

West Virginia

Department of Transportation

Unified Certification Program

WEST VIRGINIA UNIFIED CERTIFICATION PROGRAM

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SECTION 1. DEFINITIONS.

1.1 Agreement

“Agreement” means this document, the West Virginia Unified Certification Program agreement.

1.2 Committee

“Committee” means the Committee created by this document to administer and implement the UCP.

1.3 Contract

“Contract” means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them.

1.4 Contractor

“Contractor” means one who participates, through a contract or subcontract (at any tier), in a DOT-assisted highway, transit, or airport program.

1.5 Department or DOT

“Department” and “DOT” mean the United States Department of Transportation.

1.6 Disadvantaged Business Enterprise or DBE

“Disadvantaged Business Enterprise” and “DBE” mean a for-profit small business concern –

- (a) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and
- (b) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it; and
- (c) Meets all certification criteria under 49 CFR, Part 26.

1.7 Immediate Family Member

“Immediate family member” means father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, or father-in-law.

1.8 Indian Tribe and Tribally-Owned Concern

“Indian tribe” means any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native Corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. A “tribally-owned concern” is that which is at least 51 percent owned by an Indian tribe as defined in this section.

1.9 Processing Agency

“Processing Agency” means the agency to which the firm applied for DBE certification.

1.10 Joint Venture

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

1.11 Operating Administration

“Operating administration” means the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA).

1.12 Personal Net Worth

“Personal net worth” means the net value of the assets of an individual remaining after total liabilities are deducted. An individual’s personal net worth does not include the individual’s ownership interest in an applicant or participating DBE firm or the individual’s equity in his or her primary place of residence. An individual’s personal net worth includes only his or her own share of assets held jointly or as community property with the individual’s spouse.

1.13 Primary Industry Classification

“Primary Industry Classification” means the six digit North American Industrial Classification System (NAICS) code designation which best describes the primary business of a firm. The NAICS code designations are described in the Classification Manual. The North American Industrial Classification System (NAICS) Manual is available through the National Technical Information Service (NTIS) of the U.S. Department Commerce (Springfield, VA, 22262). NTIS also makes materials available through its web site (www.ntis.gov/naics).

1.14 Recipient

“Recipient” means a West Virginia recipient of any of the following types of funds:

- (a) (Federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA). Pub L. 102-240, 105 Stat.1914, or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, 112 Stat.107.
- (b) Federal transit funds authorized by titles I, III, V, and VI of ISTEA, Pub. L. 102-240 or be Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA-21 Pub. L. 105-178.
- (c) Airport funds authorized by 49 U.S.C. 47101, et. seq.

1.15 Regulation

“Regulation” means 49 CFR, Parts 26, and any revisions, additions, deletions, or replacements.

1.16 Secretary

“Secretary” means the Secretary of the United States Department of Transportation.

1.17 Socially and Economically Disadvantaged Individual

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

- (a) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis.
- (b) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
 - (1) “Black Americans,” which includes persons having origins in any of the Black racial groups of Africa;
 - (2) “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;
 - (3) “Native Americans,” which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
 - (4) “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, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;

- (5) “Subcontinent Asian Americans,” which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
- (6) Women;
- (7) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

1.18 State

“State” means the State of West Virginia.

1.19 Unified Certification Program or UCP

“Unified Certification Program” and “UCP” mean the program created by this agreement.

SECTION 2. ADMINISTRATION.

2.1 West Virginia Unified Certification Program

The West Virginia Unified Certification Program (“the **UCP**”) is established according to this agreement to certify all DBEs on DOT-assisted contracts in West Virginia.

2.2 West Virginia Unified Certification Committee

The West Virginia Unified Certification Program Committee (“the **UCP Committee**”) is hereby established to implement and administer the West Virginia Unified Certification Program. At least one member of the **UCP Committee** shall be female, and at least one other member shall be a member of a minority group. The membership of the **UCP Committee** shall consist of: Transportation EEO Officer (serves as Committee chairperson); Director of Public Transit or designee; Director of Aeronautics Commission or designee; Director of DOH Contract Administration (serves as Committee Co-Chairperson); a representative from DOH Engineering Division; a representative from DOH Finance Division; a representative from the Division of Motor Vehicles; an attorney from DOH Legal Division (non-voting legal counsel).

(a) The **UCP Committee** shall:

- (1) Make all certification decisions on behalf of all DOT recipients in the State with respect to participation in the DOT DBE Program;
 - (i) certification decisions by the **UCP Committee** shall be binding on all DOT recipients within the State.
 - (ii) the **UCP Committee** shall provide "one-stop shopping" to applicants for certification, such that an applicant is required to apply only once for a DBE certification that will be honored by all DOT recipients in the State.

- (iii) the **UCP Committee** shall carry out all obligations of recipients with respect to certification and nondiscrimination. Recipients may use only UCPs that comply with the certification and nondiscrimination requirements of this part.
- (2) Ensure that only firms certified as eligible DBEs under this section participate as DBEs in each recipient's program by only re/certifying eligible DBEs as DBEs (this does not require the **UCP Committee** to monitor the recipients);
- (3) Maintain a Unified DBE directory containing, for all firms certified by the **UCP Committee** in the listing for each firm, its address, phone number, and the types of work the firm has been certified to perform as a DBE. The **UCP Committee** shall also:
 - (i) print the directory at least annually;
 - (ii) make updated information available to contractors and the public on request;
 - (iii) make the directory available to the public electronically, on the internet, as well as in print; and
 - (iiia) the electronic directory will be maintained by the Agency designated by the **UCP Committee** on their website for public viewing.
 - (iiib) the electronic directory will be updated as needed by the designated Agency.
- (4) Follow all certification procedures and standards of this agreement, on the same basis as recipients;
- (5) Cooperate fully with oversight, review, and monitoring activities of DOT and its operating administrations;
- (6) Implement DOT directives and guidance concerning certification matters; and
- (7) Make all decisions administering and implementing the **UCP**.
- (b) All certifications by the **UCP Committee** shall be pre-certifications; i.e., certifications that have been made final before the due date for bids or offers on a contract on which a firm seeks to participate as a DBE.
- (c) The **UCP Committee** is not required to process an application for certification from a firm having its principal place of business outside the State if the firm is not certified by the **UCP** in the State in which it maintains its principal place of business. The "home state" **UCP** shall share its information and documents concerning the firm with other **UCPs** certifying under 49 CFR 26 that are considering the firm's application.
- (d) The **UCP Committee** may accept the certification of any other **UCP** or DOT recipient.
- (e) This agreement shall commit recipients to ensuring that the **UCP Committee** has sufficient resources and expertise to carry out the requirements of this agreement.
- (f) This agreement includes an implementation schedule ensuring that the **UCP** is fully operational no later than 18 months following the approval of the agreement by the Secretary (Appendix A).

