

10/30/2024



## Memphis International Airport DBE Plan

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**UNITED STATES DEPARTMENT OF TRANSPORTATION**  
**DBE PROGRAM – 49 CFR PART 26**  
Memphis-Shelby County Airport Authority  
for Memphis International Airport, Memphis TN

**POLICY STATEMENT**

**Section 26.1, 26.23 Objectives/Policy Statement**

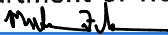
Memphis-Shelby County Airport Authority (hereafter ‘MSCAA’) has established a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the U.S. Department of Transportation (USDOT) 49 CFR Part 26. MSCAA has received federal financial assistance from USDOT, and as a condition of receiving this assistance, MSCAA has signed an assurance that it will comply with 49 CFR Part 26.

It is the policy of MSCAA to ensure that DBEs, as defined in 49 CFR Part 26, have an equal opportunity to receive and participate in USDOT–assisted contracts. It is also the policy:

1. To ensure nondiscrimination in the award and administration of USDOT-assisted contracts.
2. To create a level playing field on which DBEs can compete fairly for USDOT-assisted contracts.
3. To ensure that the DBE Program is narrowly tailored in accordance with applicable law.
4. To ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs.
5. To help remove barriers to the participation of DBEs in USDOT-assisted contracts.
6. To promote the use of DBEs in all types of federally assisted contracts and procurement activities conducted by recipients.
7. To assist the development of firms that can compete successfully in the marketplace outside the DBE program.
8. To provide appropriate flexibility to recipients of federal financial assistance in establishing and providing opportunities for DBEs.

**Ms. Regina Armstrong, Senior Manager, Business Diversity Development, Memphis International Airport** has been designated as the DBE Liaison Officer (DBELO). In that capacity, the Senior Manager for Business Diversity Development is responsible for implementing 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 MSCAA in its financial assistance agreements with the US Department of Transportation.

*Regina Armstrong*

  
Michael Fulton (Nov 1, 2024 13:45 CDT)

MSCAA has disseminated this policy statement to MSCAA Commission members, and will distribute this statement to DBE and non-DBE business communities that perform work for the Airport on USDOT-assisted contracts in the following manner:

1. This policy statement will be prepared as a handout, and made available at pre-bid conferences, and/or outreach meetings conducted by MSCAA.
2. The policy statement will be posted on MSCAA’s website.

*Terry Blue*

\_\_\_\_\_  
Terry Blue, President & CEO, Memphis-Shelby County Airport Authority

\_\_\_\_\_  
Date

## **SUBPART A - GENERAL REQUIREMENTS & INFORMATION**

### **Section 26.1 Objectives**

The objectives are found in the policy statement on the first page of this program.

### **Section 26.3 Applicability**

Memphis-Shelby County Airport Authority (MSCAA) is the recipient of federal airport funds authorized by 49 U.S.C. 47101, *et seq.*

### **Section 26.5 Definitions**

MSCAA will adopt the definitions contained in Title 49 Subtitle A Part 26 Subpart A §26.5.

### **Section 26.7 Non-discrimination Requirements**

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

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

### **Section 26.11 Record Keeping Requirements**

#### **Reporting to USDOT: 26.11(b)**

MSCAA will report DBE participation to USDOT as follows:

The Airport will submit annually, by or before December 1, the Uniform Reports of DBE Awards or Commitments and Payments, as modified for use by FAA recipients, via FAA Civil Rights Connect (<https://faa.civilrightsconnect.com/>). The report will include information about all participating DBE firms.

#### **Bidders List: 26.11(c)(2)**

MSCAA will capture and compile the bidders list information as described in § 26.11(c)(2) and enter it into USDOT's designated system. This data will assist MSCAA in gathering accurate data on both DBE and non-DBE contractors and subcontractors who want to work on federally assisted projects at the Airport. The list may also assist MSCAA in setting overall DBE goals and provide USDOT with data to assess how well MSCAA is meeting the objectives of § 26.1.

MSCAA will collect the following information about all DBE and non-DBE firms who bid as prime contractors and subcontractors on each of its federally assisted contracts:

- Firm name;

- Prime or Sub;
- Point of Contact;
- Firm status as an ACDBE or non-ACDBE;
- Race and gender information for the firm's majority owner;
- Firm address including ZIP code;
- Phone Number;
- Scope of Work;
- Email Address;
- NAICS code applicable to the concession contract in which the firm is seeking to perform;
- Age of the firm; and
- The annual gross receipts of the firm.

MSCAA will collect the data from all bidders for its federally assisted contracts by requiring the information in paragraph (c)(2) of this section to be submitted with their bids or initial responses to negotiated procurements. MSCAA will collect this information using the Bidders List Data Collection form, as shown in Attachment 9.

MSCAA will enter this data into USDOT's designated system no later than December 1 following the fiscal year in which the relevant contract was awarded.

In the case of a "design-build" contracting situation where subcontracts will be solicited throughout the contract period as defined in a DBE Performance Plan pursuant to § 26.53(e), MSCAA will enter the data no later than December 1 following the fiscal year in which the design-build contractor awards the relevant subcontract(s).

### **Section 26.13 Federal Financial Assistance Agreement**

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

#### Assurance: 26.13(a)

*The Memphis-Shelby County Airport Authority (MSCAA) shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any USDOT-assisted contract; or in the administration of its DBE Program or the requirements of 49 CFR Part 26. MSCAA shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of USDOT assisted contracts. MSCAA's DBE Program, as required by 49 CFR Part 26 and as approved by USDOT, 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 MSCAA of its failure to carry out its approved program, the Department may impose sanction as provided for under 49 CFR Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).*

This language will appear in financial assistance agreements with sub-recipients.

#### Contract Assurance: 26.13b

MSCAA will ensure that the following clause is placed in every USDOT-assisted contract and subcontract:

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

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

## **SUBPART B - ADMINISTRATIVE REQUIREMENTS**

### **Section 26.21 DBE Program Updates**

MSCAA is required to have a DBE program meeting the requirements of this part as it will receive grants for airport planning or development and will award prime contracts, cumulative total value of which exceeds \$250,000 in FAA funds in a federal fiscal year. MSCAA is not eligible to receive USDOT financial assistance unless USDOT has approved this DBE program and MSCAA is in compliance with it and Part 26. MSCAA will continue to carry out this program until all funds from USDOT financial assistance have been expended. MSCAA does not have to submit regular updates of the DBE program document, as long as it remains in compliance. However, significant changes in the program, including those required by regulatory updates, will be submitted for USDOT approval.

### **Section 26.23 Policy Statement**

The policy statement is elaborated on the first page of this program.

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

MSCAA has designated the following individual as its DBE Liaison Officer:

**Regina Armstrong, Senior Manager, Business Diversity Development**  
**Memphis International Airport**  
**2491 Winchester Rd., Suite 113**  
**Memphis, TN 38116**  
**Phone: 901-922-2556**  
**Email: rarmstrong@flymemphis.com**

In that capacity, the DBELO is responsible for implementing all aspects of the DBE program and ensuring that MSCAA complies with all provisions of 49 CFR Part 26. The DBELO has direct, independent access to the President & CEO of MSCAA concerning DBE program matters. An organization chart displaying the DBELO's position in the organization is found in Attachment 1 to this program.

The DBELO is responsible for developing, implementing, and monitoring the DBE program, in coordination with other appropriate officials. The DBELO will administer the program. The duties and responsibilities include the following:

1. Gathers and reports statistical data and other information as required by USDOT.
2. Reviews third party contracts and purchase requisitions for compliance with this program.
3. Ensures that bid notices and requests for proposals are available to DBEs in a timely manner.
4. Identifies contracts and procurements so that DBE goals are included in solicitations (both race-neutral methods and contract specific goals).
5. Analyzes MSCAA's progress toward attainment and identifies ways to improve progress.
6. Participates in pre-bid meetings.
7. Advises MSCAA on DBE matters and achievement.
8. Provides DBEs with information and assistance in preparing bids, obtaining bonding and insurance.
9. Determines compliance of bidders/offerors with good faith efforts in bid submittals.
10. Plans and participates in DBE training seminars.
11. Provides outreach to DBEs and community organizations to advise them of opportunities.

#### **Section 26.27 DBE Financial Institutions**

It is the policy of MSCAA to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community, to make reasonable efforts to use these institutions, and to encourage prime contractors on USDOT-assisted contracts to make use of these institutions.

To date, the following institutions have been identified:

##### **Liberty Bank and Trust Company**

4606 Elvis Presley Blvd

Memphis TN 38116

Phone: (901) 398-1342

<https://www.libertybank.net/locations/tn/memphis/liberty-bank-memphis>

The DBELO will conduct an evaluation on a yearly basis, and if any additional institutions are established in the Airport's service area, MSCAA will consider the services offered by these institutions and refer them to contractors, as noted above.

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

The MSCAA requires that all subcontractors performing work on DOT-assisted contracts shall be promptly paid for work performed pursuant to their agreements, in accordance with all relevant federal, state, and local law.

In accordance with 49 CFR §26.29, the MSCAA established a contract clause implementing this requirement and requires prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 15 days from the prime contractor's receipt of each payment from the MSCAA.

MSCAA has declined to hold retainage from prime contractors and prohibit prime contractors from holding retainage from subcontractors. To implement this measure, MSCAA includes the following clause from FAA Advisory Circular 150/5370-10 (Section 90-06) in each DOT-assisted prime contract:

- a. Retainage will not be withheld on this project. No retainage will be withheld by MSCAA from progress payments due to the prime Contractor. Retainage by the prime or subcontractors is prohibited, and no retainage will be held by the prime from progress due subcontractors.
- b. The prime contractor agrees to pay each subcontractor under this prime contract for satisfactory performance of its contract no later than 25 days from the receipt of each payment the prime contractor receives from MSCAA. A subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented as required by the MSCAA. When MSCAA has made an incremental acceptance of a portion of a prime contract, the work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed. Any delay or postponement of payment from the above referenced timeframe may occur only for good cause following written approval of the MSCAA. This clause applies to both DBE and nonDBE subcontractors.

#### Monitoring Payments to DBEs and Non-DBEs

MSCAA clearly understands and acknowledges that reliance on complaints or notifications from subcontractors about a contractor's failure to comply with prompt payment requirements is not a sufficient monitoring and oversight mechanism. Therefore, MSCAA will undertake proactive monitoring and oversight of prime contractors' compliance with subcontractor prompt payment requirements of 49 CFR Part 26. MSCAA will utilize an electronic software tool in this effort. MSCAA will require prime contractors to report documentation of payments to subcontractors monthly. MSCAA will send emails to subcontractors on the day that prime contractors have been paid to inform them of when the payment clock starts. The DBELO will review and verify that payments have been made and retainage has been returned to subcontractors in accordance with section 26.29.

MSCAA will require prime contractors to maintain records and documents of payments to subcontractors, including DBEs, for a minimum of three (3) years unless otherwise provided by applicable record retention requirements for MSCAA's financial assistance agreement, whichever is longer. These records will be made available for inspection upon request by any authorized representative of MSCAA or USDOT. This reporting requirement extends to all subcontractors, both DBE and non-DBE.

MSCAA uses a number of DBE forms, which can be found in Attachment 3, to collect DBE information for initial project setup and for ongoing monitoring of DBE participation.

The DBELO or MSCAA's representative will conduct onsite compliance reviews of FAA-funded projects. The DBELO will review all DBE subcontracts and payments; and will evaluate any DBE firms working on the project during the date of the visit. The DBELO will conduct a commercially useful function (CUF) review at least once during the project for all DBEs. The DBELO will also review monthly progress reports submitted by prime contractors to determine if they are on track to meet the DBE goal. Written certification will be documented by the DBELO on the DBE Project Compliance Review Checklist form.



### Prompt Payment Dispute Resolution

MSCAA will take the following steps to resolve disputes as to whether work has been satisfactorily completed for purposes of §26.29.

A meeting will be scheduled with the prime contractor, subcontractor, DBELO and other appropriate City representative(s). Any meeting for the purpose of dispute resolution will include City representative(s) authorized to bind each interested party, including Airport representative(s), to take enforcement action.

MSCAA has established, as part of its DBE program plan, the following mechanism(s) to ensure prompt payment and return of retainage:

A contract clause providing that the prime contractor will not be reimbursed for work performed by subcontractors unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have performed.

### Prompt Payment Complaints

Complaints by subcontractors regarding the prompt payment requirements are handled according to the following procedure.

1. The affected subcontractor shall file a complaint with the prime contractor directly regarding payment.
2. If filing a complaint with the prime contractor does not result in timely and meaningful action by the prime contractor to resolve the prompt payment dispute, the affected subcontractor may contact the Airport's DBELO.
3. If filing a prompt payment complaint with the DBELO does not result in timely and meaningful action by MSCAA to resolve prompt payment disputes, the affected subcontractor may contact the FAA Office of Civil Rights.
4. Pursuant to Sec. 157 of the FAA Reauthorization Act of 2018, all complaints related to prompt payment will be reported via FAA Civil Rights Connect, including the nature and origin of the complaint and its resolution.

### Enforcement Actions for Noncompliance of Participants

MSCAA will provide appropriate means to enforce the requirements of §26.29. These means may include:

- Assessing liquidated damages, in accordance with the contract, against the prime contractor for each day beyond the required time period the prime contractor fails to pay the subcontractor.
- Advising subcontractors of the availability of the payment and performance bond to assure payment for labor and materials in the execution of the work provided for in the contract
- Paying subcontractors directly and deducting this amount from the retainage owed to the prime contractor.
- Issuing a stop-work order until payments are released to subcontractors, specifying in the contract that such orders constitute unauthorized delays, for the purposes of calculating liquidated damages, if milestones are not met.

MSCAA will actively implement the enforcement actions detailed above.

### **Section 26.31            Directory**

The primary Disadvantaged Business Enterprise Directory for MSCAA comes from the Tennessee Department of Transportation (TNDOT) and contains listings of certified minority- and women-owned construction firms and material suppliers from throughout the State of Tennessee.

TNDOT maintains active lists of certified disadvantaged businesses located throughout the state. Therefore, all of the firms listed in the directory have been certified by this state and in accordance with USDOT criteria.

The directory lists the following details about each certified firm:

- Business name
- Business address
- Business phone number
- Firm website(s)
- Types of work the firm has been certified to perform as a DBE and/or ACDBE
- The specific North American Industry Classification System (NAICS) code(s) that describes the type of work a DBE and/or ACDBE is eligible to perform

The UCP directory may include additional data fields of other items that are readily verifiable in state or locally maintained databases, such as state licenses held, pre-qualifications, and bonding capacity. The UCP directory is an online system that permits the public to search and/or filter for DBEs by:

- Physical location
- NAICS code(s)
- Work descriptions
- All additional data fields of readily verifiable optional information described above.

