

# U.S. VIRGIN ISLANDS

## DEPARTMENT OF PUBLIC WORKS



# DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM PLAN 2020

Prepared by  
Office  
of  
Civil Rights

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Approved: March 2016

Revised: December 2019

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## **SUBPART A – GENERAL REQUIREMENTS**

### **Section 26.1 Objectives**

The purpose of the VIDPW DBE Program is to implement the provisions of 49 CFR Part 26 and other pertinent authorities with the following objectives:

- To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs
- To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts
- To ensure that the Department's DBE program is narrowly tailored in accordance with applicable law
- To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs
- To help remove barriers to the participation of DBEs in DOT-assisted contracts
- To promote the use of DBEs in all types of federally assisted contracts and procurement activities conducted by recipients
- To assist the development of firms that can compete successfully in the marketplace outside the DBE program
- To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

### **Section 26.3 Applicability**

The VIDPW is the recipient of federal transportation funding within the meaning of Title 49 U.S.C. 53 and Title 23 U.S.C. 165, and related amendments, regulations and authorities.

### **Section 26.5 Definitions**

The VIDPW will adopt the definitions contained in Section 26.5 of Part 26 for this program including but not limited to:

**AFFILIATION** – has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR part 121, except, as otherwise provided in 13 CFR part 121, concerns are affiliated of each other when either directly or indirectly one concern controls or has the power to control the other; or a third party or party's controls or has the power to control both; or an identity of interest between or among parties exists that affiliation may be found. In determining whether affiliations exist, 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 statutory cap on the participation of firms in the DBE program.

**ALASKA NATIVE** – A Citizen of the United States who is a person of one fourth (1/4) degree or more Alaskan (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 a minimum blood quantum, any citizen whom a Native village or Native Group regards as an Alaskan Native if their father or mother is regarded as an Alaskan Native.

**Alaskan Native Corporation (ANC)** – 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 **COMMERCIALLY USEFUL FUNCTION (CUF)** – means that a DBE is responsible for execution of a distinct element of the work of a contract or subcontract and carries out its responsibilities by actually performing, managing and supervising the work involved, or provides professional services.

**COMPLIANCE** – means that a recipient has correctly implemented the requirements of this part.

**CONTRACT** - means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyers to pay for them. For purposes of this part, a lease is considered to be a contract.

**CONTRACT GOAL** – means the percentage of DBE participation established by VIDPW, if required for a USDOT – Assisted Contract.

**CONTRACTOR** – means one who participates, through a contract or subcontract (at any tier), in a USDOT – assisted highway, transit, or airport program.

**DEPARTMENT** – 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).

**DESIGN CONSULTANT** – means an individual, firm or partnership who contracts with the VIFHWA to provide services for engineering, surveying, environmental, hazardous materials, subsurface utility engineering, and other services which require a rigorous, logical science based approach for data acquisition to be used in the development of VIFHWA highway construction plans.

**DISADVANTAGED BUSINESS ENTERPRISE OR DBE** – means a for-profit small business concern that is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and whose management and daily business operation are controlled by one or more of the socially and economically disadvantaged individuals who own it.

**GOOD FAITH EFFORTS (GFE)** – means efforts to achieve a DBE goal or other requirement of the DBE Program, which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirements.

**IMMEDIATE FAMILY MEMBER** – means father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, father-in-law, sister-in-law, brother-in-law, and domestic partner and civil unions recognized under State law.

**INDIAN TRIBE** – means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or are 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** – means 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.

**LSOP** – Liaison Outreach and Services Program – Cooperative Agreements with chambers of commerce and trade associations to provide liaison service between the USDOT, its grantees, recipients, contractors, subcontractors, and minority-owned and disadvantaged business enterprises.

**NAICS** – North American Industrial Classification System – replaces the Standard Industrial Classification Code (SIC) designation which best describe the primary business of a firm.

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

**NATIVE HAWAIIAN ORGANIZATION** – means any community service organization serving Native Hawaiians in the state of Hawaii which 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** – means that a recipient has not correctly implemented the requirements of 49 CFR.

**OFFEROR** – means an individual, firm, or partnership that submits a proposal for consideration for Design Consultant services.

**OPERATING ADMINISTRATION (OA)** means – any of the following parts of USDOT: Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The “Administrator” of any OA includes his or her designees.

**OVER CONCENTRATION** – means a condition in which DBE firms are being utilized in certain types of work to the extent that non-DBEs are unduly burdened from participating in this same type of work.

**PERSONAL NET WORTH** – means 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 INDUSTRY CLASSIFICATION** – means the four digit STANDARD industrial classification (SIC) code designation which best describes the primary business of a firm. The SIC code designations are described in the standard Industry Classification manual.

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

**PRINCIPAL PLACE OF BUSINESS** – means 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** – means any undertaking on a recipient’s part to use USDOT financial assistance, authorized by the laws to which this part applies.

**PROPOSAL** – means an offer compiled and developed by an offeror in response to a Request for Proposal (RFP).

**RACE-CONSCIOUS MEASURE** – means a program that is focused specifically on assisting only DBEs, including women-owned DBEs.

**RACE-NEUTRAL MEASURE** – means a program that is, or can be, used to assist all small businesses. For purposes of this part, race-neutral includes gender-neutrality.

**READY, WILLING AND ABLE** – means, for the purpose of setting annual DBE goals, in the context of a DBE or DBE business, that it has the necessary license to perform work on USDOT-assisted contracts in its home state, is not currently suspended or debarred, and has demonstrated its interest in performing work on USDOT-assisted contracts by submitting a bid, proposal, or quotation as a prospective prime contractor, subcontractor, supplier, trucker, consultant, or other relevant business entity, on a Virgin Islands USDOT-assisted contract within the current or two (2) previous federal fiscal years, or such shorter duration as established by the Department.

**RECIPIENT** – means any entity, public or private, to which USDOT 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** – means a firm that owns, operates or maintains a store, warehouse, or other establishment in which the material supplies articles or equipment of the general character described by the specifications and

required under the contract are brought, kept in stock, and regularly sold or leased to the public in the usual course of business. 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. A person may be a regular dealer in such bulk items as petroleum products, steel cement, gravel stone, or asphalt without owning, operating, or maintaining a place of business, if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealer's own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis. Packagers, brokers, manufacturer's representatives, or other persons who arrange or expedite transactions are not regular dealers.

**REQUEST FOR PROPOSAL (RFP)** – means all documents, including those attached or incorporated by reference, used for soliciting proposals.

**SECRETARY** – means the Secretary of the U.S. Department of Transportation or his/her designee.

**SET-A-SIDE** – means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

**SMALL BUSINESS ADMINISTRATION (SBA)** – means the United States Small Business Administration.

**SMALL BUSINESS CONCERN** – means with respect to firms seeking to participate as DBEs in USDOT-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).

**SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUAL** – means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a member of groups and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual's control any individual who is a citizen or lawfully admitted permanent resident of the United States and who is –

- Individual whom the VIDPW-DBE finds to be a socially and economically disadvantaged individual on a case-by-case basis
- Any individual in the following groups, members of which are refutably presumed to be socially and economically disadvantaged;
- African Americans, which includes persons having origins in any of the Black racial groups of Africa;
- 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;

- Native Americans,” which includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians
- 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), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;
- Subcontinent Asian Americans, which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives islands, Nepal or Sri Lanka;
- Women; and
- Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.
  - 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.

**STATE GOAL** – means the VIDPW-DBE determination, calculated annually as a percentage, of the level of DBE participation on the Virgin Islands USDOT-Assisted Contracts, VIDPW-DBE expects absent the effects of discrimination.

**TRIBALLY OWNED CONCERN** – means any concern at least 51 percent by an Indian tribe as defined in this section.

**UNIFIED CERTIFICATION PROGRAM (UCP)** – is a program that provides a one-stop shopping service to applicants seeking DBE certification and must comply with all provisions of the rule concerning certification and nondiscrimination.

**USDOT** – means U.S. Department of Transportation

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

**VIDPW** – means Virgin Islands Department of Public Works.



## **Section 26.7 Non-discrimination Commitment**

The VIDPW will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR part 26 on the basis of race, color, sex, or national origin.

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

## **Section 26.11 Record Keeping Requirements**

VIDPW reports DBE participation to the relevant operating administration [FHWA and FTA] using the Uniform Report of DBE Awards or Commitments and Payments, found in Appendix B to the DBE regulation and by submitting the Semi-Annual Report of Awards & Commitments via the Civil Rights Connect (CRC) System (for FHWA) or Transit Award Management (TrAMS) System (for FTA) by June 1 and December 1 of each year.

The VIDPW will also create a bidders list, consisting of information about all DBE and non-DBE firms that bid or quote on DOT-assisted contracts. The purpose of this requirement is to allow use of the bidder's list approach to calculating overall goals. The bidder list will include the name, address, DBE non-DBE status, age, and annual gross receipts of firms.

The information is collected in the following ways:

- **Contract Clause:** At the time of bid submittal, all bidders shall submit a completed and signed Bidder's List of Quoters Form BL-DBE (**Attachment A**). All bidders are required to list on this form the following information a) name, address and telephone numbers, b) age of firm, c) annual gross receipts and d) DBE/Non-DBE status. The information required will be accurate, complete in every detail and in final form. Failure to submit this form at the Bid Opening shall render the bid non-responsive.
- **Information Log:** The DBE Liaison Officer will collect all Bidder's List information and compile it in a log form for use on DBE Goal Methodology.

The VIDPW will report to FHWA's Office of Civil Rights, by January 1, 2015, and each year thereafter, the percentage and location in the USVI of certified DBE firms in the UCP Directory by Women, Socially and economically disadvantaged individuals (other than women), and individuals who are women and are otherwise socially and economically disadvantaged individuals.

## **Section 26.13 Assurances**

VIDPW has signed the following assurances, applicable to all DOT-assisted contracts and their administration:

*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.*

## **SUBPART B – ADMINISTRATIVE REQUIREMENTS**

### **Section 26.23 DBE Policy Statement**

VIDPW has a signed and dated policy statement that expresses its commitment to the DBE program, states its objectives, and outlines responsibilities for its implementation. The statement has been circulated throughout the organization and to the DBE and non-DBE business communities that perform work on DOT-assisted contracts (**Attachment B**).

### **Section 26.25 DBE Liaison Officer (DBELO)**

VIDPW has designated the following individual as our DBE Liaison Officer:

*Sharon Challenger, DBE Program Manager  
#6002 Estate Anna's Hope, Christiansted, VI 00820-4428  
(340)773-1290 ext. 2272  
Sharon.challenger@dpw.vi.gov*

In that capacity, the DBELO is responsible for implementing all aspects of the DBE program and ensuring that the VIDPW complies with all provision of 49 CFR Part 26. The DBELO has direct, independent access to the VIDPW Commissioner concerning DBE program matters. An organization chart displaying the DBELO's position in the organization is found in **Attachment C** to this program.

The DBELO is responsible for developing, implementing and monitoring the DBE program, in coordination with other appropriate officials. The DBELO has a staff of 3 to assist in the administration of the program. The duties and responsibilities include the following:

- Gathers and reports statistical data and other information as required by DOT.
- Reviews third party contracts and purchase requisitions for compliance with this program.
- Works with all departments to set overall triennial goals.

- Ensures that bid notices and requests for proposals are available to DBEs in a timely manner.
- Identifies contracts and procurements so that DBE goals are included in solicitations (both race-neutral methods and contract specific goals attainment and identifies ways to improve progress.
- Analyzes VIDPW's progress toward attainment and identifies ways to improve progress.
- Participates in pre-bid meetings.
- Advises the Commissioner on DBE matters and achievement.
- Chairs the DBE Advisory Committee.
- Provides DBEs with information and assistance in preparing bids, obtaining bonding and insurance.
- Plans and participates in DBE training seminars.
- Certifies DBEs according to the criteria set by DOT and acts as liaison to the Uniform Certification Process in the USVI.
- Provides outreach to DBEs and community organizations to advise them of opportunities.
- Maintains the VIDPW's updated directory on certified DBEs.

### **Section 26.27            Financial Institutions**

VIDPW does not annually investigate services offered by financial institutions, because at this time none are owned and controlled by socially and economically disadvantaged individuals in the U.S. Virgin Islands.

### **Section 26.29            Prompt Payment Mechanisms**

The VIDPW includes the following clause in each DOT-assisted prime contract:

*The prime contractor agrees to pay each subcontractor for satisfactory performance of its contract no later than 10 days from the receipt of each payment the prime contractor receives from VIDPW. Any delay or postponement of payment may occur only for good cause following written approval of the VIDPW. This clause applies to both DBE and non-DBE subcontracts.*

The VIDPW exercises Option 3 as it relates to return of retainage in that it withholds retainage of 10 percent from prime contractors. VIDPW reserves the right to return retainage but only after 50 percent of the contract work is satisfactorily completed. Further, the VIDPW allows prime contractors to withhold retainage providing it is returned within 30 days after completion of the subcontractor's work. Any delay or postponement for good cause must be approved in writing by VIDPW. This applies to both DBE and non-DBE subcontracts.