2.3 Nonapplicable Contracts

- (a) If a recipient is letting a contract, and that contract is to be performed entirely outside the United States, its territories and possessions, Puerto Rico, Guam, or the Northern Marianas Islands, this agreement does not apply to the contract.
- (b) If the recipient is letting a contract in which DOT financial assistance does not participate, this agreement does not apply to the contract.

SECTION 3. PROCEDURES.

3.1 Policy for Processing Applications

The **UCP Committee** will process applications for certification as a Disadvantaged Business Enterprise as follows:

- (a) Firms that perform a commercially useful function.
- (b) Firms that are organized for profit.

Certification applications are not processed for:

- (a) Not-for-profit firms.

Firms who have been determined as ineligible to participate in the DBE program and have been denied certification based on 49 CFR, Parts 26 shall not reapply for certification for twelve (12) months from date of denial.

Firms who withdraw their applications shall not reapply for certification for six (6) months from date of withdrawal.

3.2 Application and Decision

- (a) To become a DBE, a firm must submit an application to a Processing Agency of the **UCP Committee**; FAA, FTA, or WVDOT. The **UCP Committee** shall:
 - (1) Use a uniform application form;
 - (2) Ensure that the applicant attests to the accuracy and truthfulness of the information on the application form. This shall be done either in the form of an affidavit sworn to by the applicant before a person who is authorized by State law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States.
- (b) The Processing Agency shall review all information on the form and associated documentation provided by DBE applicant.

- (c) An onsite visit to the principal offices of the firm shall be conducted by, at a minimum, the Processing Agency, at which time the appropriate **UCP Committee** member(s), or designee, shall:
 - (i) interview the principal officers of the firm and review their resumes and/or work histories; and
 - (ii) perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in the local area. The **UCP Committee** may rely upon the site visit report of any other recipient with respect to a firm applying for certification;
- (d) The Processing Agency shall report its findings to the **UCP Committee**. The **UCP Committee** shall meet monthly, either in person, by phone, electronically or any combination thereof, to review and determine certification eligibility.
- (e) Four (4) **UCP Committee** members, or designee(s), shall constitute a quorum, and the approval of the quorum regarding certification decisions shall be binding on the entire **UCP Committee**.
- (f) The **UCP Committee** shall take all the following steps in determining whether a DBE firm meets the standards of section 3 of this agreement:
 - (1) If the firm is a corporation, analyze the ownership of stock in the firm;
 - (2) Analyze the bonding and financial capacity of the firm;
 - (3) Determine the work history of the firm, including contracts it has received and work it has completed;
 - (4) Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program and its preferred locations for performing the work, if any;
 - (5) Obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the DBE program;
 - (6) Follow the on-site reporting form and standards set forth by the **UCP Committee**.
- (g) The Processing Agency shall maintain the files of DBEs processed by that Agency. When a recipient, in connection with its consideration of the eligibility of a firm, makes a written request for certification information, the Processing Agency has obtained about that firm (e.g., including application materials or the report of a site visit, if the Processing Agency has made one to the firm), the Processing Agency shall promptly make the information available to the recipient.
- (h) The **UCP Committee** shall safeguard from disclosure to unauthorized persons information gathered as part of the certification process that may reasonably be regarded as proprietary or other confidential business information, consistent with applicable DBE rules, Federal, State, and local law.
- (i) Once the **UCP Committee** has certified a DBE, it shall remain certified for a period of at least three years unless and until its certification has been removed through the procedures of subsection 3.2 of this agreement. The **UCP Committee** may elect not to require DBEs to reapply for certification as a condition of continuing to participate in the program during this three-year period, unless the factual basis on which the certification was made changes.

- (j) Every DBE certified by a recipient or the **UCP Committee** shall inform the Processing Agency in writing of any change in circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this agreement or any material change in the information provided in the **UCP Committee's** application form.
 - (1) Changes in management responsibility among members of a limited liability company are covered by this requirement.
 - (2) The DBE shall attach supporting documentation describing in detail the nature of such changes.
 - (3) The notification of changes shall take the form of an affidavit sworn to by the owners of the firm before a person who is authorized by State law to administer oaths executed under penalty of perjury of the laws of the United States. The DBE shall provide the written notification within 30 days of the occurrence of the change. If the DBE fails to make timely notification of such a change, it shall be deemed to have failed to cooperate in accordance with section 26.83(I)(3) of the Regulation.
- (k) Every DBE shall provide to the **UCP Committee** via the Processing Agency, on the anniversary of the date of the DBE's certification, an affidavit sworn to by the firm's owners before a person who is authorized by State law to administer oaths executed under penalty of perjury of the laws of the United States. This affidavit shall affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material changes in the information provided in its application form, except for changes about which the DBE has notified the **UCP Committee** under paragraph (e) of this section. The affidavit, which shall be provided by the **UCP Committee/Processing Agency**, shall specifically affirm that the firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of the firm's size and gross receipts. If the DBE fails to provide this affidavit in a timely manner, it shall be deemed to have failed to cooperate under section 5(a) of this agreement.
- (l) The **UCP Committee** shall make decisions on applications for certification within 90 days of receiving from the applicant firm all information required under this part. The **UPC Committee** may extend this time period once, for no more than an additional 60 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension. The **UCP Committee** may establish a different time frame, upon a showing that this time frame is not feasible, and subject to the approval of the concerned operating administration. The **UCP Committee's** failure to make a decision by the applicable deadline under this paragraph is deemed a constructive denial of the application, on the basis of which the firm may appeal to DOT under section 3.3 of this agreement.