The directory includes a prominently displayed disclaimer that states the information within the directory is not a guarantee of the DBE's capacity and ability to perform work.

MSCAA will refer potential bidders to the TNDOT DBE directory that is available online. The link for the directory can be found in Attachment 2 to this program.

Prime contractors may also consider the FAA's DBE directory, which can be found at FAA Matchmaker (<https://faa.dbesystem.com>).

### **Section 26.33            Overconcentration**

MSCAA has not identified that overconcentration exists in the types of work that DBEs perform. However, the DBELO will continue to monitor the various categories every three years to ensure that non-DBE firms are not unduly burdened.

**Section 26.35 Business Development Programs**

MSCAA has not established a business development program. The DBELO will re-evaluate the need for such a program every three years.

**Section 26.37 Monitoring and Enforcement Mechanisms**

MSCAA implements and carries out appropriate mechanisms to ensure compliance with 49 CFR Part 26 program requirements by all program participants and describes and set forth these mechanisms in its DBE program plan.

Running Tally

MSCAA will implement a running tally mechanism to compare the cumulative DBE awards and commitments on federally funded projects to determine whether or not the implementation of contract goals is sufficient to meet the triennial DBE goal. MSCAA will also implement a running tally to provide for a comparison of payments made to each DBE firm relative to the progress of work. The running tally mechanism will help MSCAA whether or not there exists a projected shortfall such that the prime contractor would need to address via good faith efforts to meet the DBE contract goal. MSCAA will use the an electronic software system to track the progress of DBE participation on its federally funded projects. The DBELO will maintain the running tally of DBE participation.

Monitoring Contracts and Work Sites

MSCAA will review contracting records and will engage in active monitoring of work sites to ensure that work committed to DBEs at contract award or subsequently (*e.g., as the result of modification to the contract*) is actually performed by the DBEs to which the work was committed. The DBELO and/or MSCAA's designated representative will monitor the work site, and the DBELO will review all contracting records. MSCAA will maintain written certification that contracting records have been reviewed and work sites have been monitored for this purpose.

**Section 26.39 Fostering Small Business Participation**

MSCAA has created an element to structure contracting requirements to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors.

This element is included as Attachment 4. MSCAA will actively implement the program elements to foster small business participation. Doing so is a requirement of good faith implementation of the DBE program.

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

**Section 26.43 Race-Neutral Opportunities or Quotas**

MSCAA does not use quotas in any way in the administration of this DBE program. However, the use of race neutral opportunities for small businesses is permissible as a strategy under 26.39 (b) (1).

**Section 26.45 Overall Goal**

MSCAA will establish an overall DBE goal covering a three-year federal fiscal year period if it anticipates awarding USDOT/FAA-funded prime contracts the cumulative total value of which exceeds \$250,000 during any one or more of the reporting fiscal years within the three-year goal period. In accordance with Section 26.45(f), MSCAA will submit its overall three-year DBE goal to FAA by August 1st as required by the established schedule below:

<b>Airport Type</b>	<b>Region</b>	<b>Date Due (Goal Period)</b>	<b>Next Goal Due (Goal Period)</b>
Medium-Hub Primary	All Regions	August 1, 2022 (2023/2024/2025)	August 1, 2025 (2026/2027/2028)

[https://www.faa.gov/sites/faa.gov/files/2021-12/FAAGoalsDueChart\\_New\\_Final.pdf](https://www.faa.gov/sites/faa.gov/files/2021-12/FAAGoalsDueChart_New_Final.pdf)

DBE goals will be established for those fiscal years that MSCAA anticipates awarding USDOT- assisted prime contracts exceeding \$250,000 during the three-year period. The DBE goals will be established in accordance with the two-step process as specified in 49 CFR Part 26.45. If MSCAA does not anticipate awarding USDOT/FAA-funded prime contracts the cumulative total value of which exceeds \$250,000 during any of the years within the three-year reporting period, MSCAA will not develop an overall goal; however, this DBE program will remain in effect and MSCAA will seek to fulfill the objectives outlined in 49 CFR Part 26.1.

Step 1. The first step is to determine a base figure for the relative availability of DBEs in the market area. MSCAA will use the DBE Directory information and Census Bureau’s City Business Patterns database as the method to determine the base figure. MSCAA understands that the exclusive use of a list of prequalified contractors or plan holders, or a bidders list that does not comply with the requirements of 49 CFR Part 26.45(c)(2), is not an acceptable alternative means of determining the availability of DBEs.

Step 2. The second step is to adjust, if necessary, the “base figure” percentage from Step 1 so that it reflects as accurately as possible the DBE participation the recipient would expect in the absence of discrimination. Adjustments may be made based on past participation, information from a disparity study (to the extent it is not already accounted for in the base goal), and/or information about barriers to entry to past competitiveness of DBEs on contracts. MSCAA will examine all of the evidence available in its jurisdiction to determine what adjustment, if any, is needed. If the evidence does not suggest an adjustment is necessary, then no adjustment shall be made.

Any methodology selected will be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in MSCAA’s market. A description of the methodology to calculate the overall goal and the goal calculations can be found in Attachment 5 to this program. This section of the program will be updated triennially.

In establishing the overall goal, MSCAA will provide for consultation and publication. This includes consultation with minority, women’s and general contractor groups, community organizations, and other officials or organizations that could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and MSCAA’s efforts to establish a level playing field for the participation of DBEs. The consultation will include a scheduled, direct, interactive exchange (e.g., a face-to-face meeting,

video conference, teleconference) with as many interested stakeholders as possible focused on obtaining information relevant to MSCAA's goal setting process, and it will occur before submitting the goal methodology to the FAA for review pursuant to paragraph (f) of this section. MSCAA will document in the goal submission the consultation process that was utilized. Notwithstanding paragraph (f)(4) of this section, MSCAA will not implement the proposed goal until this requirement is fulfilled.

In addition, MSCAA will post a notice announcing the proposed overall goal before submission to the FAA on August 1st. The notice will be posted on MSCAA's official internet web site and may be posted in any other sources (e.g., minority-focused media, trade association publications). If the proposed goal changes following review by the FAA, the revised goal will be posted on the official internet web site.

MSCAA will begin using the overall goal on October 1 of the required year of submission, unless it has received other instructions from USDOT. If MSCAA establishes a goal on a project basis, it will begin using the goal by the time of the first solicitation for a USDOT-assisted contract for the project.

#### Section 26.45 (e) - Project Goals

If permitted or required by the FAA, MSCAA will express its overall goals as a percentage of funds for a particular grant or project or group of grants and/or projects, including entire projects. Like other overall goals, a project goal may be adjusted to reflect changed circumstances, with the concurrence of the FAA. A project goal is an overall goal, and it must meet all the substantive and procedural requirements of this section pertaining to overall goals. A project goal covers the entire length of the project to which it applies. The project goal should include a projection of the DBE participation anticipated to be obtained during each fiscal year covered by the project goal. The funds for the project to which the project goal pertains are separated from the base from which the regular overall goal, applicable to contracts not part of the project covered by a project goal, is calculated. If MSCAA establishes a goal on a project basis, MSCAA will begin using its goal by the time of the first solicitation for a USDOT-assisted contract for the project.

#### Section 26.45(f) - Prior Operating Administration Concurrence

MSCAA understands that it is not required to obtain prior FAA concurrence with the overall goal. However, if the FAA's review suggests that the overall goal has not been correctly calculated or that the method for calculating goals is inadequate, the FAA may, after consulting with MSCAA, adjust the overall goal or require that MSCAA do so. The adjusted overall goal is binding. In evaluating the adequacy or soundness of the methodology used to derive the overall goal, the FAA will be guided by the goal setting principles and best practices identified by USDOT in guidance issued pursuant to § 26.9.

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

MSCAA cannot be penalized or treated by USDOT as being in noncompliance with Part 26, because DBE participation falls short of an overall goal, unless MSCAA fails to administer its DBE program in good faith.

MSCAA understands that, to be considered to be in compliance with this part, an approved DBE Program and overall DBE goal, if applicable, must be maintained, and this DBE Program plan must be administered in good faith.

MSCAA understands that if the awards and commitments shown on MSCAA's Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall applicable to that fiscal year, the Airport will:

1. Analyze in detail the reason for the difference between the overall goal and the actual awards/commitments;
2. Establish specific steps and milestones to correct the problems identified in the analysis; and
3. MSCAA will submit, within 90 days of the end of the fiscal year, the analysis and corrective actions developed under paragraphs (1) and (2) above to the FAA for approval.

**Section 26.49 Transit Vehicle Manufacturers Goals**

N/A

**Section 26.51(a-c) Breakout of Estimated Race-Neutral & Race-Conscious Participation**

The breakout of estimated race-neutral and race-conscious participation can be found in Attachment 5 to this program. This section of the program will be updated triennially when the goal calculation is updated.

**Section 26.51(d-g) Contract Goals**

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

MSCAA will establish contract goals only on those USDOT-assisted contracts that have subcontracting possibilities. MSCAA does not need to establish a contract goal on every such contract, and the size of contract goals will be adapted to the circumstances of each such contract (e.g., type and location of work, availability of DBEs to perform the particular type of work).

MSCAA will express its contract goals as a percentage of the total share of a USDOT-assisted contract.

**Section 26.53 Good Faith Efforts Procedures**

Demonstration of good faith efforts (26.53(a) & (c))

The obligation of the bidder/offeror is to make good faith efforts. The bidder/offeror can demonstrate that it has done so either by meeting the contract goal or documenting good faith efforts. Examples of good faith efforts are found in Appendix A to Part 26.

The DBELO is responsible for determining whether a bidder/offeror who has not met the contract goal has documented sufficient good faith efforts to be regarded as responsive.

MSCAA will ensure that all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before committing to the performance of the contract by the bidder/offeror.

#### Information to be submitted (26.53(b))

In its solicitations for USDOT/FAA-assisted contracts for which a contract goal has been established, MSCAA will require the following:

- (1) Award of the contract will be conditioned on meeting the requirements of this section;
- (2) All bidders or offerors will be required to submit the following information to MSCAA, at the time provided in paragraph (b)(3) of this section:
  - (i) The names and addresses of DBE firms that will participate in the contract;
  - (ii) A description of the work that each DBE will perform. To count toward meeting a goal, each DBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the contract;
  - (iii) The dollar amount of the participation of each DBE firm participating;
  - (iv) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal; and
  - (v) Written confirmation from each listed DBE firm that it is participating in the contract in the kind and amount of work provided in the prime contractor's commitment.
  - (vi) If the contract goal is not met, evidence of good faith efforts as described in Appendix A of 49 CFR Part 26). The documentation of good faith efforts must include copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract; and
- (3) MSCAA will require that the bidder/offeror present the information required by paragraph (b)(2) of this section under sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contract negotiation procedures.

For each DBE listed as a regular dealer or distributor, MSCAA will make a preliminary counting determination to assess its eligibility for 60 or 40 percent credit, respectively, of the cost of materials and supplies based on its demonstrated capacity and intent to perform as a regular dealer or distributor, as defined in §§ 26.55(e)(2)(iv)(A), (B), (C), and (3) under the contract at issue. MSCAA will make the preliminary determination based on the DBE's written responses to relevant questions and its affirmation that its subsequent performance of a commercially useful function will be consistent with the preliminary counting of such participation. Where the DBE supplier does not affirm that its participation will meet the specific requirements of either a regular dealer or distributor, MSCAA will make appropriate adjustments in counting such participation toward the bidder's good faith efforts to meet the contract goal. The bidder is responsible for verifying that the information provided by the DBE supplier is consistent with the counting of such participation toward the contract goal.

In a design-build contracting situation, in which MSCAA solicits proposals to design and build a project with minimal project details at time of letting, MSCAA may set a DBE goal that proposers must meet by submitting a DBE Open-Ended DBE Performance Plan (OEPP) with the proposal. The OEPP replaces the requirement to provide the information required in paragraph (b) of § 26.53(b). To be considered responsive, the OEPP must include a commitment to meet the goal and provide details of the types of subcontracting work or services (with projected dollar amounts) that the proposer will solicit DBEs to perform. The OEPP must include an estimated time frame in which actual DBE subcontracts would be executed. Once the design-build contract is awarded, MSCAA will provide ongoing monitoring and oversight to evaluate whether the design-builder is using good faith efforts to comply with the OEPP and schedule. MSCAA and the design-builder may agree to make written revisions of the OEPP throughout the life of the project, e.g., replacing the type of work items the design-builder will solicit DBEs to perform and/or adjusting the proposed schedule, as long as the design-builder continues to use good faith efforts to meet the goal.

This information will be collected using the forms found in Attachment 6.

#### Administrative reconsideration (26.53(d))

Within seven (7) days of being informed by MSCAA that it is not responsive because it has not documented sufficient good faith efforts, a bidder may request administrative reconsideration. Bidders should make this request in writing to the following reconsideration official:

**Terry Blue, President and CEO**  
**Memphis Shelby County Airport Authority,**  
**2491 Winchester Road, Suite 113**  
**Memphis, Tennessee 38116**  
**(901) 922-8000**  
**tblue@flymemphis.com**

The reconsideration official will not have played any role in the original determination that the bidder did not document sufficient good faith efforts.

As part of this reconsideration, the bidder/offeror will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The bidder/offeror will have the opportunity to meet in person with MSCAA's administrative reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so. MSCAA will send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so. The result of the reconsideration process is not administratively appealable to the US Department of Transportation.

#### Good Faith Efforts procedures in situations when there are contract goals (26.53(f)(g))

MSCAA will include a clause equivalent to the following in each prime contract a provision stating:

The contractor shall utilize the specific DBEs listed to perform the work and supply the materials for which each is listed unless the contractor obtains MSCAA's written consent as provided in this paragraph 26.53(f); and

That, unless MSCAA's consent is provided under this paragraph 26.53(f), the contractor shall not be entitled to any payment for work or material unless it is performed or supplied by the listed DBE.



MSCAA will require the contractor that is awarded the contract to make available upon request a copy of all DBE subcontracts. The subcontractor shall ensure that all subcontracts or an agreement with DBEs to supply labor or materials require that the subcontract and all lower tier subcontractors be performed in accordance with this part's provisions.

#### Good Faith Efforts when a DBE is replaced on a contract (26.53(f))

MSCAA requires that prime contractors not terminate a DBE subcontractor listed on a bid/contract with a DBE contract goal without MSCAA's prior written consent. Prior written consent will only be provided where there is "good cause" for termination of the DBE firm, as established by Section 26.53(f)(3) of the DBE regulation.

