, unless the contractor submits to the Engineer documentation which demonstrates good cause for not making any required payment, and good cause as submitted is accepted by the Engineer in writing. Once good cause is accepted in writing by the Engineer, the contractor shall provide written notification of any such good cause to the affected subcontractor.

The subcontractor, within fourteen (14) days of receipt of payment, shall acknowledge receipt of payment in CMS. If the subcontractor fails to acknowledge receipt within this time, that shall be sufficient documentation of good cause for the contractor.

**END OF SUBCONTRACT PAYMENTS**

WYDOT declines to withhold retainage from prime contractors. When a subcontractor’s work is satisfactorily complete and he/she has met the requirements of the subcontractor agreement, the contractor shall release all payment due, including but not limited to, payment for work completed and retainage, within fourteen (14) days. The subcontractor shall acknowledge to the contractor, in CMS, an executed *Certification of Subcontractor Payments* within fourteen (14) days of receipt of payment. The contractor shall process *Certification of Subcontractor Payments* for each subcontract in CMS prior to the next progress payment or prior to processing a *Report on Status of Project (Form E-96)*, by the Engineer, whichever occurs first.

**DISPUTE RESOLUTION**

Disputes between the contractor and subcontractor shall be submitted in writing to the Engineer, immediately. The contractor or subcontractor may submit a dispute. The documentation submitted to the Engineer shall include, but not be necessarily limited to the following; who the dispute is between, the reason for the dispute and the amount of dollars in dispute. Once the dispute is received, the Engineer will withhold an equal amount as noted in the dispute from the following progress payment. The contractor and subcontractor shall settle the dispute by a mutually agreed upon arbitrator. The cost of arbitration shall be paid for by whichever party is found at fault as determined by the arbitrator.

Ref: [49 CFR 26.29](#)

[Standard Specification for Road and Bridge Construction \(Sections 109.5.2, 109.5.3, 113\)](#)

**SUBPART B - ADMINISTRATIVE REQUIREMENTS  
SECTION 5**

**DBE DIRECTORY**

WYDOT will maintain and make available to interested persons a directory identifying all firms eligible to participate as DBEs in any DOT-assisted contract administered by WYDOT. The listing for each firm will include the firm's address, phone number, and the types of work the firm has been certified to perform as a DBE.

WYDOT's DBE directory is a dynamic, or living, document; therefore, the directory is continually edited and updated as changes occur. The directories are made available in different formats and are accessible via WYDOT's website at this address:

[http://www.dot.state.wy.us/home/business\\_with\\_wydot/contractors/Disadvantaged\\_Business\\_Enterprise.html](http://www.dot.state.wy.us/home/business_with_wydot/contractors/Disadvantaged_Business_Enterprise.html)

A printed directory will be furnished to all requesting individuals or agencies, including Federal and State agencies that are engaged in contracting and procuring goods and services with Federal-aid funds.

*Ref: 49 CFR 26.31*

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**SUBPART B - ADMINISTRATIVE REQUIREMENTS  
SECTION 6**

**OVER-CONCENTRATION OF DBES IN CERTAIN WORK AREAS**

WYDOT will compare DBEs in certain types of work to non-DBEs in the same type of work on an annual basis to determine if an over-concentration is occurring.

If an over-concentration is determined to exist, WYDOT will submit this concern to the USDOT OA for concurrence. If concurrence is given by the OA, WYDOT will direct its DBE Supportive Services administrator to analyze the concentration and provide WYDOT with a proposal to address the over-concentration. This proposal will be submitted to the OA for approval. Once approved, the proposal measures will be implemented and become part of this DBE program.

*Ref: [49 CFR 26.33, Appendix C](#)*

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**SUBPART B - ADMINISTRATIVE REQUIREMENTS  
SECTION 7**

**BUSINESS DEVELOPMENT PLANS**

A Business Development Plan may be required of a DBE firm to receive assistance through WYDOT.

**MENTOR - PROTÉGÉ PROGRAM**

A mentor-protégé program may be developed to assist DBE firms.

*Ref: [49 CFR 26.35](#), [Appendix C](#), [Appendix D](#)*

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**SUBPART B - ADMINISTRATIVE REQUIREMENTS  
SECTION 8**

**MONITORING PERFORMANCE OF OTHER PROGRAM RECIPIENTS**

WYDOT will implement appropriate mechanisms, including sanctions, suspension, debarment, and application of legal and contract remedies available under Federal, state and local law, as deemed appropriate and necessary, to ensure compliance with the requirements by all Program participants.

**Documented Bid Solicitation**

For all FHWA contracts, WYDOT incorporates a *Special Provision*, requiring each prime bidder to document DBE bid solicitations in WYDOT's *Electronic Bid System (EBS)*. The solicitation information is reviewed by the DBE office and commitment reports are generated and distributed to appropriate WYDOT and FHWA personnel. The successful bidder must also submit the *DBE Notification of Intent to Subcontract on Federal-aid Projects (Form DBE-2)*, for each commitment listed in the EBS, before any contract will be executed (see also Subpart C).

**Commercially Useful Function**

WYDOT will monitor commercially useful function (CUF) performance of DBE firms to verify that the work committed to DBEs at contract award is actually performed by the DBEs. This verification will be made by WYDOT personnel at the project site. The form is completed in WYDOT's construction management system (CMS) and reviewed by the DBE office for tracking purposes.

**Monitoring**

Within CMS, numerous reports were developed for WYDOT to continuously track the DBE awards/commitments, verify timely and ongoing payment amounts, and monitor annual goal attainment. DBE firms will also submit a *Subcontract Payment Report* upon completion to confirm final pay amount.

**SANCTIONS**

If WYDOT determines that the contractor or consultant has failed to make sufficient reasonable efforts to meet the DBE commitment in the contract or agreement, or to otherwise carry out the DBE Special Provisions, such failure shall constitute a breach of contract and may result in termination of the contract/agreement, or other remedy as WYDOT deems appropriate.

*Ref: [49 CFR 26.37](#)*

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**SUBPART B - ADMINISTRATIVE REQUIREMENTS  
SECTION 9**

**FOSTERING SMALL BUSINESS PARTICIPATION**

WYDOT is working to improve small business participation through job size criteria and the verification of “small businesses” that are bidding on WYDOT projects. WYDOT is currently providing opportunity to small businesses by providing numerous projects that are less than \$1 million. These project are available to many types of contractors, construction and otherwise.

WYDOT will accomplish this element by the following the objectives listed below:

1. WYDOT will implement appropriate measures to determine and verify a small business by definition through the prequalification processes (i.e.: gross receipts and appropriate NAICS codes) to ensure compliance with the requirements by all participants.
2. WYDOT will monitor project size and small business participation through verification of business size and bidding participation of verified businesses.
3. WYDOT will maintain reports showing participation of small businesses (by definition) on current projects.

Current data shows that the majority of contracts that were awarded in the last five (5) years were between \$5 and \$10 million dollars. WYDOT does not have “mega projects” or “design build” projects that would constitute a separate goal process or program to create additional opportunity for small businesses.

Based on the definition of a Small Business, WYDOT is currently providing ample opportunity to small businesses to obtain work. Current size of projects does not justify the unbundling or other reorganizing of projects.

Wyoming DBE goals are being obtained through race-neutral measures currently with no project specific goals. As long as WYDOT continues to meet or exceed its race-neutral goals no other goals will be assigned for small business participation.

*Ref: [49 CFR 26.39](#)*

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**SUBPART C - GOALS, BONA-FIDE EFFORT AND COUNTING  
SECTION 1**

**GOALS AND GOAL SETTING**

WYDOT, in accordance with DOT guidelines, will determine WYDOT's Disadvantaged Business Enterprise Annual Participation Goal (APG) for each fiscal year. This annual goal will be in place for three (3) consecutive years, unless DOT determines a mid-cycle adjustment.

**WYDOT's Disadvantaged Business Enterprise Annual Participation Goal through September 30, 2021 will be 4.78% utilizing an all race and gender neutral program.**

**STEP 1 ANALYSIS: BASE GOAL CALCULATIONS**

**Method Selected**

WYDOT calculates the APG using the bidder's list method as set forth in 49 CFR Part 26.45. The determination is based on a level of DBE participation relative to all businesses ready, willing and able to participate on Federally assisted contracts, and reflects a level WYDOT would expect in the absence of discrimination. WYDOT's methodology is based on demonstrable evidence of local market conditions and is designed to ultimately attain a goal that is narrowly tailored to the relative availability of DBEs in the Wyoming market.

**Description of Data Used**

The APG setting procedure is based on the following data sources:

1. WYDOT has compiled a bidder's list, to include data from all prequalified prime contractors and bidders, all subcontractors who quoted or were utilized on prime contracts, as well as all suppliers and manufacturers who quoted or were utilized. Also included are the professional discipline types of firms utilized for design services.
2. WYDOT's market area has been determined to be all available contractors and consultants that are on the bidders list, representing the following states: Alabama, Arizona, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin and Wyoming.
3. DBE businesses will be certified by WYDOT in order to be considered as an eligible Disadvantaged Business Enterprise and will be listed in the WYDOT DBE Directory. This listing includes both resident and non-resident DBE firms. Using this listing, WYDOT will identify the DBE firms that could be used on WYDOT Federal-aid projects to fulfill the APG.

**Description of Calculation**

1. DBE Availability
  - a. WYDOT compiled the NAICS data in the bidders list utilizing the NAICS codes supplied by firms in their prequalification and/or DBE certification documentation.
2. DBE's Ready, Willing and Able
  - a. WYDOT prequalifies prime bidders for highway design and construction, but also for other types of work for many other agencies outside WYDOT. WYDOT is the Unified Certification Office in the state, and certifies DBE firms for several other agencies, many of which do not perform types of work that

could be utilized in highway construction. The NAICS codes listed below are only those applicable to highway and airport construction/engineering work from the bidder's list.

In light of these factors, the data collected for ready, willing and able DBEs has been tailored to remove DBEs that perform work for other agencies and non-DOT related work. With the NAICS codes remaining for contractors and subcontractors, WYDOT received the results shown in Table 1.

**TABLE 1**

<b>NAICS Code</b>	<b>Class Description</b>	<b>Total Bidders</b>	<b>Active DBE's</b>
237310	Highway, Street, and Bridge Construction	151	8
237990	Other Heavy and Civil Engineering Construction	6	1
238210	Electrical Contractors and Other Wiring Installation	12	
238910	Site Preparation Contractors	41	2
238990	All Other Specialty Trade Contractors	18	1
464220	Specialized Freight (except Used Goods) Trucking,	6	2
561730	Landscaping Services		2
561990	All Other Support Services (i.e., flagging)		2
541330	Engineering Services	100	
541320	Landscaping Architects	17	1
541620	Environmental Consulting	49	1
541310	Architectural Services	18	
<b>TOTALS</b>		<b>418</b>	<b>20</b>
<b>DBE Program Based Goal</b>		<b>4.78%</b>	

Table 1 represents the potential bidders in the market area versus the DBEs that are bidding – successfully and unsuccessfully – in the specified NAICS code(s).