3.3 Denials

- (a) When the **UCP Committee** denies a request by a firm to be certified as a DBE, which is not currently certified by the recipients or the **UCP Committee**, the Processing Agency shall provide the firm a written explanation of the **UCP Committee's** reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based shall be made available to the applicant, upon request.
- (b) When a firm is denied certification, the **UCP Committee** shall establish a time period of twelve months that shall elapse before the firm may reapply to the recipient for certification. The time period for reapplication begins to run on the date the explanation letter required by paragraph (a) of this section is received by the firm.
- (b) When the **UCP Committee** makes an administratively final denial of certification concerning a firm, the firm may appeal the denial to the Department under section 3.3 of this agreement.

3.4 Removals

- (a) Ineligibility complaints.
 - (1) Any person may file with the **UCP Committee** a written complaint alleging that a currently certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. The **UCP Committee** is not required to accept a general allegation that a firm is ineligible or an anonymous complaint. Confidentiality of complainants' identities shall be protected as provided in section 26.109(b) of the Regulation.
 - (2) The **UCP Committee** shall refer the complaint to the Processing Agency who shall review its records concerning the firm, any material provided by the firm and the complainant, and other available information and present its results and recommendations to the **UCP Committee**. The **UCP Committee** may request additional information from the firm or conduct any other investigation that it deems necessary.
 - (3) If the **UCP Committee** determines, based on this review, that there is reasonable cause to believe that the firm is ineligible, it shall provide written notice to the firm that it proposes to find the firm ineligible, setting forth the reasons for the proposed determination. If the **UCP Committee** determines that such reasonable cause does not exist, it shall notify the complainant and the firm in writing of this determination and the reasons for it. 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.
- (b) **UCP Committee**-initiated proceedings. If, based on notification by the firm of a change in its circumstances or other information that comes to the attention of the **UCP Committee**, it determines that there is reasonable cause to believe that a currently certified firm is ineligible, the Processing Agency shall conduct an

investigation and inform the **UCP Committee** of its actions. If the Processing Agency finds evidence that the firm should be considered ineligible the information shall be provided to the **UCP Committee**. The **UCP Committee** shall provide written notice to the firm that it proposes to find the firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause shall specifically reference the evidence in the record on which each reason is based.

- (c) **Hearing.** When the **UCP Committee** notifies a firm that there is reasonable cause to remove its eligibility as provided in paragraph (a) or (b) of this section, it shall give the firm an opportunity for an informal hearing at the Unified Certification Program Committee level, at which the firm may respond to the reasons for the recommendation to remove its eligibility in person and provide information and arguments concerning why it should remain certified.
 - (1) In such a proceeding, the **UCP Committee** bears the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part.
 - (2) The **UCP Committee** shall maintain a complete record of the hearing and will retain the original record of the hearing at the site of the Processing Agency. The **UCP Committee** may charge the firm only for the cost of copying the record.
 - (3) The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, the **UCP Committee** bears the same burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards, as it would during a hearing.
- (d) **Separation of functions.** The **UCP Committee** shall ensure that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions. The decision maker shall be an individual who is knowledgeable about the certification requirements of the DBE program and this agreement as agreed upon by mutual consent by the **UCP Committee**.
- (e) **Grounds for Decision.** The **UCP Committee** shall not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to the recipient at the time of its certification of the firm. The **UCP Committee** may base such a decision only on one or more of the following:
 - (1) Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part;
 - (2) Information or evidence not available to the **UCP Committee** at the time the firm was certified;
 - (3) Information that was concealed or misrepresented by the firm in previous certification actions by a recipient;
 - (4) A change in the certification standards or requirements of the Department since the **UCP Committee** certified the firm; or

- (5) A documented finding that the **UCP Committee's** determination to certify the firm was factually erroneous.
- (f) Notice of decision. Following the **UCP Committee's** decision, it shall provide the firm written notice of the decision not later than ten (10) working days after the **UCP Committee's** decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice shall inform the firm of the consequences of the decision and of the availability of an appeal to the Review Committee under Section 3.3 of this agreement.
- (g) Status of firm during proceeding.
 - (1) A firm remains an eligible DBE during the pendency of the proceeding to remove its eligibility.
 - (2) The firm does not become ineligible until the issuance of the notice provided for in paragraph (f) of this section.
- (h) Effects of removal of eligibility. When the **UCP Committee** removes a firm's eligibility, it shall take the following action:
 - (1) The firm shall not be a DBE even though the firm's name may remain in the directory until the next update.
 - (2) When a prime contractor has made a commitment to using the ineligible firm, or a recipient has made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before the **UCP Committee** issues the decertification notice provided for in paragraph (g) of this section, the ineligible firm does not count toward the contract goal or overall goal. The **UCP Committee** shall direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate to the recipient that it has made a good faith effort to do so.
 - (3) If a prime contractor has executed a subcontract with the firm before the **UCP Committee** has notified the firm of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE goal for the firm's work. In this case, or in a case where a recipient has let a prime contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after the **UCP Committee** issued the notice of its ineligibility shall not count toward the recipient's overall goal, but may count toward the contract goal.
 - (4) (Exception: If the DBEs ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, the recipient may continue to count its participation on that contract toward overall and contract goals.