### **Section 26.31            Directory**

The VIDPW maintains and update its DBE directory bi-annually identifying all firms eligible to participate as DBEs. The directory lists the firm's name, address, phone number, date of the most recent certification, and the type of work the firm has been certified to perform as a DBE. The Directory is available as follows: *electronically via VIDPW website @ dpw.vi.gov*. The Directory may be found in **Attachment D** to this program document or by visiting VIDPW offices during business hours.

### **Section 26.33 Overconcentration**

VIDPW has not identified overconcentration in any existing types of work performed by DBEs. VIDPW assesses the program for potential overconcentration during triennial goal setting.

### **Section 26.37 Monitoring and Enforcement Mechanisms**

The VIDPW uses the following monitoring and enforcement mechanisms to ensure compliance with the regulations.

- Reporting to the Department of Transportation any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the DOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in 26.109.
- Using all available territorial authorities, including responsibility determinations in future contracts. **Attachment E** lists the regulation, provisions, and contract remedies available in the events of non-compliance with the DBE regulation by a participant in procurement activities.
- Providing monitoring and enforcement ensuring that work committed to DBEs at contract award is actually performed by the DBEs. This is accomplished by project site visits and collection/review of Forms A-644 for each contract/project on which DBEs are participating.
- Maintaining a running tally of actual payments to DBE firms for work committed to them at the time of contract award.

### **Section 26.39 Small Business Participation**

The VIDPW has incorporated the following race neutral element to its DBE program to facilitate competition on DOT-assisted public works projects by small business concerns (both DBEs and non-DBE small businesses):

- The VIDPW inserts specific language into the Special Provisions of the VIDPW Federal-aid contract documents, to ensure small business participation. In addition, VIDPW strives to unbundle large contracts to make them more accessible to small businesses. VIDPW also reserves select contracts under \$1 million for bid exclusively by small businesses, DBE and Non-DBE (**Special Provisions at Attachment F**).
- VIDPW DBE Program uses the following procedures in its Small Business Program. Including but will not be limited to:
  - Incorporation of the SBE into the Department's Federal Aid Contract Documents.
  - Advertisement in local news media and publications requesting participation of all small businesses in our SBE program.
  - Workshops, Seminars and Training Opportunities specifically to attract participation of Small Business Concerns.

- The VIDPW DBE Program Race Neutral efforts to increase DBE participation also includes:
  - Arranging solicitations, times for the presentation of bids, quantities, specification, and delivery schedules in ways that facilitate DBEs.
  - Providing assistance in overcoming limitations such as inability to obtain bonding or financing.
  - Providing technical assistance and other services through the implementation of the Supportive Services Program.
- VIDPW SBE Program is open to all small businesses as defined by Small Business Administration (SBA) operating in the U.S. Virgin Islands. Small Businesses need not be a DBE to participate.
- The VIDPW uses local news media such as The VI Daily News, The St. Croix Avis, The VI Source, the Community Bulletin Boards on Television and Radio Station to advise small businesses of upcoming opportunities. The VIDPW also partners with SBA/Small Business Development Center (SBDC) to co-host seminars as an outreach effort for small businesses. VIDPW also includes the SBA/SBDC in contract executions to enable small businesses the bidding opportunities.

### **SUBPART C – GOALS, GOOD FAITH EFFORTS, AND COUNTING**

#### **Section 26.43            Set-asides or Quotas**

The VIDPW does not use quotas in any way in the administration of this DBE program.

#### **Section 26.45            Overall Goals**

In accordance with Section 26.45, the VIDPW submits its triennial overall DBE goal to FHWA and FTA on August 1 of the years specified by FHWA and FTA. As part of its triennial goal VIDPW establishes project-specific DBE goals as appropriate, and/or will establish project-specific DBE goals as directed by FHWA and FTA.

The VIDPW establishes overall goals in accordance with the 2-Step process defined by the regulations. The first step is to determine the relative availability of DBEs in the market area, “base figure”. The second step is to adjust the “base figure” percentage from Step 1 so that it reflects as accurately as possible the DBE participation the recipient would expect in the absence of discrimination based on past participation, a disparity study and/or information about barriers to entry to past competitiveness of DBEs on projects **(See Attachment G for the most recent triennial goal document)**.

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

Following this consultation, the VIDPW publishes a notice of the proposed overall goals, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at the VIDPW DBE office for 30 days following the date of the notice, and informing the public that VIDPW and DOT will accept comments on the goals for 45 days from the date of the notice. Notice is provided via the general circulation media and available minority- focus media and trade publications, websites by June 1st. The notice includes addresses to which comments may be sent and addresses (including offices and websites) where the proposal may be reviewed. The notice announces the proposed overall goal before submission to the operating administration on August 1st. It must be posted on VIDPW's official Internet website and may be posted in any other sources (e.g., minority-focused media, trade association publications). If the proposed goal changes following review by the operating administration, the revised goal must be posted on your official Internet Web site. Inform the public that the proposed overall goal and its rationale are available for inspection during normal business hours at VIDPW's principal office and for a 30-day comment period. Notice of the comment period must include addresses to which comments may be sent. The public comment period will not extend the August 1st deadline per regulations.

The VIDPW submits its overall goal methodology to DOT for legal sufficiency. The overall goal submission to DOT includes: the goal (including the breakout of estimated race- neutral and race-conscious projections, as appropriate); a copy of the methodology, worksheets, etc., used to develop the goal; a summary of information and comments received during this public participation process and our responses; and proof of publication of the goal in media outlets listed above. VIDPW uses the overall goal on October 1 of the specified year, unless other instruction is received from DOT.

#### **Section 26.47            Goal Setting and Accountability**

If the awards and commitments shown on VIDPW's Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall applicable to that fiscal year, VIDPW must submit a short fall analysis in which VIDPW analyzes in detail the reason for the difference between the overall goal and the actual awards/commitments; in addition, VIDPW must establish specific steps and milestones to correct the problems identified in the analysis; and submit the analysis and steps to address the short fall to FHWA and FTA within 90 days of the end of the affected fiscal year.

#### **Section 26.51            Meeting Overall Goals/Contract Goals**

The VIDPW makes every opportunity to meet the maximum feasible portion of its overall goal by using race-neutral means of facilitating DBE participation. To this effort, the VIDPW uses a combination of the following race-neutral means to increase DBE participation:

- Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBEs, and other small business', participation (e.g., unbundling large contracts to make them more accessible to small businesses, requiring or encouraging Prime contractors to subcontract portions of work that they might otherwise perform with their own forces)

- Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by simplifying the bonding process, reducing bonding requirements, and providing services to help DBEs and other small businesses obtain bonding and financing)
- Providing technical assistance and other services to DBEs and other small businesses.
- Implementing 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
- Ensuring that Prime contractors are aware of and know how to obtain the approved DBE listing from the VIDPW.

