

Rules of
Department of Transportation
Division 10—Missouri Highways and Transportation
Commission
Chapter 8—Disadvantaged Business Enterprise Program

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**Title 7—DEPARTMENT OF
TRANSPORTATION**
**Division 10—Missouri Highways and
Transportation Commission**
**Chapter 8—Disadvantaged Business
Enterprise Program**

7 CSR 10-8.010 General Information
(Rescinded November 30, 2000)

AUTHORITY: sections 226.020 and 226.150, RSMo 1986, section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991, and Title 49 Code of Federal Regulations part 23. Original rule filed Aug. 15, 1988, effective Jan. 13, 1989. Amended: Filed April 13, 1994, effective Oct. 30, 1994. Emergency rescission filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Rescinded: Filed May 10, 2000, effective Nov. 30, 2000.

7 CSR 10-8.011 Definitions

PURPOSE: This rule defines terms applicable to the Disadvantaged Business Enterprise (DBE) Program established by the Missouri Department of Transportation (MoDOT) in this chapter, in accordance with Title 49 Code of Federal Regulations part 26, section 1101(b) of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107, 113, and in accordance with MoDOT's approved DBE Program submittals to the U.S. Department of Transportation (USDOT).

(1) The following words and phrases have the same meaning and definition in Missouri Department of Transportation's (MoDOT's) Disadvantaged Business Enterprise (DBE) Program as they have been given by United States Department of Transportation (USDOT) in Title 49 CFR section 26.5: "Affiliation"; "Alaska native"; "Alaska Native Corporation" or "ANC"; "immediate family member"; "Indian tribe"; "joint venture"; "native Hawaiian"; "Native Hawaiian Organization"; "personal net worth"; "primary industry classification"; "principal place of business"; "set-aside"; "Small Business Administration"; "tribally-owned concern."

(2) The following words and phrases have the meaning and definition stated below, exclusively for the purpose of administering and regulating the DBE Program established by MoDOT in this chapter:

(A) "CFR" means the *Code of Federal Regulations*, published by the Office of the Federal Register, National Archives and Records Administration, through the U.S. Government Printing Office, Superintendent of Documents, Washington, D.C. 20402-9328;

(B) "Commission" means the Missouri Highways and Transportation Commission, a state agency created by statute and vested with authority by Article IV, Section 29, *Missouri Constitution*;

(C) "Compliance" when used with respect to MoDOT or another USDOT recipient, means that recipient has correctly implemented the requirements of 49 CFR part 26. When used regarding a contractor, subcontractor or supplier on a USDOT-assisted commission contract with funding authority described in 49 CFR section 26.3 (or successor funding thereto), "compliance" means that contractor, subcontractor or supplier has correctly implemented the requirements of this chapter, the relevant DBE Program provisions of the commission contract, and 49 CFR part 26;

(D) "Contract" means a legally binding relationship obligating a seller (including but not limited to a contractor, subcontractor or supplier) to furnish supplies or services (including but not limited to construction and professional services) and the buyer to pay for them. For the purposes of this chapter, either a lease or a subcontract is considered to be a contract;

(E) "Contractor" means a person or firm which receives a contract directly from the commission or another USDOT recipient in a USDOT-assisted highway, transit or airport program, to perform construction (of all types including maintenance and repair) work, project design, design-build, or other professional services;

(F) "CSR" means the *Code of State Regulations* for the state of Missouri, published by the secretary of state of Missouri;

(G) "DBE" means a disadvantaged business enterprise;

(H) "Department" means the Missouri Department of Transportation or "MoDOT," a constitutional state department answerable and subordinate to the commission within the executive branch of Missouri government, which entity is also described in Missouri law as the Missouri Highways and Transportation Department; unless the context and usage of the term clearly indicates that it is referring to the United States Department of Transportation or "USDOT";

(I) "Disadvantaged business enterprise" means a for-profit small business concern—

1. That is at least fifty-one percent (51%) owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation or other business entity, in which fifty-one percent (51%) of the stock or shares are owned by one or more socially and economically disadvantaged individuals; and

2. Whose management and daily business operations are controlled by one or more of those socially and economically disadvantaged individuals who own it;

(J) "FAA" means the Federal Aviation Administration within USDOT, including its administrator and his or her designees;

(K) "FHWA" means the Federal Highway Administration within USDOT, including its administrator and his or her designees;

(L) "FTA" means the Federal Transit Administration within USDOT, including its administrator and his or her designees;

(M) "MoDOT" means the Missouri Department of Transportation, which is also described in Missouri law as the Missouri Highways and Transportation Department;

(N) "Noncompliance" when used with respect to MoDOT or another USDOT recipient, means that recipient has not correctly implemented the requirements of 49 CFR part 26. When used regarding a contractor, subcontractor or supplier on a USDOT-assisted commission contract with funding authority described in 49 CFR section 26.3 (or successor funding thereto), "compliance" means that contractor, subcontractor or supplier has not correctly implemented either the requirements of this chapter, or the relevant DBE Program provisions of the commission contract, or 49 CFR part 26, or a combination of those legal requirements;

(O) "Race- and gender-conscious" measure or program is one that is focused specifically on assisting only businesses owned and controlled by members of certain racial groups and/or the feminine gender, such as businesses which qualify for DBE Program certification under USDOT's definition of a "socially and economically disadvantaged individual" at 49 CFR section 26.5, using a rebuttable presumption to classify persons as "disadvantaged" or not based upon their race, national origin or ancestry, or female gender;

(P) "Race- and gender-neutral" measure or program is one that is, or can be, used to assist all small businesses, regardless of the race, national origin or ancestry, or gender, of the persons who own and control those businesses;

(Q) "Recipient" is 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 else it is an entity that has applied for such assistance. MoDOT is usually a “primary recipient” of USDOT financial assistance, but then MoDOT may pass some of that funding through to other recipients. A person or firm which is providing construction, design or other professional services, or materials, supplies or equipment, for a recipient’s USDOT-assisted project as a contractor, subcontractor or supplier, is not a “recipient” for the purposes of this chapter;

(R) “Small business concern,” with respect to firms seeking to participate as DBEs in USDOT-assisted contracts, means 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 49 CFR section 26.65(b);

(S) “Socially and economically disadvantaged individual” means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is—

1. Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis;

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 American Indians, Eskimos, Aleuts, 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), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Naura, 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 U.S. Small Business Administration (SBA), at such time as the SBA designation becomes effective;

3. Provided, however, that no individual can qualify as “economically disadvantaged” or be considered “socially and economically disadvantaged” if his or her personal net worth (computed as directed under 49 CFR part 26 and its Appendix E) exceeds the maximum amount specified in 49 CFR section 26.67(b) and (d), as that amount may be adjusted by USDOT;

(T) “Subcontractor” means a person or firm which does not receive a contract directly from the commission or another USDOT recipient in a USDOT-assisted highway, transit or airport program, but instead contracts with a contractor or subcontractor in that program, to perform construction (of any type including maintenance and repair) work, project design, design-build, or other professional services, to help complete a USDOT-assisted highway, transit or airport project;

(U) “Supplier” means a person or firm which provides exclusively materials, supplies or equipment, but not construction, design, or other professional services, by contract with the commission or another USDOT recipient, or with a contractor or a subcontractor;

(V) “TEA-21” means the federal Transportation Equity Act for the 21st Century, Public Law 105-178, 112 Stat. 107 et seq., and any of its sections or provisions;

(W) “USDOT” refers to the U.S. Department of Transportation, including the secretary of transportation, the office of the secretary, the FHWA, the FTA and the FAA, or any one of these administrative units of the U.S. Department of Transportation;

(X) “USDOT-assisted contract” means any contract between the commission (or other USDOT recipient) and a contractor or supplier funded in whole or in part with USDOT financial assistance. This term also includes lower tier contracts between the contractor and a subcontractor or a supplier, or between a subcontractor and a supplier, for any services or supplies needed to perform the contract work which is being funded in whole or in part with USDOT financial assistance.

(3) Throughout this chapter, the term “firm” shall be used to refer to any private legal person or business entity which may lawfully exist under the laws of Missouri or its state of creation, and which may contract to perform any services, or to provide or sell any materials or supplies. The term “firm” shall be deemed to include (but not be limited to) an

individual, corporation, partnership, limited partnership, joint venture, limited liability company, or a professional corporation. However, the term “firm” shall not include any “not-for-profit” corporation or other “not-for-profit” entity, and shall not include any public governmental entity. Furthermore, the firm and any fictitious name used by the firm must, to the extent required by Missouri law, be properly registered to do business in Missouri with the Missouri Secretary of State and the Missouri Department of Revenue, before that firm may perform work or sell materials or supplies in Missouri as a contractor, subcontractor, supplier, or any DBE firm recognized by MoDOT.

AUTHORITY: section 226.150, RSMo 1994; Title 49 Code of Federal Regulations part 26; section 1101(b) of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107, 113; and MoDOT’s approved DBE Program submittals to the U.S. Department of Transportation. Emergency rule filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Original rule filed May 10, 2000, effective Nov. 30, 2000.*

**Original authority: 226.150, RSMo 1939, amended 1977.*

7 CSR 10-8.020 Definitions
(Rescinded November 30, 2000)

AUTHORITY: sections 226.020 and 226.150, RSMo 1994, section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991, and Title 49 Code of Federal Regulations part 23. Original rule filed Aug. 15, 1988, effective Jan. 13, 1989. Amended: Filed April 13, 1994, effective Oct. 30, 1994. Emergency amendment filed Feb. 15, 1996, effective Feb. 25, 1996, expired Aug. 22, 1996. Amended: Filed Feb. 15, 1996, effective Aug. 30, 1996. Emergency rescission filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Rescinded: Filed May 10, 2000, effective Nov. 30, 2000.

7 CSR 10-8.021 General Information

PURPOSE: This rule provides general information regarding MoDOT’s implementation of the DBE Program requirements of Title 49 Code of Federal Regulations part 26 in USDOT-assisted programs and contracts.

PUBLISHER’S NOTE: The publication of the full text of the material that the adopting

agency has incorporated by reference in this rule would be unduly cumbersome or expensive. Therefore, the full text of that material will be made available to any interested person at both the Office of the Secretary of State and the office of the adopting agency, pursuant to section 536.031.4, RSMo. Such material will be provided at the cost established by state law.

(1) United States Department Transportation (USDOT)-Required Disadvantaged Business Enterprise (DBE) Program. The Missouri Highways and Transportation Commission, through Missouri Department of Transportation (MoDOT), has been and is the recipient of federal-aid highway funds, federal transit funds, and airport funds, as described in 49 CFR section 26.3. Some of these funds the commission, through MoDOT, expends directly by awarding a contract for design, construction or other professional services, or supplies, to a contractor or supplier. Some of these federal funds the commission, through MoDOT, transfers to other recipients, for them to expend through appropriate contracts. In accordance with 49 CFR section 26.3 and the provisions of various federal laws such as Transportation Equity Act for the 21st Century (TEA-21) which it implements and enforces, the provisions of Title 49 CFR part 26 are applicable to the commission, MoDOT, and all other recipients of USDOT financial assistance through MoDOT; as well as to the contractors, subcontractors and suppliers which receive USDOT-assisted contracts from the commission and all other recipients of USDOT financial assistance through MoDOT, from the funding sources described in 49 CFR section 26.3 (or their successor sources). The commission, MoDOT, all other recipients of such funds through MoDOT, and their contractors, subcontractors and suppliers on USDOT-assisted contracts, are bound by the provisions of Title 49 CFR part 26; and they are also bound by the commission's DBE Program regulations in this chapter. Some recipients of USDOT funding through MoDOT, including those described in 49 CFR section 26.21, may be required by such federal regulations to have their own DBE Program. Those recipients of USDOT funding through MoDOT are required to comply with the applicable provisions of this chapter, and to develop other portions of their own DBE program in cooperation with and under the supervision of the USDOT.

(2) MoDOT's DBE Program Policy Statement. MoDOT has developed and filed with USDOT its signed and dated "Policy

Statement" pursuant to 49 CFR section 26.23, stating MoDOT's commitment to the DBE Program, as follows:

The Missouri Department of Transportation (MoDOT) has established a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the U.S. Department of Transportation (USDOT), 49 CFR Part 26. MoDOT has received Federal financial assistance from the Department of Transportation, and as a condition of receiving this assistance, MoDOT has signed an assurance that it will comply with 49 CFR Part 26.

It is the policy and commitment of MoDOT that disadvantaged businesses, as defined in 49 CFR Part 26, shall have a level playing field to participate in the performance of contracts financed in whole or part with federal funds. It is also the policy of MoDOT to:

A. Ensure nondiscrimination in the award and administration of USDOT assisted contracts;

B. Create a level playing field on which DBE firms can compete fairly for USDOT assisted contracts;

C. Ensure that the DBE Program is narrowly tailored in accordance with applicable law;

D. Ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBE firms;

E. Assist in the removal of barriers to the participation of DBE firms in USDOT assisted contracts; and

F. Assist in the development of firms to enhance the ability to compete successfully in the market place outside the DBE Program.

The External Civil Rights Administrator has been designated as the DBE Liaison Officer. In that capacity, the administrator is responsible for the implementation of all aspects of the DBE program. Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by the MoDOT in its financial assistance agreements with the USDOT.

MoDOT will advise each contractor, through contract specifications, that failure to carry out these requirements shall constitute a breach of contract and may result in termination of the contract, or any such remedy that MoDOT deems appropriate. MoDOT will require all employees and agents to adhere to the provisions of 49 CFR Part 26.

MoDOT shall annually submit to the Federal Highway Administration (FHWA) overall goals for the participation of DBE

firms for a one year period of time. The goal shall be analyzed, and adjusted if necessary, at the end of each federal fiscal year.

/s/ Henry Hungerbeeler, Director
Dated September 30, 1999

(3) DBE Program Applicable Only to USDOT-Assisted Contract Work. In accordance with 49 CFR section 26.3(d) and other provisions of federal law, the USDOT DBE Program at 49 CFR part 26, and the commission's DBE Program regulations in this chapter, only apply to USDOT-assisted contracts awarded by USDOT funding recipients. If the commission or a recipient is bidding or awarding a contract which involves no USDOT funding, and which will be paid or financed entirely with state or local funding, or other federal funding not covered by DBE Program requirements, then 49 CFR part 26 and the commission's DBE Program regulations in this chapter do not apply to such contract work. Although the commission and MoDOT are implementing race- and gender-neutral measures and programs to assist small businesses as they are able to, the commission and MoDOT have no DBE Program applicable to contract work which is entirely state-funded or state and local-funded, and the provisions of this chapter do not apply to such state-funded or state and local-funded contract work. Any commission "Request for Bid" will clearly indicate whether an included project is a federal project or not, and if so, it will contain information on the DBE contract goal, if any. Any recipient of USDOT funding specified in 49 CFR section 26.3 through MoDOT must provide the same information in its bidding documents.

(4) The Administration of the Commission's DBE Program. The Missouri Highways and Transportation Commission has adopted these DBE Program regulations for MoDOT, which executive branch department of state government is subordinate to and controlled by the commission through the commission's appointee, the MoDOT director, who is MoDOT's chief executive officer. The administration of the DBE Program within MoDOT has been assigned to the external civil rights administrator, who has been designated as MoDOT's DBE liaison officer in compliance with 49 CFR section 26.25. The external civil rights administrator supervises the External Civil Rights Unit, and reports directly to MoDOT's inspector general, who is in turn, supervised by the MoDOT director. However, the external civil rights administrator retains direct and independent access



to MoDOT's director, chief engineer, and all other members of the director's staff, concerning all DBE Program matters. As the DBE liaison officer, MoDOT's external civil rights administrator develops, manages, and administers the DBE Program, including defining processes, procedures, and operational policies, and is responsible for implementing all aspects of MoDOT's DBE Program. The external civil rights administrator directs and controls the staff of the External Civil Rights Unit, and receives assistance as necessary from the inspector general, other MoDOT staff and commission legal counsel, and occasionally from commission-retained consultants and contractors, so that MoDOT has adequate staff to administer this DBE Program in compliance with 49 CFR part 26. The external civil rights administrator works closely with the commission's chief counsel's office to review DBE policies and contract provisions periodically, to ensure that they conform to state and federal law; and reviews program administration issues with the commission attorneys assigned DBE program responsibilities.