3.5 Appeals

- (a) (1) A firm denied certification or whose eligibility is removed by a recipient, may make an administrative appeal to the Department.

- (2) A complainant in an ineligibility complaint to the **UCP Committee**, may appeal to the Department if the **UCP Committee** does not find reasonable cause to propose removing the firm's eligibility or, following a removal of eligibility proceeding, determines that the firm is eligible.
- (3) Send appeals to the following address:

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

- (b) Pending the Department's decision in the matter, the **UCP Committee's** decision remains in effect. The Department does not stay the effect of the **UCP Committee's** decision while it is considering an appeal.
- (c) If a firm or complainant wants to file an appeal, it shall send a letter to the Department within 90 days of the date of the **UCP Committee's** final decision, containing information and arguments concerning why the **UCP Committee's** decision should be reversed. The Department may accept an appeal filed later than 90 days after the date of the decision if the Department determines that there was good cause for the late filing of the appeal.
 - (1) An applicant who is a firm which has been denied certification, whose certification has been removed, whose owner is determined not to be a member of a designated disadvantaged group, or concerning whose owner the presumption of disadvantage has been rebutted, shall state the name and address of any other recipient or **UCP** which currently certifies the firm, which has rejected an application for certification from the firm or removed the firm's eligibility within one year prior to the date of the appeal, or before which an application for certification or a removal of eligibility is pending. Failure to provide this information may be deemed a failure to cooperate under section 5(a) of this agreement.
 - (2) An applicant other than one described in paragraph (c)(1) of this section, shall promptly provide, upon the Department's request, the information called for in paragraph (c)(1) of this section. Failure to provide this information may be deemed a failure to cooperate under section 5(c) of this agreement.
- (d) When it receives an appeal, the Department shall request a copy of the **UCP Committee's** complete administrative record in the matter. The **UCP Committee** shall provide the administrative record, including a hearing transcript, within 20 days of the Department's request. The Department may extend this time period on the basis of the **UCP Committee's** showing of good cause. To facilitate the Department's review of a **UCP Committee's** decision, the **UCP Committee** shall ensure that such administrative records are well organized, indexed, and paginated. If an appeal is brought concerning the **UCP Committee's** certification decision concerning a firm in which the **UCP Committee** relied on the decision and/or administrative record of another DOT recipient or **UCP**, this requirement applies to both the **UCP Committee** and the recipient or **UCP** involved.

- (e) The Department makes its decision based solely on the entire administrative record. The Department does not make a de novo review of the matter and does not conduct a hearing. The Department may supplement the administrative record by adding relevant information made available by the DOT Office of Inspector General; Federal, State, or local law enforcement authorities; officials of a DOT operating administration or other appropriate DOT office; a recipient; or a firm or other private party.
- (f) If the **UCP Committee** provides supplementary information to the Department, it shall also make this information available to the firm and any third-party complainant involved, consistent with Federal or applicable State laws concerning freedom of information and privacy. The Department makes available, on request by the firm and any third-party complainant involved, any supplementary information it receives from any source.
 - (1) The Department affirms the **UCP Committee's** decision unless it determines, based on the entire administrative record, that its decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification.
 - (2) If the Department determines, after reviewing the entire administrative record, that the **UCP Committee's** decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification, the Department reverses the **UCP Committee's** decision and directs the **UCP Committee** to certify the firm or remove its eligibility, as appropriate. The **UCP Committee** shall take the action directed by the Department's decision immediately upon receiving written notice of it.
 - (3) The Department is not required to reverse the **UCP Committee's** decision if the Department determines that a procedural error did not result in fundamental unfairness to the appellant or substantially prejudice the opportunity of the appellant to present its case.
 - (4) If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the Department may remand the record to the **UCP Committee** with instructions seeking clarification or augmentation of the record before making a finding. The Department may also remand a case to the **UCP Committee** for further proceedings consistent with Department instructions concerning the proper application of the provisions of this agreement.
 - (5) The Department does not uphold the **UCP Committee's** decision based on grounds not specified in the decision.
 - (6) The Department's decision is based on the status and circumstances of the firm as of the date of the decision being appealed.
 - (7) The Department provides written notice of its decision to the **UCP Committee**, the firm, and the complainant in an ineligibility complaint. A copy of the notice is also sent to any other recipient or **UCP** whose administrative record or decision has been involved in the proceeding (see paragraph (d) of this section). The notice includes the reasons for the

Department's decision, including specific references to the evidence in the record that supports each reason for the decision.

- (8) The Department's policy is to make its decision within 180 days of receiving the complete administrative record. If the Department does not make its decision within this period, the Department provides written notice to concerned parties, including a statement of the reason for the delay and a date by which the appeal decision will be made.
- (g) All decisions under this section are administratively final, and are not subject to petitions for reconsideration.