The VIDPW uses contract goals to meet any portion of the overall goal it does not project being able to meet using race-neutral means. Contract goals are established so that, over the period to which the overall goal applies, they will cumulatively result in meeting any portion of our overall goal that is not projected to be met through race-neutral means.

VIDPW establishes contract goals only on those DOT-assisted contracts that have subcontracting possibilities. VIDPW does not establish a contract goal on every such contract, and the size of contract goals will be adapted to the circumstances of each such contract (e.g., type and location of work, availability of DBEs to perform the particular type of work). VIDPW expresses its contract goals as a percentage of total amount of a DOT-assisted contract.

### **Section 26.53            Good Faith Efforts Procedures**

In those instances, where a contract-specific DBE goal is included in a procurement/solicitation, VIDPW will not award the contract to a bidder who does not either: (1) meet the contract goal with verified, countable DBE participation; or (2) documents it has made adequate good faith efforts to meet the DBE contract goal, even though it was unable to do so. It is the obligation of the bidder to demonstrate it has made sufficient good faith efforts prior to submission of its bid.

The VIDPW requires all prime contractors to submit all subcontracts on the respective contracts to the Contracting Officers prior to their starting any work on the project. These contracts must be signed and notarized by all to the following reconsideration official: **Nelson Petty, P.E. Commissioner, #6002 Estate Anna's Hope, Christiansted, VI 00820-4428, (340) 773-1290, nelson.petty@dpw.vi.gov**. The reconsideration official will not have played any role in the original determination that the bidder/offeror did not document sufficient good faith efforts.

As part of this reconsideration, the bidder/offeror will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The bidder/offeror will have the opportunity to meet in person with our reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do. The VIDPW will send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did

not meet the goal or make adequate good faith efforts to do so. The result of the reconsideration process is not administratively appealable to the Department of Transportation.

VIDPW does not permit the termination of a DBE by a prime contractor without prior written consent. Failure to adhere to this contract provision will, at a minimum, result in withholding payment for any work or materials not provided by the DBE. VIDPW provides written consent for termination only for good cause and only upon a satisfactory showing of good cause, including:

- DBE fails/refuses to execute a written contract
- DBE fails/refuses to perform subcontract work in good faith and consistent with industry practice
- DBE fails/refuses to meet reasonable, non-discriminatory bonding requirements
- DBE becomes bankrupt, insolvent or unable to obtain sufficient credit
- DBE is in suspension/debarment proceedings under federal or territorial law
- DBE is found by VIDPW to not be a responsible contractor
- DBE voluntarily withdraws from the project after providing written notice
- DBE is unable to perform due to death, illness or injury
- Other documented cause satisfactory to VIDPW

VIDPW does not consider as good cause the termination of a DBE so that the prime can perform part or all the work committed to a DBE. Contractors must provide written notice of intent to terminate to the DBE and provide at least five (5) days for the DBE to submit objections, if any. VIDPW must be copied on all communication with the DBE regarding termination.

As in pre-award, VIDPW will not permit termination of a DBE at any time post-award without the contractor making good faith efforts to locate another DBE subcontractor to substitute for the original DBE. Substituting DBEs must perform at least the same amount of work under the contract as the terminated DBE. If the contractor cannot locate a DBE for substitution, then it has seven (7) days to submit to VIDPPW evidence showing GFE.

The VIDPW requires DBE prime contractors to meet goals and make good faith efforts on the same basis as other prime contractors. DBE bidders on prime contracts will be expected to make the same outreach efforts as other bidders and to document good faith efforts in situations where they do not fully meet contract goals. DBE prime contractors, however, may count their own participation toward contract goal achievement.<sup>1</sup>

The VIDPW uses the following DBE special provisions:

*When the VIDPW has established a DBE contract goal on a USDOT-assisted individual project, it shall award*

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<sup>1</sup> VIDPW applies the requirements to DBE bidders/offerors for prime contracts. In determining whether a DBE bidder/offeror for a prime contract has met a contract goal, VIDPW counts the work the DBE has committed to performing with its own forces as well as the work that it has committed to be performed by DBE subcontractors and DBE suppliers.



*the contract only to a bidder who meets the established goal or who makes good faith efforts to do so. The award of the contract will be conditioned on meeting the requirements of this section. The VIDPW shall determine whether a bidder has made good faith efforts if it documents either: that it can meet the DBE contract goal by documenting that it has obtained commitments for sufficient participation by DBE firms; or by documenting that it made adequate good faith efforts to meet the DBE contract goal by showing that it took all necessary and reasonable steps, which by their scope, intensity, and appropriateness to the objective of meeting the goal, could reasonably be expected to obtain sufficient DBE participation, even if the bidder was not fully successful.*

- 1. All bidders shall give written assurance in their bid proposal to meet the established DBE contract goal or propose a reduced goal. The bidder's written assurance will be considered binding. Failure to make and/or abide by such written assurance shall render a bid non-responsive.*
- 2. All bidders must complete and sign the DBE Commitment Form A-585 (Appendix A) and the Bidders List of Quoters Form BL-DBE (Appendix B) and include them with the other required documents of the bidder's "Proposal Package" submitted at the time of the Bid Opening. If the contract involves the use of consultants, then the bidder must complete the Offeror's List (Appendix C) and the Certification of Consultant or Offeror for DBE Annual State Goal forms (Appendix D) and submit them with the "Proposal Package". All listed DBE firm(s) must be certified by the DPW prior to submission of the DBE Commitment Form.*
- 3. The information required on all forms must be accurate, complete in every detail and in final form at the time it is submitted to the VIDPW and/or its Contracting Office (Department of Property & Procurement) at the Bid Opening. Failure to submit these forms in proper form and accuracy at the Bid Opening shall render the bid non-responsive. All bidders are required to list on the DBE Commitment Form A-585, the following information:
  - a. The names of the DBE subcontractor(s) and/or material supplier(s) that will participate in the contract;*
  - b. Item number(s) & description of the work that the DBE will perform;*
  - c. The dollar amount of the participation for each item of work the DBE will perform;*
  - d. Written documentation of the bidder's commitment to use a DBE subcontractor/supplier whose participation it submits to meet the DBE contract goal.**
- 4. If the apparent low bidder cannot meet the established DBE contract goal, the bidder shall submit documented demonstration of good faith efforts at the time of the bid opening. This justification is a documented demonstration of good faith efforts by the bidder, which must, in the end; show that the contractor had actively and aggressively sought out DBEs to participate in the project. Mere pro forma efforts are not the necessary and reasonable steps that indicate good faith efforts. The VIDPW will consider the quality, quantity, and intensity of the different kinds of efforts that were made in trying to obtain DBE participation sufficient to meet the DBE contract goal. The following is a list of types of actions, which the VIDPW will consider as part of the bidder's good faith efforts to obtain DBE participation. This list is not intended to be a mandatory checklist, nor is it intended to be exclusive or*