(5) Duties of the External Civil Rights Administrator. The external civil rights administrator performs the following duties and responsibilities, either directly and personally, or through the staff of the External Civil Rights Unit:

(A) Setting and approving DBE contract goals on federal aid construction projects, including projects administered by local public agencies, aviation and transit authorities, or any other recipient receiving USDOT assistance through MoDOT;

(B) Monitoring the DBE contract goals to verify contractor compliance at the time of the bid, when the contract is awarded, during project construction, and at the time of project acceptance;

(C) With the assistance of MoDOT field staff plus other contractors and subcontractors, monitoring DBE performance to determine that the DBE firm has performed a commercially useful function, and has otherwise complied with the requirements of 49 CFR part 26 in that contract work;

(D) Overseeing all support services provided to certified DBEs by MoDOT;

(E) Gathering and reporting statistical data and other information as required by USDOT;

(F) Reviewing third party contracts and purchase requisitions for DBE Program compliance;

(G) Working with MoDOT management, business units and staff to set the annual DBE

Program goal, as well as individual project or contract goals;

(H) Ensuring that bid notices and bidding documents are made available to DBE firms in a timely manner;

(I) Identifying USDOT-assisted contracts and procurement, to include DBE contract goals (factoring in both race- and gender-neutral contracting methods as well as contract goals preferential to DBE firms) in bid solicitations, and monitoring the results of those bids;

(J) Analyzing MoDOT's progress toward annual DBE Program goal attainment, and identifying various race- and gender-neutral or other ways to achieve the annual DBE Program goal;

(K) Participating in pre-bid meetings;

(L) Advising the commission and MoDOT's director on DBE Program matters and the achievement of MoDOT and USDOT program requirements;

(M) Providing DBE firms with information and assistance in preparing bids, and obtaining bonding and insurance;

(N) Planning and participating in DBE training seminars;

(O) Providing outreach to DBEs and community organizations to advise of training, contracting and other business opportunities available;

(P) Maintaining the MoDOT DBE Directory, its addenda and updates;

(Q) Performing any other functions and duties necessary or appropriate to administer and enforce the provisions of 49 CFR part 26 and this chapter in Missouri.

(6) Contacting MoDOT's DBE Liaison Officer. MoDOT's external civil rights administrator is MoDOT's DBE liaison officer. MoDOT's DBE liaison officer may be contacted in writing or by telephone as follows:

External Civil Rights Administrator
Missouri Department of Transportation
105 West Capitol Avenue, P.O. Box 270
Jefferson City, MO 65102-0270

Fax Number: (573) 526-5640
Telephone Number: 1-888-ASK MODOT
(1-888-275-6636)
E-Mail: taeges@mail.modot.state.mo.us

(7) DBE Directory. MoDOT publishes a directory annually, with monthly updates, identifying certified DBE firms willing to perform as subcontractors on MoDOT's USDOT-assisted projects. Copies of the directory are mailed annually to all contractors authorized to do business with MoDOT, DBE firms,

DBE organizations, contractor organizations, local public agencies, MoDOT district offices, and any other entity requesting copies. Monthly addenda (showing DBE firm additions and deletions, and other certification changes) are mailed to all firms and entities receiving notices of bid openings, and to plan holders, DBE firms, DBE organizations, contractor organizations, local public agencies, MoDOT district offices, and any other entity requesting copies. The firms contained in the DBE Directory and its addenda are certified as meeting the certification eligibility requirements of 49 CFR part 26 and this chapter, unless the addenda specifically lists the firm as not certified any longer. The directory contains each DBE firm name, address, phone, fax, socially and economically disadvantaged owner's name, the work categories in which the firm may perform DBE certified contract work, and the geographic work area in Missouri preferred by the DBE firm. MoDOT has made the DBE Directory available electronically to all MoDOT district offices, and to the public on the Internet. Paper copies of the DBE Directory are available by contacting MoDOT's DBE liaison officer or staff members in writing or by telephone as follows:

External Civil Rights Administrator
Missouri Department of Transportation
105 West Capitol Avenue, P.O. Box 270
Jefferson City, MO 65102-0270

Fax Number: (573) 526-5640
Telephone Number: 1-888-ASK MODOT
(1-888-275-6636)
E-Mail: temmek@mail.modot.state.mo.us

(8) MoDOT's Non-Discrimination Policy. MoDOT will not exclude any person from participating in, deny any person the benefits of, or otherwise discriminate against any person 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. Further, MoDOT will not, directly or through contractual or other arrangements, use criteria or methods that have the effect of defeating or substantially impairing accomplishment of the objectives of the USDOT or MoDOT DBE Program with respect to individuals of a particular race, color, sex, or national origin, in MoDOT's administration of the DBE Program. The commission and MoDOT are bound by, and agree to comply with, all requirements of USDOT's 49 CFR part 26, the provisions of which are incorporated by reference into this rule.

(9) DBE Program Duration and Updates. MoDOT will continue to carry out the DBE Program until all funds from the USDOT financial assistance have been expended, or Congress has terminated the DBE Program. MoDOT will provide USDOT with updates and revised program submissions representing any significant changes in the MoDOT DBE Program.

(10) No Quotas or Set-Asides. MoDOT does not use quotas or set-asides in any way in the administration of the DBE Program.

(11) Measures Taken in Anticipation of a Unified Certification Process.

(A) In anticipation of the Unified Certification Process (UCP) and its inherent cooperative program administration, as required by USDOT at 49 CFR section 26.81, MoDOT has submitted to USDOT one DBE Program which incorporates all modes and agencies within the USDOT, including the Federal Transit Administration (FTA) and Federal Aviation Administration (FAA) programs. The MoDOT External Civil Rights Unit and its Administrator will work closely with the FTA and FAA program administrators to develop uniform certification and reporting processes.

(B) The External Civil Rights Unit is responsible for the administration of the DBE program for all USDOT agency requirements. This DBE Program administration includes goal setting for concurrence, participation, verification, and DBE certification.

(C) Any recipients of USDOT funding through the commission and MoDOT will be required to comply with MoDOT's DBE Program, unless they have a USDOT-approved program of their own. The requisite MoDOT DBE Program compliance includes, but is not limited to, observing all provisions of this chapter and MoDOT's approved DBE Program which govern MoDOT's recipients of USDOT funding; and inserting the necessary provisions in their contracts to assure that their contractors, subcontractors and suppliers comply with the applicable provisions of this chapter and MoDOT's approved DBE Program. Once a statewide UCP is defined, all recipients will be required to accept only those firms certified under the UCP agreement. All Block Grant recipients will continue to be required to comply with leasing goals established by the sponsoring agency.

(12) Financial Institutions Owned and Controlled by Socially and Economically Disadvantaged Persons. MoDOT will identify and determine the full extent of services offered by financial institutions owned and

controlled by socially and economically disadvantaged persons in Missouri. MoDOT will make reasonable efforts to use the services of these institutions, within the scope permitted by state law. MoDOT will encourage prime contractors and other firms to use the services of those financial institutions which are owned and controlled by socially and economically disadvantaged persons.

(13) Required Contract Clauses in USDOT-Assisted Contracts and Subcontracts.

(A) Pursuant to 49 CFR section 26.13(a), each financial assistance agreement the commission or MoDOT signs with a USDOT operating administration, or with another primary recipient of USDOT funding subject to 49 CFR part 26, shall contain the following assurance, in which "DOT" and "the Department" refer to USDOT: "The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award or 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 recipient of its failure to carry out its approved program, the Department may impose sanctions 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.*)"

(B) As mandated by 49 CFR section 26.13(b), MoDOT will require the following assurance to be included in every USDOT-assisted contract which MoDOT or the commission signs with a contractor, and each subcontract that prime contractor signs with a subcontractor; where "DOT" refers to USDOT and "the recipient" means MoDOT and the Commission: "The contractor, subrecipient 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 all 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 termi-

nation of this contract or such other remedy as the recipient deems appropriate."

(14) Overconcentration of DBE Firms. USDOT rule 49 CFR section 26.33(a) provides that if MoDOT determines that DBE firms are so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work, MoDOT must devise appropriate measures to address that overconcentration. MoDOT has not identified any types of work in which DBE firms are so overconcentrated. MoDOT will continue to monitor DBE firm participation and usage, and will take appropriate action to address any identified DBE firm overconcentration in a certain type of work.

(15) Mentor-Protégé Program. USDOT rule 49 CFR section 26.35 discusses mentor-protégé programs in the context of the DBE Program. MoDOT will not be participating in a mentor-protégé program at this time.

(16) Program Violations, or False or Fraudulent Claims or Conduct. MoDOT will notify USDOT of any program violations, or suspected false, fraudulent or dishonest conduct, in connection with the DBE Program, in order for USDOT (and/or the U.S. Department of Justice) to take any of the compliance procedures, enforcement actions or sanctions provided in 49 CFR part 26, subpart F. These procedures, actions or sanctions include, but are not limited to: suspension or termination of federal funding; refusal to approve projects, grants or contracts until deficiencies are remedied; U.S. government-wide suspension or debarment proceedings under 49 CFR part 29; available program fraud and Civil Remedies provided for in 49 CFR part 31; or criminal prosecution under 18 U.S.C. section 1001 or other applicable provisions of law. MoDOT will also consider initiating compliance procedures, enforcement actions or sanctions available under Missouri civil, criminal, contract law, or in equity. The commission and MoDOT will consider whether the conduct at issue affects the determination of that entity's responsibility as a contractor, and thus, the entity's eligibility to receive future commission contracts.

AUTHORITY: section 226.150, RSMo 1994; Title 49 Code of Federal Regulations part 26; section 1101(b) of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107, 113; and MoDOT's approved DBE Program submittals to the U.S. Department of Transportation. Emergency rule filed May 10, 2000, effective*



May 20, 2000, expired Nov. 6, 2000. Original rule filed May 10, 2000, effective Nov. 30, 2000.

*Original authority: 226.150, RSMo 1939, amended 1977.

7 CSR 10-8.030 Procedures for Certifying Disadvantaged Business Enterprises
(Rescinded November 30, 2000)

AUTHORITY: sections 226.020 and 226.150, RSMo 1986, section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991, and Title 49 Code of Federal Regulations part 23. Original rule filed Aug. 15, 1988, effective Jan. 13, 1989. Amended: Filed April 13, 1994, effective Oct. 30, 1994. Emergency rescission filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Rescinded: Filed May 10, 2000, effective Nov. 30, 2000.

7 CSR 10-8.031 Who Is Governed and Bound by the USDOT and MoDOT DBE Program Regulations

PURPOSE: This regulation describes which individuals, entities and firms are governed and bound by the DBE Program regulations in this chapter, the USDOT DBE Program regulations at 49 CFR part 26, and the USDOT-approved MoDOT DBE Program submissions.

PUBLISHER'S NOTE: The publication of the full text of the material that the adopting agency has incorporated by reference in this rule would be unduly cumbersome or expensive. Therefore, the full text of that material will be made available to any interested person at both the Office of the Secretary of State and the office of the adopting agency, pursuant to section 536.031.4, RSMo. Such material will be provided at the cost established by state law.

(1) United States Department of Transportation (USDOT) Disadvantaged Business Enterprise (DBE) Regulations Incorporated Into These Rules. The USDOT DBE Program rules at 49 CFR part 26 are adopted by the commission, and incorporated by reference into these MoDOT DBE Program rules. To the extent that any individual, entity or firm is governed by the DBE Program regulations in this chapter, that individual, entity or firm is also governed and bound by the corresponding USDOT DBE Program regulations at 49 CFR part 26.

(2) MoDOT DBE Program Submissions to USDOT. As required by 49 CFR section 26.21, MoDOT must have a DBE Program which USDOT has approved, and MoDOT and the commission must comply with it. Whenever MoDOT and the commission submit proposed significant changes in the MoDOT DBE Program to USDOT for approval, the commission will publish the contemplated significant changes in the *Missouri Register* as proposed rulemaking, or proposed amendments. If and when USDOT approves the proposed changes in MoDOT's DBE Program, the commission will immediately adopt an order or emergency order of rulemaking accordingly, so that the published rules in this chapter of the *Code of State Regulations* are consistent with the MoDOT DBE Program as it is then approved by USDOT.

(3) The following individuals, entities and firms are governed and bound by the DBE Program regulations in this chapter, and the related and pertinent USDOT DBE Program regulations at 49 CFR part 26:

(A) Any individual or firm with an ownership interest in a firm which is DBE certified, or which desires to be DBE certified, as well as that firm and its officers, management, employees, agents and representatives. They are bound when they or the firm apply for DBE certification, while they are certified, and when they participate in any USDOT-assisted program or contract work which is subject to 49 CFR part 26; and for at least three years thereafter;

(B) Any individual, entity or firm which is a recipient through the commission and MoDOT of USDOT funding subject to 49 CFR part 26, including their owners, officers or officials, employees, agents and representatives. They are bound when the individual, entity or firm applies for status as a recipient of USDOT funding subject to 49 CFR part 26; while that funding exists and is available for expenditure; and for at least three years thereafter;

(C) Any individual, entity or firm which is a contractor, subcontractor or supplier on a USDOT-assisted contract issued by MoDOT or any other recipient funded through MoDOT, if that USDOT funding is subject to 49 CFR part 26; including their owners, officers or officials, management, employees, agents and representatives. They are bound when as a contractor, subcontractor or supplier, they submit a bid for the USDOT-assisted contract, or when they submit a bid or quote which is considered for or used in a bid for that USDOT-assisted contract; they remain bound while they perform as a con-

tractor, subcontractor or supplier on such USDOT-assisted contract work; and for at least three years after that work is completed and accepted, and final payment thereon has been made;

(D) Each member of the commission, the MoDOT director and chief engineer, the MoDOT external civil rights administrator, and all other MoDOT or commission officers, officials, employees, agents and representatives. They are bound while they hold that position, and indefinitely thereafter for those DBE program duties and responsibilities of a continuing nature after they have left those positions or employment with the commission or MoDOT; and

(E) The USDOT and its operating administrations Federal Highway Administration (FHWA), Federal Aviation Administration (FAA) and Federal Transit Administration (FTA), plus its agency administrators, officers, officials, employees, agents and representatives are bound in accordance with 49 CFR section 26.21(b)(1), but only to the extent that the USDOT or one of its operating administrations has approved or will approve the MoDOT DBE Program submissions and updates which correspond to the provisions of these regulations.

AUTHORITY: section 226.150, RSMo 1994; Title 49 Code of Federal Regulations part 26; section 1101(b) of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107, 113; and MoDOT's approved DBE Program submittals to the U.S. Department of Transportation. Emergency rule filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Original rule filed May 10, 2000, effective Nov. 30, 2000.*

*Original authority: 226.150, RSMo 1939, amended 1977.

7 CSR 10-8.040 Procedures for Certification Renewal of Disadvantaged Business Enterprises
(Rescinded November 30, 2000)

AUTHORITY: sections 226.020 and 226.150, RSMo 1986, section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991, and Title 49 Code of Federal Regulations part 23. Original rule filed Aug. 15, 1988, effective Jan. 13, 1989. Amended: Filed April 13, 1994, effective Oct. 30, 1994. Emergency rescission filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Rescinded: Filed May 10, 2000, effective Nov. 30, 2000.

7 CSR 10-8.041 Effective Date of the DBE Program Under 49 CFR Part 26

PURPOSE: This rule describes, under federal and state law, when the different components of the USDOT and MoDOT DBE Program became effective in Missouri.

(1) Effective Date of 49 CFR Part 26. United States Department of Transportation's (USDOT's) new Disadvantaged Business Enterprise (DBE) regulations at 49 CFR part 26 became effective and replaced USDOT's former DBE regulations (previously located at 49 CFR part 23) on March 4, 1999. See 49 CFR section 26.9(a), and see USDOT's final rulemaking with comments at 64 *Federal Register* 5096-5148, at page 5096. USDOT has determined and advised all recipients such as Missouri Department of Transportation (MoDOT) that since part 26 is now in effect, recipients are responsible for implementing it, and they may no longer implement the former part 23. Therefore, under federal law, 49 CFR part 26 became effective and began governing the DBE Program on March 4, 1999; and MoDOT has been obligated to observe and enforce its provisions from and after that date as a matter of federal law.

(2) USDOT Binding Written Interpretations and Guidance. Since the publication of 49 CFR part 26, USDOT has been periodically issuing valid and binding written interpretations and guidance concerning 49 CFR part 26. As MoDOT's External Civil Rights Unit has received or continues to receive these, MoDOT has been observing and enforcing their DBE program guidance, and MoDOT will continue to do so, as a matter of federal law. These valid and binding written guidance are available from USDOT and its Office of Small and Disadvantaged Business Utilization on the Internet at their website for the DBE Program: <http://osdbuweb.dot.gov/programs/dbe/dbe.html>; or on the main USDOT website (www.dot.gov) in the Office of Small and Disadvantaged Business portion of the site. Also, you may write or phone the Office of Civil Rights for Federal Highway Administration (FHWA), Federal Transit Administration (FTA) or Federal Aviation Administration (FAA); or contact the FHWA, FTA, or FAA field offices serving Missouri.