In those instances where "good cause" exists to terminate a DBE's contract, MSCAA will require the prime contractor to make good faith efforts to replace a DBE that is terminated or has otherwise failed to complete its work on a contract with another certified DBE, to the extent needed to meet the contract goal. MSCAA will require the prime contractor to notify the DBELO immediately of the DBE's inability or unwillingness to perform and provide reasonable documentation.

In this situation, MSCAA will require the prime contractor to obtain prior approval of the substitute DBE and to provide copies of new or amended subcontracts, or documentation of good faith efforts. MSCAA will provide such written consent only if MSCAA agrees, for reasons stated in a concurrence document, that the prime contractor has good cause to terminate the DBE firm. For purposes of this paragraph, good cause includes the following circumstances:

- (1) The listed DBE subcontractor fails or refuses to execute a written contract;
- (2) The listed DBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided however, that good cause does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor;
- (3) The listed DBE subcontractor fails or refuses to meet the prime contractor's reasonable, non-discriminatory bond requirements.
- (4) The listed DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;
- (5) The listed DBE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant to 2 CFR Parts 180, 215 and 1,200 or applicable state law;
- (6) MSCAA has determined that the listed DBE subcontractor is not a responsible contractor;
- (7) The listed DBE subcontractor voluntarily withdraws from the project and provides to us written notice of its withdrawal;
- (8) The listed DBE is ineligible to receive DBE credit for the type of work required;
- (9) A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract;
- (10) Other documented good cause that MSCAA has determined compels the termination of the DBE subcontractor. Provided, that good cause does not exist if the prime contractor seeks to terminate a DBE it relied upon to obtain the contract so that the prime contractor can self-

perform the work for which the DBE contractor was engaged or so that the prime contractor can substitute another DBE or non-DBE contractor after contract award.

Before transmitting its request to MSCAA to terminate and/or substitute a DBE subcontractor, the prime contractor must give notice in writing to the DBE subcontractor, with a copy to MSCAA, of its intent to request to terminate and/or substitute, and the reason for the request.

The prime contractor must give the DBE five days to respond to the prime contractor's notice and advise MSCAA and the contractor of the reasons, if any, why it objects to the proposed termination of its subcontract and why MSCAA should not approve the prime contractor's action. If required in a particular case as a matter of public necessity (e.g., safety), MSCAA may provide a response period shorter than five days.

In addition to post-award terminations, the provisions of this section apply to pre-award deletions of or substitutions for DBE firms put forward by offerors in negotiated procurements.

Each prime contract will include a provision stating:

*The contractor shall utilize the specific DBEs listed in the contractor's bid to perform the work and supply the materials for which each is listed unless the contractor obtains prior written consent of the Memphis-Shelby County Airport Authority as provided in 49 CFR Part 26, §26.53(f). Unless such consent is provided, the contractor shall not be entitled to any payment for work or material unless it is performed or supplied by the listed DBE.*

MSCAA will require a contractor to make good faith efforts to replace a DBE that is terminated or has otherwise failed to complete its work on a contract with another certified DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal that MSCAA established for the procurement. The good faith efforts shall be documented by the contractor. If MSCAA requests documentation from the contractor under this provision, the contractor shall submit the documentation within seven days, which may be extended for an additional seven days, if necessary, at the request of the contractor, and MSCAA shall provide a written determination to the contractor stating whether or not good faith efforts have been demonstrated.

MSCAA will include in each prime contract the contract clause required by § 26.13(b) stating that failure by the contractor to carry out the requirements of this part is a material breach of the contract and may result in the termination of the contract or such other remedies set forth in that section that MSCAA deem appropriate if the prime contractor fails to comply with the requirements of this section.

If the contractor fails or refuses to comply within the time specified, MSCAA's contracting office will issue an order stopping all or part of payment/work until satisfactory action has been taken. If the contractor still fails to comply, the contracting officer may issue a termination for default proceeding.

Sample Bid Specification:

The requirements of 49 CFR Part 26, Regulations of the U.S. Department of Transportation, apply

to this contract. It is the policy of the Memphis-Shelby County Airport Authority to practice nondiscrimination based on race, color, sex, or national origin in the award or performance of this contract. All firms qualifying under this solicitation are encouraged to submit bids/proposals. Award of this contract will be conditioned upon satisfying the requirements of this bid specification. These requirements apply to all bidders/offerors, including those who qualify as a DBE. A DBE contract goal of \_\_\_percent has been established for this contract. The bidder/offeror shall make good faith efforts, as defined in Appendix A, 49 CFR Part 26, to meet the contract goal for DBE participation in the performance of this contract.

The bidder/offeror will be required to submit the following information:

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

#### **Section 26.55 Counting DBE Participation**

MSCAA will count DBE participation toward overall and contract goals as provided in 49 CFR 26.55. The participation of a DBE subcontractor will not be counted toward a contractor's final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE.

In the case of post-award substitutions or additions, if a firm is not currently certified as a DBE in accordance with the standards of subpart D of this part at the time of the execution of the contract, the firm's participation will not be counted toward any DBE goals, except as provided for in §26.87(j).

Pursuant to Sec. 150 of the FAA Reauthorization Act of 2018, DBE firms that exceed the business size standard in § 26.65(b) will remain eligible for DBE credit for work in that category as long as they do not exceed the small business size standard for that category, as adjusted by the United States Small Business Administration.

#### **SUBPART D – CERTIFICATION STANDARDS**

##### **Section 26.61 – 26.73 Certification Process**

MSCAA is a certifying member of the TNUCP. MSCAA will use the certification standards of Subpart D of Part 26 to determine the eligibility of firms to participate as DBEs in USDOT-assisted contracts. To be certified as a DBE, a firm must meet all certification eligibility standards. MSCAA makes all certification decisions based on the facts as a whole. Detailed certification processes are described in the TNUCP agreement. The full UCP agreement can be found at <https://flymemphis.com/disadvantaged-business-enterprise-program/>.

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

**Memphis-Shelby County Airport Authority  
Business Diversity Development Office**

2491 Winchester Road  
 Memphis, TN 38116  
 Phone: 901-922-0255  
<https://flymemphis.com/disadvantaged-business-enterprise-program/>

A link to the certification application forms and documentation requirements is found in Attachment 7 to this program plan.

**SUBPART E – CERTIFICATION PROCEDURES**

**Section 26.81 Unified Certification Programs**

MSCAA is a certifying member of the Tennessee Unified Certification Program (TNUCP) administered by the Tennessee Department of Transportation. The TNUCP will meet all of the requirements of this section. The TNUCP uses the certification standards of Subpart D of Part 26 and the certification procedures of Subpart E of Part 26 to determine the eligibility of firms to participate as DBEs in USDOT/FAA-assisted contracts. Under the TNUCP, there are 22 certifying members. The certifying members of the TNUCP include:

Bristol Tennessee Transit	Memphis Area Transit Authority
Chattanooga Area Regional Transportation Authority	Memphis Shelby County Airport Authority
Chattanooga Metropolitan Airport Authority	Metropolitan Nashville Airport Authority
City of Murfreesboro Rover Public Transit	Nashville Metropolitan Transit Authority
Clarksville Transit System	Smyrna Airport
Jackson Airport Authority	TDOT - Aeronautics Division
Jackson Transit Authority	TDOT - Civil Rights Division
Johnson City Transit	TDOT - Multi Modal Transportation Resources
Kingsport Area Transit Service	Tri-Cities Airport
Knoxville Area Transit	Metropolitan Knoxville Airport Authority

To be certified as a DBE, a firm must meet all certification eligibility standards.

**Section 26.83 Procedures for Certification Decisions**

MSCAA will take all required steps outlined in § 26.83(c) in determining whether a DBE firm meets the standards of Subpart D of Part 26. In the case of a denial of certification, MSCAA will make an entry in DOCR's Online Portal within five (5) days of the denial. MSCAA will enter the name of the firm, name(s) of the firm's owner(s), date of decision, and the reason(s) for the decision.

Once a firm has been certified as a DBE, it shall remain certified until and unless its certification has been removed, in whole or in part (*i.e., NAICS code removal*), through the procedures of § 26.87.

MSCAA will not require a DBE to reapply for certification, renew its certification, undergo a recertification, or any functionally equivalent requirement. However, a certification review of a certified DBE firm may be conducted at a reasonable time and/or at a regular interval of two years. The certification review may, at MSCAA's discretion, include a new onsite review (OSR). MSCAA may also make an unannounced visit to the DBE's offices and/or job site. MSCAA may also rely on another certifier's report of its OSR of the DBE.

## Notices of Change and Annual Declarations of Eligibility

The FLUCP requires all DBEs to submit every year, on the anniversary of the date they were certified in their Jurisdiction of Original Certification (JOC), a new Declaration of Eligibility (DOE) along with documentation verifying the gross receipts for its most recently completed fiscal year, calculated on a cash basis regardless of the DBE's overall accounting method. The sufficiency of documentation may vary by business type, size, history, resources, and overall circumstances. However, the UCP will generally consider the following documents to be "safe harbors," provided that they include all reportable receipts, properly calculated, for the full reporting period: audited financial statements, a CPA's signed attestation of correctness and completeness, or all income-related portions of one or more (when there are affiliates) signed federal income tax returns as filed. The UCP will treat non-compliance, whether full or partial, as a § 26.109(c) failure to cooperate.

The UCP also requires all DBEs to provide written notice of any change in circumstances affecting their ability to meet size, disadvantaged status, ownership, or control criteria of 49 CFR Part 26, or of any material changes in the information provided with DBEs' applications for certification. DBEs must provide the UCP with written notice of material changes affecting their continued eligibility within 30 days of the occurrence, explain the change fully, and include a duly executed DOE with the notice.

### **Section 26.85 Interstate Certification**

MSCAA complies with certification procedures requirements of Subpart E of Part 26 in all matters related to interstate certification. Any procedures included here are highlights only. The TNUCP agreement details the full interstate certification procedures.

When a DBE certified in any UCP applies to MSCAA for certification, MSCAA will accept the DBE's certification from its JOC. To obtain interstate certification, the DBE must provide:

- (1) A cover letter with its application that specifies that the DBE is applying for interstate certification, identifies all UCPs in which the DBE is certified (including the UCP that originally certified it)
- (2) An electronic image of the UCP directory of the original UCP that shows the DBE certification; and
- (3) A new DOE.

Within ten (10) business days of receiving the documents required above, MSCAA will confirm the certification of the DBE by reference to the UCP directory of the JOC. If the DBE fulfills the requirements of this section and MSCAA confirms the DBE's certification, MSCAA will certify the DBE immediately without undergoing further procedures and provide the DBE with a letter documenting its certification.

MSCAA will require DBEs to provide an annual DOE with documentation of gross receipts, under [§ 26.83\(j\)](#), on the anniversary date of the DBE's original certification by its JOC.

If MSCAA has reasonable cause to remove a DBE's certification, in whole or in part (*i.e.*, NAICS code removal), MSCAA will notify the other UCPs in which the DBE is certified ("other jurisdictions") via email. The notice will explain MSCAA's reasons for believing that the DBE's certification should be removed.

If MSCAA receives such a notification from another UCP, within 30 days of receiving the notice, MSCAA will email the UCP contemplating decertification a concurrence or non-concurrence with the proposed action. MSCAA's responses may provide written arguments and evidence and may propose additional reasons to remove certification. MSCAA understands a failure to timely respond to the reasonable cause notice from another UCP will be deemed to be a concurrence.

If MSCAA finds a DBE firm ineligible the firm immediately loses certification in all jurisdictions in which it is certified. MSCAA will email a copy of its decision to the other jurisdictions within 3 business days.

#### **Section 26.86            Decision Letters**

When MSCAA denies a firm's request for certification or decertifies the firm, MSCAA will provide the firm a notice of decision (NOD) explaining the reasons for the adverse decision, specifically referencing the evidence in the record that supports each reason. MSCAA will also include, verbatim, the instructions found on the Departmental Office of Civil Rights' web page, available at <https://www.transportation.gov/dbeappeal>. If a currently certified DBE firm is decertified, or if an applicant firm's initial application is denied, the affected firm may not reapply for at least 12 months. The waiting period begins to run the day after the date the decision letter is emailed to the firm. After the waiting period expires, the denied firm may reapply to any member of the UCP that denied the application. MSCAA will inform the applicant of that right, and specify the date the waiting period ends, in its decision letter.

If an applicant appeals this decision to USDOT pursuant to §26.89, such an appeal does not extend the waiting period.

#### **Section 26.87            Decertification**

MSCAA complies with all decertification procedures requirements of Subpart E of Part 26 in all decertification proceedings. The procedures included here are highlights only. The TNUCP agreement lists the full decertification procedures.

MSCAA's first step in any decertification proceeding will be to email a notice of intent (NOI) to the DBE. The NOI will clearly and succinctly state each reason for the proposed action, and specifically identify the supporting evidence for each reason. The NOI will notify the DBE of its right to respond in writing, at an informal hearing, or both. The NOI will inform the DBE of the hearing scheduled on a date no fewer than 30 days and no more than 45 days from the date of the NOI.

If the ground for decertification is that the DBE has been suspended or debarred for conduct related to the DBE program, MSCAA will issue a notice of decision (NOD) decertifying the DBE. In this case, there is no NOI or opportunity for a hearing or written response.

MSCAA has determined that the **Tennessee Department of Transportation Small Business Program Director** will serve as the hearing officer for informal hearings provided pursuant to §§ 26.87(c)-(e). The hearing is an informal proceeding with rules set by the hearing officer.

MSCAA will ensure that the decision in a decertification case is made by an individual who did not take part in actions leading to or seeking to implement the proposal to decertify the DBE and is not subject, with respect to the matter, to direction from the office or personnel who did take part in



these actions. MSCAA implements this requirement for a separation of functions in the following manner:

- **The hearing official will not have played any role in the original decertification decision.**

MSCAA will send the firm a NOD no later than 30 days from the date of the informal hearing and/or receiving written arguments/evidence from the firm in response to the NOI. The NOD will conform in all respects to the requirements of § 26.87(g). MSCAA will make an entry in DOCR's Online Portal within five (5) days of the action, entering the name of the firm, names(s) of the firm's owner(s), date of decision, and the reason(s) for its decision. DBEs will remain certified until MSCAA issues a NOD.

Once a firm is decertified, MSCAA will take appropriate actions related to contract and overall goals and DBE participation as described in § 26.87(j).

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

MSCAA will follow procedures consistent with § 26.88 regarding the suspension of a DBE's certification.