Although the numbers remain consistent with previous bidders lists, there has been a steady decline of contractors, averaging a decrease of fourteen (14) contractors per year since FY 2009. In addition, a few top performing DBEs left the program during the last goal cycle.

The figures in Table 1 were not weighted due to inability to gather specific factors to figure a “weighted” goal. After much consideration “weighting” was not considered to be a potential issue in WYDOT’s goal determination.

**Resultant Baseline Goal**

The resultant baseline goal from the Step 1 analysis is a goal of 4.78%.

**STEP 2 ANALYSIS: ADDITIONAL FACTORS ANALYSIS FOR POSSIBLE ADJUSTMENT**

**Past Participation - Commitments**

WYDOT has accumulated sufficient history on actual contract awards and subcontract commitments that current prime contractor participation can be based on those DBE commitments made. This is done with the realization that commitment history is a cumulative factor, not attached to any set fiscal year because of the variance in the number of projects available to let and the nature of Federal highway funding. However, this decision falls in line with the spirit of the regulations in that commitments are a reliable indicator of actual participation.

**Commitments**

The commitments made to DBEs on projects let to contract consistent with 49 CFR 26, and tracked as stated in 26.37 and 26.55, is currently 6.15% of project dollars bid as shown in Table 2. Past commitment is representative of what might be expected in FY 2019 based on the type of projects from each of the past five (5) years.

**TABLE 2**

Fiscal Year	Prime Contracts Awarded	Value of Contracts Awarded	DBE Contract Commitment	Annual DBE Goal	% DBE Committed To DBE's
2013	43	\$144,006,832.60	\$11,110,297.61	5.06%	7.72%
2014	69	\$240,947,060.35	\$13,697,579.86	5.06%	5.68%
2015	59	\$187,106,266.75	\$10,895,157.29	5.06%	5.82%
2016	66	\$220,712,633.97	\$12,342,214.81	4.55%	5.59%
2017	70	\$229,498,710.63	\$14,807,511.79	4.55%	6.45%
<b>Total Commitments</b>		<b>\$1,022,271,504.30</b>	<b>\$62,852,761.36</b>		<b>6.15%</b>

**Past Participation - Payments**

WYDOT has accumulated sufficient history on actual contract and subcontract payments so that current participation can be based on actual DBE payments made. The decision to use the data falls in line with the spirit of the regulations in that actual payments are a primary indicator of actual participation.

This is done with the realization that payment history is a cumulative factor, not necessarily attached to any set fiscal year because of the nature of the construction industry. The projects let in a specific year are not necessarily the same projects completed in that same fiscal year; therefore, Table 2 showing commitments at time of award has no direct correlation to the payment history shown in Table 3.

**Payments**

The payments made to DBEs on completed projects let to contract, consistent with 49 CFR 26, and tracked as stated in 26.37 and 26.55, is currently 6.07% of project dollars bid as shown in Table 3.

**TABLE 3**

Fiscal Year	Prime Contracts Completed	Value of Prime Contracts Completed	DBE Contract Payments	Annual DBE Goal	% DBE Participation Attained
2013	63	\$228,193,573.17	\$11,857,098.89	5.06%	5.20%
2014	63	\$130,585,628.37	\$8,382,675.09	5.06%	6.42%
2015	35	\$117,883,728.51	\$6,236,467.81	5.06%	5.29%
2016	68	\$182,666,789.77	\$13,964,720.30	4.55%	7.64%
2017	22	\$58,136,108.64	\$3,092,521.71	4.55%	5.32%
<b>Total Attainments</b>		<b>\$717,465,828.46</b>	<b>\$43,533,483.80</b>		<b>6.07%</b>

Past participation is representative of what might be expected in FY 2019 based on the type of projects from each of the past years.

**Step 2 Adjustment**

A review of the currently available data sources shows the following:

1. Step 1 NAICS data indicates the current construction industry in Wyoming reflects a Step 1 base figure DBE firm population availability of 4.78%

2. Past participation of project bids, award and commitment data indicates prime contractor commitments to DBE on contracts let to bid under 49 CFR 26 of 6.15%. Bid and commitment history is cumulative.
3. Past participation of contract and subcontract payments to DBEs on completed projects let to bid under 49 CFR 26 of 6.07%, which reflects contract dollars over and above the original levels of commitment at time of bid letting. Contract and subcontract payment history is cumulative.
4. The leveling out of DBE commitments and DBE payments in relation to the current DBE community of firms that are ready, willing and able to participate in Federal-aid highway design and construction is reflected in these cumulative histories.
5. Despite WYDOT's best efforts, several top performing DBEs left the program during the last goal cycle.
6. Tables 2 and 3 demonstrate that WYDOT's program is successful in achieving the program objectives, thus no adjustment to the base goal is necessary.

In accordance with 49 CFR 26.45, after examination of the evidence available and in consideration of the factors outlined above, WYDOT has determined that a Step 2 adjustment to the baseline goal is not necessary.

### **Public Involvement**

Public involvement in the goal setting process includes:

1. Consultation
  - a. The goal setting consultation public meeting was held on June 4, 2018 at the Laramie County Library.
  - b. The Wyoming Contractor's Association (WCA) is a member trade association consisting of general contractors, construction managers, specialty contractors and service/supplier companies supporting Wyoming's construction industry. There are minority and women businesses represented in these groups. Monthly meetings are held in conjunction with WYDOT's bid letting, with full open discussion. On April 11, 2018, WCA members were informed of the upcoming goal changes and encouraged to provide feedback. The proposed goal was presented at the WCA meeting on July 11, 2018.
2. Published Notice
  - a. A Public Legal Notice was published in the major newspaper representing the local market area, announcing the period of time for public comment on the proposed process, and where comments could be mailed or received. The notice was published on June 17, 2018 and again June 24, 2018.
  - b. The notice was posted on the WYDOT webpage on June 13, 2018.
  - c. The notice was distributed to relevant contractors, public entities and associations on June 13, 2018 and June 14, 2018, by either email or direct mail.
  - d. The notice was published in the Wyoming Contractor's Association (WCA) newsletter June 21, 2018.
3. Comments
  - a. One (1) comment was received regarding the overall DBE program, and not specific to the goal setting methodology and/or proposed goal.

Based on the best information, WYDOT will set an Annual Aspirational Goal of 4.78% for FY 2019 - FY 2021 to be attained by 100% race-neutral means.

### **STEP 3 ANALYSIS: RACE - AND GENDER - NEUTRAL/RACE - AND GENDER - CONSCIOUS**

WYDOT had reviewed factors to determine the race and gender neutral and/or race and gender conscious APG percentages as outlined in 49 CFR 26.51. As stated in 26.51(f)(3):

“If the DBE participation [WYDOT] has obtained by race-neutral means alone meets or exceeds [WYDOT’s] overall goals for two consecutive years, [WYDOT] is not required to make a projection of the amount of [WYDOT’s] goal [WYDOT] can meet using such means in the next year. [WYDOT] does not set contract goals on any contracts in the next year. [WYDOT] continues using only race-neutral means to meet [WYDOT’s] overall goals unless and until [WYDOT] does not meet [WYDOT’s] overall goal for a year.”

Therefore, WYDOT will continue utilizing an all race and gender neutral program to achieve the DBE goal, to be attained by 100% race-neutral means.

However, WYDOT reserves the right to evaluate typical construction projects (for example, involving grading, draining, paving and structures), for DBE goals. WYDOT will not use contract goals unless program administration determines that contract goals would better fulfill the program intent. WYDOT will not use quotas or set-aside contracts.

If WYDOT fails to meet its overall goal at the end of any fiscal year, the reasons for the shortfall will be analyzed thoroughly and a corrective action plan will be submitted to DOT.

*Ref: [49 CFR 26.41](#), [26.43](#), [26.45](#), [26.47](#) and [26.49](#)*

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**SUBPART C - GOALS, BONA-FIDE EFFORT AND COUNTING  
SECTION 2**

**RACE-NEUTRAL AND RACE-SPECIFIC MEASURES**

WYDOT will meet the maximum feasible portion of the Annual Participation Goal (APG) by using race-neutral means of facilitating DBE and small business participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures, is awarded a subcontract on a prime contract that does not carry a DBE contract goal, or even if there is a DBE contract goal, wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g., a prime contractor that uses a strict low bid system to award subcontracts).

Race-neutral means include, but are not limited to, the following:

1. Carrying out information and communication programs on contracting procedures and specific contract opportunities, such as ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors;
2. Providing a copy of the Invitation For Bids, when requested, to WYDOT-certified DBEs for each bid letting;
3. Providing services to help DBEs, and other small businesses, improve long term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self sufficiency;
4. Ensuring distribution of WYDOT's DBE directory, through print and electronic means, to potential prime contractors;
5. Providing technical assistance and other services;
6. Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media;
7. Providing assistance in overcoming limitations such as inability to obtain bonding or financing; and
8. As Federal funding is made available, WYDOT will implement a supportive services program to develop and improve immediate and long term business management, record keeping, and financial and accounting capability for DBEs and other small businesses.

Each time WYDOT submits its APG for review and approval by FHWA, WYDOT will also submit what portion of the APG that can be expected to be met through race-neutral means and the basis for that position.

WYDOT will use, if necessary, contract goals as a race-specific means of meeting any portion of the APG not achieved by use of race-neutral means.

The following provisions apply to the use of race-specific contract goals:

1. WYDOT will use contract goals only on those Federally-funded contracts that have subcontracting possibilities.
2. The goal for a specific contract may be higher or lower than that percentage level of the APG, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. However, over the period covered by WYDOT's APG, WYDOT will set contract goals so that they will cumulatively result in meeting any portion of WYDOT's APG not demonstrated as being able to meet through the use of race-neutral means.

3. Contract goals will provide for participation by all certified DBEs and not be subdivided into group specific contract goals.

To ensure that WYDOT's DBE program continues to be narrowly tailored to overcome the effects of discrimination, use of contract goals will be adjusted as follows:

1. If WYDOT concludes that WYDOT can meet the entire APG for a given year through race-neutral means, WYDOT will implement the program without using contract goals during that year.
2. If, during the course of any year in which WYDOT uses contract goals, WYDOT determines that the APG will be exceeded, WYDOT will reduce or eliminate the use of contract goals to the extent necessary to ensure that the use of contract goals does not result in exceeding the APG. If WYDOT determines that the APG will not be met, WYDOT will make appropriate modifications in the use of race-conscious measures to allow WYDOT to meet the APG.

In any year in which WYDOT meets part of the goal through race-neutral means and the remainder through contract goals, WYDOT will maintain data separately on DBE payments in those contracts with and without contract goals, respectively. WYDOT will report this data to FHWA as provided in 49 CFR 26.11.