3.6 Result of Appeal

- (a) The decision of an appeal under section 3.3 of this agreement is binding on the **UCP Committee** whose decision was appealed. It is not binding on other recipients or **UCPs**.
- (b) The **UCP Committee** shall take the following action:
 - (1) If the Department determines that the **UCP Committee** erroneously certified a firm, the **UCP Committee** shall remove the firm's eligibility on receipt of the determination, without further proceedings. Effective on the date of the **UCP Committee's** receipt of the Department's determination, the consequences of a removal of eligibility set forth in section 26.87(i) of the Regulation shall take effect.
 - (2) If the Department determines that the **UCP Committee** erroneously failed to find reasonable cause to remove the firm's eligibility, the **UCP Committee** shall expeditiously commence a proceeding to determine whether the firm's eligibility should be removed, as provided in section 3.3 of this agreement.
 - (3) If the Department determines that the **UCP Committee** erroneously declined to certify or removed the eligibility of the firm, the **UCP Committee** shall certify the firm, effective on the date of the Board's receipt of the written notice of Department's determination.
 - (4) If the Department determines that the **UCP Committee** erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, the **UCP Committee** shall take appropriate corrective action as determined by the Department.
 - (5) If the Department affirms the **UCP Committee's** determination, no further action is necessary.
- (c) Where DOT has upheld another DOT recipient or **UCP's** denial of certification to or removal of eligibility from a firm, or directed the removal of a firm's eligibility, the **UCP Committee** may commence a proceeding to remove the firm's eligibility, as provided in section 3.3 of this agreement. The **UCP Committee** shall not remove the firm's eligibility absent such a proceeding. Where DOT has reversed a denial of certification to or removal of eligibility from a firm, the **UCP Committee** shall take the DOT action into account in any certification action involving the firm. However, the **UCP Committee** shall not be required to certify the firm based on the DOT decision.

SECTION 4. STANDARDS.

4.1 Generally

- (a) In determining whether to certify a firm as eligible to participate as a DBE, the **UCP Committee** shall apply the standards of this section.
- (b)
 - (1) Consideration of whether a firm performs a commercially useful function or is a regular dealer pertains solely to counting toward DBE goals the participation of firms that have already been certified as DBEs. Except as provided in paragraph (a)(2) of this section, the **UCP Committee** shall not, in any way, consider issues determining commercially useful function relative to counting goals when making decisions about whether to certify a firm as a DBE.
 - (2) The **UCP Committee** may consider, in making certification decisions, whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program.
- (c) The **UCP Committee** shall evaluate the eligibility of a firm on the basis of present circumstances. The **UCP Committee** shall not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of this part. The **UCP Committee** shall not refuse to certify a firm solely on the basis that it is a newly formed firm.
- (d) DBE firms and firms seeking DBE certification shall cooperate fully with the **UCP Committee's** requests for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial or removal of certification.
- (e) Only firms organized for profit may be eligible DBEs. Not-for-profit organizations, even though controlled by socially and economically disadvantaged individuals, are not eligible to be certified as DBEs.
- (f) Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is an independent business, owned and controlled by socially and economically disadvantaged individuals.
- (g) The **UCP Committee** shall not require a DBE firm to be prequalified as a condition for certification unless the recipient requires all firms that participate in its contracts and subcontracts to be prequalified.
- (h) A firm that is owned by an Indian tribe, Alaska Native Corporation, or Native Hawaiian organization as an entity, rather than by Indians, Alaska Natives, or Native Hawaiians as individuals, may be eligible for certification. Such a firm shall meet the size standards of section 4.4 of this agreement. Socially and economically disadvantaged individuals, as provided in section 4.5 of this agreement shall control such a firm.

4.2 Burdens of Proof

- (a) The firm seeking certification has the burden of demonstrating to the **UCP Committee**, by a preponderance of the evidence, that it meets the requirements of this section concerning group membership or individual disadvantage, business size, ownership, and control.
- (b) The **UCP Committee** shall rebuttably presume that members of the designated groups identified in section 4.5(a)(1) of this agreement are socially and economically disadvantaged. This means that they do not have the burden of proving to the **UCP Committee** that they are socially and economically disadvantaged. However, applicants have the obligation to provide the **UCP** information concerning their economic disadvantage (see section 4.5 of this agreement).

4.3 Group Membership

- (a) If the **UCP Committee** has reason to question whether an individual is a member of a group that is presumed to be socially and economically disadvantaged, it shall require the individual to demonstrate, by a preponderance of the evidence, that he or she is a member of the group.
- (b) In making such a determination, the **UCP Committee** shall consider whether the person has held himself out to be a member of the group over a long period of time prior to application for certification and whether the relevant community regards the person as a member of the group. The **UCP Committee** may require the applicant to produce appropriate documentation of group membership.
 - (1) If the **UCP Committee** determines that an individual claiming to be a member of a group presumed to be disadvantaged is not a member of a designated disadvantaged group, the individual shall demonstrate social and economic disadvantage on an individual basis.
 - (2) The **UCP Committee's** decisions concerning membership in a designated group are subject to the certification appeals procedure of section 3.4 of this agreement.

4.4 Business Size

- (a) To be an eligible DBE, a firm (including its affiliates) shall be an existing small business, as defined by Small Business Administration (SBA) standards or as determined by governing Department regulations. The **UCP Committee** shall apply current SBA business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts.
- (b) Even if it meets the requirements of paragraph (a) of this section, a firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations (see 13 CFR 121.402), over the firm's previous three fiscal years, in excess of \$17,420,000. The Secretary may adjust this amount for inflation from time to time.

4.5 Socially and Economically Disadvantaged Persons

- (a) Presumption of disadvantage.
 - (1) The **UCP Committee** shall rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. The **UCP Committee** shall require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.
 - (2)
 - (i) the **UCP Committee** shall require each individual owner of a firm applying to participate as a DBE whose ownership and control are relied upon for DBE certification to submit a signed, notarized statement of personal net worth, with appropriate supporting documentation.
 - (ii) in determining net worth, the **UCP Committee** shall exclude an individual's ownership interest in the applicant firm and the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). A contingent liability does not reduce an individual's net worth. The personal net worth of an individual claiming to be an Alaska Native will include assets and income from sources other than an Alaska Native Corporation and exclude any of the following which the individual receives from any Alaska Native Corporation: cash (including cash dividends on stock received from an ANC) to the extent that it does not, in the aggregate, exceed \$2,000 per individual per annum; stock (including stock issued or distributed by an ANC as a dividend or distribution on stock); a partnership interest; land or an interest in land (including land or an interest in land received from an ANC as a dividend or distribution on stock); and an interest in a settlement trust.
- (b) Rebuttal of presumption of disadvantage.
 - (1) If the statement of personal net worth that an individual submits under paragraph (a)(2) of this section shows that the individual's personal net worth exceeds that which is established by 49 CFR, Part 26 (\$750,000 for contracting, \$2,000,000 proposed for concessions) the individual's presumption of economic disadvantage is rebutted. The **UCP Committee** shall not be required to have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.
 - (2) If the **UCP Committee** has a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged the **UCP Committee** may, at any time, start a proceeding to determine whether the presumption should be

regarded as rebutted with respect to that individual. The proceeding shall follow the procedures of section 2.5 of this agreement.