MSCAA will mandatorily and immediately suspend a DBE's certification when MSCAA has clear and credible evidence of the DBE's or its SEDO's involvement in fraud or other serious criminal activity, or when directed to suspend the firm by the FAA with oversight responsibility.

MSCAA may elect to suspend a DBE's certification when MSCAA has clear and credible evidence that the DBE's continued certification poses a substantial threat to program integrity, or when an owner upon whom the firm relies for eligibility does not timely file the declaration and gross receipts documentation that [§ 26.83\(j\)](#) requires.

MSCAA will notify the firm, by email, of its summary suspension notice (SSN) on a business day during regular business hours. The SSN will explain the action, the reason for it, the consequences, and the evidence on which MSCAA relies. Elective SSNs will not cite more than one reason for the action. Mandatory SSNs may state multiple reasons. Regardless of whether it is elective or mandatory, the SSN will demand that the DBE show cause why it should remain certified and provide the time and date of a virtual show-cause hearing at which the firm may present information and arguments concerning why MSCAA should lift the suspension. The SSN will also advise that the DBE may provide written information and arguments lieu of or in addition to attending the hearing.

After sending the SSN to the suspended firm, MSCAA will follow all procedures required under §§ 26.88(d)(2)-(6).

### **Section 26.89                      Appeals to the Department**

Applicants and decertified firms may appeal adverse NODs to USDOT. An ineligibility complainant or the FAA (the latter by the terms of § 26.87(c)) may appeal to USDOT if MSCAA does not find reasonable cause to issue an NOI to decertify or affirmatively determines that the DBE remains eligible.

Appellants must email appeals as directed in MSCAA's NOD within 45 days of the date of NOD. The appeal must at a minimum include a narrative that explains fully and specifically why the firm

believes the decision is in error, what outcome-determinative facts the certifier did not consider, and/or what part 26 provisions MSCAA misapplied. The UCP will promptly implement any USDOT certification appeal decisions affecting the eligibility of DBEs for USDOT-assisted contracting (*e.g., certify a firm if USDOT has determined that the denial of its application was erroneous*).

#### **Section 26.91            Actions Following USDOT Certification Appeal Decisions**

If MSCAA is a certifier to which a USDOT determination under § 26.89 is applicable, MSCAA will take any and all required action(s) pursuant to § 26.91.

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

#### **Section 26.101            Compliance Procedures Applicable to MSCAA**

MSCAA understands that if it fails to comply with any requirement of this part, it may be subject to formal enforcement action under §26.103 or §26.105 or appropriate program sanctions by the FAA, such as the suspension or termination of federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied. Program sanctions may include, in the case of the FAA program, actions consistent with 49 U.S.C. 47106(d), 47111(d), and 47122.

#### **Section 26.103, 105    Enforcement Actions Applicable to FAA Programs**

**Compliance reviews (§26.103(b)):** The FAA may review the recipient's compliance with this part at any time, including reviews of paperwork and on-site reviews, as appropriate. The Office of Civil Rights may direct the FAA to initiate a compliance review based on complaints received.

Compliance with all requirements of this part by airport sponsors and other recipients of FAA financial assistance is enforced through the procedures of Title 49 of the United States Code, including 49 U.S.C. 47106(d), 47111(d), and 47122, and regulations implementing them.

Any person who knows of a violation of this part by a recipient of FAA funds may file a complaint under [14 CFR Part 16](#) with the Federal Aviation Administration Office of Chief Counsel.

#### **Section 26.107            Enforcement Actions Applicable to Participating Firms**

If a firm that does not meet the eligibility criteria of subpart D of this part attempts to participate in a USDOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the Department may initiate suspension or debarment proceedings against the firm under 2 CFR parts [180](#) and [1200](#).

If a firm, in order to meet DBE contract goals or other DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of subpart D of this part, the Department may initiate suspension or debarment proceedings against the firm under 2 CFR parts 180 and 1200.

In a suspension or debarment proceeding brought under paragraph (a) or (b) of this section, the FAA may consider the fact that a purported DBE has been certified by a recipient. Such certification does not preclude USDOT from determining that the purported DBE, or another firm that has used or



attempted to use it to meet DBE goals, should be suspended or debarred.

The Department may take enforcement action under [49 CFR Part 31](#), Program Fraud and Civil Remedies, against any participant in the DBE program whose conduct is subject to such action under [49 CFR part 31](#).

The Department may refer to the Department of Justice, for prosecution under [18 U.S.C. 1001](#) or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any USDOT-assisted program or otherwise violates applicable Federal statutes.

## **Section 26.109 Information, Confidentiality, Cooperation**

### Availability of Records

1. USDOT adheres to the Federal Freedom of Information and Privacy Acts when responding to requests about the DBE program and can release information unless prohibited by federal law.
2. Confidential business information, such as DBE certification applications, cannot be released to third parties without the firm's written consent. However, this information must be shared with USDOT during certification appeals or with other states for certification purposes.

### Confidentiality of Information on Complainants

- Complainants' identities are kept confidential unless necessary for due process. If confidentiality hinders proceedings, complainants may need to waive this right to avoid investigation closure or dismissal. FAA procedures for confidentiality are followed as per [14 CFR Part 16](#).

### Cooperation

- All participants in the DBE program must fully and promptly cooperate with USDOT and recipient compliance reviews, investigations, and other requests for information. Non-cooperation can lead to penalties, such as noncompliance findings, denial of certification, or suspension.

### Intimidation and Retaliation

- Participants in the DBE program including MSCAA, contractors, subcontractors and any others must not intimidate, threaten, coerce, or discriminate against anyone for exercising their rights under this part or for participating in investigations. Violating this prohibition results in noncompliance with 49 CFR Part 26.

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## ATTACHMENTS

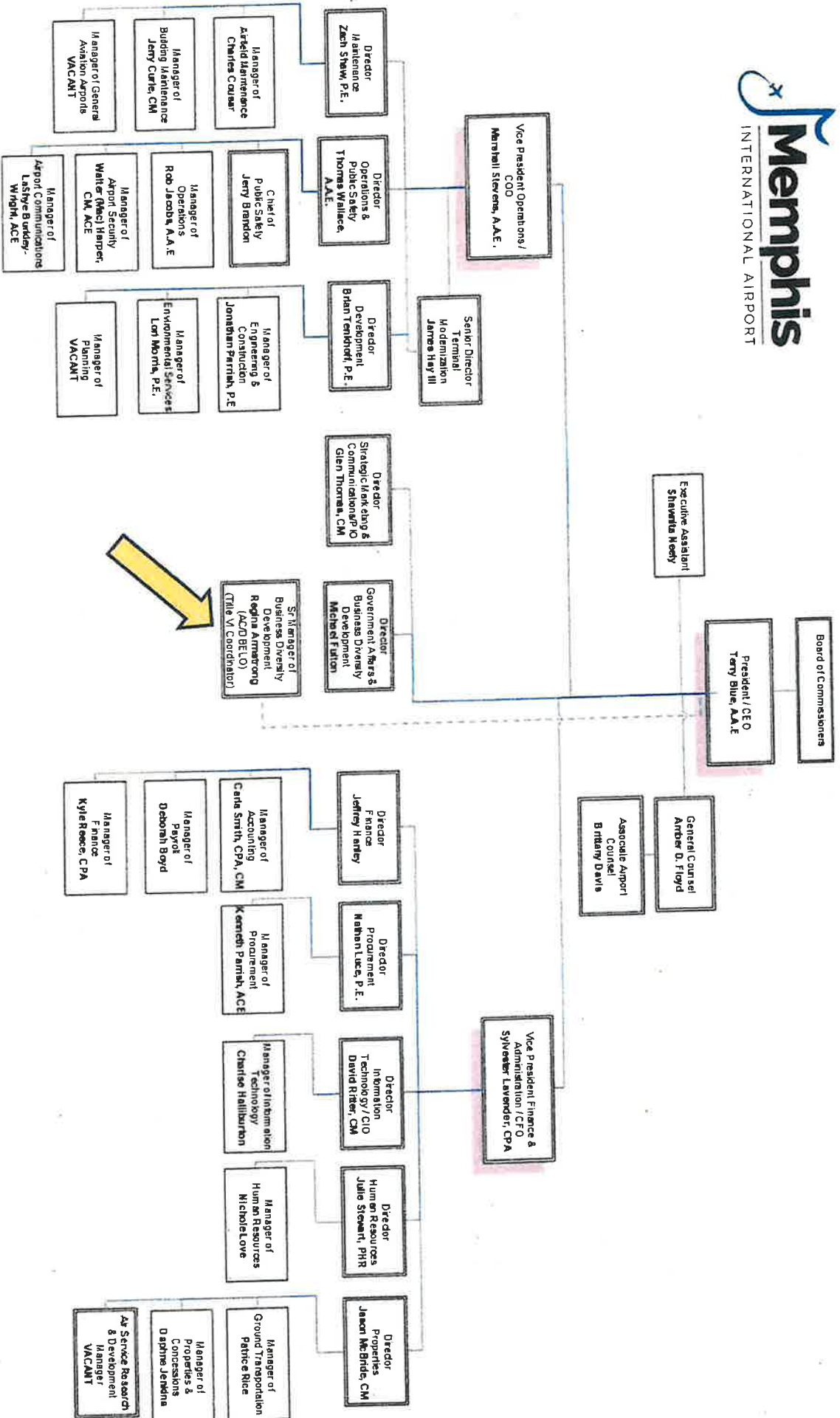
Attachment 1	Organizational Chart
Attachment 2	DBE Directory
Attachment 3	Monitoring and Enforcement Mechanisms
Attachment 4	Fostering Small Business Participation
Attachment 5	Overall Goal Calculation
Attachment 6	DBE Forms
Attachment 7	Certification Application Forms
Attachment 8	Regulations: 49 CFR Part 26
Attachment 9	Bidders List Data Collection Form
Attachment 10	UCP Agreement

# **Attachment 1**

## **Organizational Chart**



# MEM Organization Chart



# **Attachment 2**

## **DBE Directory**

The DBE Directory for the State of Tennessee may be found at <https://www.tdot.tn.gov/APPLICATIONS/DBEDirect/>.

# **Attachment 3**

## **Monitoring and Enforcement Mechanisms**

## Memphis-Shelby County Airport Authority – Memphis International Airport

1. All participants are hereby notified that, pursuant to Title 49 Code of Federal Regulations, United States Department of Transportation, Part 26 and the Disadvantaged Business Enterprise Participation Program for the Memphis-Shelby County Airport Authority (“MSCAA”), they must affirmatively ensure that, in any contract entered into with MSCAA, DBEs will be afforded *equal* opportunity to participate in subcontracting activities. It is the policy of MSCAA to ensure that DBEs, as defined in Part 26, have an equal opportunity to receive and participate in USDOT-assisted contracts. It is further the policy of MSCAA to ensure nondiscrimination in the award and administration of USDOT-assisted contracts.
2. All contracts between MSCAA and a Contractor shall contain an appropriate provision to the effect that failure by the Contractor to comply with MSCAA’s DBE Program shall constitute a breach of contract, exposing the Contractor to a potential termination of the contract or other appropriate remedy, including withholding of funds, until such time as the contractor complies with all the DBE requirements of this program. Under authority granted by Tennessee law, MSCAA may impose liquidated damages, contract suspension, or even contract termination.
3. All documentation submitted at time of bid, as well as additional data provided by the successful bidder, is considered part of the contract documents. Any alterations, substitutions, deletions, etc., to data provided at the time of submission of bid must have prior approval of MSCAA’s DBE Liaison Officer.
4. Should a DBE firm not certified by the Tennessee Department of Transportation be proposed by a potential contractor as a part of his/her DBE plan efforts, the inclusion of said firm will not be considered a demonstration of making good faith efforts towards meeting the DBE goal.
5. In contracts with DBE contract goals, bids submitted which do not meet the DBE contract goals, and which do not show that a meaningful good faith effort was made to achieve the stated goals, will be considered non-responsive bids, and bidders will be notified of the deficiency and given opportunity to appeal to the Administrative Reconsideration Official (49 CFR 26.53). The bidder will not be eligible for award of the contract until the appeal procedures are complete. The Administrative Reconsideration Official will make the determination on the sufficiency of the good faith efforts.
6. MSCAA reserves the right to reject any or all bids, or to re-advertise for bids. Award, if made, will be to the lowest responsive and qualified bidder. A bid will not be considered responsive unless the bidder complies with Title 49 Code of the Federal Regulations, Part 26, and MSCAA’s Disadvantaged Business Enterprise Program plan.
7. MSCAA shall require contractors to make good faith efforts to replace a DBE subcontractor that is terminated, or fails to complete its work on the contract for any reason, with another DBE subcontractor. If a DBE subcontractor is terminated, or fails to complete its work on the contract for any reason, the Contractor must notify the Airport immediately. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the



established contract goal. MSCAA shall approve all substitutions prior to contract award and during contract performance in order to ensure that the substitute firms are eligible DBEs.

Additional information on MSCAA's Disadvantaged Business Enterprise Program can be obtained from the DBE Liaison Officer, **Ms. Regina Armstrong, Senior Manager Business Diversity Development, Memphis International Airport, 2491 Winchester Rd., Suite 113, Memphis, TN 38116, Phone: 901-922-2556, Email: rarmstrong@flymemphis.com.**

8. MSCAA will also implement a monitoring and enforcement mechanism to ensure that work committed to DBEs at contract award is actually performed by DBEs. This mechanism will provide for a running tally of actual DBE attainments (e.g., payments actually made to DBE firms), including a means of comparing these attainments to commitments. These mechanisms will include, but not be limited to, the following:
  - a. Reviewing bid package documentation thoroughly, obtaining clarification, if necessary.
  - b. Reviewing monthly reports regarding employment as well as DBE participation to ensure adherence to plan as represented in bid documents and as stipulated in this program.
  - c. Monitoring progress of payments to DBEs through monthly reports from prime contractors.
  - d. Monitoring progress of DBEs work through on-site visits and communication with DBEs. MSCAA will implement a monitoring and enforcement mechanism that will include written certification that MSCAA has reviewed contracting records and monitored work sites for this purpose. This monitoring will be conducted during routine project site visits by MSCAA on a monthly basis. The DBELO will sign off on the written certifications.
9. MSCAA will bring to the attention of USDOT any false, fraudulent, or dishonest conduct in connection with the program, so that USDOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the USDOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in 26.109.
10. MSCAA also will consider similar action under its own legal authorities, including responsibility determinations in future contracts. In addition, MSCAA will apply legal and contract remedies under state and local law. This includes, for example, applying liquidated damages, withholding payments, etc.
11. In its reports of DBE participation to USDOT, MSCAA will show both commitments and attainments, as required by the USDOT reporting form.