To ensure that prime contractors are facilitating the utilization of DBE firms and small businesses by race-neutral means, they must incorporate the following procedures into their bidding process:

1. Offering Assistance. The prime contractor may offer assistance to DBEs and small businesses in the areas of interpreting plans, preparing proposals, providing advice to obtain bonding and insurance, etc. Any assistance requested or provided shall be documented.
2. Discussions with Small Businesses. The prime contractor shall respond to any requests from DBEs and small businesses that are submitting quotes, concerning: quantities, expected overtime, project scheduling, pit information (location, length of haul, type of road), method of measurement (seeding by the mile or acre, hauling by the ton-mile or by the hours, etc.), payment schedule, items of work included in the quote.
3. Accepting and Evaluating All Bids Offered. Prime contractors, DBEs and small businesses shall accept and evaluate all bids offered, regardless of work elements intended to be subcontracted. DBEs and small businesses should not be limited to smaller subcontracts because a larger amount of work is intended to be subcontracted to a larger business.
  - a. To better gain Program information, prime contractor's quotes received shall contain the name and address of the quoter, bid items, price per bid item, total quote, and conditions of the quote.
  - b. If a prime contractor, DBE firm or small business intends to use its own bulk items (such as petroleum products or fabrics) previously purchased in quantity or held in inventory, the quote for those items must include quantity purchased, date purchased, specific item, price for item, and quantity used to date, and must be signed by the prime contractor.

*Ref: [49 CFR 26.51](#)*

**SUBPART C - GOALS, BONA-FIDE EFFORT AND COUNTING  
SECTION 3**

**DOCUMENTED BID SOLICITATION PROCEDURES**

While this Section primarily references those projects involving Federal-aid funding in which WYDOT uses a DBE contract/ agreement goal, similar administrative procedures are followed when WYDOT operates a race-neutral program.

Documented bid solicitation will be required of all prime contractors, including DBE firms.

WYDOT will not use quotas for DBEs on Federal-aid contracts. WYDOT will not use set-aside contracts for DBEs on Federal-aid contracts.

When WYDOT uses a DBE contract goal, WYDOT will award the contract only to a bidder who makes documented bid solicitation to meet the contract goal. Award of the contract will be conditioned on meeting the requirements of this section when a bidder submits a responsive bid to a WYDOT letting. The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE requirements. Mere pro forma efforts are not satisfactory to meet the DBE contract requirements. The satisfactory efforts are discussed throughout the remainder of this section and apply to both race-neutral and race-conscious programs.

For FHWA contracts, WYDOT will incorporate a Special Provision for DBE Participation in each Federal-aid contract. The Special Provision will specify that each prime bidder shall record documented bid solicitations in the Electronic Bid System (EBS) and include supporting or additional documentation with their bid proposal. WYDOT will require that a *DBE Notification of Intent to Subcontract on Federal-aid Projects (Form DBE-2)* be submitted by the successful bidder for each DBE commitment listed in the EBS, with confirmation of quantities and dollar amounts, before any contract will be executed.<sup>1</sup>

For FAA and FTA agreements, certification of DBE commitment in the negotiation phases, and documentation of bid solicitations will be provided prior to issuance of *Notification to Proceed*.

Documented good-faith affirmative action taken to secure DBE participation will be made available to WYDOT if contract goals are used and verification of efforts are required. Documented affirmative action shall include, but will not necessarily be limited to, the following actions:

1. Advertising and soliciting through all reasonable and available means, including but not limited to in general-circulation, trade association and minority-focus media, attendance at pre-bid meetings, advertising and/or written notices, the interest of all certified DBEs who have the capability to perform the work of the contract concerning DBE subcontracting opportunities. The bidder must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.
2. Providing written notice to a reasonable number of specific DBEs that their interest in the contract is being solicited. The notice shall be provided in sufficient time to allow DBEs to participate effectively.
3. Following up the initial solicitations of interest by contacting DBEs to determine with certainty whether they are interested.

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<sup>1</sup> Sub-recipients of FHWA funds will complete, sign, and submit a *Disadvantaged Business Enterprise Participation Certification (Form E-91)* with their bid proposal certifying their commitment to eligible DBE's for participation in the performance of the contract.

4. Selecting portions of the work of the contract to be performed by DBEs in order to increase the likelihood of meeting DBE participation (including, where appropriate, breaking down contracts into economically feasible units to facilitate DBE participation), even when the prime contractor might otherwise prefer to perform these work items with its own forces.
5. Providing interested DBEs with adequate information about the plans, specifications and requirements of the contract in a timely manner to assist them in responding to a solicitation.
6. Negotiating in good-faith with interested DBEs and not rejecting any DBEs as unqualified without sound reasons based on a thorough investigation of the DBEs capabilities. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.

A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make documented solicitations. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

7. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance required by the prime bidder.
8. Effectively using the services of available minority community organizations, minority contractor groups, local, State and Federal minority business assistance offices, and other organizations that provide assistance for and placement of DBEs.
9. Securing a DBE replacement for each DBE that will not or cannot honor a commitment to perform subcontract work or supply materials. (Similar documented affirmative action shall be taken in securing DBE replacements as that required initially).

Affirmative action taken by bidders, contractors and DBE subcontractors to fulfill the contract DBE participation requirements will not be deemed to have been taken in efforts if, given all relevant circumstances, the action could not reasonably be expected to produce a level of DBE participation. The action taken must be that which, given all relevant circumstances, a bidder actively and aggressively seeking, would make.

Documents submitted by prime bidders, contractors and subcontractors, that are intended to support good-faith affirmative actions taken to meet the contract DBE participation, may be reviewed to verify affirmative action taken. The reviewing officer will make a determination concerning the sufficiency of the action taken based on the documentation submitted.

In determining whether a bidder has documented bid solicitation, WYDOT may take into account the performance of other bidders in meeting the contract goal. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, WYDOT may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, WYDOT may view

this, in conjunction with other factors, as evidence of the apparent successful bidder having made documented solicitations.

If it is determined that a prime bidder did not document their bid solicitations to meet the specified DBE participation the bidder may be deemed to be non-responsive, and the bid proposal submitted may be declared irregular and subject to rejection by the Transportation Commission of Wyoming.

Evidence of collusion among the prime bidders, a DBE, or any other individual, business or joint venture, or evidence of undue influence on a DBE to alter the committed quantities or its quotation, may result in cancellation of the award, withdrawal of bidder prequalification, and/or denial by the State Construction Engineer of approval of future contract and/or subcontract work by the implicated parties.

The State Construction Engineer will review all subcontract requests by prime contractors and recommend approval or disapproval. The State Construction Engineer will not approve any subcontract to a DBE or non-DBE which violates the commitments made to DBE subcontractors in the prime contractor's bid proposal. The prime contractor must fulfill the original subcontract commitment to a DBE unless a written statement is submitted from the DBE that they cannot or will not accept the proposed subcontract. At that time, the contractor may subcontract this work to another DBE, if approved by the State Construction Engineer.

Documented bid solicitations must be made to fulfill the original DBE subcontract commitments made in the EBS using certified DBE's. If, after making a documented effort to find another DBE, the contractor is unsuccessful, the contractor may elect to:

1. Complete the work with the prime contractor's own work force; or
2. Subcontract the work to a non-DBE contractor.

If it is determined that a prime contractor has not taken good-faith affirmative action to replace a DBE that fails to perform under its subcontract with other DBEs; or that a DBE subcontractor has not taken good-faith affirmative action to secure DBEs for lower-tier subcontract work, the State Construction Engineer may not approve the subcontract request.

The prime contractor may not terminate for convenience a DBE subcontractor listed in the EBS, or an approved substitute subcontracting DBE firm, and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without WYDOT's prior written consent.

If a DBE subcontractor is terminated, or fails to complete its work on the contract for any reason, WYDOT will require the prime contractor to make documented solicitations to find another DBE subcontractor to substitute for the original DBE. These solicitations shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal WYDOT established for the project.

If the prime contractor elects to perform the work original committed to a DBE without approval, or subcontract all or a portion of the work of the DBE subcontract without approval, the Prime contractor will be found in noncompliance and payment may be withheld until the project is brought back into compliance.

Failure to comply with these requirements may result in any or all administrative relief and penalties that the contract, Program regulations, Federal regulations, and laws of the State of Wyoming may provide.

### **LOWER TIER SUBCONTRACTS**

A subcontractor on WYDOT contracts also may subcontract a portion of its subcontract work to other subcontractors. Such lower-tier subcontract requests, as in the case of first-tier subcontracts, must be approved

by the State Construction Engineer. The prime contractor and subcontractors at all levels will be limited to a total subcontract amount not to exceed 50% of the original contract amount.

DBE subcontractors requesting approval of lower-tier subcontracts to non-DBEs will be required to submit supplementary documentation with their lower-tier subcontract, substantiating their documented bid solicitations to secure eligible DBEs to perform the work. The action taken shall be the same as that required of the prime bidder for initial DBE subcontract commitments. The prime contractor will be responsible to ensure that DBE subcontractors requesting approval of lower-tier subcontracts has made a sufficient effort to secure DBEs to perform the lower-tier subcontract work.

The monetary value of all DBE lower-tier subcontracts will be included in meeting the project goals. Any work subcontracted, at any tier, to a non-DBE by a DBE will not be counted toward the contract goal and the prime contractor will be required to make documented bid solicitations to subcontract an equal dollar amount of work to another DBE.

*Ref: 49 CFR 25.43, 26.53, Appendix A*

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## **SUBPART C - GOALS, BONA-FIDE EFFORT AND COUNTING**

### **SECTION 4**

#### **COUNTING DBE PARTICIPATION**

WYDOT will monitor DBE participation for all Federal-aid transportation contracts. DBE participation will be based in the monetary value of work performed by DBEs, consistent with this Section. Monitoring will be conducted on all of these contracts, whether or not the project has a DBE project goal, by WYDOT personnel at the project site.

When a DBE participates in a contract, WYDOT will count only the value of the work actually performed by the DBE toward the DBE requirements. WYDOT will count only the amount of payments made directly to the DBE. WYDOT will count payments to a DBE contractor only if the DBE is performing a commercially useful function on that contract.

If a firm is not currently certified as a DBE in accordance with the standards of Subpart D of this Plan at the time of the execution of the contract, WYDOT will not count the firm's participation toward any DBE requirements.

WYDOT will not count towards the overall DBE requirements the dollar value of work performed under a contract with a firm after it has ceased to be certified.

WYDOT will not count the participation of a DBE subcontractor toward the prime contractor's DBE achievements or WYDOT's overall DBE APG until the dollar amount being counted has been paid directly to the DBE.

#### **COMMERCIALLY USEFUL FUNCTION (CUF) AND COUNTING**

A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, WYDOT will evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors. This verification will be made by WYDOT personnel at the project site. The form is completed in WYDOT's construction management system (CMS) and reviewed by the DBE office for tracking purposes.

A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, WYDOT will examine similar transactions, particularly those in which DBEs do not participate.

A DBE subcontractor will not be performing a commercially useful function if WYDOT determines that:

1. The prime contractor is performing all or any portion of the DBE subcontract work.
2. The prime contractor is directing or supervising any portion of the DBE subcontract work.
3. The DBE owner(s) or principal employee(s) are employed by the prime contractor or other subcontractors.
4. The DBE subcontractor is performing all or a portion of the subcontract work with manpower or equipment furnished by the prime contractor or other subcontractors at no cost, or with equipment leased from the prime contractor or other subcontractors at non-competitive rates.