*exhaustive, as other factors or types of efforts may be relevant in appropriate cases. This demonstration should include, but not be limited to, the following:*

- a. Soliciting through all reasonable and available means (e.g. 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. The bidder must solicit this interest within sufficient time to allow DBEs to respond to the solicitation. The bidder must determine with certainty if taking appropriate steps to follow up initial solicitations interests the DBEs.*
- b. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items 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.*
- c. 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.*
- d. Negotiating in good faith with interested DBEs. 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 the prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.*

- e. Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.*
- f. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.*
- g. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.*
- h. Effectively using the services of available minority/women community organizations; minority/women contractor's groups; local, state, and Federal minority/women business assistance*

*offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.*

*The requirements of 49 CFR Part 26, Regulations of the U.S. Department of Transportation, apply to this contract. It is the policy of the VIDPW to practice nondiscrimination based on race, color, sex, or national origin in the award or performance of this contract. All firms qualifying under this solicitation are encouraged to submit bids/proposals. Award of this contract will be conditioned upon satisfying the requirements of this bid specification. These requirements apply to all bidders/offerors, including those who qualify as a DBE. A DBE contract goal of 20% (twenty) percent has been established for this contract. The bidder/offeror shall make good faith efforts, as defined in Appendix A, 49 CFR Part 26 (Attachment 1), to meet the contract goal for DBE participation in the performance of this contract.*

*The bidder/offeror will be required to submit the following information with its bid: (1) the names and addresses of DBE firms that will participate in the contract; (2) a description of the work that each DBE firm will perform; (3) the dollar amount of the participation of each DBE firm participating; (4) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet the contract goal; (5) Written confirmation from the DBE that it is participating in the contract as provided in the commitment made under (4); and (5) if the contract goal is not met, evidence of good faith efforts.*

## **Section 26.55            Counting DBE Participation**

VIDPW accounts DBE participation toward overall and contract goals as provided in the regulations. This means only counting the value of the work actually performed by the DBEs, including the costs or supplies of materials obtained by the DBE or equipment leased by the DBE. Credit will be allowed for 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 USDOT-assisted contract. Credit is allowed for fees considered reasonable and not excessive as compared with fees customarily allowed for similar services. When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted only if the DBE's subcontractor is itself a certified DBE. Work that a DBE subcontracts to a non-DBE firm does not count.

When a DBE performs as a participant in a joint venture, credit for a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces will be allowed.

VIDPW only allows credit to a DBE contractor if the DBE is performing a commercially useful function on the contract. If a DBE does not perform or exercise responsibility for at least the percentage determined by the VIDPW Office of Highway Engineer in conjunction with VIDPW's Contracting Office (Department of Property & Procurement) of the total cost of its contract with its own forces, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, it will be presumed that the DBE is not performing a commercially useful function. While a DBE is presumed not to be performing a commercially useful function as provided above, the DBE may present

evidence to rebut this presumption. However, decisions concerning commercially useful function matters are not administratively appealable to USDOT.

For DBE trucking, the VIDPW requires the DBE to own and operate at least one fully licensed, insured, and operational truck used on the contract, whereby the DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs. VIDPW allows credit where the DBE leases trucks from another DBE firm, including an owner-operator who is certified as a DBE. However, the DBE who leases trucks from a non-DBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE may lease trucks without drivers from a non-DBE truck leasing company. If the DBE leases trucks from a non-DBE truck leasing company and uses its own employees as drivers, it is entitled to credit for the total value of these hauling services.

Prior to beginning work on a contract, the DBE must submit valid lease agreements to the VIDPW on all leased trucks and written agreements with owner/operators. Whether the agreement is with an owner/operator or trucks hired from a trucking firm, the agreement must include the:

- Operator's Name
- Social Security number
- Federal Identification Number (FIN)
- Cab Card Number of the Truck;
- Description of the Truck and the Method of Payment.

All listed DBE firms must be certified by the VIDPW prior to the prime contractor's submission of the DBE Commitment Form A-585. If a firm is not currently certified as a DBE in accordance with approved certification standards at the time of the execution of the contract, the VIDPW may not count the firm's participation toward any DBE goals.

When a prime contractor has made a commitment to using the ineligible firm or the VIDPW has made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before the issue of a de-certification notice, the ineligible firm will not count toward the contract goal or overall goal. The VIDPW shall direct the prime parties. VIDPW adheres to the U.S. DOT Guidance Concerning Good Faith Efforts found at 49 CFR Appendix to Part 26 in any instance where the bidder/contractor is unable to achieve the established goal or in instances involving termination, substitution or replacement of a DBE. VIDPW requires that GFE show active and aggressive attempts to achieve the contract goal. It does not accept pro forma efforts and does not use quantitative formulas to assess GFE.

VIDPW treats bidder/offers' compliance with good faith efforts' requirements as a matter of responsiveness. Each solicitation for which a contract goal has been established will require the bidders/offerors to submit the following information at the time of bid submission:

1. The names and addresses of DBE firms that will participate in the contract;

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

Within 15 days of being informed by VIDPW that it is not responsive because it has not documented sufficient good faith efforts, a bidder/offeror may request administrative reconsideration. Bidder/offerors should make this request in writing Federal Financial Assistance Agreement Assurance

VIDPW will ensure the following language will appear in financial assistance agreements with sub-recipients:

*VIDPW 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 of 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of 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 VIDPW of its failure to carry out its approved program, the Department may impose sanction as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).*

### Contract Assurance

contractor to meet the contract goal with an eligible DBE firm or demonstrate that it has made good faith efforts to do so.

If a prime contractor has executed a subcontract with the firm before the VIDPW 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 towards its DBE goal for the firm's work. In this case, or in a case where the VIDPW has let a prime contractor to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after the VIDPW has issued the notice of its ineligibility shall not count toward the VIDPW's overall goal, but may count toward the contract goal. However, this does not apply if the DBE's ineligibility is caused solely by its having exceeded the size standard during its performance of the contract, the VIDPW may continue to count its participation on that contract toward overall and contract goals.

The VIDPW does not count the dollar value of work performed under a contract with a firm, after it has ceased to be certified, toward the overall goal. The VIDPW may not count the participation of a DBE subcontractor

toward the prime contractor's DBE achievements or the overall goal until the amount being counted toward the goal has been paid to the DBE. VIDPW does not count any DBE credit absent a showing of commercially useful function (CUF). VIDPW conducts CUF reviews on every DBE at least once during the life of the project.

## **SUBPART D & E CERTIFICATION STANDARDS & PROCEDURES**

### **Section 26.61            Burden of Proof**

In determining whether to certify a firm as eligible to participate as a DBE, the VIDPW requires the firm seeking certification to demonstrate that it meets the requirements by a preponderance of the evidence including group membership or individual disadvantage, business size, ownership, and control.