(3) Effective Date of the Commission's Revised DBE Regulations. The commission and MoDOT understand that these revised state DBE Program regulations will take effect on a date later than March 4, 1999 under state law. Therefore, these regulations will not be relied upon for actions taking

place prior to their legally-effective date; but the USDOT regulations at 49 CFR part 26 will apply to govern MoDOT's DBE Program from and after March 4, 1999, as required by federal law and section 226.150, RSMo.

AUTHORITY: section 226.150, RSMo 1994; Title 49 Code of Federal Regulations part 26; Section 1101(b) of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107, 113; and MoDOT's approved DBE Program submittals to the U.S. Department of Transportation. Emergency rule filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Original rule filed May 10, 2000, effective Nov. 30, 2000.*

**Original authority: 226.150, RSMo 1939, amended 1977.*

7 CSR 10-8.050 Challenge Procedures for Disadvantaged Business Enterprises
(Rescinded November 30, 2000)

AUTHORITY: sections 226.020 and 226.150, RSMo 1986, section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991, and Title 49 Code of Federal Regulations part 23. Original rule filed Aug. 15, 1988, effective Jan. 13, 1989. Amended: Filed April 13, 1994, effective Oct. 30, 1994. Emergency rescission filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Rescinded: Filed May 10, 2000, effective Nov. 30, 2000.

7 CSR 10-8.051 Procedures and Policies for Initially Certifying and Recertifying Disadvantaged Business Enterprise Firms

PURPOSE: This rule describes the procedures and policies which MoDOT will use to certify firms as DBEs under federal law.

(1) The Certification Application and Review Process.

(A) All applicants for Disadvantaged Business Enterprise (DBE) certification by or through MoDOT shall be furnished an application form in one or more parts, written instructions for completing the application, a copy of the rules in this chapter, and a copy of the eligibility requirements of Title 49 CFR part 26. Through this application process, each firm seeking DBE certification has the burden of demonstrating to Missouri Department of Transportation (MoDOT) by a preponderance of the evidence, that it meets the requirements of 49 CFR part 26, subpart D, concerning group membership or individ-

ual social and economic disadvantage, business size, ownership and control. As a part of this application process, each applicant must:

1. Provide information showing that the individuals who own and control the applicant firm are members of one or more groups identified in 49 CFR section 26.67(a) that are rebuttably presumed to be socially and economically disadvantaged. Each applicant firm, through one or more of the individuals owning and controlling that firm, must submit one or more signed, notarized "statement of disadvantage" certification(s) on a form provided by MoDOT, certifying under oath that each owner listed in the application as presumptively disadvantaged is, in fact, socially and economically disadvantaged. If MoDOT has no reason to question these sworn certifications, then MoDOT will rebuttably presume that each such owner is actually socially and economically disadvantaged. If MoDOT has any reason to question whether one or more of the designated individuals is actually a member of a United States Department of Transportation (USDOT) rebuttably-presumed socially and economically disadvantaged group, MoDOT shall require each such individual to demonstrate, by a preponderance of the evidence, that he is a member of, and has held himself out over a long period of time as a member of, a group whose members are classified by USDOT in 49 CFR sections 26.5 and 26.67(a) as being rebuttably presumed to be "socially and economically disadvantaged individuals";

2. Alternatively, if an applicant firm is owned and controlled by one or more individuals who are not or do not claim to be a member of a group identified in 49 CFR section 26.67(a) as socially and economically disadvantaged, then as part of the application, each such individual must submit an alternative signed and notarized "statement of disadvantage" bearing the same certification under oath as the "statement of disadvantage" form described in paragraph 1. above; which alternative form shows and demonstrates with supporting documentation and details of a convincing nature that such individual is in fact both socially and economically disadvantaged under the criteria specified in 49 CFR part 26;

3. Each individual owner of an applicant firm whose ownership and control are being relied upon for DBE certification must submit a signed, notarized statement of personal net worth (PNW), referencing and accompanied by appropriate supporting documentation. If an individual's PNW statement shows that the individual's personal net

worth exceeds \$750,000, then any presumption of economic disadvantage of that individual is rebutted, and that individual cannot be deemed to be “economically disadvantaged” for DBE firm certification purposes.

A. If any financial statement or other information from an accountant or certified public accountant (CPA) is used in preparing or supporting the PNW statement, the supporting documentation must include the accountant’s financial statement or analysis, together with all disclosures and footnotes appearing in that document, or an explanation of why that documentation would be unduly lengthy, burdensome or intrusive.

B. If any documentation prepared within the last two years valuing any of the individual owner’s corporate or other business or personal property in excess of \$25,000 (except as limited in subparagraph (1)(A)3.C. below) exists, that documentation should be included, or else an explanation of why that documentation would be unduly lengthy, burdensome or intrusive.

C. An individual’s PNW statement must report an individual’s ownership interest in the applicant firm and the individual’s equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm); however, those factors will be excluded from the final computation of personal net worth. A contingent liability does not reduce an individual’s net worth. 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 (ANC) and exclude any of the following which the individual receives from any ANC: 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.

D. To calculate an individual’s PNW statement, count the present value of assets attributable to the individual. For marital property held as community property or jointly (such as tenants by the entirety), normally 50% of the value of the asset is attributable to each person. However, a legal instrument valid under state law may alter this method of asset attribution between married owners. For PNW calculations, the present value of assets, including retirement savings or investment devices (such as a pension

plan, IRA, 401(k) plan) do count toward calculations of an individual’s personal net worth. These assets, even though generally not readily available as sources of financing for business operations, are still part of an individual’s overall wealth. However, only the present value of a retirement savings or investment device should be counted in the PNW computation; not what the individual’s return from it may be at some point in the future. Also in making a PNW calculation, it is proper to deduct or subtract any interest or tax losses the individual would incur if he or she liquidated that asset (converted it into cash) today;

4. The applicant firm must certify and show that it is a “small business,” within the current U.S. Small Business Administration business size standards found in 13 CFR part 121, for the type or types of work the firm seeks to perform in USDOT-assisted contracts;

5. The applicant firm must certify and show that it (and its affiliates) has had average annual gross receipts (as that term is defined in current U.S. Small Business Administration regulations) over the firm’s previous three fiscal years of \$16.6 million or less per year;

6. The applicant firm must certify and show with supporting documentation that the firm is at least fifty-one percent (51%) owned by socially and economically disadvantaged individuals. The applicant firm’s ownership by these 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 the firm’s arrangements. All securities that constitute actual, effective ownership of a firm must be held directly by disadvantaged persons, as described and with the exceptions provided in 49 CFR section 26.69(d). Also, the applicant firm must certify and show that the contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. All of USDOT’s criteria provided in 49 CFR section 26.69 and in other approved guidance apply to govern the determination that the firm is sufficiently owned by socially and economically disadvantaged individuals for DBE Program purposes;

7. The applicant firm must certify and show with supporting documentation that the same socially and economically disadvan-

taged individuals who own the firm are in control of that firm; and that the applicant firm is an independent business which is viable on its own, without being dependent on its relationship with another firm or firms. The applicant firm must certify and show that its socially and economically disadvantaged owners possess the real and unrestricted 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. Furthermore, the applicant firm must certify and show that its socially and economically disadvantaged owners have an overall understanding of, and managerial and technical competence and experience directly related to, the type(s) of business in which the firm is engaged, and the firm’s operations. Also, to the extent that state or local law may require the persons who own and/or control a type of firm (such as an engineering design or consulting firm) to have a particular license, registration or other credential, then the same socially and economically disadvantaged individuals who own and control an applicant firm of that type must possess the required license, registration or credential. All of USDOT’s criteria provided in 49 CFR section 26.71 and in other approved guidance apply to govern the determination that the firm is actually controlled by socially and economically disadvantaged individuals for DBE Program purposes;

8. The applicant firm must certify and show that it is an operational, for-profit firm, and that it is not owned or controlled by another firm, even a DBE firm, except as authorized in 49 CFR section 26.73(e), and that the firm meets all other USDOT certification eligibility criteria of 49 CFR part 26, subpart D;

9. Furthermore, the applicant must provide all of the information required by MoDOT in its application form and materials (plus any subsequent requests for information or clarification) relevant to show that the applicant is eligible under 49 CFR section 26.83, as well as 49 CFR part 26, subpart D; and

10. The application must be signed by all of the applicant firm’s socially and economically disadvantaged individual owners who are in control of the firm. The application must include the sworn affidavits of those individuals before a notary public or other person authorized to administer oaths, under penalty of perjury of the laws of the United States, attesting to the accuracy, completeness and truthfulness of the information on and accompanying the application form.

(B) Each application received shall be reviewed for completeness, and the applicant firm will be notified in writing of any additional information required. The additional information requested must be received within a maximum of thirty (30) days or as specified in writing. After that period, if the additional information requested has not been received and no extension of time has been requested and granted in writing, MoDOT may deny the application for the firm's failure or refusal to provide the relevant information requested by MoDOT (or possibly requested by USDOT), in accordance with 49 CFR section 26.73(c).

(C) After all required information is received, an on-site visit to the offices of the applicant firm, and to job sites at which the firm is working in Missouri, will be scheduled as required by 49 CFR section 26.83(C)(1). Minutes of the on-site review will be made and a copy of these minutes will be given to the applicant after the close of the on-site review. MoDOT will usually not make an on-site visit of firms domiciled outside of Missouri, but will contact the state of residence of that firm (or another certifying USDOT recipient) for a copy of their on-site visit.

(D) Following the on-site review, a final review of the application and its related documentation, plus the review minutes, will be made to determine that the application is complete, and that MoDOT has no questions or issues which require further submissions or documentation.

(2) The Effect of Small and Disadvantaged Business Program Certification From or Recognized By the U.S. Small Business Administration. MoDOT does not accept a firm's Section 8(a) or Small and Disadvantaged Business (SDB) Program certification from, or as recognized by, the U.S. Small Business Administration. Each such firm having 8(a) or SDB certification must independently establish its eligibility for initial DBE Program certification by MoDOT under the procedures of section (1) above. Each such firm which was previously certified as a DBE by MoDOT under the mandates of the former (now repealed) USDOT DBE Program regulations at 49 CFR part 23 on the basis of its 8(a) or SDB certification, must establish its right to certification independently under the standards of 49 CFR part 26 and the provisions of this chapter, in order to be certified or re-certified as a MoDOT DBE firm after March 4, 1999.

(3) The Effect of Certification as a DBE by Another USDOT Funding Recipient. In

accordance with 49 CFR section 26.83(e), MoDOT does not accept a firm's certification by another USDOT funding recipient as a basis upon which MoDOT will rely in the DBE certification process. In each instance, and regardless of the other USDOT recipients which may have previously or currently certified this firm as a DBE for the purposes of their DBE programs, MoDOT will request, accept and consider certification documentation provided by any other certifying USDOT recipient, together with the documentation required by section (1) of this rule; but MoDOT will in each instance make an independent determination of whether the applicant firm will be certified as a DBE or not.

(4) The Effect of Certification as a DBE by a Missouri Unified Certification Program. A Unified Certification Program (UCP) for the state of Missouri, as required by 49 CFR section 26.81, is being developed but does not currently exist. Once a Missouri UCP exists and has been approved by the U.S. Secretary of Transportation under 49 CFR section 26.81(a), certification as a DBE by the UCP shall be binding upon and honored by MoDOT, and that Missouri-certified DBE firm will not be obligated to separately apply for MoDOT DBE certification under this rule or chapter.

(5) The Burdens of Proof in Certification Determinations. As provided in 49 CFR section 26.61, any firm applying for DBE certification has the burden of demonstrating to MoDOT by a preponderance of the evidence, that the firm meets the requirements of 49 CFR part 26, subpart D, concerning group membership or individual disadvantage, business size, firm ownership and control of the firm. MoDOT will rebuttably presume that individuals who establish themselves to be members of any of the USDOT-designated groups identified in 49 CFR section 26.67(a) are socially and economically disadvantaged. However, such applicants still have the obligation to provide MoDOT with the information concerning their economic disadvantage as required by this chapter and by 49 CFR part 26, subpart D, especially at section 26.67. All other 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 MoDOT by a preponderance of the evidence that they are socially and economically disadvantaged.

(6) Pre-Determination Informal Proceedings to Receive Evidence for DBE Certification Purposes. MoDOT is not obligated to do so, but in the course of any DBE certification application review, if MoDOT decides that facts, circumstances, relationships or other DBE issues require clarification or explanation by this method, MoDOT may request the applicant in writing to appear before MoDOT External Civil Rights Unit personnel and a notary public, to provide verbal testimony in person, sworn under penalty of perjury, together with supporting documentation, on the outstanding questions which MoDOT requests additional information. MoDOT's written notice will specify the issues or questions which require clarification and supplementation by the applicant. MoDOT's written notice will also afford the applicant the alternative opportunity to submit written testimony by affidavit sworn under penalty of perjury, and accompanied by other documentation, on these issues or questions, in lieu of providing sworn verbal testimony before a notary public, if the applicant is confident that such a written reply will sufficiently answer MoDOT's questions and issues. The sworn verbal presentation will not be a hearing, but will be an informal question and answer session. The applicant may have legal counsel present for any reason, including to ask clarifying questions but all sworn statements made and documentation presented shall be given by the individual owners and/or representatives of the applicant firm. A verbatim transcript of any such informal verbal presentation will be prepared by MoDOT at its own cost, and one copy will be provided to the applicant firm at no charge. The information so obtained shall also be used by MoDOT in reaching its determination on DBE firm certification.

(7) Certification Determination. MoDOT shall make its determinations of whether individuals and firms have met their burden of demonstrating group membership, ownership, control, and social and economic disadvantage, by considering all the facts in the record, viewed as a whole. MoDOT will make its decision on the great majority of applications for DBE certification within ninety (90) days of receipt of all information required from the applicant firm under 49 CFR part 26 and this chapter. However, if MoDOT is unable to decide a DBE certification question within that ninety (90)-day period, MoDOT may extend that time period once, for up to an additional sixty (60) days, upon written notice to the applicant firm, explaining fully and specifically the reasons for this extension. If for any reason, MoDOT



fails to issue a written decision on certification within that time period (as it may have been extended once in writing), then MoDOT is deemed to have denied the DBE certification application by USDOT, and the applicant firm may appeal that constructive denial to USDOT under the provisions and authority of 49 CFR sections 26.83(k) and 26.89.

(8) Effect of DBE Certification.

(A) If MoDOT determines to certify an applicant firm as a DBE, that firm shall be notified in writing by MoDOT, and MoDOT shall notify the firm of the specific category or categories of work in which the firm is DBE certified. The firm and its pertinent information, including its approved categories of DBE work shall be added to MoDOT's DBE directory immediately. The firm will remain certified for MoDOT purposes for a period of three (3) years from its date of certification. On that date, the firm's DBE certification shall lapse and be null and void, unless the firm has submitted a reasonably complete new certification application to MoDOT. Provided, however, that during the three (3)-year certification period, each DBE firm must accurately, truthfully and completely submit the interim sworn affidavits and documentation to MoDOT required annually and/or when there is a material change in circumstances relating to that firm, as specified in 49 CFR section 26.83 and in this chapter. Also, any certified DBE firm is potentially subject to having its DBE certification removed through the procedures specified in 49 CFR section 26.87 and in this chapter.

(B) DBE certification confers no vested or permanent right or property interest which continues beyond the three (3)-year certification period. About sixty (60) days prior to the end of its three (3)-year certification period, each DBE firm will be mailed a complete packet of certification application materials to be completed and submitted for another three (3)-year certification period. If the certification application materials are completed reasonably accurately and completely by the applicant DBE firm and received by MoDOT's External Civil Rights Unit staff on or before the certification expiration date, then that firm's DBE certification will not lapse on the third anniversary date after certification. While a timely new certification application is pending, the prior DBE certification shall continue until MoDOT rules on the new certification application. If a new certification application is not timely received by MoDOT on or before the third anniversary date of certification, then that firm's DBE certification shall lapse, and the firm shall no

longer be DBE certified by MoDOT. Should a firm whose certification has lapsed later apply for DBE certification with MoDOT, that firm shall remain without DBE certification unless and until its new DBE application is approved by MoDOT.

(9) Effect of MoDOT DBE Certification Denial.

