

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

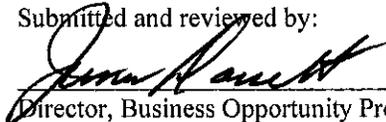
The Texas Transportation Commission (commission) finds it necessary to propose amendments to §9.53, relating to the disadvantaged business enterprise program, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the proposed amendments, attached to this minute order as Exhibits A and B, are incorporated by reference as though set forth at length verbatim in this minute order.

IT IS THEREFORE ORDERED by the commission that the amendments to §9.53 are proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:



Director, Business Opportunity Program

Recommended by:



Executive Director

110693 SEP 28 06

Minute
Number

Date
Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes
3 amendments to §9.53, concerning the disadvantaged business
4 enterprise (DBE) program.

5

6 EXPLANATION OF PROPOSED AMENDMENTS

7 After its compliance review of the department's Disadvantaged
8 Business Enterprise Program (DBE), the Federal Highway
9 Administration (FHWA) recommended changes to §9.53 to comply
10 with 49 CFR Part 26, the federal rules for DBEs. The department
11 is proposing amendments to §9.53 in response to these
12 recommendations.

13

14 Subsection (a) is amended to comply with the provisions of 49
15 CFR §26.25 requiring an independent DBE liaison to administer
16 the DBE program.

17

18 Subsection (c)(1) documents a prime contractor's commitment to
19 meet DBE goals as required by 49 CFR §26.53.

20

21 Subsection (d)(1) changes the DBE certification from three years
22 to an open period conditioned upon no change in status and a
23 DBE's submission of an annual affidavit to this effect as
24 required by 49 CFR Part 26, Subpart D.

25

1 Subsection (d)(2) clarifies that a DBE is not required to
2 reapply for certification, but must submit an annual affidavit
3 as required by 49 CFR Part 26, Subpart D.

4
5 Subsection (d)(4) adds subparagraph (C) to clarify that
6 determinations of ownership and control of a DBE will be made to
7 comply with 49 CFR §26.69 and §26.71.

8
9 Subsection (d)(5)(B) adds clause (iii) to clarify how
10 participation is counted when a DBE performs work in a joint
11 venture to comply with 49 CFR §26.55. Subsection (d)(5) deletes
12 subparagraph (C) because a disadvantaged truck owner operator is
13 not a separate DBE category requiring a separate DBE application
14 under 49 CFR Part 26.

15
16 Subsection (d)(7) clarifies that DBE certification must be
17 maintained by meeting certification standards and submission of
18 an annual affidavit to comply with 49 CFR §26.83(j).

19
20 Subsection (d)(8)(A) is amended to notify DBE applicants that
21 they cannot reapply for DBE certification until after twelve
22 months if they withdraw their application.

23
24 Subsection (e)(5)(A) adds clause (iii) to clarify the activities
25 that constitute a commercially useful function to comply with 49

1 CFR §26.55. Subsection (e)(5)(C)(i) clarifies the sanctions and
2 procedure the department may use upon determining a DBE firm is
3 not performing a commercially useful function to comply with 49
4 CFR §26.55. Subsection (e)(5)(D) is amended to correctly notify
5 DBEs that the department's determinations in regard to whether a
6 commercially useful function has been performed are not
7 appealable to the USDOT to comply with 29 CFR §26.55(c)(5).

8
9 Subsection (e)(6)(C) is amended to clarify what activities and
10 costs of the DBE may not be counted toward the DBE goal to
11 comply with 49 CFR §26.55(a). Subsection (e)(6) is also amended
12 by adding subparagraph (D) to clarify when the DBE's
13 subcontractors work may be counted toward the DBE goal to comply
14 with 49 CFR §26.55(a).

15
16 Subsection (e) has also been amended by adding subparagraph (8),
17 concerning prompt payment to DBEs, and subparagraph (9),
18 concerning how prime contractors must handle retainage, to
19 comply with 49 CFR §26.29.

20
21 Other revisions to §9.53 correct grammar and punctuation and do
22 not substantively affect the rules.

23
24 FISCAL NOTE

25 James Bass, Chief Financial Officer, has determined that for

1 each of the first five years the amendments as proposed are in
2 effect, there will be no fiscal implications for state or local
3 governments as a result of enforcing or administering the
4 amendments. There are no anticipated economic costs for persons
5 required to comply with the section as proposed.