- (3) In such a proceeding, the **UCP Committee** has the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. The **UCP Committee** may require the individual to produce information relevant to the determination of his or her disadvantage.
 - (4) When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility under this subpart unless and until he or she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds the standard set forth in the regulation, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage.
- (c) 8(a) and SDB firms. If a firm applying for certification has a current, valid certification from or recognized by the SBA under the 8(a) or small and disadvantaged business (SDB) program (except an SDB certification based on the firm's self-certification as an SDB), the UCP may accept the firm's 8(a) or SDB certification in lieu of conducting an additional certification proceeding, just as the **UCP Committee** may accept the certification of another DOT recipient for this purpose.
 - (d) Individual determinations of social and economic disadvantage. Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. The **UCP Committee** shall make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to the **UCP Committee**, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds the standard shall not be deemed to be economically disadvantaged. In making these determinations, use the guidance found in Appendix B of this agreement. The **UCP Committee** shall require that applicants provide sufficient information to permit determinations under the guidance of Appendix B of this agreement.

4.6 Ownership

- (a) In determining whether the socially and economically disadvantaged participants in a firm own the firm, the **UCP Committee** shall consider all the facts in the record, viewed as a whole.
- (b) To be an eligible DBE, a firm shall be at least 51 percent owned by socially and economically disadvantaged individuals.

- (1) In the case of a corporation, such individuals shall own at least 51 percent of the each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding.
 - (2) In the case of a partnership, socially and economically disadvantaged individuals shall own 51 percent of each class of partnership interest. Such ownership shall be reflected in the firm's partnership agreement.
 - (3) In the case of a limited liability company, socially and economically disadvantaged individuals shall own at least 51 percent of each class of member interest.
- (c) The firm's ownership by socially and economically disadvantaged individuals shall be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The disadvantaged owners shall enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.
- (d) All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Except as provided in this paragraph (d), no securities or assets held in trust, or by any guardian for a minor, are considered as held by disadvantaged persons in determining the ownership of a firm. However, securities or assets held in trust are regarded as held by a disadvantaged individual for purposes of determining ownership of the firm, if –
- (1) The beneficial owner of securities or assets held in trust is a disadvantaged individual, and the trustee is the same or another such individual; or
 - (2) The beneficial owner of a trust is a disadvantaged individual who, rather than the trustee, exercises effective control over the management, policy-making, and daily operational activities of the firm. Assets held in a revocable living trust may be counted only in the situation where the same disadvantaged individual is the sole grantor, beneficiary, and trustee.
- (e) The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests shall be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.
- (f) The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership:
- (1) The owner's expertise shall be --
 - (i) in a specialized field;
 - (ii) of outstanding quality;
 - (iii) in areas critical to the firm's operations;
 - (iv) indispensable to the firm's potential success;
 - (v) (specific to the type of work the firm performs; and
 - (vi) documented in the records of the firm. These records shall clearly show the contribution of expertise and its value to the firm.

- (2) The individual whose expertise is relied upon shall have a significant financial investment in the firm.
- (g) The **UCP Committee** shall always deem as held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual --
 - (1) As the result of a final property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce decree is inconsistent with this section; or
 - (2) Through inheritance, or otherwise because of the death of the former owner.
- (h) (1) The **UCP Committee** shall presume as not being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm who is --
 - (i) involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;
 - (ii) involved in the same or a similar line of business; or
 - (iii) engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.
- (2) To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual shall demonstrate to the **UCP Committee**, by clear and convincing evidence, that --
 - (i) the gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
 - (ii) the disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.
- (i) The **UCP Committee** shall apply the following rules in situations in which marital assets form a basis for ownership of a firm:
 - (1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, the **UCP Committee** shall deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. The **UCP Committee** shall not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.

- (2) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm shall be included as part of the firm's application for DBE certification.
- (j) The **UCP Committee** may consider the following factors in determining the ownership of a firm. However, the **UCP Committee** shall not regard a contribution of capital as failing to be real and substantial, or find a firm ineligible, solely because --
 - (1) A socially and economically disadvantaged individual acquired his or her ownership interest as the result of a gift, or transfer without adequate consideration, other than the types set forth in paragraph (h) of this section;
 - (2) There is a provision for the co-signature of a spouse who is not a socially and economically disadvantaged individual on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents; or
 - (3) Ownership of the firm in question or its assets is transferred for adequate consideration from a spouse who is not a socially and economically disadvantaged individual to a spouse who is such an individual. In this case, the **UCP Committee** shall give particularly close and careful scrutiny to the ownership and control of a firm to ensure that it is owned and controlled, in substance as well as in form, by a socially and economically disadvantaged individual.
- (k) An eligible DBE firm shall be owned by individuals who are socially and economically disadvantaged. Except as provided in this paragraph, a firm that is not owned by such individuals, but instead is owned by another firm -- even a DBE firm -- cannot be an eligible DBE.
 - (1) If socially and economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, the **UCP Committee** may certify the subsidiary if it otherwise meets all requirements of this section. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.
 - (2) The **UCP Committee** may certify such a subsidiary only if there is cumulatively 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals.