5. Payment for equipment leased from the prime contractor or other subcontractors by the DBE subcontractor is being withheld from the DBE's payments.
6. Materials and supplies necessary for completion of the DBE subcontract work are being purchased by the prime contractor or other subcontractors and furnished to the DBE subcontractor.
7. The DBE subcontractor does not have exclusive use of leased equipment.
8. The DBE subcontractor is not paying for required insurance coverage and permits for leased equipment.
9. Leased equipment is not being operated by the DBE subcontractor's own employees (except for certain specialized equipment).
10. Bulk products such as cement, aggregate, stone, structural steel and petroleum products being supplied by the DBE Regular Dealer are being paid for by the prime contractor or other subcontractors.
11. The DBE Regular Dealer in bulk products is not delivering the products to the job site with equipment owned and operated by them.
12. The DBE Regular Dealer in bulk products does not have Wyoming PSC authority to operate the delivery equipment it owns or operates for delivery of bulk products to the job site.
13. The DBE Regular Dealer in bulk products is operating its delivery equipment under another firm's Wyoming PSC authority.
14. The DBE subcontractor for hauling of excavated materials, virgin aggregates, recycled pavement materials, and paving materials being produced by the prime contractor and other subcontractors is not transporting the materials with equipment owned or operated by it under its own Wyoming PSC authority.
15. The DBE subcontractor is acting as a broker or packager.

### **DBE CONTRACTORS/SUBCONTRACTORS**

#### **Counting**

WYDOT will count 100% of the actual payments to DBEs for work performed on a contract toward the contract DBE participation requirements. WYDOT will count the entire amount of that portion of a construction contract that is performed by the DBE's own forces. This includes the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE, except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate.

When a DBE subcontracts work to another firm, the value of the subcontracted work may be counted toward DBE requirements only if the subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward the DBE requirements.

When a DBE performs as a participant in a joint venture, only the clearly defined portion on the contract that the DBE performs with its own forces will be counted towards the DBE .

WYDOT will count the following payments to DBE prime contractors and subcontractors that are not Regular Dealers or Manufacturers toward the contract DBE requirements:

1. The fees charged for delivery of materials and supplies required on a job site, but not the cost of the materials and supplies themselves, when the DBE firm is not also the manufacturer or regular dealer in the materials

and supplies, provided that the fee is determined by WYDOT to be reasonable and not excessive as compared with fees customarily allowed for similar services.

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

WYDOT will count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a Federally-funded contract, toward the DBE requirements, provided WYDOT determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.

#### **Commercially Useful Function**

To determine whether a DBE contractor/subcontractor company is performing a commercially useful function, WYDOT will review the following:

With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, WYDOT will count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE requirements, provided WYDOT determines the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. WYDOT will not count any portion of the cost of the materials and supplies themselves toward DBE requirements.

### **DBE MANUFACTURERS**

#### **Counting**

If the materials or supplies are obtained from a DBE manufacturer, WYDOT will count 100% of the payments for materials and supplies required under a contract, including delivery to the job site, toward the DBE requirements.

#### **Commercially Useful Function**

A manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

WYDOT will require that a manufacturer of materials or supplies obtained for the performance of the prime contract or any subcontracts be certified as an eligible DBE by WYDOT, and specifically designated as a Manufacturer by WYDOT, before expenditures for materials purchased from such firms will be counted toward the contract DBE participation requirements.

A firm, in order to be designated as a manufacturer by WYDOT, shall own and operate or maintain a factory or establishment that produces on the premises the materials or supplies obtained for the performance of the prime contract or any subcontracts. Brokers and packagers will not be regarded by WYDOT as manufacturers. The materials or supplies obtained from a designated manufacturer must be manufactured from raw materials or materials that are substantially altered before resale.

### **DBE MATERIAL SUPPLIERS AND REGULAR DEALERS**

#### **Counting**

WYDOT will count 60% of the payments for materials and supplies required under a contract, including delivery to the job site, which are purchased from a DBE regular dealer.

### **Commercially Useful Function**

To determine whether a DBE regular dealer company is performing a commercially useful function, WYDOT will review the following:

1. For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.
2. To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.
3. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not considered regular dealers.
4. WYDOT will require that a regular dealer of materials or supplies obtained for the performance of the prime contract or any subcontracts be certified as an eligible DBE by WYDOT, and specifically designated as a regular dealer by WYDOT, before expenditures for materials purchased from such firms will be counted toward the contract DBE requirements.

### **DBE TRUCKING FIRMS**

#### **Counting**

WYDOT will count 100% of the total value of the transportation services the DBE trucking firms provides on the contract using trucks its owns, insures, and operates using drivers it employs.

The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.

The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit for the total value of the transportation services provided by non-DBE lessees not to exceed the value of transportation services provided by DBE-owned trucks on the contract. Additional participation by non-DBE lessees receives credit only for the fee or commission it receives as a result of the lease arrangement.

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

#### **Commercially Useful Function**

To determine whether a DBE trucking company is performing a commercially useful function, WYDOT will review the following:

1. For DBE participation to be credited, the trucking firm must be covered by a subcontract or a written agreement approved by the WYDOT prior to performing their portion of the work.
2. To perform a commercially useful function (CUF), the trucking firm is restricted to the same subcontracting limitations in effect for other contractors.

3. The DBE must be responsible for the management and supervision of the entire trucking fleet and operation for which it has subcontracted on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.
4. The DBE must itself own and operate, including CDL drivers, at least one fully licensed, insured, and operational tractor and trailer, or tractor and appropriate hauling units, to be used on the contract.

*Ref: [49 CFR 26.55](#)*

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**SUBPART D - CERTIFICATION STANDARDS  
SECTION 1**

**CERTIFICATION OF DBE ELIGIBILITY**

The integrity and credibility of the WYDOT DBE Program depends upon the establishment of systematic procedures to ensure that only bona fide small business firms independently owned and controlled in both substance and form by one or more socially and economically disadvantaged individuals participate in the DBE program. Therefore, ascertaining the eligibility of prospective DBEs is critically important component of WYDOT's DBE program. Procedures established to fulfill this aspect of the DBE program are what is known as the Certification Process. This process consists of sequential steps to certify that the prospective DBE is eligible to participate in the program. These steps are:

1. Collecting the specified and necessary information from the prospective DBE:
2. Applying the criteria for eligibility set forth in the WYDOT DBE program; and
3. Certifying (or denying) that the prospective DBE is eligible to participate in WYDOT's DBE program.

This Subpart will outline the eligibility criteria which must be address in the certification process. Subpart E will address the actual certification procedures.

**CERTIFICATION OF DBE ELIGIBILITY - BURDEN OF PROOF**

In determining whether to certify a firm as eligible to participate as a DBE, WYDOT will apply the standards of this subpart. Any firm seeking certification has the burden of demonstrating to WYDOT, by a preponderance of the evidence, that it meets the requirements of this Subpart concerning group membership or individual disadvantage, business size, ownership, and control.

WYDOT must rebuttably presume that members of the designated groups identified in Section 4 of this Subpart and 49 CFR 26.67(a) are socially and economically disadvantaged. This means that they do not have the burden of proving to WYDOT that they are socially and economically disadvantaged. In order to obtain the benefit of the rebuttable presumption, individuals must submit a signed, notarized statement that they are a member of one of the groups in §26.67(a). Applicants do have the obligation to provide WYDOT information concerning their economic disadvantage.

Individuals who are not presumed to be socially and economically disadvantaged, and individuals concerning whom the presumption of disadvantage has been rebutted, have the burden of proving to WYDOT, by a preponderance of the evidence, that they are socially and economically disadvantaged.

WYDOT will 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.

All applicants to WYDOT's DBE program are required to cooperate fully and promptly with WYDOT certification reviews, investigations, and other requests for information. Failure to do so may be grounds for appropriate action against the party involved, such as denial of certification, removal of eligibility, and/or suspension and debarment.

All currently WYDOT-certified DBE firms will be certified by the standards of 49 CFR 26 by October 1, 1999.

*Ref: [49 CFR 26.61](#)*

**SUBPART D - CERTIFICATION STANDARDS  
SECTION 2**

**CERTIFICATION OF DBE ELIGIBILITY - GROUP MEMBERSHIP**

If, after reviewing the signed notarized statement of membership in a presumptively disadvantaged group, WYDOT has a well founded reason to question the individual's claim of membership in that group, WYDOT must require the individual to present additional evidence that he or she is a member of the group. WYDOT will provide a written explanation of the reasons for questioning his or her group membership and a written request for additional evidence.

In making such a determination, WYDOT will consider whether the person currently holds himself out to be a member of the group, 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 and has been regarded as a member of the group by the relevant community. WYDOT may require the applicant to produce appropriate documentation of group membership.

If WYDOT 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.

*Ref: [49 CFR 26.63](#)*

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**SUBPART D - CERTIFICATION STANDARDS  
SECTION 3**

**CERTIFICATION OF DBE ELIGIBILITY - BUSINESS SIZE**

To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. WYDOT will 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 DOT-assisted contracts.

The business must provide more than **prima facie** evidence that it does not exist just on paper, and has not been organized in an attempt to take advantage of contract DBE participation goals. The disadvantaged owner(s) must possess the resources and the expertise to operate the business in its field of work.

Even if the firm meets these requirements of this section, it 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. The Secretary adjusts this amount for inflation from time to time.

Applicant firms determined to be disadvantaged by the Small Business Administration (SBA) pursuant to Section 8(a) of the Small Business Act will be conclusively presumed by WYDOT to be socially and economically disadvantaged. Such firms will be required to submit an *Application for Certification of Eligibility*, together with submission of documentation of current SBA 8(a) certification. However, WYDOT's determination of DBE eligibility for SBA 8(a) certified firms will be limited to determining that the firm meets the SBA size standards stated above. If it is determined that an SBA 8(a) certified firm does not meet the size standard, the firm's eligibility will be denied or revoked, as appropriate, and SBA will be notified.

The information WYDOT will require in order to make a size determination for applicant firms includes certified financial statements and Federal tax returns for the three most recent fiscal years, and information regarding the firm's owners, managers, and key employees; location and ownership of facilities; source and size of work force and equipment; and the extent to which the business relies on other companies for services.

*Ref: [49 CFR 26.65](#), and [49 CFR 23 - Appendix A to Subpart F](#)*

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**SUBPART D - CERTIFICATION STANDARDS  
SECTION 4**

**CERTIFICATION OF DBE ELIGIBILITY - DETERMINATION OF SOCIAL AND ECONOMIC DISADVANTAGE**

**Presumption of Disadvantage**

WYDOT will rebuttably 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. WYDOT will require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

WYDOT will 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 certifying that he/she has a personal net worth that does not exceed \$1.32 million, with appropriate supporting documentation.

In determining an individual's net worth, WYDOT will observe the following requirements and exclude an individual's ownership interest in the applicant firm, and the individual's equity in his or her primary residence. A contingent liability does not reduce an individual's net worth. With respect to assets held in vested pension plans, Individual Retirement Accounts, 401(k) accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time without significant adverse tax or interest consequences, include only the present value of such assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time.