Attachment 8 contains a link to 49 CFR Part 26, which describes federal regulations, provisions, and contract remedies available to MSCAA in the event of non-compliance by a participant.



# Commercially Useful Function (CUF)/ Compliance Evaluation Form - Contractor

This form serves as written certification that the elements of work performed by a Disadvantaged Business Enterprise (DBE) contractor were monitored and evaluated according to the Commercially Useful Function (CUF) and counting requirements of 49 Code of Federal Regulation Part 26.55. This form also contains data and questions to supplement monitoring of payments, termination of work, or changes in contract scope that may require prompt action to ensure compliance with applicable BDE regulations. The CUF review will be conducted annually for each DBE on each project. This form is to be completed by MSCAA personnel only.

## Section I- Project and Payment Data

Project No./ID:  Project Name:

Prime Contractor:  DBE Goal:  Air or Land Side:

DBE Subcontract \$:  DBE Commitment \$:  % of DBE Work Completed:

DBE Start Date:  DBE Payments to Date \$:

DBE Company Name:  DBE Representative:

DBE Company Owner:  DBE Representative Title:

DBE is Performing as:  Prime Contractor  Subcontractor  Lower-tier Subcontractor  Trucker/Hauler

Type of Arrangement:  Furnish and Install  Labor Only

Provide a brief description of the DBE's scope of work from the approved subcontract:

The following two questions pertain to DBE participation submitted (under commitment) to meet a contract goal:

- Are the descriptions of work in the DBE's subcontract and the Prime's DBE commitment consistent?
   
 YES  NO (If "NO," how was this resolved?)  N/A

- Have there been any changes in project scope that would affect the DBE's commitment?
   
 YES (If "YES," describe changes in scope, impacts, and actions to resolve)  NO  N/A

**Section II- Evaluation**

<b>Management</b>	<b>YES</b>	<b>NO</b>	<b>N/A</b>
1. Does the DBE's Supervisor/Foreman direct and schedule all work activities, including material deliveries, without assistance from the prime or upper-tier subcontractor?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
2. Is the person who signs the DBE's certified payrolls an employee of the DBE and not the prime or upper-tier subcontractor?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

**Comments Required for all "NO" or "N/A" Responses:**

<b>Performance</b>	<b>YES</b>	<b>NO</b>	<b>N/A</b>
3. Did MSCAA make adjustments in counting where the DBE itself subcontracted any portion of its work to a non-DBE?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
4. Did the DBE perform at least 30% of its subcontract with its own workforce?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
5. Did the prime make every good faith effort to replace the value of work under commitment not performed by the DBE for any reason (other than MSCAA-initiated changes in scope)?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

**Comments Required for all "NO" or "N/A" Responses:**

<b>Workforce</b>	<b>YES</b>	<b>NO</b>	<b>N/A</b>
7. Do DBE employee names only appear on the DBE's payrolls and not the payrolls of the prime or other contractor employed on the project?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
8. Based on the review of at least one certified payroll, is the number of DBE personnel documented in the project work report/diary consistent with the number of personnel on the DBE's payroll(s)?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
9. Based on employee interviews, is the DBE the only contractor providing pay and other compensation (i.e. benefit plans) to its personnel?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
10. Are the DBE's employees working on a distinct element of work, independently without assistance of other participating contractors?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

**Comments Required for all "NO" or "N/A" Responses:**

Equipment	YES	NO	N/A
11. For equipment used in the performance of work <u>without permanent markings</u> , were ownership documents verified?( i.e. registrations, leases, or rental agreements)	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
12. Was all equipment used by the DBE owned by the DBE?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
13. Is all leased equipment being leased by the DBE?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
14. If 12. or 13. above is "NO," provide the value of equipment borrowed or leased from the prime or an upper-tier subcontractor:			<input type="checkbox"/>

**Provide explanation for equipment not leased by DBE:**

15. For work under commitment, did the prime increase its DBE participation to replace the value of equipment borrowed or leased from the prime or upper-tier subcontractor, as indicated in "13." above?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
16. Is all equipment being operated by DBE employees and under the direct supervision of the DBE?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

**Comments Required for all "NO" or "N/A" Responses:**

Materials (This section applies to "Furnish and Install" work only)	YES	NO	N/A
17. Were material shipping documents addressed to the DBE?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
18. Was the DBE on-site to receive delivery of its materials?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
19. According to the material invoice, did the DBE purchase materials from a source other than the prime or one of its affiliates? (If "NO" DBE credit is disallowed)	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
20. According to the material invoice, were materials billed to the DBE or DBE Owner/ representative? (Attach Invoice)	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
21. Was proof of payment obtained? (Attach document such as electronic funds transfer, copy of check, signed payment certification, etc.)	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
22. If a joint check was used, did it go through the proper approval process, and did the DBE present it to the manufacturer/supplier?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

**Comments Required for all "NO" or "N/A" Responses:**

23. Briefly describe the on-site controls used to identify DBE and non-DBE haulers and to track the value of their participation, i.e. number of trips, quantities, etc. (Attach supporting documents, such as haul tickets, vehicle logs, trucking worksheets, etc.)

- 24. Was at least one DBE-owned and operated truck used in the hauling operation?  YES  NO  N/A
- 25. Does the MSCAA approved DBE Program allow hauling credit for non-DBEs? If "NO" complete Questions 26-28. If "YES" complete Questions 29-31.  YES  NO  N/A
- 26. Were all trucks operated by DBE owner-operators, employees of the DBE or lower-tier DBE, or leased from a non-DBE truck leasing company and operated by DBE drivers, bearing the name and MSCAA identification number of the DBE?  YES  NO  N/A
- 27. Was the value of any non-DBE hauler's participation adjusted to allow only fees and commissions?  YES  NO  N/A
- 28. Considering the value/running tally of DBE hauling completed to date, as compared to remaining hauling, does it appear that the DBE commitment will be met?  YES  NO  N/A

**1:1 DBE/Non-DBE Counting**

- 29. Does the on-site monitoring of trucks provide a means to identify and count non-DBE and DBE haulers, ensuring non-DBE hauling is limited to the value of DBE hauling?  YES  NO  N/A
- 30. Was credit for only fees and commissions given for additional non-DBE hauling that exceeded the value of DBE hauling?  YES  NO  N/A
- 31. Considering the value/running tally of DBE and non-DBE hauling completed to date, as compared to remaining hauling, does it appear that the DBE commitment will be met?  YES  NO  N/A

**Comments Required for all "NO" or "N/A" Responses:**

**Section III - CUF Determination**

Based on the observations reported in this document, including relevant attachments, I affirm that the participation of the DBE entered at the top of this form has been counted in accordance with 49 CFR §26.55, and accurately reflected in MSCAA's reporting system.

Reviewer Signature:  Date:

Printed Name and Title of Reviewer:

**Questions/Comments/Concerns:**



# Commercially Useful Function (CUF)/ Compliance Evaluation Form - Professional Services

This form serves as written certification that the elements of work performed by a Disadvantaged Business Enterprise (DBE) contractor were monitored and evaluated according to the Commercially Useful Function (CUF) and counting requirements of 49 Code of Federal Regulation Part 26.55. This form also contains data and questions to supplement monitoring of payments, termination of work, or changes in contract scope that may require prompt action to ensure compliance with applicable BDE regulations. The CUF review will be conducted annually for each DBE on each project. This form is to be completed by MSCAA personnel only.

## Section I- Project and Payment Data

Contract No./ID:  Project Name:

Prime Provider:  DBE Goal:  Air or Land Side:

DBE Subcontract \$:  DBE Commitment \$:  % of DBE Work Completed:

DBE Start Date:  DBE Payments to Date \$:

DBE Provider Name:  DBE Representative:

DBE Provider Owner:  DBE Representative Title:

DBE is Performing as:  Prime Service Provider  Sub Service Provider  Lower-tier Service Provider

Service Category: Other

Provide a brief description of the DBE's scope of work/services from the approved subcontract/sub-agreement:

The following two questions pertain to DBE participation submitted (under commitment) to meet a contract goal:

➤ Are the descriptions of work in the DBE's subcontract/sub-agreement and the Prime's DBE commitment consistent?

YES  NO (If "NO," how was this resolved?)  N/A

➤ Have there been any changes in project scope that would affect the DBE commitment?

YES (If "YES," describe changes in scope, impacts, and actions to resolve)  NO  N/A



**Section II- Evaluation and CUF Determination**

**Supervision and Management (Questions 1 -3 do not apply to temporary labor services)**      **YES**      **NO**      **N/A**

- |   |                          |                                     |                          |
|---|--------------------------|-------------------------------------|--------------------------|
| 1. Was all work performed directed by the DBE's supervisory personnel ? (e.g. DBE directs its own employees and controls all elements of work; approving signatures/initials on work products, title blocks and other relevant documents were those of DBE supervisory personnel) If no, please provide explanation in the box below. | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
|   | <input type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |
| 2. Does DBE perform all work independently?   | <input type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |
| 3. Does DBE share office space with the Prime? If yes, please provide explanation in the box below.   | <input type="checkbox"/> | <input type="checkbox"/>            | <input type="checkbox"/> |

**Comments for all questions that require an explanation:**

**Performance**      **YES**      **NO**      **N/A**

- |  |                          |                                     |                          |
|--|--------------------------|-------------------------------------|--------------------------|
| 4. Was any portion of the contracted work performed by a company other than the DBE? If yes, explanation in the box below. | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
|--|--------------------------|-------------------------------------|--------------------------|

**Comments Required for "Yes" or "N/A" Responses:**

**Workforce**      **YES**      **NO**      **N/A**

- |  |                          |                                     |                          |
|--|--------------------------|-------------------------------------|--------------------------|
| 8. Based on the site visit, were the personnel performing work consistent with contract?   | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |
| 9. With respect to professional services, are document authors and signers of certifications, stamps, seals, title blocks, etc. consistent with the DBE's affirmed listing of qualified project personnel? | <input type="checkbox"/> | <input checked="" type="checkbox"/> | <input type="checkbox"/> |

**Workforce (continued)**

YES NO N/A

10. Based on employee interviews, is the DBE the only service provider that is compensating the personnel performing the work?

-Provide the names of DBE personnel observed or interviewed in the Comments box along with a brief description of work observed.

**Comments Required for all "NO" or N/A" Responses:**

[Empty text box for comments]

**Equipment**

YES NO N/A

11. For equipment used in the performance of work without permanent markings, were ownership documents verified? (i.e.. registrations, leases, or rental agreements)

12. Was all equipment used by the DBE owned by the DBE?

13. Is all leased equipment being leased by the DBE?

14. If 12. or 13. above is "NO", provide the value of equipment borrowed or leased from the prime or an upper-tier subcontractor:

[Empty text box for value]



[Empty text box for additional details]

15. Did the prime increase DBE participation to replace the value of equipment borrowed or leased from the prime or upper-tier service provider, as indicated in "14" above?

16. Is all equipment being operated by DBE employees and under the direct supervision of the DBE?

[Empty text box for additional details]

**CUF Determination**

Based on the observations reported in this document, including relevant attachments, I affirm that the participation of the DBE entered at the top of this form has been counted in accordance with 49 CFR §26.55, and accurately reflected in MSCAA's reporting system.

Reviewer Signature: [Empty text box]

Date: [Empty text box]

Printed Name and Title of Reviewer: [Empty text box]

**Comments Required for all "NO" or "N/A" Responses:**

[Empty text box for comments]



# **Attachment 4**

## **Fostering Small Business Participation**

## Section 26: 39- Fostering Small Business Participation

### A. Purpose and Objective of this Element

This element, part 26:39, included as an amendment to our DBE Program Plan, is herein referenced as the Small Business Participation Plan (SBPP). Part 26.39 calls for the inclusion of an element to "structure contracting requirements to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation." The MSCAA and the Memphis International Airport hereby set forth its plan to implement these requirements. The Airport's SBPP is also regarded as a substantial effort in helping fulfill the overall intent of part 26.51, i.e. to meet the "maximum feasible portion" of its overall goal by using race-neutral means of obtaining DBE participation. Therefore, implementation of the MSCAA's and Airport's SBPP will be based on the standard of *business size*, without regard to race or gender of the business owner.

This section also addresses the unnecessary and unjustified "bundling" of contract requirements which may preclude or inhibit small business participation in procurements, as either prime or subcontractors.

Further, the MSCAA perceives the objectives of this section to be consistent with its DBE Program Policy Statement, which states in part:

*"- To ensure nondiscrimination in the award and administration of DOT-assisted contracts.  
- To help remove barriers to the participation of DBEs in DOT assisted contracts..."*

Our Policy Statement and this small business element (SBPP) are consistent with the MSCAA's and the Airport's long history of creating and implementing economic development strategies to support and encourage business growth at all levels.

### B. SBPP Strategy

The MSCAA and the Memphis International Airport intends to carry out the objectives of this part by employing the following strategies and supporting activities:

#### 1. Establishment of a Race-Neutral "Subcontracting Goal"

The MSCAA and the Airport proposes that, where feasible, on certain prime contracts that do not have a DBE contract goal (race-conscious), that Prime Contractors be required to provide subcontracting opportunities to qualified Small Business Concerns, (SBC's) as herein defined, *without* regards to race or gender of the business owner. Again,

verified "business size" and subcontracting opportunities will be the basis of the Subcontracting Goal. The opportunities must be of a size that SBC's, including some which may happen to also be DBE's, can reasonably perform. The MSCAA and Airport Compliance staff will assist the potential primes by reviewing the project (s), in advance of the solicitation, and suggesting potential subcontracting opportunities in the solicitation documents, thereby establishing a reasonable Subcontracting Goal.

## 2. Reduction in "size" of Prime Contracts.

Each program year, the Compliance Staff will coordinate with the the Development Staff, to review upcoming projects and determine, where feasible, that some larger projects be "broken up" i.e. reduced in scope and size, so that smaller "prime" contracts might be let of a reasonable size so that Small Business Concerns (SBC's) may reasonably bid as primes. This may increase the number of solicitations, but again, some of the smaller businesses might also be DBE's and therefore add to the Airport's bidders list. The Airport will consider developing a "Tier" of Contracts Size, based on estimated dollar value, and with coordination between the Compliance Staff and the Development Staff, recommend which "Tier" should or could be available for SBC (Small Business Concern) as a prime contract.

## 3. Consideration of "Unbundling" of Large Contracts

The second strategy noted above, proposed by the MSCAA and Memphis International Airport, essentially is "unbundling" to a large degree and addresses the required consideration of this approach.