(A) If any applicant for DBE certification (whether currently certified by MoDOT or not) is denied certification by MoDOT's External Civil Rights Unit, MoDOT's External Civil Rights Unit shall notify the firm of that decision in writing by certified mail, return receipt requested. The notice shall set out the specific grounds for certification denial in Title 49 part 26 and in this chapter, and shall specifically describe or refer to the evidence (or lack thereof) which supports that determination by MoDOT's External Civil Rights Unit.

(B) The written notice of denial shall inform the applicant firm of its discretionary right to seek MoDOT administrative review of this certification denial by an independent hearing officer who did not take part in the actions leading to the denial of certification, and who is not subject to direction or instruction from the External Civil Rights Unit, its administrator or its personnel, who did take part in those actions. The notice of denial shall inform the applicant firm that if it requests this MoDOT administrative review within fifteen (15) days of the date of the MoDOT certification denial letter, the firm will have the choice of an informal hearing before the hearing officer, with sworn testimony; and MoDOT will maintain a verbatim record of the hearing and the record evidence. The notice shall further inform the applicant firm of its right to elect to present additional information and arguments supporting its certification to the hearing officer in writing, without going to a hearing. The notice will provide that if the applicant firm elects MoDOT administrative review by either an informal hearing or by written submissions, the applicant firm shall be afforded an opportunity to respond to the reasons stated for denial of certification, and may provide information and arguments concerning why it should be certified. In such an administrative review, the applicant firm still bears the burdens of proof specified in section (5) of this rule and in 49 CFR section 26.61. The procedures for such an informal hearing or written presentation to an independent MoDOT hearing officer are the same as those set forth in this chapter in rule 7 CSR 10-8.091, except that the applicant for initial or renewed certification shall bear the burdens

of proof, and not MoDOT. As a result of the MoDOT administrative review, the hearing officer may either affirm the initial MoDOT denial of certification, or may reverse that determination and rule that the firm shall be certified. The ruling of the hearing officer shall be by written findings of fact and conclusions of law, and shall restate or provide by enclosure all pertinent USDOT rules in 49 CFR part 26. If the independent hearing officer ultimately affirms the denial of certification, the applicant firm shall be informed in writing of its right to appeal the certification denial to USDOT under the procedures set forth in 49 CFR section 26.89, and that USDOT regulation shall be cited in full or enclosed.

(C) The written notice of denial shall also clearly state that further administrative review by an independent MoDOT hearing officer is optional, and not mandatory, before the firm may appeal the MoDOT certification denial to USDOT. The applicant firm, if it so wishes, may bypass any further MoDOT administrative review and may appeal the certification denial within ninety (90) days of the date of that certification denial directly to USDOT under the procedures set forth in 49 CFR section 26.89, specifying the procedures for certification appeals to the U.S. Department of Transportation. A copy of 49 CFR section 26.89, and any other pertinent USDOT DBE Program regulations cited in the determination, shall be enclosed with the written notice of denial.

(D) A firm which has been denied DBE certification may not reapply for DBE certification to MoDOT for a period of at least twelve (12) months from the date of the written notice of denial. The written notice of denial shall also inform the applicant firm of that MoDOT restriction.

(E) A firm which has previously been certified, but has been denied renewed certification as a DBE firm upon reapplication to MoDOT for DBE certification, shall be removed immediately from MoDOT's DBE directory listings. The firm, its owners, agents and employees, shall no longer represent this firm's status as an eligible MoDOT DBE firm to any other firm or person. As with any other MoDOT denial of certification, such a firm may not reapply for DBE certification to MoDOT for a period of at least twelve (12) months from the date of the written notice of denial. The written notice of denial shall also inform the applicant firm of that MoDOT restriction.

(10) The Finality of MoDOT's Determination to Deny Initial or Renewal Certification. Whether MoDOT's determination to deny

DBE certification initially or on a renewal application is made by MoDOT's External Civil Rights Unit and not appealed to a MoDOT hearing officer, or the determination is made by an independent MoDOT hearing officer under this rule, that determination is final as to MoDOT, but that determination remains appealable to USDOT under the provisions of 49 CFR sections 26.87 and 26.89, and until USDOT has resolved such an appeal, the determination is not final under 49 CFR part 26. Therefore, for purposes of Missouri law, the MoDOT determination to deny initial or renewal certification is not a final state administrative decision, and it is not subject to judicial review in Missouri's courts under the provisions of Chapter 536, RSMo, or 49 CFR part 26.

AUTHORITY: section 226.150, RSMo 1994; Title 49 Code of Federal Regulations part 26; section 1101(b) of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107, 113; and MoDOT's approved DBE Program submittals to the U.S. Department of Transportation. Emergency rule filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Original rule filed May 10, 2000, effective Nov. 30, 2000.*

**Original authority: 226.150, RSMo 1939, amended 1977.*

7 CSR 10-8.060 Requirements to Participate in a Mentor-Protege Agreement (Rescinded November 30, 2000)

AUTHORITY: sections 226.020 and 226.150, RSMo 1986, section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991, and Title 49 Code of Federal Regulations part 23. Original rule filed Aug. 15, 1988, effective Jan. 13, 1989. Amended: Filed April 13, 1994, effective Oct. 30, 1994. Emergency rescission filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Rescinded: Filed May 10, 2000, effective Nov. 30, 2000

7 CSR 10-8.061 Missouri Unified Certification Program

PURPOSE: This rule describes Missouri's Unified Certification Program (UCP) for USDOT DBE certification when that program has been established by MoDOT with other USDOT recipients in Missouri; and until then, to state that no such UCP program currently exists in Missouri.

(1) Under the mandates of 49 CFR section 26.81, within several years Missouri Department of Transportation (MoDOT) and all other United States Department of Transportation (USDOT) funding recipients in Missouri must participate in a Unified Certification Program (UCP). When the UCP is established and operational, a firm will be required to apply for certification with only one entity, and if that firm is certified by that one entity, the firm's Disadvantaged Business Enterprise (DBE) certification will be honored by all other USDOT funding recipients in Missouri. However, such a UCP program does not currently exist in and for Missouri.

(2) When a Missouri UCP program is established, this regulation will be amended to describe how the UCP DBE certification process applies to and governs MoDOT's DBE certification process. This regulation will also be amended to adopt any requirements necessary to conform and comply to the new state UCP program for DBE certification.

AUTHORITY: section 226.150, RSMo 1994; Title 49 Code of Federal Regulations part 26; section 1101(b) of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107, 113; and MoDOT's approved DBE Program submittals to the U.S. Department of Transportation. Emergency rule filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Original rule filed May 10, 2000, effective Nov. 30, 2000.*

**Original authority: 226.150, RSMo 1939, amended 1977.*

7 CSR 10-8.070 Decertification Procedures for Disadvantaged Business Enterprises (Rescinded November 30, 2000)

AUTHORITY: sections 226.020 and 226.150, RSMo 1986, section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991, and Title 49 Code of Federal Regulations part 23. Original rule filed Aug. 15, 1988, effective Jan. 13, 1989. Amended: Filed April 13, 1994, effective Oct. 30, 1994. Emergency rescission filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Rescinded: Filed May 10, 2000, effective Nov. 30, 2000.

7 CSR 10-8.071 DBE Program Reporting and Disclosure Requirements for Currently Certified DBE Firms

PURPOSE: This rule describes the various affidavits and other documents each currently certified DBE firm must file with MoDOT to remain certified; and the legal implications for a DBE firm which fails to timely file the required affidavit or other documents.

(1) Sworn Affidavit of a Material Change in the DBE's Status or Circumstances.

(A) As required by 49 CFR section 26.83(i), each certified Disadvantaged Business Enterprise (DBE) firm must inform the Missouri Department of Transportation (MoDOT) in writing of any change in circumstances which affects the firm's legal ability to meet the size, disadvantaged status, ownership or control requirements of 49 CFR part 26; or of any material change in the information provided in the firm's last DBE certification process with MoDOT. This includes, but is not limited to, changes in a firm's management or management responsibilities; changes in operational or daily control of the firm's business; changes in firm ownership; material changes in the firm's annual gross receipts; or material changes in the personal net worth of any one owner who was represented or found to be socially and economically disadvantaged. This written notice to MoDOT should be sent to MoDOT's DBE Program liaison officer, the external civil rights administrator.

(B) The written notice must take the form of an affidavit by the firm's socially and economically disadvantaged individual owners, sworn to before a notary public or other person who is authorized by state law to administer oaths; or else it may be an unsworn declaration which clearly contains a written affirmation that it is executed by each individual signing it under penalty of perjury as provided in the laws of the United States.

(C) The DBE firm and its controlling owners must provide this written notification to MoDOT within thirty (30) days of the occurrence of the change in question, regardless of when the change in status or circumstances occurred. If the DBE firm or its owners fails to make a timely written notification to MoDOT of such a change in status or circumstances, the firm will be deemed to have failed to cooperate, and shall subject the firm to removal of eligibility as a DBE, and each of them to any one or more of the other sanctions provided in 49 CFR section 26.109(c), or elsewhere in state or federal law. An intentional failure to timely notify MoDOT of the change in status or circumstances may subject the DBE firm or its owners to federal or state criminal prosecution for fraud or other crimes, and may also result in contractual or other liability as well.



(2) Annual Sworn Affidavit.

(A) Each year, on or before the annual anniversary date of its last certification, each DBE firm must submit a sworn and notarized affidavit from each of the firm's controlling socially and economically disadvantaged owners, executed under penalty of perjury of the laws of the United States. If a notary is not available, then the affidavit must be executed before a person who is authorized by state law to administer oaths. This affidavit must truthfully, accurately and completely affirm that there have been no changes in the firm's status or circumstances affecting its ability to meet the DBE firm size, ownership or control requirements of 49 CFR part 26, that there have been no changes in that individual owner's status, personal net worth or other circumstances which may affect that individual's status as socially and economically disadvantaged under 49 CFR part 26, that there have been no other material changes in any of the other information originally provided with the firm's application for DBE certification, and that the firm is still eligible for MoDOT DBE certification status; except as the firm may have previously notified or be notifying MoDOT under 49 CFR section 26.83(i) and section (1) of this rule. These affidavits must be accompanied by the most recent personal state and federal income tax returns for each socially and economically disadvantaged individual who is on record with MoDOT as owning and controlling the firm; plus the DBE firm's most recent state and federal income tax returns; and the DBE firm's most recent financial statement. If any audited financial statement has been prepared for an individual disadvantaged owner (individually or jointly with his or her spouse) or for the DBE firm since the last certification date or its annual anniversary, then a complete photocopy of that document must also be provided, including but not limited to its asset and liability descriptions, balance sheets, and all its notes, footnotes, and accompanying statements and qualifications.

(B) MoDOT will notify each DBE firm by regular U.S. mail in writing at least thirty (30) days before the annual anniversary date of certification of this annual sworn affidavit and its accompanying document submission requirement. However, regardless of whether the firm receives that notification, it is the DBE firm's responsibility to timely submit the required affidavit and other documentation.

(C) If the DBE firm and its owners fail to make a timely submission to MoDOT of the required annual affidavits and documentation, or if the information contained therein is not accurate, complete and truthful, the firm

will be deemed to have failed to cooperate, which shall subject the firm to removal of eligibility as a DBE, and to any one or more of the other sanctions provided in 49 CFR section 26.109(c), or elsewhere in state or federal law. An intentional failure to truthfully, accurately and completely notify MoDOT in the annual affidavit and its submissions of any change in status or circumstances may subject the DBE firm or its owners to federal or state criminal prosecution for fraud or other crimes, and may also result in contractual or other liability as well.

AUTHORITY: section 226.150, RSMo 1994; Title 49 Code of Federal Regulations part 26; section 1101(b) of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107, 113; and MoDOT's approved DBE Program submittals to the U.S. Department of Transportation. Emergency rule filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Original rule filed May 10, 2000, effective Nov. 30, 2000.*

**Original authority: 226.150, RSMo 1939, amended 1977.*

7 CSR 10-8.080 Determination and Review Procedures Governing the Failure to Perform a Commercially Useful Function (Rescinded November 30, 2000)

AUTHORITY: section 226.020 and 226.150, RSMo 1994, section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991, and Title 49 Code of Federal Regulations part 23. Emergency rule filed Feb. 15, 1996, effective Feb. 25, 1996, expired Aug. 22, 1996. Original rule filed Feb. 15, 1996, effective Aug. 30, 1996, Emergency rescission filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Rescinded: Filed May 10, 2000, effective Nov. 30, 2000.

7 CSR 10-8.081 Ineligibility Complaints

PURPOSE: This rule discusses the procedures for, and confidentiality governing, the filing of a DBE firm ineligibility complaint, in accordance with 49 CFR sections 26.87(a) and 26.109(b).

(1) Filing an Ineligibility Complaint. Any person, firm, recipient, or other legal entity may file with Missouri Department of Transportation (MoDOT) a written complaint alleging that a currently-certified firm is ineligible for Disadvantaged Business Enterprise

(DBE) Program certification, and specifying the reasons why that firm is alleged to be ineligible. However, MoDOT will not accept a general allegation that a firm is ineligible without some supporting details or allegations; and MoDOT will not accept an anonymous complaint for purposes of 49 CFR section 26.87(a) compliance (although MoDOT may act upon the allegations in an anonymous complaint on its own initiative). As a matter of program and contract compliance, MoDOT encourages all DBE firms, prime contractors, other subcontractors, and their owners, officials and employees, to file a detailed ineligibility complaint, with as much supporting information as is available, whenever they have a legitimate reason to believe that a currently-certified DBE firm is not properly eligible for DBE certification under this chapter or under 49 CFR part 26. All DBE firm ineligibility complaints should be addressed to and filed with MoDOT's DBE liaison officer, the external civil rights administrator. An ineligibility complaint may be sworn under penalty of perjury of the laws of the United States as an affidavit before a notary public or other officer authorized to administer oaths, but that is not a legal prerequisite for filing an ineligibility 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.

(2) MoDOT Processing of Ineligibility Complaints. Upon receipt of a signed ineligibility complaint including one or more detailed allegations, MoDOT will acknowledge the receipt of the complaint in writing; but a copy of the acknowledgement will not be sent to the DBE firm. MoDOT will review its records concerning the DBE firm in question, along with any material provided by the complainant or available from other sources within or without MoDOT. MoDOT will conduct any investigation it deems necessary under the circumstances, although MoDOT is not legally obligated to conduct any investigation beyond a document request and review. At an appropriate time in the complaint investigative phase, MoDOT will notify the DBE firm in writing that a complaint alleging the firm's ineligibility had been filed, and request additional information from the firm relating to the allegations. In that letter, MoDOT will provide the DBE firm with a general statement or summary of the allegation(s) against the DBE firm's continued certification.

(3) The MoDOT Determination and Future Actions. After MoDOT has reviewed the

complaint and conducted any investigation it deems necessary, MoDOT shall make a determination whether there is reasonable cause to believe that the DBE firm is ineligible to be certified. If MoDOT finds reasonable cause to believe that the DBE firm is ineligible, MoDOT will provide written notice to the DBE firm that MoDOT proposes to find the firm ineligible for certification, which notice sets forth the reasons for that proposed determination. MoDOT will not provide the complainant with that notice of reasonable cause or the preliminary findings set forth therein, but may advise the complainant that proceedings concerning the firm's DBE eligibility are continuing at MoDOT. In the event that MoDOT determines that reasonable cause does not exist, MoDOT will separately and confidentially notify the complainant and the DBE firm in writing of that determination and MoDOT's reasons for making that determination. All statements of reasons for findings on the issue of reasonable cause shall specifically reference the evidence in the record on which each reason is based.

(4) MoDOT Hearing or Other Due Process Review. When MoDOT notifies a firm that there is reasonable cause to remove its DBE eligibility on the basis of an ineligibility complaint and MoDOT's review and investigation of that complaint, MoDOT will follow the procedures required by 49 CFR section 26.87(d), and offer the DBE firm an opportunity for an informal hearing with a complete and verbatim record, or if the firm elects, an opportunity to present information and arguments in writing for a written record review, without going to a hearing. Such a reasonable cause notice shall be sent to the DBE firm by certified U.S. mail, return receipt requested. An informal hearing or written record review will be conducted and decided by an independent hearing officer for MoDOT. In the event the firm requests either an informal hearing or a written record review of a reasonable cause determination, MoDOT shall bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of 49 CFR part 26 and this chapter. If the firm does not request either an informal hearing or the opportunity for a written record review within fifteen (15) days after the date the firm receives the reasonable cause notice, as shown on the return receipt card, then the file MoDOT's External Civil Rights Unit has developed on this eligibility complaint (along with any sworn affidavits of the staff or others) shall be turned over to the independent hearing officer to determine if, by a prepon-

derance of the evidence present in the file before the hearing officer, MoDOT has proven that the firm does not meet the certification standards of 49 CFR part 26 and this chapter.