The personal net worth of an individual claiming to be an Alaska Native will include assets and income from sources other than an Alaska Native Corporation and exclude any of the following which the individual receives from any Alaska Native Corporation: cash (including cash dividends on stock received from an ANC) to the extent that it does not, in the aggregate, exceed \$2,000 per individual per annum; stock (including stock issued or distributed by an ANC as a dividend or distribution on stock); a partnership interest; land or an interest in land (including land or an interest in land received from an ANC as a dividend or distribution on stock); and an interest in a settlement trust.

Notwithstanding any provision of Federal or state law, WYDOT will 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. Provided, that WYDOT must transmit this information to DOT in any certification appeal proceeding under §26.89 in which the disadvantaged status of the individual is in question.

**Rebuttal of Presumption of Disadvantage**

If the statement of personal net worth that an individual submits shows that the individual's personal net worth exceeds \$1.32 million, the individual's presumption of economic disadvantage is rebutted.

If WYDOT 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 WYDOT may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. WYDOT may require the individual to produce information relevant to the determination of his or her disadvantage.

When an individual's presumption of social 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 subpart 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 \$1.32 million, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage.

### **SBA 8(a) and SDB Firms**

If a firm applying for certification has a current, valid certification from or recognized by the SBA under the 8(a), or Small and Disadvantaged Business (SDB) Program except an SDB certification based on the firm's self-certification as an SDB, WYDOT may accept the firm's 8(a) or SDB certification in lieu of conducting its own certification proceeding, just as WYDOT may accept the certification of another DOT recipient for this purpose. WYDOT is not required to do so, however.

### **Individual Determinations of Special and Economic Disadvantage**

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. WYDOT will 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 WYDOT, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds \$1.32 million shall not be deemed to be economically disadvantaged. WYDOT will require that applicants provide sufficient information to permit determinations under the guidelines outlined below.

## **DETERMINATION GUIDELINES**

The following guidance is adapted, with minor modifications by FHWA, from SBA regulations concerning social and economic disadvantage determinations.

### **Presumed Socially and Economically Disadvantaged Individuals**

Pursuant to 49 CFR 26.5, women and members of the following designated groups whose minority status is clearly established will be presumed by WYDOT to be both socially and economically disadvantaged.

1. Black Americans
2. Hispanic Americans
3. Native Americans
4. Asian-Pacific Americans
5. Subcontinent Asian Americans
6. Other persons certified by the SBA pursuant to the 8(a) program to be both socially and economically disadvantaged.

When considering the DBE eligibility, of firms owned by individuals whose race/ethnic origin is in question, WYDOT will apply the particular minority community recognition test to determine if the individuals have held themselves out to be members of the minority community and are so recognized by that community.

If the appropriate minority community necessary for determining the applicant's minority status does not exist, WYDOT will require that the applicant provide proof of social and economic disadvantage.

Minority status or ancestry alone will not be accepted by WYDOT as conclusive proof of an individual's social and economic disadvantage if the individual has not maintained identification with his/her respective group, has not held himself or herself out to be a member of his/her respective group, and is not identified by persons in the population at large as belonging to the respective group. In such cases, WYDOT will require the individual to demonstrate both social and economic disadvantage.

WYDOT will require persons who are not members of one of the designated groups presumed to be socially and economically disadvantaged to demonstrate both social and economic disadvantage.

### **Individual Determinations of Social and Economic Disadvantage**

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. Social disadvantage of an individual may be demonstrated to WYDOT by submitting evidence of systematic exclusion, based solely upon racial, ethnic or cultural bias, from those opportunities and institutions which afford individuals the chance to improve and advance themselves. Evidence of individual social disadvantage must include, but will not necessarily be limited to the following elements:

1. 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.
2. Evidence of educational discrimination in professional and business schools showing disproportionate educational opportunities for those individuals not considered to be members of the socially disadvantaged group. WYDOT 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.
3. Evidence of employment discrimination showing disproportionate employment opportunities for those individuals not considered to be members of the socially disadvantaged group. WYDOT 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.
4. Evidence showing disproportionate opportunities for individuals not considered to be members of a socially disadvantaged group to engage in the kinds of businesses and business transactions in which the individual is engaged. WYDOT 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.
5. Negative impact on entry into or advancement in the business world because of the disadvantage. WYDOT will consider any relevant evidence in assessing this element. In every case, however, WYDOT 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.
6. Evidence of denial of access to organizations, groups, or professional societies, whether in business or in school, based solely upon racial and/or ethnic considerations.
7. Any other evidence of denial of opportunity or access to those things available to individuals not considered to be members of the socially disadvantaged group which would enable the individual to advance the quality of his/her life.
8. Personal experiences of substantial and chronic social disadvantage in American society, not in other countries.

With respect to paragraph 1 above, WYDOT 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. WYDOT recognizes plausible that many individuals with disabilities - especially persons with severe disabilities (e.g., significant mobility, vision, or hearing impairments) - may be socially and economically disadvantaged.

Under the laws concerning social and economic disadvantage, people with disabilities are not a group presumed to be disadvantaged. Nevertheless, WYDOT will 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 program. As public entities subject to Title II of the ADA, WYDOT will 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 will not restrict the access of potential applicants to the certification process or other services made available to DBEs and applicants.

**General.** Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.

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. When married, an individual claiming economic disadvantage also must submit separate financial information for his or her spouse, unless the individual and the spouse are legally separated.

Economic disadvantage of an individual may be demonstrated to WYDOT by submitting evidence of an inability of the individual to compete in the free enterprise system due to impaired capital and credit opportunities. Demonstrative evidence may include, but will not necessarily be limited to the following:

1. Statistical profile outlining the income level and standard of living enjoyed by individuals not considered to be members of an economically disadvantaged group as compared to the income level and standard of living of the individual.
2. Availability of capital to those individuals not considered to be members of an economically disadvantaged group as compared to the availability of capital to the individual.
3. Availability of technical and managerial resources to individuals not considered to be members of an economically disadvantaged group as compared to the availability of technical and managerial resources to the individual.
4. Any other evidence of impaired capital or credit opportunities of the individual.

**Factors to be considered.** In considering diminished capital and credit opportunities, WYDOT 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. WYDOT 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 WYDOT will compare include total assets, net sales, pre-tax profit, sales/working capital ratio, and net worth.

**Transfers within two (2) years.** WYDOT 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, unless 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.

WYDOT 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.

In determining an individual's access to capital and credit, WYDOT 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 (e.g., transfers to charities).

*Ref: 49 CFR 26.67, Appendix E*

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**SUBPART D - CERTIFICATION STANDARDS  
SECTION 5**

**CERTIFICATION OF DBE ELIGIBILITY - DETERMINATION OF OWNERSHIP**

Once WYDOT has determined the business size of an applicant firm, and the social and economic disadvantage of the owners of the firm, ownership and control of the firm will be evaluated to determine whether the firm is in fact independently owned and controlled by one or more socially and economically disadvantaged individuals.

WYDOT will not consider an applicant firm to be independently owned if it is inextricably associated with another through ownership, affiliation, sharing of employees, facilities, profits and losses. Factors which will be considered by WYDOT in determining whether the firm is independently owned will include the date the firm was established, the adequacy of the financial and physical resources for the work involved, and the degree to which financial, equipment leasing, business, and other relationships with non-minority firms vary from normal industry practice.

1. In determining whether the socially and economically disadvantaged participants in a firm own the firm, WYDOT will consider all the facts in the record, viewed as a whole.
2. To be an eligible DBE, a firm must be at least 51% owned by socially and economically disadvantaged individuals, as outlined below:
  - a. In the case of a corporation, such individuals must own at least 51% of the each class of voting stock outstanding and 51% of the aggregate of all stock outstanding.
  - b. In the case of a partnership, 51% of each class of partnership interest must be owned by socially and economically disadvantaged individuals. Such ownership must be reflected in the firm's partnership agreement.
  - c. In the case of a limited liability company, at least 51% of each class of member interest must be owned by socially and economically disadvantaged individuals.
3. The firm's ownership by socially and economically disadvantaged individuals must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.
4. All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Except as provided in this paragraph, 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:
  - a. 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
  - b. 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.
5. The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must 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.

6. The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership:
  - a. The owner's expertise must be:
    - i. In a specialized field;
    - ii. Of outstanding quality;
    - iii. In areas critical to the firm's operations;
    - iv. Indispensable to the firm's potential success;
    - v. Specific to the type of work the firm performs; and
    - vi. Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.
  - b. The individual whose expertise is relied upon must have a significant financial investment in the firm.
7. WYDOT will always deem 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:
  - a. 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
  - b. Through inheritance, or otherwise because of the death of the former owner.
8. WYDOT will 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:
  - a. Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;
  - b. Involved in the same or a similar line of business; or
  - c. 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 WYDOT, by clear and convincing evidence, that:

- d. The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
  - e. 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.
9. WYDOT will apply the following rules in situations in which marital assets form a basis for ownership of a firm:

- a. 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, WYDOT will 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. WYDOT will 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.
  - b. 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.
10. WYDOT may consider the following factors in determining the ownership of a firm. However, WYDOT must not regard a contribution of capital as failing to be real and substantial, or find a firm ineligible, solely because:
- a. A socially and economically disadvantaged individual acquired his or her ownership interest as the result of a gift, or transfer without adequate consideration, other than the types set forth in paragraph 8 of this section;
  - b. 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
  - c. 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, WYDOT will 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.

*Ref: [49 CFR 26.69](#)*

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**SUBPART D - CERTIFICATION STANDARDS  
SECTION 6**

**CERTIFICATION OF DBE ELIGIBILITY - DETERMINATION OF CONTROL**

Once WYDOT has determined the business size of an applicant firm, and the social and economic disadvantage of the owners of the firm, and ownership, control of the firm will be evaluated to determine whether the firm is in fact independently owned and controlled by one or more socially and economically disadvantaged individuals.

WYDOT will not consider the disadvantaged owner(s) of an applicant firm to be in control of the firm if they do not possess experience and technical competence in the types of work which the firm typically performs. In determining control, the State Construction Engineer or his representative will perform an on-site visit to the offices of the firm and to job sites on which the firm is working, as necessary, to interview the disadvantaged owner(s) and key employees of the firm to determine if the disadvantaged owner(s) possesses the power to make independent and unilateral business decisions which guide the firm.

1. In determining whether socially and economically disadvantaged owners control a firm, WYDOT will consider all the facts in the record, viewed as a whole.
2. 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.
  - a. In determining whether a potential DBE is an independent business, WYDOT will scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.
  - b. WYDOT will 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. WYDOT will 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.
  - d. In considering factors related to the independence of a potential DBE firm, WYDOT will consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.
3. 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 as provided for in 49 CFR 26.69(j)(2).
4. 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.

- a. A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president).
  - b. In a corporation, disadvantaged owners must control the board of directors.
  - c. In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.
5. 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.
6. The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policy making, 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 WYDOT can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.
7. 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 policy making. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.
8. If Wyoming law 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 Wyoming state law or local law does not require such a person to have such a license or credential to own and/or control a firm, WYDOT will not deny certification solely on the ground that the person lacks the license or credential. However, WYDOT 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.
9. WYDOT may consider 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 will 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.