VIDPW presumes that women, black Americans, Hispanic Americans, Native Americans who are enrolled in a State or Federally recognized tribe, and other minorities found to be disadvantaged by the SBA are socially and economically disadvantaged. This means they do not have the burden of proving that they are socially and economically disadvantaged. However, they must nonetheless submit to VIDPW a signed, notarized statement that they are a member of one of these groups.

Individuals who are not presumed to be socially and economically disadvantaged, and individuals concerning whom the presumption of disadvantage has been rebutted, must prove that they are socially and economically disadvantaged. VIDPW will make the determination considering all the facts in the record, viewed as a whole.

### **Section 26.63            Group Membership**

If, after reviewing the signed notarized statement of membership in a presumptively disadvantaged, the VIDPW has a well-founded reason to question the individual's claim of membership in that group, it will require the individual to present additional evidence that he or she is a member of the group.

The VIDPW will provide the individual a written explanation for questioning his or her group membership and a written request for additional evidence. The VIDPW will take special care to ensure that it does not impose a disproportionate burden on members of any particular designated group which could violate §26.7(b) and/or Title VI of the Civil Rights Act of 1964 and 49 CFR part 21.

If it is determined 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. The individual will have an opportunity to appeal to USDOT if they disagree with our findings.

After satisfying the requirements of group membership, the VIDPW UCP will conduct a desk audit review of the applicant file and after confirming that all required documents are present and that the firm meets the personal net worth, and business size eligibility standards. Once those standards are met, the VIDPW UCP will conduct an on-site review of the applicant firm to determine if the firm meets the eligibility standards of ownership, and control.

#### **Section 26.65 Business Size Determinations**

To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. VIDPW applies the 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, including the primary industry classification of the applicant. However, firms are not eligible in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, over the firm's previous three fiscal years, in excess of \$23.98 million.

#### **Section 26.67 Determining Social and Economic Disadvantage**

VIDPW requires applicants to certify and support with a signed, notarized statement that their personal net worth does not exceed \$1.32 million. Notwithstanding any provision of Federal or State law, VIDPW will not release an individual's personal net worth statement nor any documents pertaining to it to any third party without the written consent of the submitter excepting to DOT in any certification appeal proceeding.

If VIDPW 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 it will start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual, following the procedures and regulations.

#### **Section 26.69 Determinations of Ownership**

In determining whether the socially and economically disadvantaged participants in a firm own the firm, VIDPW considers all the facts in the record viewed as a whole, including the origin of all assets and how and when they were used in obtaining the firm. All transactions for the establishment and ownership (or transfer of ownership) must be in the normal course of business, reflecting commercial and arms-length practices. To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.

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

Insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, mere participation in a firm's activities as an employee, or capitalization not commensurate with the value for the firm.

The disadvantaged owners must enjoy the customary incidents of ownership and share in the risks and be entitled to the profits and loss commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements. Any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm's profits, compared to the disadvantaged owner(s), are grounds for denial.

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.

Where the applicant relies on expertise as contribution to acquire ownership, VIDPW ensures it is specialized, high-quality, intrinsic and specific to the firm's operations, and demonstrable through adequate documentation. The individual whose expertise is relied upon must still have a significant financial investment in the firm.

## **Section 26.71            Determinations Concerning Control**

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. In determining whether a potential DBE is an independent business, VIDPW scrutinizes relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources. It also considers 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. Finally, the VIDPW examines the nature and consistency of 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.

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. This means that the disadvantaged owner must hold the highest officer position in the company, control the board of directors, or in partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.

The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have



experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

VIDPW applies the most specific available NAICS code to the firm's work. If a firm believes that there is not a NAICS code that fully or clearly describes the type(s) of work in which it is seeking to be certified as a DBE, the firm may request that the certifying agency, in its certification documentation, supplement the assigned NAICS code(s) with a clear, specific, and detailed narrative description of the type of work in which the firm is certified. A vague, general, or confusing description is not sufficient for this purpose, and recipients should not rely on such a description in determining whether a firm's participation can be counted toward DBE goals.

### **Section 26.73            Other Rules Affecting Certification**

The VIDPW understands that 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. Commercially useful function issues will not be considered in any way in making decisions about whether to certify a firm as a DBE.

### **Section 26.81            Unified Certification Program Requirements**

VIDPW is the head of the Unified Certification Program (UCP), currently consisting of itself and the Port Authority. The VIDPW has a UCP agreement dated September 24, 2009 specifying that the UCP will consistently follow all certification procedures and standards of this part; and it will fully cooperate fully with oversight, review, and monitoring activities of DOT and its operating administrations.

The VIDPW UCP maintains for all firms certified by the UCP and makes the directory available to the public electronically, on the internet, as well as in print. The UCP updates the electronic version of the directory by including additions, deletions, and other changes as soon as they are made and revises the print version of the Directory at least quarterly.

## **Section 26.83                      Certification Decision Procedures**

VIDPW must ensure that only firms certified as eligible DBEs under this section participate as DBEs the program by following these steps:

- Perform an on-site visit to the firm's principal place of business, interviewing the principal officers and reviewing résumés and/or work histories
- Perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in the local area
- Analyze documentation related to the legal structure, ownership, and control of the applicant firm. This includes, but is not limited to, Articles of Incorporation/Organization; corporate by-laws or operating agreements; organizational, annual and board/member meeting records; stock ledgers and certificates; and State-issued Certificates of Good Standing
- Analyze the bonding and financial capacity of the firm; lease and loan agreements; bank account signature cards
- Determine the work history of the firm, including contracts it has received, work it has completed; and payroll records
- Obtain 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
- Obtain or compile a list 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
- Obtain complete Federal income tax returns (or requests for extensions) filed by the firm, its affiliates, and the socially and economically disadvantaged owners for the last 3 years. A complete return includes all forms, schedules, and statements filed with the Internal Revenue Service.
- Require potential DBEs to complete and submit an appropriate application form, except as otherwise provided in §26.85 of this part.

VIDPW must review all information on the specified forms prior to making a decision about the eligibility of the firm. It reserves the right to request clarification of information contained in the application at any time in the application process. VIDPW is required to provide application materials and other information about the firm to other recipients in connection with eligibility consideration.

VIDPW does not impose fees for DBE certification applications and is careful to safeguard information that can reasonably be regarded as proprietary or other confidential business information, consistent with applicable Federal, state, and local law. Firms certified by VIDPW remain certified unless certification has been duly removed by following applicable regulations.