## C. Definitions for this Element

### 1. Small Business

For purposes of this program element, which is part of our approved DBE program, "small business" shall have the *same* definition as "small business concerns" contained in 49 CFR, 26.5, which states:

*"Small business concern means, with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR part 121) that also does not exceed the cap on average annual gross receipts specified in §26.65(b)."*

For additional clarification, it is useful to include here some excerpts from the SBA regulations, 13 CFR, 121.105:

*(a)(1) Except for small agricultural cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor...." and,*

*(b) A business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust or cooperative, except that where the form is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture.*

Further, it is acknowledged that the SBA rules make allowances for the dollar amounts to be adjusted from time to time.

## 2. Disadvantaged Business Enterprise

Disadvantaged Business Enterprise or **DBE** means a for-profit small business concern— (defined by SBA rules, above), and 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;*
- *Whose socially and economically disadvantaged owners do not exceed the personal net worth (PNW) does not exceed the described in 49 CFR Part 26. (The current PNW cap is \$2.047 million)*
- *Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it;*
- *Has been certified as a DBE by a certifying member of the Tennessee Unified Certification Program (TNUCP) in accordance with the full requirements of 49 CFR 26.*

It is understood that in the implementation of this element, all of the “Small Business Concerns” may not necessarily be DBE firms. However, small businesses which are also owned and controlled by individuals who meet the DBE standard will be encouraged to seek DBE certification. Only DBE certified firms will be counted towards DBE race-neutral participation on FAA-assisted contracts in this program.

## D. Verification Standards and Procedures

To participate in MSCAA’s Small Business Element a company must provide documentation for one of the following:

1. **Tennessee Unified Certification Program (TNUCP) DBE Certification** – DBE Certification by a certifying member of the TNUCP which stipulates that a firm has been determined to meet all the requirements in accordance with 49 CFR Part 26. All certification determinations are evidenced by a letter of DBE certification issued by a certifying member of the TNUCP. It should be noted that the Memphis International Airport is a certifying member of the TNUCP and has its own

Certification staff. The Certification staff also applies the standards and procedures for DBE certification applicants contained in Subparts D, and E, of 49 CFR (26.61 – 26.91)

2. **A non-DBE certified potential small business concern** may have to complete a simplified application and/or provide the following information at time of response to a solicitation or a bid submittal, as evidence of the small business status:
  - i. A copy of the business tax returns for the most recent five-year period indicating the gross receipts; and/or
  - ii. Proof of meeting the current personal net worth standards of the DBE program (49 CFR Part 26.68), which is presently \$2.047 million.
3. **Use of Personal Net Worth:** The MSCAA, in addition to the standards for small business concerns described above, plans to utilize the current Personal Net Worth standards of the DBE program (26.68), which is presently \$2.047 million dollars.

#### E. Supportive Services

The MSCAA and Memphis International Airport is a certifying member of the Tennessee UCP and contracts the certification services to a local agency, the Mid-South Minority Business Council, (MMBC) which operates an entity called the Uniform Certification Agency (UCA). The MMBC contract also includes a number of supportive and/or business development services for DBE firms and/or potential DBE firms. Often firms which make contact with the Airport are referred to the MMBC. These services, as relevant, will also be made to verified small business concerns. Currently, these services include:

1. Assist contractors by providing financial assistance through their MMBC Working Capital Loan Fund.
2. The MMBC conducts an annual a trade show that promotes interaction between minority and women suppliers and corporate buyers called the Economic Development Fair. The Airport actively encourages small and women-owned businesses that come in contact with the airport to take advantage of this opportunity.
3. The MMBC disseminates bid information to certified DBEs and will extend this service to verified small business concerns.
4. The MMBC currently assists with outreach efforts, i.e., information sessions, open houses, etc., as part of its recruitment efforts of qualified DBE firms. This will be expanded to include potential small business concerns.

5. Publicizing information to the minority community with regard to current, on-going and future opportunities at the Airport.

#### **F. Implementation Plan and Time-Table -Memphis International Airport Small Business Participation Plan (SBPP)**

The MSCAA and Memphis International Airport proposes to have its SBPP fully implemented within 120 days (four months) of the FAA final approval of the Plan. The Airport will utilize the time frame to properly set up the program in order to maximize the potential for ultimate success. These set-up activities will include:

1. Review, in coordination with the Development Staff, all upcoming projects to try and pre-determine which, if any, will be conducive for application of either of the two selected SBPP strategies, described in Section B, above.
2. Review, in coordination with the Development Staff, Compliance, and the Legal staff, the necessary revisions and modifications to solicitation language etc., prior to implementation.
3. Coordinate properly with the Tennessee UCP to initiate discussions as to whether any changes/modifications are implicated in the UCP stakeholder agreement, due to verification of small business concerns.
4. Coordinate with the Mid-South Minority Business Council (MMBC), which is the Airports contracted entity currently providing certification assistance, as well as some supportive services, to prepare appropriately for the potential expanded role.
5. The Airport, during the pre-implementation period, "may" seek consultation with the representative small business community.

#### **G. Principal Responsible Person**

The principal responsible person for overseeing and implementing the Airport's SBPP, will be the currently designated Disadvantaged Business Enterprise Liaison Officer.

# **Attachment 5**

Overall DBE Goal Calculation

The DBE Goal Methodology  
was submitted for FY 2023 -  
2025

# **Attachment 6**

## **DBE Forms**



Received: _____ Date: _____ Sr. Manager of BDD	Project Name: _____ Project No.: _____
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## DISADVANTAGED BUSINESS ENTERPRISE (DBE) REQUIREMENTS FOR SUBCONTRACTS

Memphis-Shelby County Airport Authority (MSCAA) operates a federal Disadvantaged Business Enterprise (DBE) Program to ensure full and fair opportunities in MSCAA contracting for businesses owned by socially and economically disadvantaged individuals, which is governed by 49 CFR Part 26. This document sets forth DBE provisions that must be included in all contracts and subcontracts for the subject project as required by federal regulations. **A SIGNED COPY MUST BE (1) SUBMITTED TO THE MSCAA DBE LIAISON OFFICER AND (2) INCLUDED IN YOUR SUBCONTRACT AS AN EXHIBIT TO ANY UNDERLYING AGREEMENT FOR THE SUBJECT PROJECT.**

The undersigned parties agree and acknowledge that this document shall be deemed to form, be read and construed as, as if stated verbatim therein, part of any agreement between the parties related to the subject project. This document is an agreement wherein the parties accept, agree to, and incorporate federally mandated contractual provisions into any underlying agreement for the subject project as well as acknowledge applicable federal and local DBE rules and regulations. **THE TEXT CONTAINED IN THIS DOCUMENT CANNOT BE REVISED, ALTERED, OR OTHERWISE MODIFIED BY THE PARTIES. THIS IS A FINAL DOCUMENT.**

Any subcontract for the subject project shall be governed by regulations set forth in 49 CFR Part 26 and MSCAA DBE program rules and regulations, including but not limited to the following:

1. **Assurance (49 CFR 26.13(b)):** The contractor, sub-recipient, or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate, which may include, but is not limited to: 1) Withholding monthly progress payments; 2) Assessing sanctions; 3) Liquidated damages; and/or 4) Disqualifying the contractor from future bidding as non-responsible.
2. **Prompt Payment (49 CFR 26.29):** The prime contractor is required to pay its subcontractors performing work related to this contract for satisfactory performance of that work no later than 15 days after the prime contractor's receipt of payment for that work from MSCAA. A subcontractor's work is satisfactorily completed when all the tasks called for in the subcontract have been accomplished and documented as required by MSCAA. When MSCAA has made an incremental acceptance of a portion of a prime contract, the work of a subcontractor covered by that acceptance is deemed to be satisfactorily completed. Any delay or postponement of payment from the above referenced timeframe may occur only for good cause and written approval of the MSCAA. Retainage will not be withheld on this project. No retainage will be withheld by the MSCAA from progress payments due the prime contractor. Retainage by the prime or subcontractors is prohibited. No retainage will be held by the prime from progress due subcontractors.
3. **Termination/Substitution (49 CFR 26.53):** The prime contractor may not terminate or substitute any approved DBE subcontractor listed in the Assurance Statement without prior written consent of MSCAA. The prime contractor must follow the procedures set forth in 49 CFR 26.53(f).
4. **Counting Participation:** DBE participation in a contract must be counted in accordance with 49 CFR 26.55 and applicable guidance.
5. **DBE Independence:** An independent business is one the viability of which does not depend on its relationship with another firm or firms. Determination of ownership and control of a DBE is governed by 49 CFR 26.71.
6. **DBE Liaison Officer (DBELO):** For DBE-related questions, issues, and disputes, please contact the MSCAA DBELO (contact information found at <https://flymemphis.com/business-diversity-development-program/>). The current DBELO is Regina Armstrong, who may be reached at 901-922-0167 or [rarmstrong@flymemphis.com](mailto:rarmstrong@flymemphis.com).

**This document shall control and supersede any inconsistency, conflict or ambiguity contained in any underlying agreement between the parties for the subject project as to the procedures, processes, or subject matter set forth in this document or otherwise governed by 49 CFR Part 26 and/or other applicable MSCAA DBE program rules and regulations.**

PRIME CONTRACTOR: \_\_\_\_\_  
 SIGNATURE: \_\_\_\_\_  
 TITLE: \_\_\_\_\_ DATE: \_\_\_\_\_

SUBCONTRACTOR: \_\_\_\_\_  
 SIGNATURE: \_\_\_\_\_  
 TITLE: \_\_\_\_\_ DATE: \_\_\_\_\_

Contract Name:  
 Contract Number:  
 Payments Between:  
 Run date:

Orig Contract Value	Percent of Total Award	Required Goal
% DBE		
% of All		

\* Values represent certification held by Contractor and not contract goal(s)

Contract Payments (Prime Paid in Range)	Actual Amount Paid in Range	Percentage Achieved in Range
DBE		
WBE		

\* Values represent certification held by Contractor and not contract goal(s)

Subcontractor	Sub Tier	Original Contract Award Value	Residual Award Value	Subcontractor Current Amount (including change orders)	XBE Current Contract Amount (including change orders)**	DBE Current Contract Amount	Subcontractor Participation Percentage	XBE Payment in Range	Payment %	Sub Goal from sub compose page 45)	DBE Payment in Range	Certification Held By Sub	Ethnicity	Gender
<b>Total:</b>														

\* Values represent certification held by Contractor and not contract goal(s)

\*\* If subcontractor award = 0, gives the sum of residual payments within the date range





U.S. Department of Transportation

# DBE Regular Dealer/Distributor Affirmation Form

Bidder Name: \_\_\_\_\_

Contract Name/Number: \_\_\_\_\_

Sections 26.53(c)(1) of Title 49 Code of Federal Regulations requires recipients to make a preliminary counting determination for each DBE listed as a regular dealer or distributor to assess its eligibility for 60 or 40 percent credit, respectively, of the cost of materials and supplies based on its demonstrated capacity and intent to perform as a regular dealer or distributor, as defined in section 26.55(e)(2)(iv)(A),(B),(C), and (3) under the contract at issue. The regulation requires the recipient's preliminary determination to be made based on the DBE's written responses to relevant questions and its affirmation that its subsequent performance of a commercially useful function will be consistent with the preliminary counting of such participation. The U.S. Department of Transportation is providing this form as a tool for recipients, prime contractors, regular dealers, and distributors to use to carry out their respective responsibilities under this regulation. The form may be used by each DBE supplier whose participation is submitted by a bidder for regular dealer or distributor credit on a federally-assisted contract with a DBE participation goal. The form may also be used by prime contractors in connection with DBE regular dealer or distributor participation submitted after a contract has been awarded provided such participation is subject to the recipient's prior evaluation and approval. If this form is used, it should be accompanied by the bidder's commitment, contract, or purchase order showing the materials the DBE regular dealer or distributor is supplying. Use of this tool is not mandatory. If a recipient chooses a different method for complying with Section 26.53(c)(1), it must include that method in its DBE Program Plan.

DBE Name: \_\_\_\_\_

Total Subcontract/Purchase Order Amount: \_\_\_\_\_

Authorized DBE Representative (Name and Title): \_\_\_\_\_

NAICS Code(s) Related to the Items to be Sold/Leased: \_\_\_\_\_

1. Will **all** items sold or leased be provided from the on-hand inventory at your establishment?  YES

(If "YES," you have indicated that your performance will satisfy the regular dealer requirements and may be counted at 60%. **STOP here. Read and sign the affirmation below.** If "NO" Continue.)

a) Are you selling bulk items (e.g., petroleum products, steel, concrete, concrete products, sand, gravel, asphalt, etc.) or items not typically stocked due to their unique characteristics (aka specialty items)?  YES  NO (If "YES," Go to Question 2. If "NO" Continue.)

b) Will at least 51% of the items you are selling be provided from the inventory maintained at your establishment, and will the minor quantities of items delivered from and by other sources be of the general character as those provided from your inventory?

YES  NO\* (If "YES," you have indicated that your performance will satisfy the regular dealer requirements and may be counted at 60%. **STOP here. Read and sign the affirmation below.**)

\*If 1., 1.a), and 1. b) above are "NO," your performance on the whole will not satisfy the regular dealer requirements; therefore, only the value of items to be sold or leased from inventory can be counted at 60%. (Go to Question J to determine if the items delivered from and by other sources are eligible for Distributor credit.)

2. Will you deliver all bulk or specialty items using distribution equipment you own (or under a long-term lease) and operate?  YES  NO<sup>1</sup>

(If "YES," you have indicated that your performance will satisfy the requirements for a regular dealer of bulk items and may be counted at 60%. **STOP here. Read and sign the affirmation below.**)

<sup>1</sup> If "NO," your performance will not satisfy the requirements for a regular dealer of bulk items; the value of items to be sold or leased cannot be counted at 60%. (Go to Question J.)

3. Will the written terms of your purchase order or bill of lading from a third party transfer responsibility, including risk for loss or damage, to your company at the point of origin (e.g. a manufacturer's facility)  YES<sup>2</sup>  NO<sup>3</sup>

a) Will you be using sources other than the manufacturer (or other seller) to deliver or arrange delivery of the items sold or leased  YES<sup>2</sup>  NO<sup>3</sup>

<sup>2</sup> If your responses to 3 and J\_a) are "YES," you have indicated that your performance will satisfy the requirements of a distributor; therefore, the value of items sold or leased may be counted at 40%.

<sup>3</sup> If you responded "NO" to either 3 or 3.a), counting of your participation is limited to the reasonable cost of fees or commissions charged, including transportation charges for the delivery of materials or supplies; the cost of materials or supplies may not be counted.