(5) The Confidentiality of Information on a Complainant. Pursuant to 49 CFR sections 26.87(a) and 26.109(b), the identity of complainants shall be kept confidential by MoDOT and all its staff, including its hearing officer, at the complainant's election. If such confidentiality will hinder the investigation, proceeding or hearing, or result in a denial of appropriate administrative due process to the firm, its owners or other parties, then MoDOT shall advise the complainant to determine if the complainant will waive the privilege of confidentiality. Complainants shall be advised that in some circumstances, their failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or informal hearing, if the allegations cannot be established without actually or effectively disclosing the identity of the complainant. Complainants shall further be notified that if the allegations of the complaint cannot be established by other available means, the complainant shall be expected to provide sworn testimony at an informal hearing or else a sworn affidavit for a written record review, to help MoDOT prove the firm is ineligible for certification by a preponderance of the evidence. If the complainant refuses to waive the confidentiality privilege so as to disclose his or her identity, or refuses to provide oral or written evidence where necessary to substantiate the complaint, then MoDOT will take whatever administrative action is appropriate on the complaint, including but not limited to dismissing the complaint for lack of supporting evidence.

AUTHORITY: section 226.150, RSMo 1994; Title 49 Code of Federal Regulations part 26; section 1101(b) of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107, 113; and MoDOT's approved DBE Program submittals to the U.S. Department of Transportation. Emergency rule filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Original rule filed May 10, 2000, effective Nov. 30, 2000.*

**Original authority: 226.150, RSMo 1939, amended 1977.*

7 CSR 10-8.090 Finality of Department Determinations in the Disadvantaged Business Enterprise Program
(Rescinded November 30, 2000)

AUTHORITY: sections 226.020 and 226.150, RSMo 1994, section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991 and Title 49 Code of Federal Regulations part 23. Emergency rule filed Feb. 15, 1996, effective Feb. 25, 1996, expired Aug. 22, 1996. Original rule filed Feb. 15, 1996, effective Aug. 30, 1996. Emergency rescission filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Rescinded: Filed May 10, 2000, effective Nov. 30, 2000.

7 CSR 10-8.091 MoDOT Procedures and Hearings to Remove a Firm's DBE Eligibility

PURPOSE: This rule complies with the requirements of 49 CFR sections 26.67, 26.87 and 26.89, by specifying the grounds for which MoDOT may institute proceedings to remove a firm's DBE certification and eligibility, and the hearing or other due process procedures involved.

(1) Scope of this Rule.

(A) This rule specifies the circumstances in which the Missouri Department of Transportation (MoDOT) will consider removing Disadvantaged Business Enterprise (DBE) eligibility from a firm which is currently certified as a DBE, and the procedures which will be followed to reach a determination of continued DBE eligibility. This rule also specifies the procedures which MoDOT will use to afford an individual owner of a DBE-certified firm and the firm due process if that owner's status is challenged or suspected as not qualifying that individual owner as socially and economically disadvantaged under 49 CFR part 26. This rule will apply to:

1. Complaints of a DBE firm's ineligibility under 49 CFR section 26.87(a) and rule 7 CSR 10-8.081, when MoDOT notifies the DBE firm that there is reasonable cause to remove its DBE eligibility on the basis of an ineligibility complaint and MoDOT's review and investigation of that complaint;

2. MoDOT-initiated proceedings, where based upon notification by the DBE firm of a change in its status or circumstances, or other information which comes to MoDOT's attention, and after any investigation MoDOT External Civil Rights Unit deems appropriate, the MoDOT staff determine that there is reasonable cause to believe that a currently-certified DBE firm is ineligible. At that time, MoDOT shall provide written notification to the DBE firm by certified U.S. mail, return receipt requested, that MoDOT proposes to



find the firm ineligible as a DBE, setting forth the specific reasons for that proposed determination. This statement of reasons for the finding of reasonable cause to remove the firm's DBE eligibility shall specifically reference the evidence in the record which MoDOT has developed to date, on which each reason is based. These proceedings also include, but are not limited to, a potential removal of DBE certification where MoDOT has reason to believe that an individual owner classified as socially and economically disadvantaged is actually not so disadvantaged; and the loss of that disadvantaged status would likely result in the firm's loss of DBE eligibility;

3. United States Department of Transportation (USDOT)-initiated proceedings, where a USDOT operating administration has determined that information in MoDOT's records or other information available to USDOT provides reasonable cause to believe that a firm which MoDOT certified as a DBE does not meet the eligibility criteria of 49 CFR part 26. In such an event, the USDOT operating administration may direct MoDOT to initiate a proceeding to remove the firm's certification. If USDOT does direct MoDOT to initiate a proceeding to remove a firm's certification, that USDOT operating administration will provide the DBE firm and MoDOT with the reasons for that directive, including any relevant documentation or other information available to USDOT. When that USDOT action occurs, MoDOT will immediately commence and prosecute a proceeding to remove that firm's DBE eligibility, as provided by 49 CFR section 26.87(b), and by paragraph 2. of this subsection, in accordance with 49 CFR section 26.87(c).

(B) This rule does not apply to:

1. Firms which are seeking initial certification as a DBE, or which previously have been certified as a DBE but are undergoing review to determine if the firm will be certified by MoDOT for an additional three (3)-year period. Their informal hearing or other administrative review process by an independent hearing officer within MoDOT after MoDOT External Civil Rights Unit has denied the firm's certification is addressed in rule 7 CSR 10-8.051, section (9);

2. An individual whose statement of personal net worth shows that the individual owner's personal net worth exceeds \$750,000, and so that individual's presumption of economic disadvantage is rebutted. In that event, MoDOT will simply notify that individual owner and the DBE firm in question in writing by U.S. mail that this owner is not economically disadvantaged and can no

longer be used to support the firm's eligibility as a DBE. However, if that individual's loss of economic disadvantage status may render the firm ineligible as a DBE (which will usually be the case when an individual owner ceases to be economically disadvantaged), then MoDOT will immediately commence and prosecute a proceeding to remove that firm's DBE eligibility, as provided by 49 CFR section 26.87(b) and by paragraph (1)(A)2. of this rule;

3. An individual owner of a DBE firm where MoDOT has reasonable cause to believe that such individual is not socially and/or economically disadvantaged, but that individual is only a minority owner and has no real control over the DBE firm, so his or her status is not necessary to continue the firm's DBE eligibility. Under those circumstances, MoDOT may take no immediate action, but may wait to resolve that issue when the firm next applies for certification. However, if that individual's loss of social and/or economic disadvantage status could possibly render that firm ineligible as a DBE (which will usually be the case when an individual owner ceases to be socially and economically disadvantaged), then MoDOT will immediately commence and prosecute a proceeding to determine whether that individual's presumption of social and/or economic disadvantage should be rebutted, and if so, whether MoDOT should remove that firm's DBE eligibility, as provided by 49 CFR section 26.87(b) and by paragraph (1)(A)2. of this rule.

(2) MoDOT Hearing or Other Due Process Review. When MoDOT notifies a firm that there is reasonable cause to remove its DBE eligibility for any basis specified in section (1) of this rule, MoDOT will follow the procedures required by 49 CFR section 26.87(d), and offer the DBE firm an opportunity for an informal hearing with a complete and verbatim record, or if the firm elects, an opportunity to present information and arguments in writing for a written record review, without going to a hearing. Such a reasonable cause notice shall be sent to the DBE firm by certified U.S. mail, return receipt requested. Such an informal hearing or written record review will be conducted and decided by an independent hearing officer for MoDOT. In the event the firm requests either an informal hearing or a written record review of the reasonable cause determination, MoDOT shall bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of 49 CFR part 26 and this chapter. If the firm does not request either an

informal hearing or the opportunity for a written record review within thirty (30) days after the date the firm receives the reasonable cause notice, as shown on the return receipt card, then the file MoDOT's External Civil Rights Unit has developed on this eligibility complaint (along with any sworn affidavits of the staff or others) shall be turned over to the independent hearing officer to determine if, by a preponderance of the evidence present in the file before the hearing officer, MoDOT has proven that the firm does not meet the certification standards of 49 CFR part 26 and this chapter.

(3) The Hearing Officer. The hearing officer which conducts the informal hearing or written record review shall also determine the decision in that proceeding for MoDOT. The hearing officer shall be knowledgeable about the DBE certification requirements of 49 CFR part 26 and this chapter. At MoDOT's sole election, the hearing officer may be a licensed attorney, a registered professional engineer, or any other qualified individual. If the hearing officer is not a licensed attorney, the hearing officer may have present or receive assistance from a licensed attorney knowledgeable about the DBE Program, to aid and advise the hearing officer on evidentiary issue rulings and other legal or procedural questions. In any event, the hearing officer will not be from MoDOT's External Civil Rights Unit, and will not take any direction from that unit, its personnel, or other MoDOT personnel who may have taken part in actions leading to the reasonable cause determination, or in seeking to implement the proposal to remove the firm's DBE eligibility. The hearing officer shall decide all evidentiary or other procedural issues which arise in the course of the informal hearing or written record review proceedings, as well as solely issuing the final written determination of the firm's DBE eligibility for MoDOT. The hearing officer shall also be the sole judge of the credibility of witnesses in any MoDOT informal hearing or written record review.

(4) The Informal Hearing Process.

(A) If a DBE firm requests an informal hearing to resolve the question of its DBE eligibility, that informal hearing shall be held at a location of MoDOT's choosing in Missouri before a notary public who will administer oaths, and who will prepare a complete and verbatim written record of the hearing at MoDOT's expense. The informal hearing is not a "contested case" under the provisions of Chapter 536, RSMo. The DBE firm and/or its owners need not be represented by an

attorney licensed to practice in Missouri, but they have the right to such legal representation during the informal hearing process if they so choose. The DBE firm may be represented by a controlling owner, to the extent that practice does not constitute the unauthorized practice of law. MoDOT shall be represented by a member of the External Civil Rights Unit, and by a licensed attorney.

(B) At least ten (10) days prior to an informal hearing, the MoDOT External Civil Rights Unit shall provide the DBE firm and the hearing officer with a copy of the entire record pertinent to the issues, upon which the reasonable cause findings were made. That record shall be received into evidence over any objection. The DBE firm and MoDOT shall have the right to supplement the record prior to or at the time of the informal hearing, by affidavit or other written documentation, as well as by sworn testimony given during the hearing. Within reason, all notarized affidavits sworn or affirmed under penalty of perjury, and all other competent and relevant evidence presented by the parties, shall be received by the hearing officer and considered for what it is worth. However, as to any affidavits or other documentary evidence which are disputed or objected to upon the record, the objecting party may present opposing sworn verbal testimony or affidavits at a later date (if the hearing officer deems that necessary), to be scheduled by the hearing officer so as to give the objecting party a fair and reasonable opportunity to respond. If a party wishes to do so, that party may, in addition to cross-examination of an adverse witness, present one or more sworn witnesses to rebut oral or written testimony given previously at the informal hearing.

(C) All witnesses shall be sworn by the notary public, or declare or affirm their testimony under penalty of perjury, in accordance with section 492.060, RSMo and 49 CFR part 26, before they are permitted to testify. Sworn testimony may be given in statement form or in question and answer form. Each witness shall be subject to cross-examination. Depositions for testimonial purposes may be used when agreed to by both parties and when the witness agrees to appear voluntarily. Or, a deposition may be used if a Missouri court so orders and/or issues a subpoena or subpoena *duces tecum* to compel the witness's attendance and testimony under such terms and conditions as the court deems appropriate, in order to provide a fair proceeding and due process to each party. Any opening or closing statements requested by the hearing officer from counsel or other party representatives shall not be considered as evidence, unless they are given as sworn

testimony, or affirmed or declared under penalty of perjury, and they are subject to cross-examination by the opposing party. Any party, during the presentation of its case in chief or in its rebuttal evidence, may call as a witness any person or party present; but the hearing officer has no authority to issue subpoenas or subpoenas *duces tecum* to compel testimony or the production of evidence.

(D) In proceedings where there is a complaining witness who has agreed to be identified and to disclose all of its prior submissions and complaints to the DBE firm, or in other proceedings under this rule upon written application to all parties; where the hearing officer deems it appropriate and in the best interests of developing a fair and complete record; a complaining witness may be authorized to participate as an additional party at the hearing, to present relevant and competent evidence and testimony, and to cross-examine and rebut witnesses and testimony, concerning whether the DBE firm should remain certified and eligible. Provided, however, that MoDOT shall also retain the full right and opportunity to present its relevant, competent and substantial evidence and testimony on the eligibility issues, and to cross-examine and rebut opposing witnesses.

(E) As time, the interests of fairness, or scheduling needs may require, the hearing officer may continue or reschedule an informal hearing, to begin or to resume on a specific date, at the same or at another location. However, the hearing officer is not compelled to consider or rule favorably upon a written or oral request for a continuance or for resumption of the hearing on a later date, except when that is required to provide the minimum due process required for a fair hearing, such as when a later resumption may be warranted to provide an opportunity to complete a party's case in chief, or to rebut unexpected opposing testimony and evidence. During the rebuttal phase of the informal hearing, no new oral, written, documentary or other evidence should be received unless it is relevant to rebut evidence previously presented by an opposing party.

(F) A reasonable time after the conclusion of a hearing, the hearing officer shall provide each party with a complete copy of the transcript and the rest of the record evidence upon request, if that party is willing to pay MoDOT for the actual cost of preparing a complete copy of the record. If any party so requests, the hearing officer shall afford each party the opportunity to file a brief with proposed findings of fact and a recommended decision, which should be complete with

citations to the record and to other supporting record evidence, on a date specified.

(G) As specified in 49 CFR section 26.87(d)(1), MoDOT bears the burden of proving, by a preponderance of the evidence, that the firm does not meet the DBE certification standards of 49 CFR part 26, before the hearing officer may issue a decision that the firm is no longer eligible for DBE certification.

(5) The Written Record Review.

(A) If a DBE firm requests a written record review to resolve the question of its DBE eligibility, the MoDOT External Civil Rights Unit shall provide the DBE firm by certified U.S. mail, return receipt requested, and the independent hearing officer with a copy of the entire record pertinent to the issues upon which the reasonable cause findings were made. That record shall contain one or more sworn affidavits or certifications, or possibly verbatim records of sworn verbal statements made under oath, affirmation or other declaration under penalty of perjury. That record shall be received into evidence by the hearing officer over any objection of the firm or its owners.

(B) The DBE firm shall have up to thirty (30) days after the date the External Civil Rights Unit mails the entire record to the firm in order to supplement that record with its own evidence, including affidavits and other sworn documents. Provided, that if the DBE firm intends to submit any verbatim records of sworn verbal statements, the firm or its legal counsel must make arrangements with the MoDOT External Civil Rights Unit so that legal counsel for MoDOT (an attorney who is not the hearing officer) may be present when the sworn statement is made, so MoDOT can also examine the witness; and the DBE firm may not use or abuse this process in lieu of having an informal hearing. Upon good cause shown, the independent MoDOT hearing officer may extend the time available to the DBE firm to submit its supplement to the record opposing the removal of eligibility.

(C) Within fifteen (15) days after the DBE firm has submitted its supplement to the written record to both the independent hearing officer and the attorney for the MoDOT External Civil Rights Unit, the MoDOT External Civil Rights Unit's attorney may request the hearing officer in writing to be granted leave to present additional sworn written evidence, solely to rebut any evidence submitted by the DBE firm or its legal counsel. The written motion and showing of good cause must be sent to the DBE firm (or its legal counsel) and must describe specifically



what additional sworn evidence the MoDOT External Civil Rights Unit intends to develop, the identity of each additional witness, and what each witness is expected to testify to in rebuttal. Upon good cause shown, and after consideration of any written suggestions of the DBE firm or its legal counsel, the hearing officer may grant MoDOT leave to supplement the written record, under such terms and conditions as the hearing officer deems appropriate to assure a fair and accurate written record.

(D) If any party so requests the hearing officer in writing before the written record is complete, the hearing officer shall afford each party the opportunity to file a brief with proposed findings of fact and a recommended decision, which should be complete with citations to the record evidence, on a date specified.

(E) As specified in 49 CFR section 26.87(d)(3), MoDOT External Civil Rights Unit and its counsel bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the DBE certification standards of 49 CFR part 26, before the hearing officer may issue a decision that the firm is no longer eligible for DBE certification.