VIDPW requires DBEs to advise the UCP in writing if there are any changes in circumstances affecting size, ownership, control or other eligibility within 30 days of such change. Further, VIDPW requires all certified DBEs to provide to VIDPW annually, affidavits affirming that there have been changes impacting eligibility. VIDPW deems as uncooperative any firm that fails to submit the annual affidavit.

VIDPW makes decisions on applications for certification within 90 days of receiving from the applicant firm all information required under this part. It also advises each applicant within 30 days of receipt of the application whether the application is complete and suitable for evaluation and, if not, what additional information or action is required. VIDPW allow applicants to withdraw at any time prior to decision, preserving the applicant's right to resubmit at any time and without any waiting period.

DBE certifications do not expire or do not require renewal. A DBE remains certified unless it withdraws or is removed from the program through a due process hearing described below.

### **Section 26.85 Interstate Certification**

VIDPW will accept the certification decisions from out of state DBEs applying for certification in the USVI. It will confirm that the firm has a valid certification from another state, either by viewing electronic directories or obtaining written confirmation from the state.

### **Section 26.86 Denials of Initial Requests for Certification**

When the VIDPW denies a request by a firm, it 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 addition to notifying the applicant of its appeal rights. All documents and other information on which the denial is based will be made available to the applicant, on request. When a firm is denied certification, the firm can reapply after 12 months from the date of the denial from the VIDPW.

### **Section 26.87 Removal of a DBE Firm's Eligibility**

Any person may file a written complaint alleging that a currently certified firm is ineligible and specifying the alleged reasons why the firm is ineligible to the VIDPW. The VIDPW will accept and investigate general allegations 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.

VIDPW must protect the identity of the complainants, but it will review any records concerning the firm, any material provided by the firm and the complainant, and other available information. It may also request additional information from the firm or conduct any other investigation deemed necessary.

If based on this review, or any other time that VIDPW receives information that raises a reasonable cause to believe that the firm is ineligible, the VIDPW will provide written notice to the firm proposed to be found ineligible, the reasons for the proposed determination.

The VIDPW will immediately commence and prosecute a proceeding to remove the eligibility of the firm, notify the firm of a right to a hearing and provide for a separation of functions to ensure the decision is made by personnel that did not take part in the original decision to remove the firm's eligibility and is knowledgeable about the DBE program. The VIDPW will have the burden of proving by the preponderance of the evidence that the firm's eligibility shall be removed.

A determination that a firm's eligibility shall be removed must be based only on one or more of the following grounds:

- Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards
- Information or evidence not available at the time the firm was certified
- Information relevant to eligibility that has been concealed or misrepresented by the firm
- A change in the certification standards or requirements of the Department since the firm was certified
- Decision to certify the firm was clearly erroneous
- The firm has failed to cooperate (see §26.109(c))
- The firm has exhibited a pattern of conduct indicating its involvement in attempts to subvert the intent or requirements of the DBE program (see §26.73(a)(2))
- The firm has been suspended or debarred for conduct related to the DBE program.

If VIDPW does not satisfy its burden of proof that the firm does not meet certification criteria, does not exist, it will notify the complainant and the firm in writing of this determination. If VIDPW satisfies its burden that the firm does not qualify for certification and decides to remove a firm's certification, the VIDPW will provide the firm 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 and the availability of an appeal to the USDOT under §26.89. A firm remains an eligible DBE during the pendency of the proceeding to remove its eligibility. A firm is no longer eligible after a final agency determination is made to decertify the firm

VIDPW maintains a complete record of any hearing. If there is an appeal to DOT under §26.89, VIDPW provides a transcript of the hearing to DOT and, on request, to the firm, retaining the original record of hearing. VIDPW may charge the firm only for the cost of copying the record.

## **Section 26.88 Summary Suspension of Certification**

The VIDPW will immediately suspend a DBE's certification without a hearing when an individual owner whose ownership and control of the firm are necessary to the firm's certification dies or is incarcerated. The VIDPW may immediately suspend a DBE's certification when 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, or when the DBE fails to notify the recipient or UCP in writing of any material change in circumstances, or fails to timely file an affidavit of no change.

When a firm is suspended, the VIDPW will 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. The suspension takes effect when the DBE receives, or is deemed to have received, the Notice of Suspension.

For information about the certification process or to apply for certification, firms should contact:

Sharon Challenger  
#6002 Estate Anna's Hope, Christiansted, VI 00820-4428  
(340)773-1290 ext. 2272  
Sharon.challenger@dpw.vi.gov

### **Section 26.83-26.91 Procedures for Certification Decisions**

VIDPW will follow the certification processes of Subpart E of Part 26 to determine the eligibility of firms to participate as DBEs in DOT-assisted contracts. A copy of the Unified Certified Program is included in **Attachment H**.

For information about the certification process or to apply for certification, firms should contact:

Sharon Challenger  
#6002 Estate Anna's Hope, Christiansted, VI 00820-4428  
(340)773-1290 ext.2272  
Sharon.challenger@dpw.vi.gov

Any firm or complainant may appeal a US Virgin Islands decision in a certification matter to DOT. Such appeals may be sent to:

U.S. Department of Transportation  
Office of Civil Rights Certification Appeals Branch  
1200 New Jersey Ave. SE West  
Building  
7<sup>th</sup> Floor  
Washington, D.C. 20590

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

## **SUBPART F – COMPLIANCE AND ENFORCEMENT**

### **Section 26.101 Compliance Procedures**

VIDPW understands and affirms that failure to comply with any requirement of 49 CFR 26 could result in formal enforcement action under the regulations or suspension of federal funding by FHWA or FTA.

### **Section 26.103 Enforcement Actions applied in FHWA & FTA Programs**

The provisions of this section apply to enforcement actions under FHWA and FTA programs:

- Noncompliance complaints. Any person who believes that VIDPW has failed to comply with its obligations under this part may file a written complaint with the concerned operating administration's Office of Civil Right within 180 days after the date of the alleged violation
- Compliance reviews. FHWA or FTA may review the VIDPW's compliance with this part at any time, including reviews of paperwork and on-site reviews, as appropriate.
- Reasonable cause notice. If it appears, from the investigation of a complaint or the results of a compliance review, that VIDPW is in noncompliance with this part, the modal administration will provide written notice stating the reasons for this finding and requesting conciliation.
- If the modal administration cannot successfully conciliate a violation with the VIDPW, then VIDPW may be the subject of enforcement proceedings which are binding on all parties.

### **Section 26.109 Information, Confidentiality, Cooperation and Intimidation or Retaliation**

VIDPW safeguards from disclose to third-party information that may reasonably be regarded as confidential business information, consistent with Federal, state, and local law. Notwithstanding any contrary provisions of state or local law, VIDPW will not release personal financial information submitted in response to the personal net worth requirement to a third party (other than DOT) without the written consent of the submitter.