I affirm that the information that I provided above is true and correct and that my company's subsequent performance of a commercially useful function will be consistent with the above responses. I further affirm that my company will independently negotiate price, order specified quantities, and pay for the items listed in the bidder's commitment. This includes my company's responsibility for the quality of such items in terms of necessary repairs, exchanges, or processing of any warranty claims for damaged or defective materials.

Printed Name and Signature of DBE Owner/Authorized Representative: \_\_\_\_\_

The bidder acknowledges its responsibility for verifying the information provided by the DBE named above and ensuring that the counting of the DBE's participation is accurate. Any shortfall caused by errors in counting are the responsibility of the bidder.

Printed Name and Signature of Bidder's Authorized Representative: \_\_\_\_\_

# **Attachment 7**

## **Certification Application Forms**

The UCP DBE certification application for the State of Tennessee may be found at <https://www.tn.gov/tdot/civil-rights/small-business-development-program.html>.

# **Attachment 8**

Regulations: 49 CFR Part 26

The federal regulations, Title 49 of the Code of Federal Regulations, Part 26, may be found at <https://www.ecfr.gov/>.



# **Attachment 9**

Bidders List Data Collection Form



# **Attachment 10**

UCP Agreement

TENNESSEE UNIFORM CERTIFICATION PROGRAM

# TNUCP Draft Agreement

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**Last Updated:**

**2/7/2019**

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## **Article I – Vision**

Tennessee’s USDOT Recipients share the common goal to develop a uniform certification program for the State of Tennessee that creates a level playing field in which Disadvantage Business Enterprises (DBEs) can compete fairly for Department of Transportation and other federally funded projects across the state. This aim requires a cohesive link between the development of DBEs, similarly situated programs, and an effective approach to certification.

## **Article II – Definitions**

### **2.1. Agent**

Agent means an entity that has been given certification oversight through a memorandum of understanding executed by and between a TNUCP Certifying Partner.

### **2.2. Agreement**

Agreement means the Tennessee Uniform Certification Program Agreement executed by and between all USDOT Recipients within the State of Tennessee.

### **2.3. Appeals Committee**

Appeals Committee means a committee created by this agreement and governed by Article V to oversee third party challenges to the eligibility of Disadvantaged Business Enterprises Certified by Certifying Partners of Tennessee Uniform Certification Program.

### **2.4. Certifying Agency**

Certifying Agency means a USDOT Recipient whose current DBE Program Plan approved by an appropriate USDOT Operating Administration includes provisions for DBE certification and revocation processes.

### **2.5. Certifying Partner**

Certifying Partner means a USDOT Recipient in the State of Tennessee whose current DBE Program Plan approved by an appropriate USDOT Operating Administration includes provisions for DBE certification and revocation processes.

### **2.6. 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.

### **2.7. Department or DOT**

Department and DOT mean the United States Department of Transportation.

**2.8. Disadvantage Business Enterprise (DBE)**

Disadvantage Business Enterprise means a for-profit small business concern, that is at least 51% owned by one or more individuals who are both socially and economically disadvantaged, or, in the case of a corporation, in which at least 51% of the stock is owned by one or more such individuals; and whose management and daily business operations of the entity are controlled by one or more of the socially and economically disadvantaged individuals who own it.

**2.9. Executive Committee**

Executive Committee means a standing committee created by this agreement comprised of a representative of the Small Business Development Program of Tennessee Department of Transportation's Civil Rights Division, a representative from a Certifying Partner selected annually by and among FAA TNUCP Partners, and a representative from a Certifying Partner selected annually by and among FTA TNUCP Partners.

**2.10. Lead Agency**

Lead agency means the Tennessee Department of Transportation

**2.11. MOU**

MOU means a "Memorandum of Understanding".

**2.12. Non-Certifying Agency**

Non-Certifying Agency means a USDOT Recipient who has a current DBE Program Plan approved by an appropriate USDOT Operating Administration that does not include provisions for DBE certification and revocation processes.

**2.13. Non-Certifying Partner**

Non-Certifying Partner means a USDOT Recipient in the State of Tennessee who has a current DBE Program Plan approved by an appropriate USDOT Operating Administration that does not include provisions for DBE certification and revocation processes.

**2.14. Personal Net Worth**

Personal Net Worth means the net value of the assets of an individual remaining after total liabilities are deducted. Pursuant to 49 CFR Section 26.67 and as used herein, the personal net worth of each disadvantaged owner of an applicant or a DBE firm, excluding the individual's ownership interest in the applicant or a DBE firm and the individual's equity in his or her primary place of residence, must not exceed \$2.047 million.

**2.15. Processing Agency**

Processing agency means the TNUCP Certifying Partner to which the applicant firm applied for DBE Certification.

**2.16. Recipient**

Recipient means any entity, public or private, that has an approved DBE Program, to which DOT financial assistance is extended, whether directly through another recipient, through the programs of FAA, FHWA or FTA or who has applied for such assistance.

**2.17. Regulation**

Regulation means 49 CFR Parts 23 and 26, and any of its revisions, additions, deletions, or replacement.

**2.18. Sub-Recipient**

Sub-Recipient means any entity, public or private to which USDOT financial assistance is extended through another Recipient.

**2.19. Tennessee Uniform Certification Program(TNUCP)**

The Tennessee Uniform Certification Program means the Uniform Certification Program within the State of Tennessee fashioned according to the standards of 49 CFR 29.81, approved by the USDOT, and comprised of all USDOT Recipients in the State of Tennessee.

**2.20. TNUCP Partner**

TNUCP Partner means all USDOT Recipients in the State of Tennessee participating in this agreement including both TNUCP Certifying and TNUCP Non Certifying Partners.

**Article III – Regulatory Requirements**

**3.1. Participation**

- a. As required by 49 CFR Part 26.81, all USDOT recipients in the State of Tennessee must participate in the Tennessee Uniform Certification Program.
  - i. All recipients, including airports and transit authorities, that receive funds directly from FHWA, FAA, or FTA must agree in writing to participate as members in the TNUCP.
  - ii. Signatures to the UCP agreement of all USDOT recipients in this State shall be maintained on file in the office of the Tennessee Department of Transportation’s Civil Rights Division.



**3.2. Certification Procedural Oversight**

- a. TNUCP must follow all certification procedures and standards as set forth in 49 CFR Subparts D and E.
- b. TNUCP must cooperate fully with oversight, review, and monitoring activities of DOT and its operating administrations.
- c. TNUCP must implement DOT directives and guidance concerning certification matters and make all certifications decisions on behalf of all DOT recipients in the state with respect to participation in the DOT DBE Program.

**Article IV – Rights and Responsibilities of the TNUCP**

**4.1. Certification Decisions**

- a. Certification decisions made by the Certifying Partners are binding on all TNUCP Partners with respect to participation in the DBE Program. In the event of conflict, the TNUCP, through the Executive Committee, shall make a final decision, subject to the provisions of 49 CFR, Part 26.

**4.2. “One-Stop Shopping”**

- a. The TNUCP 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 TNUCP Partners.

**4.3. Processing Out-of-State Applications**

- a. The TNUCP will not process a new application for DBE certification from a firm having its principal place of business in another state unless the firm has already been certified in the state.
- b. When a Certifying Partner processes an out of state application, a full certification application file with all supporting documentation will be compiled by the Certifying Partner, including a copy of the Site Visit Report obtained from the applicant’s home state or from the state’s UCP if it is in place, before the firm is included in the DBE Directory.
- c. The TNUCP shall make an independent certification decision based on the documentation provided by the other UCP or certifying agency unless the TNUCP has entered into an MOU or reciprocity agreement with that UCP or certifying agency

**Article V – Reciprocity**

**5.1. Reciprocity With Other UCPs, State Certifying Agencies, and State DOTs**

- a. The TNUCP may enter into written reciprocity agreements at any time with other UCPs, State Certifying Agencies, and State DOTs.
  - i. The process of entering into reciprocity agreements shall be led by the Tennessee Department of Transportation as lead agency with the assistance of the Executive Committee of the TNUCP.

- ii. Reciprocity agreements must be approved by a majority vote of the TNUCP Partners present at the TNUCP Meeting to which the reciprocity agreement is proposed.
- iii. The approved reciprocity agreement is further subject to the approval of USDOT.
- b. The reciprocity agreement must outline the specific responsibilities of each participating UCP, State Certifying Agency, or State DOT.
- c. The TNUCP, and the Certifying Partners, may accept the DBE certification decision made by another UCP or state DOT, on a case-by-case basis.

## **Article VI – TNUCP Partner Roles and Responsibilities**

### **6.2. Types of TNUCP Partners**

- a. TNUCP agrees that this Agreement provides for two (2) classes of TNUCP Partners, Certifying Partners and Non-Certifying Partners as defined in 2.5 and 2.13, and each class shall have specific rights and responsibilities as set forth herein.

### **6.3. Lead Agency Roles and Responsibilities**

- a. TNUCP agrees that the lead agency, TDOT, shall have the following roles and responsibilities
  - i. Providing oversight to the UCP
  - ii. Developing forms for the Uniform Certification Application, Uniform On-Site Visit, Annual “No Change” Affidavit, Personal Net Worth Statement
  - iii. Making all preceding forms available with instructions on the TDOT website
  - iv. Maintaining the UCP DBE database
  - v. Providing standardized training programs for certification officials in the state
  - vi. Performing state-wide certification and on-site visits
  - vii. Overseeing the development of DBE programs for TDOT and the TNUCP

### **6.4. Certifying Partner Roles and Responsibilities**

- a. Certifying Partners agree to the following roles and responsibilities
  - i. Performing regional certifications
  - ii. Developing and submitting DBE plans for their respective organizations
  - iii. Performing regional on-sites
  - iv. Forwarding completed certified files to TDOT in the appropriate manner outlined in Article XI
  - v. Forwarding applications that do not belong in their region/ area to either TDOT or an applicable Certifying Partner
  - vi. Monitoring payments to DBEs
  - vii. Performing on-site visits for members who have received applications outside their region/ area if reasonable.

**6.5. Non-Certifying Partner Roles and Responsibilities**

- a. Non-Certifying Members agree to the following roles and responsibilities
  - i. Comply with the terms of this Agreement
  - ii. Promptly forward DBE applications to the Responsible Certifying Partner
  - iii. Provide information on any certified DBE upon request by TNUCP Partner

**6.6. Agent Roles and Responsibilities**

- a. Agents agree to the following roles and responsibilities:
  - i. Performing regional on-site visits
  - ii. Collecting application materials
  - iii. Submitting completed applications to TDOT or a direct recipient of USDOT/ TDOT funds for review and certification approval

**Article VII – Communication**

**7.1. Communication Among TNUCP Partners**

- a. All TNUCP partners agree to and shall continue to communicate openly with each other. Communication can take the form of, but is not limited to, telephone conversations, conference calls, meetings correspondence, electronic transmittals and/or discussion databases.

**7.2. Communication With UCPs, State DOTs, and Certifying Agencies**

- a. The TNUCP, and its TNUCP Partners, shall share information concerning TNUCP DBE firms or applicants with other UCPs, State DOTs, or State Certifying Agencies upon written request.

**Article VIII – Executive Committee and Special Committees**

**8.1. Executive Committee**

- a. The TNUCP agrees that the Executive Committee of the TNUCP shall be primarily responsible for the oversight and implementation of this agreement.
- b. The Executive Committee shall meet as necessary to provide oversight and ensure compliance with 49 CFR Section 26.81.
- c. The Executive Committee shall at all times seek the participation, and may call special meetings of all TNUCP Partners to ensure compliance with 49 CFR Part 26.
- d. The Executive Committee will ensure that the TNUCP has sufficient resources and expertise to carry out the requirements of 49 CFR Section 26.81.
- e. The Executive Committee will advise all TNUCP Members when it appears expertise and resources are not sufficient to carry out the requirements of 49 CFR Section 26.81.

**8.2. Special Committees**

- a. The Executive Committee may establish special committees, by majority vote, which may include, but are not limited to, Finance Committee, Appeals Committee, and Eligibility/ Certification Committee.
- b. Finance Committee
  - i. The TNUCP establishes a Finance Committee to provide oversight related to the appropriate cost structure to support the UCP.
  - ii. The deliberations and decisions with the respect to the cost structure will be conducted pursuant to the rules adopted by the Finance Committee.
  - iii. All TNUCP Partners agree to accept the decision of the Finance Committee regarding the appropriate cost structure.
  - iv. The Finance Committee is comprised of a representative of TDOT, a representative from a Certifying Partner selected annually by and among FAA TNUCP Partners, and a representative from a Certifying Partner selected annually by and among FTA TNUCP Partners.
- c. Appeals Committee
  - i. The TNUCP Establishes an Appeals Committee, which will hear all Third Party challenges coming before the TNUCP
  - ii. The committee is comprised of five (5) representatives from Certifying Partners.
- d. Eligibility/ Certification Committee
  - i. The TNUCP Establishes an Eligibility/Certification Committee for eligibility determinations
  - ii. The committee is comprised of five (5) Certifying Partners with one alternating in the case that an eligibility review is submitted by one of the five committee members. In the case that an eligibility review is submitted by one of the committee members, the partner responsible for submitting the review request shall recuse themselves from the review

**Article IX – Ratification Process**

**9.1. TNUCP Participation**

- a. All recipients of federal funds administered by the USDOT, either directly or indirectly, must participate in a UCP. Failure to comply may result in the loss of federal funds from the TNUCP partners and/or the USDOT.

**9.2. TNUCP Sign Agreement**

- a. All partners listed in this UCP and their agents agree to be bound by the terms and conditions of this TNUCP Agreement. Upon approval this newly executed TNUCP Agreement by USDOT, all partners must submit to the TNUCP a signed letter

confirming their agreement to support and be bound by the terms and conditions of this TNUCP Agreement that will be forwarded to USDOT.

- b. Further by executing the Signature and Declaration Status Page of this Agreement all TNUCP Partners agree to become Partners of the TNUCP Agreement, and agree to accept the terms and conditions of this TNUCP Agreement.
- c. Any new recipient required to participate in the TNUCP who were not present at the inception of this agreement shall be added at any time after they have reviewed the plan and agree to terms and conditions set forth in this agreement.

## **Article X – Process Review**

### **10.1. The Certification Process**

- a. The TNUCP and its Partners must follow DBE certification processes and adhere to standards set forth in 49 CFR Part 26, Subparts D and E, Certification Procedures, as well as those guidelines set forth herein or otherwise attached hereto.
- b. The certification process begins when a recipient receives an application from an applicant and ends only when conditions of 49 CFR Part 23 and/or 49 CFR Part 26 are satisfied.
- c. Full descriptions of the certification and denial processes are provided below in Articles X and XI.