(6) The Hearing Officer's Determination. At a reasonable time after the conclusion of the informal hearing or the written record development phase, and any subsequent briefing, the independent hearing officer shall issue written findings and a determination of DBE eligibility of the firm in accordance with 49 CFR section 26.87(f) and (g), supported by citations to the record. The written findings and determination shall be mailed to the firm by certified U.S. mail, return receipt requested, and also served on MoDOT External Civil Rights Unit counsel; plus a copy shall be mailed to any third-party complainant or USDOT operating administration which caused the proceeding to be initiated. If the hearing officer finds that the MoDOT External Civil Rights Unit failed to prove by a preponderance of the evidence that the firm does not meet the certification standards for DBEs in 49 CFR part 26, then the hearing officer shall determine that the firm retains its status as a DBE firm. If the hearing officer finds that the preponderance of the evidence shows that the firm does not meet any one certification standard for DBE certification in 49 CFR part 26, then the hearing officer shall notify the firm in the written determination that effective that date, the firm has been declared ineligible as a DBE, and has been removed from the MoDOT roster of eligible, certified DBE firms, plus the consequences of that action. If the hearing offi-

cer's decision is to remove the firm's DBE certification eligibility, the written findings and determination shall also include the required notice of the availability of an appeal of the removal of eligibility to USDOT under 49 CFR sections 26.87(g) and (j), and 26.89. Also, if the proceedings were initiated based upon a third-party complaint of ineligibility and the hearing officer has not determined that the firm is ineligible for DBE certification, the written findings and determination shall include the required notice of the availability of an appeal to USDOT by the complainant, under 49 CFR section 26.89(a)(2).

(7) MoDOT Action Resulting From a Removal of DBE Eligibility. If the determination of the independent hearing officer is to remove the firm's DBE certification and eligibility, then MoDOT External Civil Rights Unit staff shall separately but promptly take the actions required by 49 CFR section 26.87(i). Also, MoDOT's resident engineers and their staff shall take any other or related actions which may be required by the USDOT-assisted contracts on which the firm was working, whose DBE eligibility has now been removed.

(8) The Finality of MoDOT's Determination. The determination of the hearing officer under this rule is final as to MoDOT, but that determination remains appealable to USDOT under the provisions of 49 CFR sections 26.87 and 26.89, and until USDOT has resolved such an appeal, the determination is not final under 49 CFR part 26. Therefore, for purposes of Missouri law, the MoDOT determination is not a final state administrative decision, and it is not subject to judicial review in Missouri's courts under the provisions of Chapter 536, RSMo, or 49 CFR part 26.

AUTHORITY: section 226.150, RSMo 1994; Title 49 Code of Federal Regulations part 26; section 1101(b) of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107, 113; and MoDOT's approved DBE Program submittals to the U.S. Department of Transportation. Emergency rule filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Original rule filed May 10, 2000, effective Nov. 30, 2000.*

**Original authority: 226.150, RSMo 1939, amended 1977.*

7 CSR 10-8.101 The Effect of a USDOT Certification Appeal

PURPOSE: This rule advises of the legal effect of a USDOT DBE certification appeal

upon MoDOT, and upon the other parties involved.

(1) United States Department of Transportation (USDOT) Appeal Determination Binding Upon Missouri Department of Transportation (MoDOT). If an appeal of a MoDOT disadvantaged business enterprise (DBE) certification action is taken to USDOT under 49 CFR section 26.89, the resulting USDOT determination is binding upon MoDOT, but not necessarily other recipients; under 49 CFR section 26.91(a). MoDOT shall then take any actions required by 49 CFR section 26.91(b).

(2) USDOT Appeal Determination Not Binding Upon MoDOT. If an appeal of another USDOT recipient's DBE certification removal or denial action is taken to USDOT under 49 CFR section 26.89 and USDOT upholds that other recipient's denial of certification or removal of DBE eligibility, MoDOT is not governed by that determination, but MoDOT may commence a proceeding to remove the firm's DBE eligibility with MoDOT under 49 CFR section 26.87, as provided in 49 CFR section 26.91(c). In such a proceeding, MoDOT shall not remove the firm's eligibility until a proceeding under rule 7 CSR 10-8.091 is concluded, and the hearing officer determines in that proceeding that the firm's eligibility should be removed. Likewise, if USDOT has reversed the decision of another recipient to deny certification or remove a firm's eligibility, then under 49 CFR section 26.91(c) MoDOT shall take that USDOT determination into consideration, but MoDOT is not required to certify the same firm based upon that USDOT decision.

(3) Judicial Review of a USDOT Determination. Judicial review of a USDOT appeal determination of a denial of DBE certification, or of the removal of a firm's DBE eligibility, whether that USDOT appeal is from MoDOT or another recipient's determination, is not subject to the provisions of Chapter 536, RSMo, and it does not lie in the state courts of Missouri.

AUTHORITY: section 226.150, RSMo 1994; Title 49 Code of Federal Regulations part 26; section 1101(b) of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107, 113; and MoDOT's approved DBE Program submittals to the U.S. Department of Transportation. Emergency rule filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Original rule filed May 10, 2000, effective Nov. 30, 2000.*

*Original authority: 226.150, RSMo 1939, amended 1977.

7 CSR 10-8.111 Prompt Payment, Record Keeping and Audit Requirements

PURPOSE: This rule sets forth the DBE Program requirements for the prompt payment of contractors, subcontractors and suppliers, plus related record keeping and audit requirements, on federally-assisted contracts awarded by MoDOT or any other Missouri recipient receiving USDOT funding through MoDOT.

(1) Prompt Payment Requirements.

(A) Missouri Department of Transportation (MoDOT) pays all contractors the sums due them, and when they are due, in compliance with state and federal law, including but not limited to section 34.057, RSMo. In turn, MoDOT and United States Department of Transportation (USDOT) in 49 CFR section 26.29(a), both require that all contractors pay all subcontractors and suppliers for their satisfactory performance of services or sale of materials and supplies, in compliance with the Missouri Prompt Payment Statute, section 34.057, RSMo. MoDOT and USDOT also require the return of all retainage withheld from any subcontractor promptly within the period allowed by section 34.057, RSMo, after that subcontractor's work is satisfactorily completed. For the purposes of compliance with the prompt payment requirements of 49 CFR part 26:

1. A subcontractor has satisfactorily completed its work if MoDOT has paid the contractor for all the work which the subcontractor was to (and did) perform, and MoDOT has accepted from the contractor by partial acceptance or final acceptance, those portions of the project containing all of the subcontractor's work;

2. A subcontractor has satisfactorily completed its work if MoDOT has paid the contractor for all the work which the subcontractor was to (and did) perform, and if the subcontractor has fulfilled all of its obligations to the prime contractor and to MoDOT, for and incident to that subcontract work;

3. For purposes of compliance with 49 CFR section 26.29(a), MoDOT reserves the optional and discretionary right to determine if a subcontractor has satisfactorily completed all of its subcontract work, including all of its obligations to the prime contractor and to MoDOT for and incident to that subcontract work. MoDOT shall not make such a determination of satisfactory completion unless MoDOT has received a written complaint from or on behalf of a subcontractor, and

MoDOT has contacted both the subcontractor and the prime contractor for further information. MoDOT shall not make a determination of satisfactory completion unless MoDOT is firmly convinced that the subcontractor has fulfilled all of its obligations to the prime contractor and to the commission; and the subcontract work has been accepted by MoDOT or is now acceptable to MoDOT as satisfactory in all respects. The prime contractor must provide MoDOT and the subcontractor with legal justification in writing under section 34.057, RSMo as to why full payment is not yet due and owing to the subcontractor. If MoDOT determines in writing that the subcontractor has completed all of its project subcontract obligations to the prime contractor and to the commission, MoDOT shall provide copies of that written determination to the subcontractor and to the prime contractor. Within the time provided by section 34.057, RSMo, the prime contractor should then complete payment to that subcontractor. However, the final resolution of any outstanding dispute between a prime contractor and a subcontractor over the issue of whether the subcontractor was promptly and fully paid for its project work remains with Missouri's courts, under section 34.057, RSMo;

4. MoDOT has and will continue to have a complaint process for any subcontractor (regardless of whether it is a DBE firm) which believes it has not been paid in a timely manner for its completed project work. When a written complaint is received by the MoDOT project resident engineer, MoDOT project office personnel shall conduct a review of the project work status, payments made to the prime contractor, project payments the prime contractor has made to the subcontractor, other contract and subcontract compliance by both parties, in consideration of the allegations made by the complainant. A written response shall be prepared by MoDOT and mailed or delivered to the prime contractor and the subcontractor. The MoDOT project office will continue to monitor the situation until it is apparent that both parties are satisfied. If the subcontractor has not been paid in full by the prime contractor at the time the prime contractor submits final payment documentation to MoDOT, the prime contractor's legal justification for why the subcontractor has not been paid in full must be noted as an amendment to the assurance of satisfaction of all claims. If there is no amendment and the subcontractor's claim for payment is not satisfied, the prime contractor will not receive final payment from MoDOT until the prime contractor has submitted to MoDOT satisfactory legal justifica-

tion for not paying the subcontractor, as an amendment to the final payment documentation. The final resolution of any outstanding dispute between a prime contractor and a subcontractor over the issue of whether the subcontractor was promptly and fully paid for its project work remains with Missouri's courts, under section 34.057, RSMo.

(B) As USDOT requires, this prompt return of retainage to every subcontractor is not discretionary upon the contractor's determination that the subcontractor's work is satisfactorily completed. Instead, if MoDOT has paid the contractor for all the work which the subcontractor was to (and did) perform, and MoDOT has determined under this rule and 49 CFR part 26 that the subcontractor's work was completed satisfactorily, then the contractor must promptly make any remaining payments to and return all retainage withheld from that subcontractor, or risk liability under the terms of section 34.057, RSMo. However, the final resolution of any outstanding dispute between a prime contractor and a subcontractor over the issue of whether the subcontractor was promptly and fully paid for its project work remains with Missouri's courts, under section 34.057, RSMo.

(C) Except as modified by this rule, each contractor must comply with all other provisions and requirements of section 34.057, RSMo. These requirements apply to each contractor, regardless of whether the subcontractor or supplier involved is a DBE-certified firm or not. For the purposes of DBE Program administration, the contractor's compliance (or not) with the provisions of this rule, shall be determined by MoDOT External Civil Rights Unit personnel.

(2) Record Keeping Requirements. All contractors and subcontractors must retain records of all payments made or received relating to USDOT-assisted contract work, for three (3) years from the date of final payment. These records, in all forms and in any medium, must be available for inspection and copying, upon request without prior notification during normal business hours, by any authorized representative of MoDOT or USDOT. MoDOT may also obtain and maintain records of actual payments made by contractors to DBE firms, for subcontract or supply work committed to those DBE firms at the time of the USDOT-assisted contract award.

(3) Compliance Audits.

(A) USDOT, MoDOT, or authorized agents or representatives of either of these



entities, may perform audits of contract payments to contractor, subcontractor and supplier firms. The audits may review contractors' payments to any or all subcontractors and suppliers, whether DBE firms or not, to ensure that the actual amount paid to DBE subcontractors and suppliers equals or exceeds the dollar amounts stated in the schedule of DBE participation; that there were no kickbacks, rebates or other concealed, false or fraudulent payments made or required; and that the contractor's payments were made promptly, in compliance with section 34.057, RSMo. The audits also may review compliance with any other provisions of this chapter or 49 CFR part 26 by any contractor, subcontractor or supplier. By participating in any USDOT-assisted contract or subcontract work, or tendering supplies as a DBE firm for such work, each contractor, subcontractor or DBE supplier firm consents to such audits, and agrees to provide all documentation and information requested during the audit for inspection and copying voluntarily and without charge.

(B) USDOT, MoDOT, and other authorized agents or representatives of either of these entities, also reserve the right to audit all contractors, subcontractors, and DBE suppliers, participating in any USDOT-assisted contract awarded by the commission or MoDOT, or awarded by any recipient of USDOT funding through MoDOT, to determine their general compliance with each and every provision of this chapter and 49 CFR part 26. By participating in any USDOT-assisted contract or subcontract work, or tendering supplies as a DBE firm for such work, each contractor, subcontractor or DBE supplier firm consents to such audits, and agrees to provide all documentation and information requested during the audit for inspection and copying voluntarily and without charge.

AUTHORITY: section 226.150, RSMo 1994; Title 49 Code of Federal Regulations part 26; section 1101(b) of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107, 113; and MoDOT's approved DBE Program submittals to the U.S. Department of Transportation. Emergency rule filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Original rule filed May 10, 2000, effective Nov. 30, 2000.*

**Original authority: 226.150, RSMo 1939, amended 1977.*

7 CSR 10-8.121 MoDOT DBE Program Annual Goals and Contract Goals

PURPOSE: This rule describes how MoDOT will set its annual DBE Program goal, and its individual contract goals on USDOT-assisted contract work.

(1) Annual Overall Program Goal.

(A) The Missouri Department of Transportation (MoDOT) will set its annual overall Disadvantaged Business Enterprise (DBE) Program goal (or goals) as a percentage of all federal aid highway funds for the coming year. The goal will be submitted to USDOT by August 1 of each year. MoDOT will also submit a narrative of the goal-setting process including participants, the evidence utilized, and adjustments made. The narrative will state what percentage is expected to be met by race-neutral and race-conscious means.

(B) Public Participation. In order to ensure public participation, MoDOT will consult DBE firms, DBE organizations, contractor organizations, local public agencies, the general public, and other interested and knowledgeable parties. MoDOT will publish the proposed overall goal in general circulation, minority and female focused publications, trade association publications, and the MoDOT website. Written comments can be directed to MoDOT's DBE liaison officer. MoDOT will publish a notice of its goal-setting process by June 1 of each year in order to allow thirty (30) days for evidence inspection and public comment.

(C) Amount of Goal. MoDOT may use an interim goal-setting mechanism while it updates its availability calculation basis to set its DBE goals based upon the most legally defensible methodology. MoDOT may consult with economics and statistical experts to assist in adopting a goal-setting methodology that best meets the constitutional requirements of narrow tailoring in setting MoDOT's overall DBE goal.

(D) Goal-Setting Process.

1. MoDOT will submit its overall goal to the United States Department of Transportation (USDOT) on August 1 of each year, commencing with August 1, 2000. Before establishing the overall goal each year, MoDOT will consult with minority, female, and general contractor groups, community organizations, and other officials or organizations. These groups include, but are not limited to, the minority contractors associations within the state, Women in Construction, National Association of Women in Construction, Kansas City Hispanic Contractors Association, the Associated General Contractors, Heavy Constructors Association,

Associated General Contractors of St. Louis, St. Louis City, City of Kansas City, other municipal entities, and any other organization or individuals necessary to obtain information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and MoDOT's efforts to establish a level playing field for the participation of DBE firms.

2. Following this consultation, MoDOT will publish a notice of the proposed overall goal, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at the headquarters office for thirty (30) days following the date of the notice. MoDOT and the USDOT will accept comments on the goals for forty-five (45) days from the date of the notice. Normally, MoDOT will issue the notice by June 1 of each year. The notice will include addresses to which comments may be sent and addresses, including office and website addresses where the proposal may be reviewed. MoDOT will begin using the overall goal on October 1 of each year, unless other instructions have been received from USDOT.

3. MoDOT will include a summary of information and comments received during this public participation process and our responses in the overall goal submission to the USDOT.

(E) Race- and Gender-Neutral Means.

1. MoDOT will strive to meet the maximum feasible portion of the overall annual goal by the race-neutral means. Race-neutral participation involves affirmative action to assist all small business contractors and subcontractors. MoDOT uses the following race-neutral means to increase DBE participation:

A. Where feasible MoDOT will unbundle large contracts to make them accessible to small businesses;

B. Encouraging prime contractors to subcontract portions of work normally done by their own forces, when subcontractors submit a lower quote;

C. Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE, and other small businesses, participation;

D. Providing assistance in overcoming limitations such as inability to obtain bonding or financing, by such means intended to provide services to help DBEs, and other small businesses, in obtaining bonding and financing;

E. Providing technical assistance and other services;

F. Carrying out information and communications programs on contracting procedures and specific contract opportunities by ensuring the inclusion of DBEs, and other small businesses, on mailing lists for bidders, and ensuring the dissemination of bidders lists of potential subcontractors;

G. 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;

H. Ensuring distribution of the DBE directory, through print and electronic means;

I. Assisting DBEs and other small businesses to develop the capability to utilize emerging technology and conduct business through electronic media.