In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, WYDOT 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.

10. 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.
11. 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.

If WYDOT 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.

12. 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 WYDOT, 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.

13. In determining whether a firm is controlled by its socially and economically disadvantaged owners, WYDOT may consider whether the firm owns equipment necessary to perform its work. However, WYDOT will 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.
14. WYDOT will 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 will need to demonstrate to WYDOT that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work.
15. A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, WYDOT will 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.
16. 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.

## TRUCKING FIRMS

To be certified as a trucking firm, the DBE must own at least one fully operational truck and tractors/trailer that are used on a day-to-day basis, and must be operating with their own Public Service Commission (PSC) authority.

Trucking firms may rent or lease trucks from other sources, except from the prime contractor for whom they are subcontractors, with the condition that only the vehicle is rented or leased and the DBE submits valid lease agreements on all trucks to be leased prior to beginning of work

For each fully operational truck/trailer unit that the DBE firm owns, the DBE firm may lease or rent two (2) truck/trailer units

All lease agreements shall include the lessor's name, the trucks to be leased, and the agreed upon payment. Operators, fuel, maintenance and insurance for all leased trucks must be the sole responsibility of the DBE. All leased trucks must operate under the DBE's PSC authority.

Trucking firms may utilize owner/operator trucks; however, the number of owner/operator trucks may not exceed any limitations on subletting the work specified in the WYDOT contract provisions. All owner/operators must appear on the contractor's or subcontractor's certified payroll designated as owner/operators. However, since contract wage rates are not applicable, the hours worked or wages paid may be reflected either on the payroll or on the record of payments to each owner/operator.

*Ref: [49 CFR 26.71](#)*

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**SUBPART D - CERTIFICATION STANDARDS  
SECTION 7**

**CERTIFICATION OF DBE ELIGIBILITY - OTHER RELEVANT FACTORS**

1. WYDOT 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.

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 DBEs. WYDOT will not consider commercially useful function issues in any way in making decisions about whether to certify a firm as a DBE.

2. WYDOT will evaluate the eligibility of a firm on the basis of present circumstances.
3. DBE firms and firms seeking DBE certification must cooperate fully with WYDOT'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.
4. Only firms organized for profit may be eligible DBEs. Not-for-profit organizations, even though controlled by socially and economically disadvantaged individuals, are not eligible to be certified as DBEs.
5. An eligible DBE 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 instead is owned by another firm – even a DBE firm – cannot be an eligible DBE.
  - a. If socially and economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, WYDOT may certify the subsidiary if it otherwise meets all requirements of this subpart. 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.
  - b. WYDOT may certify such a subsidiary only if there is cumulatively 51% ownership of the subsidiary by socially and economically disadvantaged individuals.
6. 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.
7. WYDOT will not require a DBE firm to be prequalified as a condition for certification.
8. A firm that is owned by an Indian tribe, or Native Hawaiian organization as an entity, rather than by Indians, Alaska Natives, or Native Hawaiians as individuals, may be eligible for certification. Such a firm must meet the size standards set out in 49 CFR 26.65. Such a firm must be controlled by socially and economically disadvantaged individuals, as provided in 49 CFR 26.71.
9. The following special rules apply to the certification of firms related to Alaska Native Corporations (ANCs).
  - a. 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:

- i. 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 decedents 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;
  - ii. 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;
  - iii. The subsidiary, joint venture, or partnership entity has been certified by the Small Business Administration under the 8(a) or small disadvantaged business program.
- b. As a recipient to whom an ANC-related entity applies for certification, WYDOT does not use the DOT uniform application form. WYDOT must obtain from the firm documentation sufficient to demonstrate the entity meets the requirements of this section. WYDOT must also obtain sufficient information about the firm to allow WYDOT to administer our program (e.g., information that would appear in WYDOT's DBE Directory).
- c. If an ANC-related firm does not meet all the conditions of this section, then it must meet the requirements of paragraph 8 of this section in order to be certified, on the same basis as firms owned by Indian Tribes or Native Hawaiian Organizations.

*Ref: [49 CFR 26.73](#)*

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**SUBPART E - CERTIFICATION PROCEDURES  
SECTION 1**

**UNIFIED CERTIFICATION PROGRAM**

In accordance with 49 CFR 26.81(b), the Wyoming Department of Transportation (WYDOT) will assume the responsibilities as the Unified Certification Program (UCP) Lead Agency. As the UCP Lead Agency, WYDOT will make all certification decisions on behalf of all DOT recipients (FHWA, FTA and FAA) in the State of Wyoming with respect to participation in the USDOT DBE Program.

WYDOT will ensure that, as the UCP Lead Agency:

1. WYDOT will follow all certification procedures in 49 CFR 26, Subparts D and E.
2. WYDOT will cooperate fully with oversight, review, and monitoring activities of USDOT and its operating administrations.
3. WYDOT will implement DOT directives and guidance concerning certification matters.

Certification decisions by WYDOT will be binding on all DOT recipients in the state and shall provide “one-stop shopping” 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.

WYDOT will carry out all obligations with respect to certification and nondiscrimination and ensure that recipients that are party to the UCP establish the same nondiscrimination obligations in their respective DBE Programs.

All certifications by WYDOT will be pre-certifications, meaning certifications will have been made final before the due date for bids or offers on a contract on which a firm seeks to participate as a DBE.

As the UCP Lead Agency, WYDOT is not required to process an application for certification from a firm having its principal place of business outside the state if a firm is not certified by the UCP in the state in which it maintains its principal place of business.

As the UCP Lead Agency, WYDOT will maintain a unified DBE directory of all firms certified by WYDOT containing the information required in 49 CFR 26.31. The DBE directory is available at the WYDOT website:

[http://www.dot.state.wy.us/home/business\\_with\\_wydot/contractors/Disadvantaged\\_Business\\_Enterprise.html](http://www.dot.state.wy.us/home/business_with_wydot/contractors/Disadvantaged_Business_Enterprise.html)

In order to be a party to the UCP, each recipient must submit their home state certification documentation along with any accompanying documents to make a determination of eligibility. This information must be submitted to the DBE Certification Officer, at the Wyoming Department of Transportation, 5300 Bishop Blvd., Cheyenne, WY 82009-3340.

*Ref: [49 CFR 26.81](#)*

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**SUBPART E - CERTIFICATION PROCEDURES  
SECTION 2**

**CERTIFICATION PROCEDURES**

WYDOT will certify the eligibility of DBEs in accordance with the criteria set forth in 49 CFR 26 consistent with the standards of Subpart D to ensure that its DBE program benefits only those firms owned and controlled by disadvantaged individuals.

1. WYDOT will require each prospective DBE to complete and submit a *Disadvantaged Business Enterprise (DBE) Uniform Certification Application*, unless the potential DBE is an SBA-certified firm applying pursuant to the DOT/SBA MOU. All information required in the application, and all required supporting documents must be submitted. The applicant will attest to the accuracy and truthfulness of the information on the application through an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths. Within thirty (30) calendar days of receipt, the applicant will be notified by mail or email if the application is incomplete or any of the required supporting documents are not included. A time limit of thirty (30) calendar days will be imposed for submission of missing information and documents. The applicant may be denied eligibility if the missing information and documents are not submitted within the imposed thirty (30) calendar day time limit.

When another recipient ("State A") has certified a firm, WYDOT will follow the interstate certifications outlined in *49 CFR 26.85*. Specifically, WYDOT will either accept State A's certification and certify the firm without further procedures or request the applicant submit a complete copy of their original application form, to include all supporting documents and any other information submitted to State A. This includes affidavits, notices of change and/or correspondence submitted to State A or any other recipient concerning their application and/or status as a DBE firm. An affidavit affirming that all information has been submitted, and is complete and identical to that submitted to State A, will be required.

WYDOT is not required to process an application for certification from an SBA-certified firm if the firm does not provide products or services that WYDOT or its UCP partners would use in their DOT-assisted programs or airport concessions.

2. Upon receipt of the completed application, and supporting documents, WYDOT will evaluate all information on the application prior to making a decision about the eligibility of the firm. Decisions regarding certification shall not exceed ninety (90) days.

The review will include, but is not limited to:

- a. Documentation related to the legal structure, ownership and control of the applicant firm;
- b. The bonding and financial capacity of the firm, lease and loan agreements, bank signature cards;
- c. Work history of the firm, including contracts it has received, work it has completed and payroll records;
- d. A statement from the firm of the type of work it prefers to perform as part of the DBE program and its preferred locations for performing the work, if any;
- e. List(s) of the equipment owned by or available to the firm, and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the DBE program.
- f. Evaluation of Federal income tax returns filed by the firm, its affiliates and the socially and economically disadvantaged owners for the last three years.

If the documentation does not support all the certification eligibility requirements, WYDOT will deny certification without further investigation.

3. Upon completion of the documentation review, WYDOT will perform an on-site investigation as outlined below.
  - a. For Wyoming Resident Applicants: If the documentation supports all the eligibility requirements, WYDOT will perform an on-site investigation of the offices and yard facilities. WYDOT will interview the principal officers of the firm and review their resumes and/or work histories. WYDOT may also perform an on-site investigation of job sites if there are such sites on which the firm is working at the time of the eligibility investigation in WYDOT's jurisdiction or local area. No Wyoming firm will be certified before the completion of the on-site investigation.
  - b. For Out-of-State (Non-Wyoming Resident) Applicants: Before an out-of state DBE applicant's eligibility will be certified by WYDOT, WYDOT will contact the DBE's resident state certifying agency to obtain a copy of its on-site investigation within seven (7) days.

Before certifying a Wyoming based firm based on its 8(a) or SDB certification, WYDOT will conduct an on-site review of the firm. WYDOT is not required to process an application for certification from an SBA-certified firm having its principal place of business outside Wyoming unless there is report of a "home state" on-site review on which WYDOT may rely. Before certifying an out-of-state firm, WYDOT will request an on-site review by the firm's home state UCP agency. If the SBA conducted an on-site review, WYDOT may choose to rely on the SBA's report of the on-site review. In connection with this review, WYDOT may also request additional relevant information from the firm.

4. Firms determined to be eligible for participation on WYDOT transportation construction projects as DBE's will be sent a "letter of certification of eligibility" and can access a copy of this DBE Program Plan on WYDOT's webpage.
5. Certified firms will also be eligible for no cost electronic plans through "Quest CDN" for projects they are interested in bidding on and may obtain a copy of the current specification book at no cost.
6. Upon WYDOT certification as a DBE firm, the firm will remain certified unless and until its certification has been removed through the procedures of 49 CFR 26.87 and Subpart E, Section 4 of this Plan. WYDOT will not require DBEs to reapply for certification as a condition of continuing to participate in the program, unless the factual basis on which the certification was made changes.
7. Each certified DBE firm must inform WYDOT, in writing, of any change in circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material change in the information provided in its application, including changes in management responsibility among members of a limited liability company are covered by this requirement. The DBE firm must attach supporting documentation describing in detail the nature of such changes. The notice must take the form of an affidavit sworn to by the owners of the firm before a person who is authorized by state law to administer oaths. The DBE firm must provide the written notification within thirty (30) days of the occurrence of the change. If the DBE firm fails to make timely notification of such a change, it will be deemed to have failed to cooperate under 49 CFR 26.109(c).
8. Each DBE certified firm must provide to WYDOT, every year on the anniversary of the date of its certification, an *Affidavit of No Change for Continuing Disadvantaged Business Enterprise Certification* sworn to by the firm's owners before a person who is authorized by state law to administer oaths. This affidavit must affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material changes in the information provided in its application, except for changes about which it has notified WYDOT, as stated in the previous paragraph.