### **10.2. Uniform Certification Documents**

- a. Tennessee Uniform Certification Program (TNUCP) agrees to utilize the uniform certification application and personal net worth statement developed by USDOT.

### **10.3. Use Of TNUCP Partner Marks**

- a. TNUCP Partners agree to use their respective logos and names on correspondence sent to applicants including letterheads and certificates.

## **Article XI – Certification Process**

### **11.1. Uniform Certification Application Materials**

- a. All Certifying Partners must require applicants seeking DBE certification to complete and submit the uniform certification application and personal net worth statement.
- b. Applicants must also be required to attest to the accuracy and truthfulness of the information provided on the forms.

## **11.2. Application Review**

- a. When a Certifying Partner receives an application, an agent for the certifying partner will provide a cursory review to assess whether that application can be processed by that certifying partner.
- b. If it is determined that the receiving partner has received an application that is in the region they are able to conduct an on-site (because of mile radius restrictions imposed on the entity) and the firm's specialty is one specifically needed by or unique to their entity (for example concessionaires and the airport authorities) that partner may accept that application and process it to certification or denial.
  - i. If that partner feels that the above-cited scenario does not apply, they may forward that application to another consulted Certifying Partner or TDOT for processing.
- c. All applications received by any Certifying Partner must be reviewed and assessed applying the standards of proof outlined in 49 CFR Part 23 & 26.
- d. When a new DBE becomes certified and upon entry to the directory, a form letter should be automatically generated to the applicant stating that:
  - i. the business is a certified DBE as well as the certification renewal date
  - ii. an Annual Affidavit of No Change is required to state that no changes have occurred in the firm in accordance with 49 CFR Part §26.83 (j)
  - iii. certification may be removed should circumstances change that render the firm ineligible for DBE status
  - iv. any other information the executive committee deems important now and in the future.
- e. The Certifying Partner must send out an e-mail to TDOT using the required TNUCP Listing Update Form informing them of the certification of the new DBE, who they are, contact information, and the firm's specialty (to be added to the TDOT website), and a complete copy of the file.

## **Article XII - Initial Certification and Applicant Denials**

### **12.1. Denial Decisions**

- a. When a Certifying Partner denies a request by a firm to be certified as a DBE, a written explanation must be provided outlining the reasons for the denial referencing the evidence in the record and the citation of the appropriate corresponding regulation.
- b. Any information and documentation that was utilized in making the decision must be available to the applicant upon request.

**12.2. Appeal**

- a. The final decision of denial of certification may be appealed to the USDOT within ninety (90) days of the certifying partner's denial.

**12.3. Reapplication**

- a. The applicant firm who is denied may reapply for certification twelve (12) months from the date that the firm receives the denial letter from the TNUCP.

**Article XIII- Data Requirements**

**13.1. DBE Directory**

- a. TDOT agrees to maintain a unified DBE directory containing all firms certified by TNUCP (including out-of-state firms).
- b. The data in the directory must always contain, at a minimum, each firm's address, phone number, and types of work the firm is certified to perform. TDOT will make this directory readily available to recipients and will print the directory annually.
- c. The database will be updated with any changes as soon as TDOT receives such updates. TDOT is the database manager and will serve as the "clearinghouse" for data required for the operation of TNUCP including, but not limited to, data regarding certification statuses, data required for the DBE directory, and data required for maintaining communication between partners.

**Article XIV- Initial Consolidation**

**14.1. TNUCP Certification Recognition**

- a. TNUCP affirms that only firms which are certified based upon compliance with the requirements of 49 CFR Part 26 shall be recognized as certified by TNUCP.

**Article XV – Geographical Designation**

**15.1. Application Review**

- a. TNUCP agrees to make eligibility determinations for all firms applying for DBE certification whose business is located in the state of Tennessee.
- b. TDOT will continue to review and certify statewide applicants, and the other TNUCP partners will continue to review and certify applicants in their prospective areas.
- c. TNUCP agrees that there may be exceptions to assignments based upon familiarity with the firm, historical knowledge, resources, etc.

**15.2. Onsite Reviews**

- a. A Certifying Partner may request that a different Certifying Partner perform an on-site visit if the first is geographically closer to the second Certifying Partner or if the firm is within the second Certifying Partner's realm of expertise.
- b. A Certifying Partner may also request that another Certifying Partner review a firm's application if the second Certifying Partner has more expertise with that kind of firm.
- c. By default, the second Certifying Partner will be TDOT unless the Certifying Partner specifically requests a different Certifying Partner.
- d. If the Certifying Partner's request for assistance is denied by the second Certifying Partner, TDOT will assume responsibility for assisting, e.g. processing applications and/or on-site visits.

**15.3. Reporting**

- a. In all such cases, the assisting Certifying Partner will report findings to the primary Certifying Partner, and the primary Certifying Partner will retain ultimate responsibility for communications with the applicant firm and determining the firm's eligibility.

**Article XVI—NAICS CODES**

**16.1. TNUCP Certification Work Types**

- a. TNUCP agrees that all certifications will include designation of specific work types.
  - i. TNUCP agrees to use the North American Industry Classification System codes for such designations.
  - ii. A firm's NAICS code designation must be provided to the firm as well as a short description of that code.

**16.2. Certification Expansion**

- a. Firms may request modification or expansion of their approved NAICS codes lists.
  - i. Such a request must be made in writing to the certifying partner and must include the equipment and experience indicating that firm's ability to perform the particular type of work.
  - ii. A firm seeking expansion of their NAICS codes must also submit documentation of past contracts showing the firm has performed the specific type of work in the past.



## **Article XVII—Removal of Certification Eligibility**

### **17.1. Eligibility Process Initiation**

- a. TNUCP agrees that process for removal of a firm's certification may be initiated by a third party challenge, TNUCP partner, or DOT directive.

### **17.2. Third Party Challenges**

- a. The TNUCP shall accept written challenges from any party alleging that a currently certified firm may be ineligible. The challenge must state specific reasons for ineligibility and submit written documentation in support of the challenge. The firm being challenged will receive written notification from the original certifying agency, the basic issues involved, and the relevant regulations. The TNUCP partner originally responsible for the certification shall thoroughly investigate the challenge within a reasonable time frame not to exceed ninety (90) business days. If reasonable cause to remove the firm does not exist, the TNUCP partner must notify the complainant and the firm of its determination the reasons for its determination, and the right of the complainant to appeal the decision to USDOT. If reasonable cause to remove certification eligibility is found, the TNUCP partner will notify the challenged firm in writing listing all of the specific reasons for the proposal to remove its certification and of its right to request an informal hearing to respond to the proposed decertification in person. The firm may elect to present information and arguments in writing without going to a hearing consistent with 49 CFR 26.87.
- b. TNUCP establishes a Third Party Challenge Committee, which will hear all Third Party challenges coming before the TNUCP. The 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 makers shall be individuals who are knowledgeable about the certification requirements of the DBE program and this agreement. The firm shall be notified of the final decision made by the Third Party Challenge Committee and the reasons for the decision, If the decision is not to remove the firm, the complainant will be notified of the right to appeal to USDOT under 49 CFR § 26.89. If the firm is removed and is certified by the SBA, a written notice shall be provided to the SBA that includes the reasons for the removal, as required by 49 CFR 26.87. The firm has the opportunity within 90 days of receipt of the date of the final decision to appeal the decision to USDOT under 49 CFR Part 26 Subpart E § 26.89.

**17.3. DOT Directive**

- a. At any time, USDOT may notify TNUCP of reasonable cause to remove a firm's certification. In such a case, TNUCP agrees to immediately begin the process of decertification

**17.4. TNUCP Partner-Initiated**

- a. The original certifying partner may initiate proceedings to remove a DBE's certification if, based on notification by the firm of a change in its circumstances or other information that comes to the partner's attention, it determines that there is reasonable cause to believe that the currently certified firm is ineligible. Upon this determination, the original certifying partner shall immediately notify the firm in writing setting forth the reasons for the determination and prosecute a proceeding to remove eligibility. The firm whose eligibility is removed may reapply for certification twelve (12) months from the date that the firm receives the removal letter from the TNUCP

**17.5. Administrative Removal of Eligibility**

- a. In the event that a currently-certified firm's owner exceeds the limits for personal net worth and there is no dispute regarding this fact, then the firm's certification may be removed without the procedures listed under 49 CFR 26.87.

**Article XVIII—Partner Compliance**

**18.1. Minimum Requirements**

- a. TNUCP agrees it is necessary to implement minimum requirements for compliance, as well as a process for dealing with any recipient that is found to be in non-compliance. The specific minimum requirements are:
  - i. All decisions related to certification must be made in compliance with 49 CFR Parts 23 & 26. This requires the political independence to make decisions based upon the specific eligibility requirements as outlined in the regulations.
  - ii. Outside entities such as construction boards or other politically mandated organizations cannot be involved in the certification determination or investigations of third party challenges.
  - iii. All TNUCP Partners must have an approved DBE Program/Plan in place that clearly defines the role of the administrative staff.
  - iv. Any partner with a DBE Program administered in conjunction with an MBEIWBE program of another entity must have the procedures and policies for the DBE program clearly defined and separated. This includes eligibility requirements, data tracking, and removal/denial of certification.

- v. All partners agree to make decisions and recommendations on certification based purely upon the eligibility requirements, without consideration of political influence or other factors.
- vi. If any TNUCP partner feels that a partner is not complying with the requirements of 49 CFR Parts 23 & 26, they may make a written complaint to TDOT. The TNUCP will review and process the complaint and circumstances. If a majority of the TNUCP partners, not including the complaining partner or the partner in question, agrees that the partner is not complying with the requirements, remedial action will be taken. The remedial action can take the form of one of the following:
- vii. Written Findings — The TNUCP may issue a formal written determination of the issues regarding that partner's certification, procedures, or practices. This determination will be sent to the senior management officials and the USDOT. It is hoped that the partner will review the procedures at issue and make improvements to the process in order to meet 49 CFR Part 26.
- viii. Monitoring & Concurrence — The TNUCP may issue a formal written determination as set out above, as well as provide a procedural review and concurrence process. It is the hope of the partners that the 14 partner in question will take this opportunity to gain additional knowledge and education of the regulations and requirements.

**18.2. Non-Compliance**

- a. Should the TNUCP make every effort to correct the deficiencies in a partner's certification process, extreme measures may be necessary. The TNUCP may find that a partner is not acting in good faith and determine that the UCP will not accept firms certified by that agency until the required changes are implemented.
- b. The TNUCP recognizes that this is a method of last resort and would not apply this remedy liberally. In addition, the TNUCP would not proceed with this remedy without notification to the USDOT, as well as the lead federal agency for the partner agency. The TNUCP further agrees that should the USDOT or the lead federal agency wish to assist or provide guidance on resolution, the TNUCP would make every effort to resolve the situation prior to implementing this remedy.

**Article XIX—Non-disclosure and Confidentiality**

**19.1. Confidentiality**

- a. TNUCP partners agree not to release information that could be reasonably construed to be confidential business information with any third party without the prior written consent of the firm(s) involved.

**19.2. Disclosure**

- a. If one partner makes a written request to another partner to gain certification information about a firm, the requested partner is to comply

**Article XX—Training**

**20.1. Training Procedures**

- a. TNUCP agrees that on-going training procedures are needed for partners and recipients.

**20.2. Guidance and Support**

- a. TNUCP agrees to monitor partners' certification processes and provide guidance and training where applicable.
- b. TNUCP furthermore agrees to seek out additional guidance and training from USDOT, FHWA, FTA, FAA, and other agencies. TNUCP will also seek and promote ongoing in-service opportunities to provide updates for partners, staff, and recipients.

**Article XXI—Voting Criteria**

**21.1. Quorum**

- a. A simple majority of TNUCP partners is needed for a quorum.

**21.2. Voting Procedures**

- a. Only a partner's official designated representative or approved alternative may vote.
- b. Each partner's name, their designated representative, and their vote will be recorded.

**Article XXII—Role of Supportive Services**

(further discussion is needed)

**Article XXIII—Regional Outreach**

**23.1. Regional Support**

- a. TNUCP partners agree to make reasonable efforts to organize and/or host social and educational events quarterly in their respective regions. This may include, but is not limited to, mixer events, conferences, town hall-style information sessions, email/traditional mail outreach to prospective DBE firms

## **Article XXIV—TNUCP Meetings**

### **24.1. Frequency and Location**

- a. TNUCP partners agree to meet quarterly for the purpose of sharing new information, ideas, and insights. Meetings will be hosted by TDOT.

### **24.2. Attendance**

- a. A simple majority of partners must be available in order to hold a meeting.

### **24.3. Notice**

- a. If a partner is unable to attend a quarterly meeting, the partner must provide prior notice of one week.

## **Article XXV - General Provisions**

### **25.1. Exhibits and Attachments**

- a. All exhibits and attachments to this agreement are incorporated herein by reference and made a part hereof.

### **25.2. Interpretation**

- a. Article and section headings and Table of Contents are for convenience only and shall not affect construction of this Agreement

### **25.3. Amendments**

- a. This Agreement may not be amended, modified, or supplemented except by an instrument in writing agreed to by the TNUCP Partners. Should any provisions of 49 CFR Part 26 be changed or modified, corresponding provisions of this Agreement shall be modified accordingly.

### **25.4. Compliance with Law**

- a. TNUCP Partners agree that the operation of this Agreement and performance of all obligations hereunder must at all times comply with 49 CFR Part 26 and with applicable federal and state laws.

### **25.5. Signed Agreement**

- a. This Agreement shall become effective upon approval by USDOT and its operating administrations
- b. By executing the Signature and Declaration of Status page of this Agreement recipients agree to become Partners of the TNUCP, and agree to accept the terms and conditions of this Agreement

- c. Following approval, a recipient may become a member by submitting a fully executed Signature and Declaration of Status page from this Agreement to the Executive Committee, which shall be delivered to the Civil Rights Division of The Tennessee Department of Transportation, where it shall remain on file.

**25.6. Severability**

- a. Should any part, term, portion, or provision of this Agreement be in conflict with any law of the United States or the State of Tennessee, or otherwise be unenforceable or ineffectual, the remaining provisions shall be deemed valid and severable, and not affected thereby

**25.7. Successors**

- a. This Agreement shall be binding upon and inure to the benefit of any successors or assigns of the TNUCP Partners.

**25.8. Execution**

- a. Execution of this Agreement by the TNUCP Partners must comply with appropriate procedures, resolutions, authorized signatures, and required filings pursuant to the law governing each TNUCP Partner.
- b. This Agreement will be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.