2. The amount of the goal estimated to be achieved by race-neutral means will be provided upon completion of the availability study and analysis set out above.

3. MoDOT does not operate a DBE program on projects wholly funded by state funds, therefore, an analysis of the DBE participation on these projects participation over and above the USDOT-assisted projects goals, and past participation of DBE firms as prime contractors will be completed in conjunction with the availability analysis. This participation represents the race-neutral participation achieved by MoDOT and will be used to develop a statistical relationship to estimate the amount expected to be achieved by race-neutral means.

4. MoDOT will adjust the estimated breakout of race-neutral and race-conscious participation to reflect actual DBE participation and will tract and report race-neutral and race-conscious participation separately. For reporting purposes, race-neutral DBE participation includes, but is not necessarily limited to, the following:

A. DBE participation through a prime contract a DBE obtains through customary competitive procurement procedures;

B. DBE participation through a sub-contract that does not carry a DBE goal;

C. DBE participation on a prime contract exceeding the contract goal.

(2) Project Goals on USDOT-Assisted Contract Work.

(A) MoDOT will use contract goals to meet any portion of the overall goal MoDOT does not project being able to be met using race-neutral means. MoDOT will establish contract goals only on those USDOT-assisted contracts with subcontracting possibilities.

(B) The External Civil Rights Unit is responsible for setting all DBE goals on MoDOT let projects. The unit is also responsible for review and concurrence on all off-system, aviation, transit, enhancement, consultant, and any other sub-recipient project DBE goal.

(C) The project goal is set by reviewing the type of project, elements of work to be performed, time frame, geographical location, history of DBE and non-DBE usage, and available DBE firms. The goal will be expressed as a percentage of the total amount of a USDOT-assisted contract.

(D) MoDOT will always attempt to ensure that its DBE Program continues to be narrowly tailored to overcome the effects of discrimination, and MoDOT will adjust its use of contract goals accordingly, as directed in 49 CFR section 26.51. MoDOT welcomes all public comments regarding any contract goal or its contract goal-setting processes. These comments should be made in writing, and sent to MoDOT's external civil rights administrator.

AUTHORITY: section 226.150, RSMo 1994; Title 49 Code of Federal Regulations part 26; section 1101(b) of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107, 113; and MoDOT's approved DBE Program submittals to the U.S. Department of Transportation. Emergency rule filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Original rule filed May 10, 2000, effective Nov. 30, 2000.*

**Original authority: 226.150, RSMo 1939, amended 1977.*

7 CSR 10-8.131 DBE Participation Credit Toward Project or Contract Goals

PURPOSE: This rule describes how DBE firm participation credit will be awarded by MoDOT toward a USDOT-assisted contract DBE participation goal.

(1) Disadvantaged Business Enterprise (DBE) Participation Computed. DBE participation will be credited by Missouri Department of Transportation (MoDOT) only in compliance with 49 CFR section 26.55, and only for the value of the work actually performed by the DBE firm toward the DBE contract goal. The contract work performed by the DBE firm must provide a "commercially useful function" as specified in 49 CFR section 26.55(c), in order to receive DBE credit toward a contract goal.

(2) DBE Participation by Classification. DBE firm contract credit varies, based upon the MoDOT classification of that DBE firm, and based upon the nature of the services the DBE firm actually performs on the United States Department of Transportation (USDOT)-assisted contract, as provided in 49 CFR section 26.55. DBE credit will be counted by MoDOT as directed by USDOT, its regulations in 49 CFR part 26, and USDOT's informal guidance; and will generally be counted in the following manner:

(A) Manufacturer. DBE credit is given for the entire value paid to a DBE manufacturer for materials furnished which become a permanent part of the project work. A manufacturer is a firm that owns and operates the facilities to produce the product required by the project and purchased by the contractor or subcontractor;

(B) Supplier. DBE credit is given for sixty percent (60%) of the value paid to a DBE supplier firm for materials which it furnishes and which become a permanent part of the project work. A supplier sells goods to the general public and maintains an inventory at an owned or leased warehouse or store. Bulk items such as steel, petroleum products, or rock do not have to be maintained in an on-site inventory, provided that the supplier regularly sells such products. Credit will not be given for the cost of the materials and also for the hauling of those same materials. Transportation costs for the materials are deemed part of the total cost of the products supplied;

(C) Broker. DBE credit is given for the entire amount of the broker fees or commission received by the DBE broker for materials it purchases, services it obtains, or equipment it procures and resells to a MoDOT contractor. However, no DBE credit is provided for the actual material costs, service charges, or equipment costs to the contractor. Fees or commissions are defined as the difference between what the DBE firm paid for the materials, services or equipment it brokered, and the price paid by the contractor to the DBE firm for those materials, services or equipment. A broker does not manufacture or act as a supplier of the materials, services or equipment, on a regular basis; or meet the criteria for being a manufacturer or supplier;

(D) Trucker. DBE credit is given for the entire amount of transportation or hauling charges paid to a DBE trucker, if the majority of the project trucking or hauling is performed by that DBE trucker firm, with employees of that DBE trucker, using vehicles and equipment owned or leased on a long-term basis by the DBE trucker firm. Trucking services provided in vehicles or



equipment leased for just that project, or for a shorter period than the project trucking work, receive no DBE trucking credit. Further, to be a DBE trucking firm and receive DBE trucking credit, at least one truck actually owned by the DBE trucking firm must be used on that project work to haul project materials or supplies. Full DBE trucking credit will not be given for leased trucks unless they are leased from another DBE firm, DBE owner operators, or a recognized commercial leasing operation, and the lease is of a sufficient term. Firms licensed by the Missouri Public Service Commission as leasing agents qualify as a recognized leasing operation. The leasing of trucks from the prime contractor will not be credited toward meeting a DBE goal, except as a broker, to the extent of the fees and commissions involved (but not the trucking costs). This type of relationship must be approved in advance by MoDOT External Civil Rights Unit personnel, and will be subject to strict scrutiny;

(E) DBE Contractor. Credit is given for the entire amount paid to a DBE prime contractor for labor and materials provided to perform the contract work; except that no credit will be given for labor and materials provided and installed by other contractors or subcontractors which are not DBE firms, approved by MoDOT to perform DBE subcontract work on that contract. Any DBE prime contractor must perform at least thirty percent (30%) of the contract work with the DBE firm's own employees; and the DBE firm must order and pay for all its own supplies and materials, to receive this credit;

(F) DBE Subcontractor. Credit is given for the entire amount paid to a MoDOT-approved DBE subcontractor on a contract, for all the labor and materials provided and installed by the DBE firm to perform a defined and clearly measurable portion of the contract work. Any DBE firm must perform at least thirty percent (30%) of the firm's subcontract work with the DBE firm's own employees, using the DBE firm's own (owned or leased) vehicles, and the DBE firm must order and pay for all of the supplies and materials which it installs and provides.

(3) Supporting Documentation Required. By bidding on a USDOT-assisted contract, or by agreeing to provide manufacturing, broker, subcontractor or supplier services for such work, each contractor, their subcontractors, and all DBE manufacturers, brokers, subcontractors and suppliers, agree to provide MoDOT or USDOT and their agents or representatives with full and complete copies of all documentation of ownership, leasing, pay-

rolls, payments, charges, rebates, kickbacks, invoices, and all manner of related documentation, so that MoDOT and USDOT know and understand accurately and completely how much was paid and received, in gross and net amounts, for DBE contract credit computation purposes. This documentation is also subject to later audit by MoDOT, USDOT, or their agents and representatives. The failure to accurately and completely represent the gross and net payments, and to provide all documentation required to show the full and complete transactions involved, may be fraudulent, and may subject all firms and persons involved to civil suit and sanction, criminal punishment including fines or imprisonment, and other contract or administrative sanctions, by MoDOT, USDOT, or other agencies of the state of Missouri or the United States.

AUTHORITY: section 226.150, RSMo 1994; Title 49 Code of Federal Regulations part 26; section 1101(b) of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107, 113; and MoDOT's approved DBE Program submittals to the U.S. Department of Transportation. Emergency rule filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Original rule filed May 10, 2000, effective Nov. 30, 2000.*

**Original authority: 226.150, RSMo 1939, amended 1997.*

7 CSR 10-8.141 USDOT-Assisted DBE Contract Awards and Good Faith Efforts

PURPOSE: This rule sets forth the MoDOT requirements and processes for determining if a bidder has made a good faith effort to achieve a DBE contract goal in a USDOT-assisted contract.

(1) Contract Bidding Requirements.

(A) The award of federally-assisted contracts having Disadvantaged Business Enterprise (DBE) contract goals requires the bidder to submit a completed Missouri Department of Transportation (MoDOT) DBE Participation form as a part of the bidding documents, including a complete list of the DBE firms to be utilized (including manufacturers, suppliers, haulers or truckers, brokers, service providers, and subcontractors); together with a complete detailed listing or explanation of the type and exact nature of the contract services the DBE firm will be providing, if the bidder is awarded the contract. If the bid of the low bidder (as computed) does not show that contractor will

meet the full DBE contract goal, that contractor will be afforded the opportunity to further document its good faith efforts to reach that contract goal. However, the bidder will not be given the opportunity to submit additional proposed DBE participation, to try to satisfy the contract goal belatedly. MoDOT treats a bidder's compliance with the good faith efforts requirements of this rule and 49 CFR part 26 as a matter of bidding responsiveness, and a bid which is otherwise low will be rejected as nonresponsive if it does not meet these United States Department of Transportation (USDOT) requirements.

(B) The DBE participation portion of the bidding documents must include the following at the time of the bid submission:

1. The names and addresses of all DBE firms that will participate in the contract work (if awarded to that bidder);

2. A detailed description of the type and nature of the work that each DBE firm listed will perform;

3. The dollar amount of the contract value of each DBE firm's participation, in total and the portion which is applicable to the contract's DBE goal;

4. Written and signed documentation of the bidder's commitment to use each DBE firm manufacturer, subcontractor, broker or supplier it has submitted, to meet the DBE contract goal;

5. Written and signed confirmation from each DBE firm listed that the DBE firm shall participate in the contract work as provided in the bidding contractor's commitment, if the bidder is awarded the contract; and

6. If the bidder's list of DBE firms and services does not show full compliance with the entire DBE contract goal set by MoDOT, the bidder must also include an accurate and complete listing or documentation of its good faith efforts to meet that DBE contract goal, even though the bidder did not succeed in obtaining the full DBE participation requested by the contract goal.

(C) If a low bidder has not met the DBE contract goal, the bidder's documentation of good faith efforts must fully comply with the requirements of 49 CFR section 26.53 and Appendix A to 49 CFR part 26. MoDOT will review the low bidder's documentation, and if the bidding contractor has documented adequate good faith efforts, MoDOT will recommend award of the contract to that low bidder, provided that the bid is otherwise responsive and the bidder is otherwise responsible and qualified to bid.

(2) Failure to Document an Adequate Good Faith Effort. In accordance with 49 CFR section 26.53(d), if MoDOT determines that the

apparent low bidder has failed to meet the DBE contract goal, and has not documented adequate good faith efforts to achieve that contract goal in its bidding documents, then MoDOT will notify the bidder by telephone, fax transmission and/or in writing of that determination, and will offer the bidder the opportunity for administrative reconsideration of its good faith efforts, in adequate time prior to the commission meeting at which this contract is scheduled to be awarded.

(3) Administrative Reconsideration.

(A) The apparent low bidder must make a written request for administrative reconsideration of the MoDOT finding of insufficient DBE participation and inadequate good faith efforts, within two (2) working days of the date the bidder was first notified by phone or in writing of MoDOT's determination of the lack of good faith efforts. The bidder's written request for administrative reconsideration may be delivered, faxed or E-mailed to:

External Civil Rights Administrator
Missouri Department of Transportation
105 West Capitol Avenue, P.O. Box 270
Jefferson City, MO 65102-0270

Fax: (573) 526-5640
Telephone: 1-888-ASK-MODOT (1-888-275-6636)
E-mail: taeges@mail.modot.state.mo.us

(B) If the bidder makes a timely request for administrative reconsideration, the bidder will have the opportunity to meet in person with the Administrative Reconsideration Committee, to discuss the issue of whether it met the goal or made adequate good faith efforts to do so. The Administrative Reconsideration Committee may be constituted as MoDOT deems appropriate and fair, provided that no committee members on reconsideration shall have taken part in the original MoDOT determination that the bidder failed to meet the DBE contract goal or make adequate good faith efforts to do so. The bidder and the Administrative Reconsideration Committee may make alternative arrangements which are mutually agreeable for their discussion, in lieu of a meeting in person. Any discussion shall be recorded, so that if necessary, a verbatim transcript can later be made of the discussion, and the identity of the speakers.

(C) The Administrative Reconsideration Committee shall timely decide whether the bidder did or did not meet the DBE contract goal, or if not, whether the low bidder made adequate good faith efforts to do so. If the Administrative Reconsideration Committee

finds that either the low bidder met the DBE contract goal, or else the low bidder did make adequate and sufficient good faith efforts to do so, then MoDOT will recommend that this otherwise responsible low bidder should be awarded the contract on its otherwise responsive low bid. If the Administrative Reconsideration Committee does not find that the low bidder met the DBE contract goal, or that the low bidder made adequate and sufficient good faith efforts to do so, then MoDOT will recommend that the bid of this low bidder should be rejected as non-responsive, and that the Commission should award this contract to the next low bidder which has properly met the DBE contract goal or adequately documented its good faith efforts to do so, in accordance with 49 CFR section 26.53 and Appendix A to 49 CFR part 26.

(D) The Administrative Reconsideration Committee shall communicate its decision at least verbally or by fax to the bidder in question, prior to the Commission meeting at which this contract shall be awarded. If possible, the Administrative Review Committee will also provide the bidder a written decision on its administrative reconsideration request, explaining the basis for its finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so, before the time of that commission meeting. But in any event, the Administrative Review Committee will provide the bidder with that written decision, explaining the basis for its finding, as soon as possible after the committee has made its decision.

(E) According to 49 CFR section 26.53(d)(5), the result of such an administrative reconsideration process is not administratively appealable to USDOT.

(4) Termination of a DBE Subcontractor or Other DBE Firm.

(A) A contractor may not terminate, release or replace a DBE subcontractor, manufacturer, supplier or other DBE firm listed in its bid, and then perform the work of that terminated DBE firm with its own forces or those of another firm, without MoDOT's prior written consent. The contractor must provide written documentation to the project resident engineer that the DBE firm is unwilling or unable to perform the work, within five working days of the DBE firm's notice to the contractor of its inability to perform the work. The resident engineer will forward this written documentation and notice of intent to replace a DBE firm to the external civil rights administrator for approval. If the DBE firm's removal is approved, or a DBE withdraws from the contract work, the contractor must make a good faith effort to find a replacement

DBE firm. The contractor must make a good faith effort to replace the entire dollar value of the DBE work which was to be performed, and not merely find a replacement for that work which the original DBE firm was to have performed. If MoDOT finds that the contractor did not make a good faith effort to locate alternative DBEs, the contractor is entitled to administrative reconsideration before the Administrative Reconsideration Committee, as set out in section (3) of this rule above. Again, if the Administrative Reconsideration Committee concurs and finds that the contractor did not make a good faith effort to replace the absent DBE firm with other DBE firms, then the contractor is subject to administrative and contract remedies upon final verification of the actual extent of DBE participation in the contract work.

(B) If one or more substitute DBE firms are approved for the contract work by MoDOT, the prime contractor must provide the resident engineer and the external civil rights administrator with copies of new or amended subcontracts for those DBE firms. If the contractor fails or refuses to comply in the time specified with any requirement of this section or 49 CFR section 26.53(f), MoDOT will issue an order stopping all or any part of the payments to the contractor on this project or contract, until satisfactory corrective action has been taken. If the contractor remains in non-compliance with any of these requirements or provisions, MoDOT may terminate the contractor for default of the contract work, or take any other appropriate action.

(5) Sanctions for Failure to Meet DBE Contract Commitments. If MoDOT finds that a contractor or other firm has failed to comply with the DBE requirements of its bid, this rule, or 49 CFR section 26.53, then MoDOT shall have the sole authority and discretion to determine the monetary value extent to which the contract DBE goals have not been met, and MoDOT shall assess damages against the contractor in the full amount of that breach, to satisfy and liquidate the contractor's damages for that contract breach. Additionally, MoDOT may impose any other administrative remedies available at law or provided by the contract in the event of such a contract breach. And if the failure to comply with the contractual DBE requirements is intentional or fraudulent in any respect, the contractor and any other firms or persons acting with the contractor are subject to suspension or debarment by MoDOT or the United States, or other civil actions or criminal penalties, in



accordance with state and federal law, and USDOT regulations.