4.7 Control

- (a) In determining whether socially and economically disadvantaged owners' control a firm, the **UCP Committee** shall consider all the facts in the record, viewed as a whole.

- (b) Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms. The **UCP Committee** shall:
 - (1) In determining whether a potential DBE is an independent business, scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources;
 - (2) Consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm;
 - (3) Examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm; and
 - (4) In considering factors related to the independence of a potential DBE firm, consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.
- (c) A DBE firm shall not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm. This paragraph does not preclude a spousal co-signature on documents as provided for in section 4.6(j)(2) of this agreement.
- (d) The socially and economically disadvantaged owners shall possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.
 - (1) A disadvantaged owner shall hold the highest officer position in the company (e.g., chief executive officer or president).
 - (2) In a corporation, disadvantaged owners shall control the committee of directors.
 - (3) In a partnership, one or more disadvantaged owners shall serve as general partners, with control over all partnership decisions.
- (e) Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals shall not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

- (f) The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority shall be revocable, and the socially and economically disadvantaged owners shall retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs shall be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.
- (g) The socially and economically disadvantaged owners shall have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners shall have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.
- (h) If State or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type shall possess the required license or credential. If State or local law does not require such a person to have such a license or credential to own and/or control a firm, the **UCP Committee** shall not deny certification solely on the ground that the person lacks the license or credential. However, the **UCP Committee** may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.
- (i)
 - (1) The **UCP Committee** may consider differences in remuneration between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a firm as a DBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm. The **UCP Committee** may determine that a socially and economically disadvantaged owner controls a firm although that owner's remuneration is lower than that of some other participants in the firm.
 - (3) In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, the **UCP Committee** may consider a difference between the

remuneration of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the non-disadvantaged individual remains involved with the firm and continues to receive greater compensation than the disadvantaged individual.

- (j) In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.
- (k)
 - (1) A socially and economically disadvantaged individual may control a firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, the **UCP Committee** shall make a judgment about the control the socially and economically disadvantaged owner exercises versus other persons involved in the business as the **UCP Committee** does in other situations, without regard to whether or not the other persons are immediate family members.
 - (2) If the **UCP Committee** cannot determine that the socially and economically disadvantaged owners -- as distinct from the family as a whole -- control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.
- (l) Where a firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged individual, and the non-disadvantaged individual remains involved with the firm in any capacity, the disadvantaged individual now owning the firm shall demonstrate to the **UCP Committee**, by clear and convincing evidence, that:
 - (1) The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
 - (2) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who formerly owned and/or controlled the firm.
- (m) In determining whether its socially and economically disadvantaged owners control a firm, the **UCP Committee** may consider whether the firm owns equipment necessary to perform its work. However, the **UCP Committee** shall not determine that a firm is not controlled by socially and economically disadvantaged individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease

does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.

- (n) The **UCP Committee** shall grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm. To become certified in an additional type of work, the firm need demonstrate to the **UCP Committee** only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. The **UCP Committee** shall not, in this situation, require that the firm be recertified or submit a new application for certification, but the **UCP Committee** shall verify the disadvantaged owner's control of the firm in the additional type of work.
- (o) A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the **UCP Committee** should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided that the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.
- (p) In order for a partnership to be controlled by socially and economically disadvantaged individuals, any non-disadvantaged partners shall not have the power, without the specific written concurrence of the socially and economically disadvantaged partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.
- (q) The socially and economically disadvantaged individuals controlling a firm may use an employee leasing company. The use of such a company does not preclude the socially and economically disadvantaged individuals from controlling their firm if they continue to maintain an employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

SECTION 5. AVAILABILITY AND CONFIDENTIALITY OF RECORDS.

5.1 Availability of Records

- (a) In responding to requests for information concerning any aspect of the DBE program, the West Virginia Department of Transportation complies with provisions of the Federal Freedom of Information (5 U.S.C. 552) and Privacy Acts (5 U.S.C. 552a). The West Virginia Department of Transportation may make

available to the public any information concerning the DBE program release of which is not prohibited by Federal law.

- (b) The **UCP Committee** shall safeguard from disclosure to unauthorized persons information that may reasonably be considered as confidential business information, consistent with Federal, State, and local law. Notwithstanding any contrary provisions of state or local law, the **UCP Committee** shall not release personal financial information submitted in response to the personal net worth requirement to a third party (other than DOT) without written consent of the submitter.

5.2 Confidentiality of Information on Complainants

Notwithstanding the provisions of subsection 5.1, the identity of complainants shall be kept confidential, at their election. If such confidentiality will hinder the investigation, proceeding or hearing, or result in a denial of appropriate administrative due process to other parties, the complainant shall be advised for the purpose of waiving the privilege. Complainants are advised that, in some circumstances, failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing. FAA follows the procedures of 14 CFR Part 16 with respect to confidentiality of information in complaints.

SECTION 6. COOPERATION AND INTIMIDATION.

6.1 Cooperation

All participants in the West Virginia Department of Transportation's DBE program (including, but not limited to, the Committee, recipients, DBE firms and applicants for DBE certification, complainants and appellants, and contractors using DBE firms to meet contract goals) are required to cooperate fully and promptly with DOT and **UCP Committee** compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so shall be a ground for appropriate action against the party involved (e.g., with respect to recipients, a finding of noncompliance; with respect to DBE firms, denial of certification or removal of eligibility and/or suspension and debarment; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment).

6.2 Intimidation and Retaliation

The **UCP Committee**, recipients, contractors, or any other participant in the program, shall not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by this part or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part.

SECTION 7. ADDITIONAL PROVISIONS.

7.1 Liability

Nothing contained in this agreement shall imply any relationship between any of the signing parties beyond the administration of the Unified Certification Program (UCP). This agreement does not expand obligations imposed under existing law upon any party hereto or the UCP Committee any liabilities to third parties in tort or in contract or injuries to persons or damage to property, including without limitation damages or losses to business trade or reputation.