The affidavit shall specifically affirm that the DBE firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of the DBE firm's size and gross receipts. If the DBE firm fails to provide this affidavit in a timely manner, it will be deemed to have failed to cooperate under 49 CFR 26.109(c).

- a. For Wyoming Resident DBE Firms: WYDOT will require each currently certified Wyoming DBE to submit an *Affidavit of No Change for Continuing Disadvantaged Business Enterprise Certification* and corresponding Federal tax documents. A notice and the affidavit form will be sent to each DBE by certified mail with a return receipt request no later than thirty (30) calendar days prior to the firm's certification anniversary date reminding them of the requirement and advising them of the procedure for submitting the affidavit.
  - b. For Out-of-State (Non-Wyoming Resident) DBE Firms: WYDOT will require each currently certified out-of-state DBE to submit an *Affidavit of No Change for Continuing Disadvantaged Business Enterprise Certification* and corresponding Federal tax documents. A notice and the affidavit form will be sent to each DBE by certified mail with a return receipt request no later than thirty (30) calendar days prior to the firm's certification anniversary date reminding them of the requirement and advising them of the procedure for submitting the affidavit. In addition, WYDOT will request the out-of-state DBE firm to submit evidence of current continuing certification with their home state certifying agency.
9. Eligibility for a currently certified DBE, whose properly completed affidavit is received by its anniversary date, will remain valid until the affidavit is processed and a continuing eligibility determination is made.

All information required in the continuing eligibility process and all required supporting documents must be submitted before the affidavit will be processed.

10. A currently certified DBE that fails to return the required affidavit and/or documentation by its certification anniversary date will be suspended for a period of thirty (30) calendar days, and not eligible to bid or submit quotes on any WYDOT projects as a DBE. If the affidavit is not received within that thirty (30) day suspension period, the DBE will no longer be considered certified and will be removed from the currently certified DBE listings.
11. A currently certified DBE that fails to submit the required affidavit and/or documentation within six (6) months following expiration of its eligibility will not be permitted to apply for current DBE certification any sooner than twelve (12) months from the date of expiration of the prior DBE certification. After that time, the applicant will be required to submit a new application. The new application will be processed in accordance with the procedure for initial certification of eligibility.
12. A currently certified DBE may withdraw their affidavit at any time by submitting the written request to the DBE Liaison Officer. Once the written request to withdraw is received, the firm will no longer be certified, and will be removed from the DBE program and from the certified DBE listings.

WYDOT will safeguard from disclosure to unauthorized persons information gathered as part of the certification process that may reasonably be regarded as proprietary or other confidential business information, consistent with applicable Federal, state, and local law.

When a Uniform Certification Program (UCP) from another state, in connection with its consideration of the eligibility of a firm, makes a written request for certification information WYDOT has obtained about that firm (e.g., including application materials or the report of an on-site investigation, if WYDOT made one to the firm), WYDOT will promptly make the information available to the other UCP.

When WYDOT receives a request of application for certification from a Wyoming based DBE-certified firm pursuing SBA certification, or a request from the SBA made pursuant to the DOT/SBA MOU, the following procedures will be followed:

1. Upon receipt of a signed, written request from the DBE firm, WYDOT will transfer to the SBA a copy of the firm's application package. WYDOT will transfer this information within thirty (30) days of receipt of the request.
2. If necessary, the SBA may make a written request to WYDOT for additional materials (e.g., the report of the on-site review). WYDOT will provide a copy of this material to the SBA within forty-five (45) days of the additional request.
3. WYDOT will provide appropriate assistance to SBA-certified firms, including providing information pertaining to the DBE application process, filing locations, required documentation and status of applications.

*Ref: [49 CFR 26.83](#) & [26.85](#)*

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**SUBPART E - CERTIFICATION PROCEDURES  
SECTION 3**

**DENIAL OF CERTIFICATION**

In the instance that WYDOT would deny a request by a firm, which is not currently certified with WYDOT, to be certified as a DBE, WYDOT will provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial.

In the instance that WYDOT would deny DBE certification to a firm certified by the SBA, WYDOT will also notify the SBA in writing, including the reason for denial.

Applicant firms denied DBE eligibility by WYDOT will be notified by certified mail of the denial, and will be advised that the denial may be appealed under 49 CFR 26.89 solely to the Director – Departmental Office of Civil Rights, U.S. Department of Transportation (U.S. DOT) within ninety (90) days of the date of the notice of denial.

Firms denied DBE eligibility will be advised that they may, as an alternative to appealing the denial, correct deficiencies in eligibility, and submit a new *Disadvantaged Business Enterprise (DBE) Uniform Certification Application* to WYDOT no sooner than twelve (12) months after the date of denial. The new application will be deemed an initial application, and will be processed in accordance with the foregoing certification procedures. The time period for re-application begins to run on the date the explanation of denial is received by the firm.

*Ref: [49 CFR 26.86](#)*

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**SUBPART E - CERTIFICATION PROCEDURES  
SECTION 4**

**DECERTIFICATION PROCEDURES**

WYDOT will "decertify"; i.e., revoke its recognition and certification of a firm's DBE eligibility upon discovery at any time that it no longer meets the eligibility standards of 49 CFR 26.

When a DBE firm is notified by WYDOT that there is a reasonable cause to remove eligibility, WYDOT will give the DBE an opportunity for an informal hearing, at which time the firm may respond in person to the reasons for the proposed removal of eligibility, and provide information and arguments why it should remain certified.

1. Ineligibility complaints. Any third party may challenge the socially and economically disadvantaged status of any individual (except an individual who has a current SBA 8(a) certification) presumed to be socially and economically disadvantaged if the challenged individual is the owner of a firm whose DBE eligibility is certified by WYDOT, or is seeking certification of DBE eligibility by WYDOT.

WYDOT will accept only a written complaint alleging that a current certified firm or a firm seeking DBE certification is ineligible, with specific alleged reasons why the firm is ineligible. WYDOT is not required to accept a general allegation that a firm is ineligible or an anonymous complaint. The complaint may include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not continue to be certified.

WYDOT will adhere to the following procedural guide for accepting, processing and resolving third-party challenges of an individual's social and economic status:

- a. The challenge must be made in writing to WYDOT. The challenging party must include with its letter all information available to it relevant to a determination of the challenged party's social and economic disadvantage.
- b. WYDOT will determine, on the basis of WYDOT's records and any other information provided by the challenging party and the DBE firm, whether the challenged DBE is in fact socially and economically disadvantaged. If WYDOT determines that the challenged DBE is in fact socially and economically disadvantaged, WYDOT will so inform the challenging party, and the proceeding will be terminated.
- c. If WYDOT determines that there is reason to believe that the challenged DBE is not socially and economically disadvantaged, WYDOT will notify the challenged DBE in writing by certified mail that its social and economic disadvantage status has been challenged. The notice will identify the challenging party and summarize the grounds for the challenge, and will require the challenged DBE to provide WYDOT, within thirty (30) calendar days, information sufficient to enable WYDOT to evaluate the status of the challenged DBE's social and economic disadvantage. The challenged DBE will be required to cooperate with WYDOT in this investigation.
- d. If a challenged DBE fails to respond within the prescribed thirty (30) day period to a WYDOT request for information which would enable WYDOT to evaluate the social and economic disadvantage of the challenged DBE, WYDOT will give written notice of decertification to the challenged DBE by certified mail, effective on the first day following the prescribed fourteen (14) day response period. The challenged DBE will be advised that its sole route of appeal is to the Director – Departmental Office of Civil Rights, U.S. DOT within ninety (90) days of the effective date of decertification as set forth in Subpart E, Section 5 of this Plan.

- e. WYDOT will evaluate the information submitted to it by both the challenging party and the challenged DBE and any other information available to it and make a preliminary determination of the social and economic disadvantage of the challenged DBE. WYDOT may request additional information from the firm or conduct any other investigation deemed necessary. To further substantiate the information submitted, the DBE Liaison Officer or his designee may interview selected members of the business community and, if deemed necessary, members of the minority community in the challenged DBE's locale. WYDOT will notify both parties of its preliminary determination in writing by certified mail, setting forth the reasons for its determination and scheduling a time and place for an informal hearing, at which time they can respond to WYDOT's preliminary determination.
  - f. Following the informal hearing, WYDOT will make a final determination concerning the social and economic disadvantage of the challenged DBE, and will notify both parties in writing by certified mail, setting forth the reasons for its determination. Both parties will be advised that the adversely affected party may appeal the final determination to the Director – Departmental Office of Civil Rights, U.S. DOT within ninety (90) days of the notice of final determination, as set forth in Subpart E, Section 5 of this Plan.
  - g. In making determinations in third-party challenges of the socially and economically disadvantaged status of an individual, WYDOT will follow the eligibility criteria set forth in the foregoing Subpart D.
  - h. The original WYDOT presumption of social and economic disadvantage for an individual will remain in effect for the challenged DBE during pendency of a final determination by WYDOT concerning the validity of a third-party challenge.
2. WYDOT-initiated proceedings. If, based on notification by the DBE of a change in its firm's circumstances or other information that comes to WYDOT's attention, WYDOT determines that there is reasonable cause to believe that a currently certified firm is ineligible, WYDOT will initiate the following procedure:
- a. WYDOT will provide written notice of intent to decertify to the DBE firm by certified mail. The notice will state that WYDOT proposes to find the DBE firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause will reference the evidence in the record on which each reason is based. The notice will provide the DBE an opportunity to respond in writing. The DBE's written response must specifically address the areas in which it feels WYDOT's determination is in error, and must be received by WYDOT within thirty (30) calendar days following receipt of WYDOT's notice of intent to decertify.
  - b. If a DBE fails to respond to a WYDOT notice of intent to decertify within the prescribed thirty (30) day period, WYDOT will give written notice of decertification to the DBE by certified mail, effective on the first day following the prescribed thirty (30) day response period. The DBE will be advised that its sole route of appeal is to the Director – Departmental Office of Civil Rights, U.S. DOT within ninety (90) days of the effective date of decertification as set forth in Subpart E, Section 5 of this Plan.
  - c. When a DBE firm is decertified by WYDOT, the OA will be notified of the name and address of the decertified DBE and its principal owners and employees. In the instance that WYDOT would decertify a firm certified by the SBA, WYDOT will also notify the SBA in writing, including the reason for decertification.
  - d. A DBE that appeals its WYDOT decertification to the USDOT cannot reapply to WYDOT for certification of eligibility until a final decision has been rendered by USDOT on its appeal. As an alternative to appealing the decertification determination to the USDOT, the DBE may, if feasible, correct the deficiencies in eligibility, and submit a new *Disadvantaged Business Enterprise (DBE)*

*Uniform Certification Application* to WYDOT no earlier than twelve (12) months after the date of decertification. The new application will be deemed an initial application, and will be processed in accordance with the foregoing certification procedures.