AUTHORITY: section 226.150, RSMo 1994; Title 49 Code of Federal Regulations part 26; section 1101(b) of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107, 113; and MoDOT's approved DBE Program submittals to the U.S. Department of Transportation. Emergency rule filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Original rule filed May 10, 2000, effective Nov. 30, 2000.*

**Original authority: 226.150, RSMo 1939, amended 1977.*

7 CSR 10-8.151 Performance of a Commercially Useful Function by a DBE Firm

PURPOSE: This rule describes when a DBE firm performs a commercially useful function, and how MoDOT and USDOT enforce that requirement in the DBE Program.

(1) DBE Program Contract Compliance Requirement. Pursuant to 49 CFR section 26.55(c), Missouri Department of Transportation (MoDOT) shall count contract expenditures made to a Disadvantaged Business Enterprise (DBE) contractor or subcontractor toward the contract's DBE goal only if the DBE firm is performing a "commercially useful function" (CUF) on that contract.

(A) A DBE firm 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 a distinct element of the United States Department of Transportation (USDOT)-assisted contract work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used by the DBE firm 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 CUF, MoDOT shall 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 any other relevant factors.

(B) Some of these CUF factors are discussed below in more detail:

1. Management. The DBE firm must manage the work that has been contracted or

subcontracted to it. Management includes, but is not limited to, scheduling work operations, ordering equipment and materials, preparing and submitting certified payrolls, and hiring and firing employees. All work must be performed with a workforce the DBE firm controls, with a minimum of thirty percent (30%) of the work to be performed by the DBE firm's regular, permanent employees, or those hired by the DBE firm for the project from an independent source other than the prime contractor. The DBE owner(s) must supervise daily operations, either personally or with a full-time, skilled and knowledgeable superintendent. The superintendent must be under the DBE owners' direct supervision and control. The DBE owner must make all operational and managerial decisions of the firm. Mere performance of administrative duties is not supervision of daily operations;

2. Materials. The DBE firm shall negotiate the cost, arrange delivery, and pay for the materials and supplies for the project. MoDOT will review invoices to verify billing and payment. The DBE must prepare the estimate, quantity of material, and be responsible for the quality of materials actually installed or used. Two-party checks for payment for materials or supplies may be made to the DBE and the supplier only if that process is specifically approved by MoDOT in advance. No credit toward the DBE goal will be given for the cost of materials or supplies paid directly by the prime contractor for the DBE firm;

3. Employees. In order to be considered an independent business, DBE firms must have and keep a regular workforce. DBE firms cannot "share" employees with non-DBE contractors, and in particular, the prime contractor. DBE firms and the contractors must provide MoDOT with copies of their payrolls, to establish that the firms have separate and independent work forces.

(C) A DBE firm does not perform a CUF 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 firm is such an extra participant, MoDOT shall examine similar transactions, particularly those in which DBE firms do not participate.

(3) Presumption that a DBE Firm is Not Performing a CUF. As provided in 49 CFR section 26.55(c)(3), if a DBE firm does not perform or exercise responsibility for at least thirty percent (30%) of the total cost of its contract or subcontract with its own work force, or the DBE subcontracts a greater por-

tion of the work of a contract or subcontract than would be expected on the basis of normal industry practice for the type of work involved, MoDOT shall presume that the DBE is not performing a CUF.

(4) DBE's Evidentiary Presentation to Support a CUF Finding. As provided in 49 CFR section 26.55(c)(4), when MoDOT presumes a DBE is not performing a CUF under section (3) of this rule, the DBE firm may present evidence to MoDOT to rebut that presumption. MoDOT shall receive that information on the record, at a hearing recorded verbatim before an independent hearing officer, which hearing is similar in process to those where an existing DBE firm's eligibility is being removed, under rule 7 CSR 10-8.091. The DBE firm shall have the burden of proving, in such an evidentiary hearing on the record, that the DBE firm is performing or did perform a commercially useful function, given the type of work involved and normal industry practices. If the independent hearing officer rules in favor of the DBE firm in whole or in part, then the MoDOT sanctions or remedies for the apparent breach of the contract shall be reduced or eliminated to that extent. If the independent hearing officer finds that the DBE firm did fail to carry its burden and show that it did perform a CUF considering the type of work involved and normal industry practices, then MoDOT shall impose sanctions or contract remedies accordingly.

(5) Contractor's Evidentiary Presentation to Support a DBE's Performance of a CUF. Likewise, when MoDOT determines a DBE firm is not performing or has not performed a CUF and proposes to disallow or reduce the amount of the contract payments to the contractor involved, or assess liquidated damages against the contractor for its failure to meet its agreed-upon DBE contract goal, MoDOT shall first allow the contractor (and the DBE firm if appropriate) to present evidence to MoDOT to rebut that presumption. MoDOT shall receive that information on the record, at a hearing recorded verbatim before an independent hearing officer, which hearing is similar in process to those where an existing DBE firm's eligibility is being removed, under rule 7 CSR 10-8.091. The contractor and DBE firm shall have the burden of proving, in such an evidentiary hearing on the record, that the DBE firm is performing or did perform a CUF given the type of work involved and normal industry practices. If the independent hearing officer rules in favor of the contractor (and DBE firm) in whole or

in part, then the MoDOT sanctions or remedies for the apparent breach of the contract shall be reduced or eliminated to that extent. If the independent hearing officer finds that the contractor (and DBE firm) failed to carry their burden and show that the DBE firm did perform a CUF, considering the type of work involved and normal industry practices, then MoDOT shall impose sanctions or contract remedies accordingly.

(6) Review of CUF Determinations by Agencies of USDOT. As provided in 49 CFR section 26.55(c)(5), MoDOT's decision on whether a CUF has been performed and the related matters is subject to review by the applicable USDOT operating administration, but these decisions are not administratively appealable to USDOT. It is MoDOT's position that a MoDOT decision on whether a CUF has been performed is not a final action, and so is not subject to judicial review in Missouri courts under Chapter 536, RSMo, at least until after the applicable USDOT operating administration Federal Highway Administration (FHWA), Federal Aviation Administration (FAA) or Federal Transit Administration (FTA) has been requested to administratively review that MoDOT decision. At that time, the action (or non-action) of the USDOT operating administration may become the determination which is judicially reviewable, but a federal agency's determination is not reviewable in the state courts of Missouri.

(7) Contract and Other Sanctions for Failure to Perform a CUF. The failure of a DBE firm to perform a CUF will result in the dollar value of that DBE firm's work not being credited toward the contractor's DBE goal for that contract. This can, and usually will, result in MoDOT withholding payment from the prime contractor of that entire amount which is not credited, if this results in the contractor's failure to achieve the DBE participation goal for that contract. Deliberate conduct or indifference to the CUF requirements can also lead to the DBE firm's removal of eligibility under the procedures of 7 CSR 10-8.091. In any and all cases of deliberate attempts by the contractor, a DBE firm, or other firms to circumvent the requirements of the USDOT or MoDOT DBE Program, or their related contract requirements, or fraud of any kind, these actions may lead to suspension or debarment of the firms and their affiliates by MoDOT and/or the United States, and may result in criminal prosecution and sanctions, plus civil and contractual liability, of any firm or person involved.

(8) The Obligation of the Contractor and the DBE Firm. It is the obligation of each contractor and DBE firm, prior to submitting a bid on a MoDOT contract, to inquire and understand the DBE Program requirements generally, and specifically the DBE's obligation to perform a CUF, and how to value a DBE firm's work for bidding and contract goal satisfaction purposes. Further, it is the contractor's obligation to make sure that a DBE firm on a project performs a CUF on that federally-assisted contract, in accordance with the contractor's approved bid and contract terms. MoDOT and USDOT have no duty or other obligation to first warn or advise a contractor or DBE firm of a failure to comply with the program requirements, before MoDOT or USDOT take administrative, civil or other actions as a result. If a contractor or DBE firm has any questions or concerns in this regard, they may contact the MoDOT External Civil Rights Unit, USDOT, or the appropriate FHWA, FTA or FAA office nearby. As with other legal requirements, ignorance of the DBE Program obligations is no excuse or justification for a contractor or DBE firm's noncompliance with their contractual and program obligations.

AUTHORITY: section 226.150, RSMo 1994; Title 49 Code of Federal Regulations part 26; section 1101(b) of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107, 113; and MoDOT's approved DBE Program submittals to the U.S. Department of Transportation. Emergency rule filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Original rule filed May 10, 2000, effective Nov. 30, 2000.*

**Original authority: 226.150, RSMo 1939, amended 1977.*

7 CSR 10-8.161 Confidentiality of DBE Program Financial and Other Information

PURPOSE: This rule complies with the USDOT requirements of 49 CFR part 26 on the confidentiality of financial and other confidential information submitted to MoDOT in and for the DBE Program.

(1) Personal Financial Information Provided for Disadvantaged Business Enterprise Program (DBE) Program Purposes. In compliance with 49 CFR section 26.67(a)(2)(ii), and notwithstanding any provision of state law, Missouri Department of Transportation (MoDOT) shall not release an individual's personal net worth statement nor any related

documentation concerning or supporting it to any third party without the written consent of the individual who provided or is the subject of that information. Provided, however, that MoDOT shall transmit this information to USDOT for any certification appeal proceeding held under 49 CFR section 26.89 in which the disadvantaged status of that individual is in question.

(2) Confidential Business Information. In compliance with 49 CFR section 26.109(a)(2), MoDOT shall safeguard from disclosure to unauthorized persons any information that may reasonably be considered as confidential business information, consistent with federal and state law. If MoDOT believes that under state law, a third party which has submitted a written request for it is entitled to receive DBE Program information or documentation which the firm or its owners may deem to be confidential business information, MoDOT may notify the firm and its owners a sufficient amount of time in advance of the information release, of the third party's request for information, including information on the identity and address of the third party, so that the firm or its owners may take any legal action they deem appropriate to protect and preserve the confidentiality of that DBE Program information or documentation against disclosure. MoDOT and the commission also reserve the right and discretionary authority to take legal or judicial action to prevent disclosure of confidential business or personal information acquired in or for the DBE Program, consistent with federal and state law, as MoDOT and the commission deem appropriate in the circumstances.

(3) Investigative Information. MoDOT's External Civil Rights Unit regularly conducts investigations in anticipation of legal actions, causes of action or litigation, including but not limited to information on whether a firm should be DBE certified or recertified, whether a firm's eligibility as a DBE should be removed, whether a bidder made a good faith effort in its bid, whether a DBE firm subcontractor has performed a commercially useful function, or properly performed all the work it was obligated to under a federally-assisted contract. These investigations, in turn, may be prepared for and provided confidentially to state or federal USDOT or other law enforcement agencies, for civil or criminal prosecution; or may be used by MoDOT and the commission to support a contract disallowance or breach of contract action.



These investigative files in MoDOT's possession are confidential and shall not be produced or disclosed while the investigation is in progress, consistent with federal and state law. If action is taken upon the record developed under this chapter, under 49 CFR part 26, or under other provisions of state or federal civil, criminal or administrative law, then the pertinent portions or all of that investigative record shall be disclosed to the necessary parties, if and to the extent required of MoDOT by applicable federal or state law.

(4) Other Confidential Information. As required by state and federal law, in producing any DBE Program documents or records, MoDOT shall not disclose to a third party any individual's Social Security number or firm's employer identification number. Further, unless a confidential complainant agrees in writing to the release of his or her identity, or the release of information or documentation which will actually or effectually identify that individual, MoDOT shall comply with the mandates of 49 CFR section 26.109(b) and maintain the confidentiality of the identity of every complainant in the DBE Program. If there is any other valid and lawful basis under state or applicable federal law available to preserve the confidentiality of DBE Program information, MoDOT may use and rely upon that legal basis to avoid disclosure of any information MoDOT perceives to be confidential.

(5) Compliance With Lawful Court Order. MoDOT will comply with a lawful order of any court having proper jurisdiction over the commission, MoDOT or their employees, regarding the release (or not) of any DBE Program documentation or information; subject to the inherent right of the commission to appeal, seek a writ or seek other judicial relief. In any such legal proceeding to compel disclosure of DBE Program information, MoDOT and the commission may notify and afford the entity which provided or is the subject of the information, and United States Department of Transportation (USDOT) or its appropriate operating administration, with the opportunity to participate in the action, and to remove it to federal court or take such other judicial action as each of them deems appropriate.

AUTHORITY: section 226.150, RSMo 1994; Title 49 Code of Federal Regulations part 26; section 1101(b) of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107, 113; and MoDOT's approved DBE Program submittals to the U.S. Department of Transportation.*

Emergency rule filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Original rule filed May 10, 2000, effective Nov. 30, 2000.

**Original authority: 226.150, RSMo 1939, amended 1977.*

7 CSR 10-8.200 Disadvantaged Business Enterprise Set-Aside Program General Information

(Rescinded November 30, 2000)

AUTHORITY: sections 226.020 and 226.150, RSMo 1986, section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991, P.L. 102-240 and Title 49 Code of Federal Regulations part 23. Original rule filed April 13, 1994, effective Oct. 30, 1994. Emergency rescission filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Rescinded: Filed May 10, 2000, effective Nov. 30, 2000.

7 CSR 10-8.210 Definitions

(Rescinded November 30, 2000)

AUTHORITY: sections 226.020 and 226.150, RSMo 1986, section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991, P.L. 102-240 and Title 49 Code of Federal Regulations part 23. Original rule filed April 13, 1994, effective Oct. 30, 1994. Emergency rescission filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Rescinded: Filed May 10, 2000, effective Nov. 30, 2000.

7 CSR 10-8.220 Eligibility for Participation in the Commission's DBE Set-Aside Program

(Rescinded November 30, 2000)

AUTHORITY: sections 226.020 and 226.150, RSMo 1986, section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991, P.L. 102-240 and Title 49 Code of Federal Regulations part 23. Original rule filed April 13, 1994, effective Oct. 30, 1994. Emergency rescission filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Rescinded: Filed May 10, 2000, effective Nov. 30, 2000.

7 CSR 10-8.230 Publication of Qualified DBEs and Joint Ventures in the DBE Directory

(Rescinded November 30, 2000)

AUTHORITY: sections 226.020 and 226.150, RSMo 1986, section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991, P.L. 102-240 and Title 49 Code of Federal Regulations part 23. Original rule filed April 13, 1994, effective Oct. 30, 1994. Emergency rescission filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Rescinded: Filed May 10, 2000, effective Nov. 30, 2000.

7 CSR 10-8.240 Retaining Qualification to Participate in the Commission's DBE Set-Aside Program

(Rescinded November 30, 2000)

AUTHORITY: sections 226.020 and 226.150, RSMo 1986, section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991, P.L. 102-240 and Title 49 Code of Federal Regulations part 23. Original rule filed April 13, 1994, effective Oct. 30, 1994. Emergency rescission filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Rescinded: Filed May 10, 2000, effective Nov. 30, 2000.

7 CSR 10-8.250 Bidding Limitations on Qualified Firms and Joint Ventures Having Active Commission DBE Set-Aside Contracts

(Rescinded November 30, 2000)

AUTHORITY: sections 226.020 and 226.150, RSMo 1986, section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991, P.L. 102-240 and Title 49 Code of Federal Regulations part 23. Original rule filed April 13, 1994, effective Oct. 30, 1994. Emergency rescission filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Rescinded: Filed May 10, 2000, effective Nov. 30, 2000.

7 CSR 10-8.260 DBE Subcontracting Goals for the Commission's DBE Set-Aside Program Contracts

(Rescinded November 30, 2000)

AUTHORITY: sections 226.020 and 226.150, RSMo 1986, section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991, P.L. 102-240 and Title 49 Code of Federal Regulations part 23. Original rule filed April 13, 1994, effective Oct. 30, 1994. Emergency rescission filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Rescinded: Filed May 10, 2000, effective Nov. 30, 2000.

7 CSR 10-8.270 Disqualification of a Firm or Joint Venture from the DBE Set-Aside Program

(Rescinded November 30, 2000)

AUTHORITY: sections 226.020 and 226.150, RSMo 1986, section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991, P.L. 102-240 and Title 49 Code of Federal Regulations part 23. Original rule filed April 13, 1994, effective Oct. 30, 1994. Emergency rescission filed May 10, 2000, effective May 20, 2000, expired Nov. 6, 2000. Rescinded: Filed May 10, 2000, effective Nov. 30, 2000.