7.2 Records

Each party agrees to keep and maintain under generally accepted accounting principles, full, true, and complete records and documents pertaining to this agreement and present, at any reasonable time, such information for inspection, examination, review, audit, and copying at any office where such records and documentation are maintained.

7.3 Limitation or Association

The parties are associated with each other only for the purposes and to the extent set forth in this agreement. Each party is and shall be a public agency separate and distinct from the other party and shall have the right to supervise, manage, operate, control, and direct performance of the details incident to its duties under this agreement. Nothing contained in this agreement shall expand obligations under existing law, or be deemed or construed to create a partnership or joint venture, to create relationships of an employer-employee or principal-agent, or to otherwise create any liability for one agency whatsoever with respect to the indebtedness, liabilities, and obligations of the other agency or any other party beyond the administration of the UCP.

7.4 Term

This agreement shall continue in effect until modified or termination in writing by the parties hereto; provided, that this agreement will automatically terminate and the obligations of the parties cease should this agreement be in substantial non-compliance with present or future Federal laws or regulations.

7.5 Entire Agreement

This agreement constitutes the entire agreement of the parties with respect to the subject matter hereof, all oral and written prior to contemporaneous discussions and agreements being merged herein and superseded hereby.

7.6 Implementation Date

April 1, 2002

APPENDIX A

Implementation Schedule

The West Virginia Division of Transportation shall make all certification decisions on behalf of all West Virginia Department of Transportation recipients in the State with respect to participation in the WVDOT DBE Program.

The Governor's Minority Business Task Force met on September 16, 1998. The West Virginia Division of Transportation, Division of Highways EEO Division became the certifier for all minority businesses in the State. August 1998, the US Small Business Administration and the West Virginia Branches of the NAACP signed a Memorandum of Understanding to promote and increase participation of West Virginia's African American-owned businesses in SBA's capital access, procurement, international trade, women's business, welfare-to-work, and advocacy programs.

Consolidation of all certification functions under the West Virginia Department of Transportation, Division of Highways EEO Division along with all partner recipients was completed at the time of the submittal of the UCP to the Secretary February 27, 2002 and was implemented on April 1, 2002. The West Virginia Division of Highways EEO Division performs concessionaire certifications. FAA concessionaires are not mandated to provide personal financial statements, however our office requires that all requests for certification provide a personal financial statement.

Signatures were obtained from West Virginia Airport Managers October 2002, November 2002, December 2002, and January 2003.

The West Virginia Division of Highways EEO Division conducted its annual Entrepreneurial Development Institute (EDI) on February 26, 2003, March 18, 2003, March 20, 2003, and April 10, 2003 at four separate locations throughout the State. Training was provided for new companies applying for certification under the UCP. Seminars were presented on submitting job quotes to prime contractors for the purposes of performing work on Federal-aid projects; requirements for a subcontractor to bid as a prime contractor; documentation and information the DBE Program office will require on all Federal-aid projects; leasing of equipment and purchasing of materials; understanding the requirements for the personal financial statement; and how change orders affect the DBE.

The West Virginia UCP is fully operational at this time as required by §26.81(a)(2), which states that the UCP must be fully operational no later than 18 months following the approval by the Secretary.

APPENDIX B

Social Disadvantage

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

- (4) With respect to paragraph I.(A) of this appendix, the Department notes that people with disabilities have disproportionately low incomes and high rates of unemployment. Many physical and attitudinal barriers remain which impede their full participation in education, employment, and business opportunities available to the general public. The Americans with Disabilities Act (ADA) was passed in recognition of the discrimination faced by people with disabilities. It is plausible that many individuals with disabilities - especially persons with severe disabilities (e.g., significant mobility, vision, or hearing impairments) - may be socially and economically disadvantaged.

II. Under the laws concerning social and economic disadvantage, people with disabilities are not a group presumed to be disadvantaged. Nevertheless, recipients should look carefully at individual showings of disadvantage by individuals with disabilities, making a case-by-case judgment about whether such an individual meets the criteria of this appendix. As public entities subject to Title II of the ADA, the **UCP Committee** shall also ensure their DBE programs are accessible to individuals with disabilities. For example, physical barriers or the lack of application and information materials in accessible formats cannot be permitted to thwart the access of potential applicants to the certification process or other services made available to DBEs and applicants.

Economic Disadvantage

- (A) General. Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.
- (B) Submission of narrative and financial information.
 - (1) Each individual claiming economic disadvantage must describe the conditions that are the basis for the claim in a narrative statement, and shall submit personal financial information.
 - (2) When married, an individual claiming economic disadvantage also shall submit separate financial information for his or her spouse, unless the individual and the spouse are legally separated.
- (C) Factors to be considered. In considering diminished capital and credit opportunities, the **UCP** shall examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including personal income for the past two years (including bonuses and the value of company stock given in lieu of cash), personal net worth, and the fair market value of all assets, whether encumbered or not. The **UCP Committee** shall also consider the financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification, or, if not available, in

similar lines of business, which are not owned and controlled by socially and economically disadvantaged individuals in evaluating the individual's access to credit and capital. The financial profiles that the **UCP Committee** shall compare include total assets, net sales, pre-tax profit, sales/working capital ratio, and net worth.

(D) Transfers within two years.

- (1) Except as set forth in paragraph (D)(2) of this appendix, the **UCP Committee** shall attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust, a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to a concern's application for participation in the DBE program, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.
- (2) The **UCP Committee** shall not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.
- (3) In determining an individual's access to capital and credit, the **UCP Committee** may consider any assets that the individual transferred within such two-year period described by paragraph (D)(1) of this appendix that are not considered in evaluating the individual's assets and net worth (e.g., transfers to charities).