3. USDOT directive to initiate proceeding. If a USDOT OA determines that information in WYDOT's certification records, or other information available, provides reasonable cause to believe that a firm WYDOT certified does not meet the eligibility criteria of this part, the OA may direct WYDOT in writing to initiate a proceeding to remove the firm's certification.

The concerned OA must provide WYDOT and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information. WYDOT will immediately commence a proceeding to remove eligibility as provided by paragraph 2 of this section.

4. Grounds for Decision. WYDOT will not base a decision to remove eligibility on a reinterpretation or changed opinion of information contained in the Application and the on-site that was available to WYDOT at the time of the firm's certification. WYDOT will base such a decision only on one or more of the following:

- a. Changes in the firm's circumstances since the certification of the firm by WYDOT that render the firm unable to meet the eligibility standards of this part;
- b. Information or evidence not made available to WYDOT at the time the firm was certified;
- c. Information that was concealed or misrepresented by the firm in previous certification actions by WYDOT;
- d. A change in the certification standards or requirements of the USDOT since WYDOT certified the firm; or
- e. A documented finding that WYDOT's determination to certify the firm was factually erroneous.

5. Status of firm during proceeding.

- a. A firm remains an eligible DBE during the pendency of WYDOT's proceeding to remove its eligibility.
- b. The firm does not become ineligible until the issuance of a written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision.

6. Effects of removal of eligibility. When WYDOT removes a firm's eligibility, WYDOT will take the following action:

- a. When a prime contractor has made a commitment to use the ineligible firm, or WYDOT has made a commitment to use a DBE prime contractor, but a subcontract or contract has not been executed before WYDOT issues the decertification notice, the ineligible firm does not count toward the APG. If there is a contract goal, WYDOT will direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate to WYDOT that it has made a bona-fide effort to do so.
- b. If a prime contractor has executed a subcontract with the firm before WYDOT has notified the firm of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE goal for the firm's work. In this case, or in a case where WYDOT has let a prime contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after WYDOT issued the notice of its ineligibility shall not count toward WYDOT's overall goal, but may count toward the contract goal.

- c. Exception: If the DBEs ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, WYDOT may continue to count its participation on that contract toward overall and contract goals.

*Ref: [49 CFR 26.86](#) and [26.87](#)*

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**SUBPART E - CERTIFICATION PROCEDURES  
SECTION 5**

**SUMMARY SUSPENSION OF CERTIFICATION**

WYDOT may immediately suspend a DBE's certification without adhering to the requirements of 49 CFR 26.87(d) when:

1. An individual owner whose ownership and/or control of the firm are necessary to the firm's certification dies or becomes incarcerated.
2. There is adequate evidence to believe that there has been a material change in circumstances that may affect the eligibility of the DBE firm to remain certified; when the DBE fails to notify WYDOT in writing of any material change or circumstances as required by 49 CFR 26.83(i); or if the DBE fails to timely file an affidavit of no change.
  - a. In determining the adequacy of the evidence to issue a suspension, WYDOT shall consider all relevant factors, including how much information is available, the credibility of the information and allegations given the circumstances, whether or not important allegations are corroborated and what inferences can be reasonably drawn as a result.
3. A concerned operating administration may also direct WYDOT to take action, pursuant to paragraph 1 or 2 of this section, if it determines that information is available to it is sufficient to warrant immediate suspension.

When a firm is suspended pursuant to paragraph 1 or 2 of this section, WYDOT 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.

Suspension is a temporary status of ineligibility pending an expedited show cause hearing/proceeding under 49 CFR 26.87 to determine whether the DBE is eligible to participate in the program and consequently should be removed. The suspension date takes effect when the DBE received, or is deemed to have received, the Notice of 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 WYDOT's overall goal. The DBE may continue to perform under an existing contract executed before the 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.

Following receipt of the Notice of Suspension, if the DBE believes it is no longer eligible, it may voluntarily withdraw from the program, in which case no further action is required. If the DBE believes that its eligibility should be reinstated, he/she must provide to WYDOT information demonstrating that the firm is eligible notwithstanding its changed circumstances. Within thirty (30) days of receiving this information, WYDOT must either lift the suspension and reinstate the firm's certification or commence a decertification action. If WYDOT commences a decertification proceeding, the suspension remains in effect during the proceeding.

The decision to immediately suspend a DBE is not appealable to the US Department of Transportation (USDOT). However, the failure of WYDOT to either lift the suspension and reinstate the firm or commence a decertification proceeding is appealable to USDOT as a constructive decertification.

*Ref: [49 CFR 26.88](#)*

**SUBPART E - CERTIFICATION PROCEDURES  
SECTION 6**

**APPEALS PROCEDURES THROUGH USDOT**

A firm which is denied certification or whose eligibility is removed by WYDOT may make an administrative appeal to the USDOT.

If a firm is a complainant in an ineligibility complaint to WYDOT (including the concerned OA in the circumstances provided in 49 CFR 26.87(c)), the firm may appeal to the USDOT if WYDOT or the OA does not find reasonable cause to propose removing the firm's eligibility or, following a removal of eligibility proceeding, determines that the firm is eligible.

Send appeals to the following address:

U.S. Department of Transportation  
Office of Civil Rights  
400 7th Street, S.W., Room 2401  
Washington, D.C. 20590

Pending the USDOT's decision in the matter, WYDOT's decision remains in effect. The USDOT does not stay the effect of WYDOT's decision while it is considering an appeal.

If a firm wants to file an appeal, the firm must send a letter to the USDOT at the above address within 90 days of the date of WYDOT's final decision, containing information and arguments concerning why WYDOT's decision should be reversed.

The USDOT will provide written notice of its decision to WYDOT, the firm, and the complainant in an ineligibility complaint. All USDOT decisions under this section are administratively final, and are not subject to petitions for reconsideration.

*Ref: [49 CFR 26.89](#)*

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**SUBPART E - CERTIFICATION PROCEDURES  
SECTION 7**

**EFFECT OF USDOT APPEAL DECISIONS**

If a WYDOT action is taken to appeal under 49 CFR 26.89 and Section 5 of this Plan, the USDOT decision is binding.

If the USDOT determines that WYDOT erroneously certified a firm, WYDOT must remove the firm's eligibility on receipt of the determination, without further proceedings on WYDOT's part. Effective on the date of WYDOT's receipt of the USDOT's determination, the consequences of a removal of eligibility set forth in 49 CFR 26.87(i) take effect.

If the USDOT determines that WYDOT erroneously failed to find reasonable cause to remove the firm's eligibility, WYDOT must expeditiously commence a proceeding to determine whether the firm's eligibility should be removed, as provided in 49 CFR 26.87.

If the USDOT determines that WYDOT erroneously declined to certify or removed the eligibility of the firm, WYDOT must certify the firm, effective on the date of WYDOT's receipt of the written notice of USDOT's determination.

If the USDOT determines that WYDOT erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, WYDOT must take appropriate corrective action as determined by the USDOT.

If the USDOT affirms WYDOT's determination, no further action is necessary.

Where USDOT has upheld WYDOT's denial of certification to or removal of eligibility from a firm, or directed the removal of a firm's eligibility, other recipients with whom the firm is certified may commence a proceeding to remove the firm's eligibility under 49 CFR 26.87. Such recipients must not remove the firm's eligibility absent such a proceeding. Where USDOT has reversed WYDOT's denial of certification to or removal of eligibility from a firm, other recipients must take the USDOT action into account in any certification action involving the firm. However, other recipients are not required to certify the firm based on the USDOT decision.

*Ref: [49 CFR 26.91](#)*

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**SUBPART F - COMPLIANCE AND ENFORCEMENT  
SECTION 1**

**NON-COMPLIANCE COMPLAINTS**

Any person who believes that WYDOT has failed to comply with its obligations under this part may file a written complaint with the concerned operating administration's Office of Civil Rights. If you want to file a complaint, you must do so no later than 180 days after the date of the alleged violation or the date on which you learned of a continuing course of conduct in violation of this part. In response to your written request, the Office of Civil Rights may extend the time for filing in the interest of justice, specifying in writing the reason for so doing. The Office of Civil Rights may protect the confidentiality of your identity as provided in §26.109(b). Complaints under this part are limited to allegations of violation of the provisions of this part.

*Ref: [49 CFR 26.103](#)*

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**SUBPART F - COMPLIANCE AND ENFORCEMENT  
SECTION 2**

**ENFORCEMENT**

The following enforcement actions apply to firms participating in the DBE Program:

1. If you are a firm that does not meet the eligibility criteria of Subpart D of this Plan and that attempts to participate in a DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, WYDOT may initiate suspension or debarment proceedings against you under 49 CFR Part 29.
2. If you are a firm that, in order to meet DBE contract goals or other DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of Subpart D of this Plan, WYDOT may initiate suspension or debarment proceedings against you under 49 CFR Part 29.
3. In a suspension or debarment proceeding brought under paragraph 1 or 2 of this section, the concerned OA may consider the fact that a purported DBE has been certified by a recipient. Such certification does not preclude WYDOT from determining that the purported DBE, or another firm that has used or attempted to use it to meet DBE goals, should be suspended or debarred.
4. WYDOT may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the DBE program whose conduct is subject to such action under 49 CFR Part 31.
5. WYDOT and/or The U.S. Department of Transportation may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program or otherwise violates applicable Federal statutes.

*Ref: [49 CFR 26.107](#)*

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**SUBPART F - COMPLIANCE AND ENFORCEMENT  
SECTION 3**

**INFORMATION, CONFIDENTIALITY, COOPERATION AND INTIMIDATION OR RETALIATION**

**Availability of records**

1. In responding to requests for information concerning any aspect of the DBE program, USDOT 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.
2. Notwithstanding any provisions of the Federal Freedom of Information (5 U.S.C. 552) and Privacy Acts (5 U.S.C. 552a), or state law, WYDOT will not release information that may reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting documentation. However, WYDOT must transmit this information to the USDOT in any certification appeal proceeding under 26.89 in which the disadvantaged status of the individual is in question.

**Confidentiality of information on complainants**

Notwithstanding the provisions of the forgoing, the identity of complainants shall be kept confidential, at their election. If such confidentiality will hinder the investigation, proceeding or hearing, 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 the closure of the investigation or dismissal of the proceeding or hearing. FAA follows the procedures of 14 CFR Part 16 with respect to confidentiality of information in complaints.

**Cooperation**

All participants in WYDOT's DBE program (including, but not limited to, 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 WYDOT and USDOT compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so shall be a ground for appropriate action against the party involved, e.g., 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.

**Intimidation and retaliation**

If you are a recipient, contractor, or any other participant in the WYDOT program, you must not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by this part or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. If you violate this prohibition, you are in noncompliance with this part.

*Ref: [49 CFR 26.109](#)*

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