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

VIDPW will cooperate fully and promptly with DOT and recipient compliance reviews, certification reviews, investigations, and other requests for information. It will ensure that its contractors and other entities affiliated with federally assisted programs likewise cooperate.

VIDPW will never 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.

## **ATTACHMENTS**

Attachment A:	Bidders List of Quoters Forms
Attachment B:	VIDPW DBE Policy Statement
Attachment C:	VIDPW Organization Chart(s)
Attachment D:	VIDPW DBE Directory
Attachment E:	Sanctions and Damages for Noncompliance
Attachment F:	VIDPW DBE Special Provisions
Attachment G:	Triennial Goal Methodology (FY2016-2018)
Attachment H:	USVI UCP Agreement





Government of the U.S. Virgin Islands  
**DEPARTMENT OF PUBLIC WORKS**  
**Office of the Civil Rights**

**BIDDERS LIST DATA FORM**

DPW is required pursuant to 49 CFR Part 26(c) to create and maintain a comprehensive Bidders List. This Bidders List Data Form will be used to collect bidder information used to determine the relative availability of Disadvantaged Business Enterprise (DBE) and non-DBEs, and will assist with establishing DPW's annual DBE goal DPW's Bidders List is a compilation of bidders, proposers, quoters, subcontractors, and suppliers of materials and services who have submitted bids during the advertising period of a solicitation for services and/or goods. **Please print legibly and provide the following information:**

**PART A: BUSINESS DATA**

1. Business Name: \_\_\_\_\_
2. Business Address: \_\_\_\_\_
3. Contact Person: \_\_\_\_\_ Title: \_\_\_\_\_
4. Phone: ( ) \_\_\_\_\_ 5. Email Address: \_\_\_\_\_
6. Is this business a certified DBE under DPW's Unified Certification Program? \_\_\_ Yes \_\_\_ No
7. Age of Business: \_\_\_\_\_ Years \_\_\_\_\_ Months
8. Business Annual Gross Receipts:  < \$500,000  \$500,000 to \$1,000,000  
 ,000,000 to \$2,000,000  \$2,000,000 to \$5,000,000  >\$5,000,000

**PART B: PROJECT AND WORK DESCRIPTION**

9. Project Name: \_\_\_\_\_
10. Provide a brief description of the scope of work, service, and/or materials to be performed or furnished:  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
11. Provide the NAICS code(s) that best defines your business: \_\_\_\_\_
12. Will the business subcontract any of work, service, and/or materials? \_\_\_ Yes\* \_\_\_ No  
 (\*If Yes, then the subcontractor(s) must also complete an individual Bidders List Data Form.

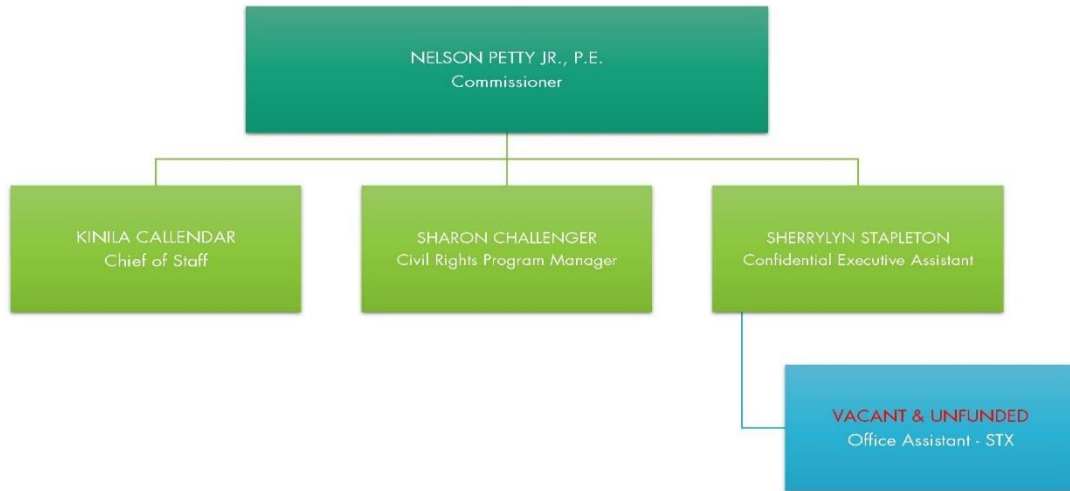
**PART C: SIGNATURE**

**Attachment B**

Policy Statement

Attachment C

DEPARTMENT OF PUBLIC WORKS ORGANIZATIONAL CHART – COMMISSIONER'S OFFICE



**VIRGIN ISLANDS DISADVANTAGED BUSINESS ENTERPRISE  
(DBE) DIRECTORY OF FIRMS  
&  
UNIFORM CERTIFICATION PROGRAM (UCP)  
August/September 2019**

## Sanctions and Damages for Non-Compliance

Whenever VIDPW believes the recipient or the contractor or any subcontractor or supplier on a USDOT – assisted contract may not be operating in compliance with the terms, conditions or requirements of the DBE Program, including but not limited to. Encouraging fronting, brokering or the circumstance of a DBE not performing a commercially useful function as defined, the VIDPW will investigate. If it is found that the recipient or the contractor, or any sub-contractor or supplier is not in compliance with the DBE Program or these Special Provisions, the non-compliant party will be notified in writing by the VIDPW and the non-compliant party or parties. If the non-compliant party or parties fails or refuses to perform in compliance with the DBE Program or these Special Provisions, a “Notice of Non-Compliance” will be transmitted. If the non-compliant party or parties corrects the deficiencies, the notice of non-compliance will be rescinded, and the party or parties will be notified as to compliance. If the deficiencies are not corrected, the VIDPW will initiate administrative action against the non-compliant party or parties, which may include but not limited to:

1. Termination of the contract
2. Withholding an appropriate percentage of partial payments. This appropriate percentage may be the amount of any proposed monetary sanction
3. Initiation of appropriate debarment or de-certification proceedings
4. Referral of any unlawful action to the appropriate enforcement agencies
5. Other actions as appropriate at the discretion of the VIDPW

### Sec. 26.107 What enforcement actions apply to firms participating in the DBE program?

(a) If you are a firm that does not meet the eligibility criteria of subpart D of this part 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, the Department may initiate suspension or debarment proceedings against you under 49 CFR part 29.

(b) 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 part, the Department may initiate suspension or debarment proceedings against you under 49 CFR part 29.

(c) In a suspension or debarment proceeding brought under paragraph (a) or (b) of this section, the concerned operating administration may consider the fact that a purported DBE has been certified by a recipient. Such certification does not preclude the Department 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.

(d) The Department 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.

(e) The Department 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

# Special Provisions

**Attachment G:**

## **Triennial Goal Methodology**

**Attachment H**