6
7 James T. Dossett, Director, Business Opportunity Program, has
8 certified that there will be no significant impact on local
9 economies or overall employment as a result of enforcing or
10 administering the amendments.

11
12 PUBLIC BENEFIT

13 Mr. Dossett has also determined that for each year of the first
14 five years the section is in effect, the public benefit
15 anticipated as a result of enforcing or administering the
16 amendments will be the clarification of DBE rules and compliance
17 with 49 CFR Part 26, federal DBE rules. There will be no
18 adverse economic effect on small businesses.

19
20 SUBMITTAL OF COMMENTS

21 Written comments on the proposed amendments to §9.53 may be
22 submitted to James T. Dossett, Director, Business Opportunity
23 Program, Texas Department of Transportation, 125 East 11th
24 Street, Austin, Texas 78701-2483. The deadline for receipt of
25 comments is 5:00 p.m. on November 13, 2006.

1

2 STATUTORY AUTHORITY

3 The amendments are proposed under Transportation Code, §201.101,
4 which provides the Texas Transportation Commission with the
5 authority to establish rules for the conduct of the work of the
6 department.

7

8 CROSS REFERENCE TO STATUTE

9 Government Code, §2251.022 and Government Code, Chapter 2253.

1 SUBCHAPTER D. BUSINESS OPPORTUNITY PROGRAMS

2 §9.53. Disadvantaged Business Enterprise (DBE) Program.

3 (a) Applicability. The DBE program is applicable to all
4 department contracts and purchases funded in whole or in part
5 with federal funds received from the United States Department of
6 Transportation (USDOT) through the Federal Highway
7 Administration, Federal Transit Administration, or the Federal
8 Aviation Administration. The Business Opportunity Program
9 Office (BOP) is a departmental office. The director of BOP is
10 the DBE liaison to the FHWA and reports directly to the
11 department's executive director. The director of BOP is
12 responsible for administering the DBE program in accordance with
13 49 CFR §26.25.

14 (b) DBE goals. The department will establish overall
15 annual DBE participation goals. The goals will be published in
16 the Texas Register and other media as appropriate. Individual
17 contract goals will be established as necessary to achieve the
18 overall goal.

19 (1) Annual goals. Each year the department will
20 establish an agency DBE goal pursuant to the two-step process
21 specified in 49 CFR §26.45. The first step will be to establish
22 a base figure for the relative availability of DBEs. The second
23 step will be to examine relevant evidence available in the

1 department's jurisdiction to determine what adjustment, if any,
2 is needed to the base figure in order to arrive at the overall
3 goal. The department will accept public comments regarding the
4 goals and the methods for establishing the goals for at least 45
5 days from the publication date of the notice in the Texas
6 Register. The maximum feasible portion of the department's
7 overall DBE goal will be met using race-neutral means. Quotas
8 will not be used in the administration of the department's DBE
9 program. The annual goal will be consistent with the federal
10 requirements of USDOT and compatible with other applicable state
11 and federal laws.

12 (2) Contract goals. Individual contracts are assigned
13 DBE goals based on the availability of qualified DBEs, work site
14 location, dollar value of the contract, and type of work items
15 specified in the contract. The department will assign
16 individual contract goals for DBE participation in federal-aid
17 highway improvements, building construction and maintenance,
18 professional services, aviation, public transportation, private
19 consultant services, and purchasing contracts as necessary to
20 cumulatively meet the annual DBE goals that are not being met
21 through race-neutral means.

22 (c) Good faith effort.

23 (1) The department will make a good faith effort to meet

1 or exceed the annual goals as described in subsection (b)(1) of
2 this section. A "Certification of DBE Goal Attainment"
3 statement is included in all federal-aid bid proposals. This
4 statement requires the prime contractor to certify that it will
5 meet the DBE goal or document good faith efforts.

6 (2) The obligation of the contractor is to make a good
7 faith effort to meet the contract goal. When a specific
8 contract goal is not being met by a contractor, the contractor
9 must document the good faith efforts taken to obtain DBE
10 participation.

11 (A) The department will consider the contractor to have
12 made a good faith effort when it complies with Appendix A to 49
13 CFR Part 26.

14 (B) If the department determines that the contractor
15 has failed to meet the good faith effort requirements, the
16 contractor will be given an opportunity for reconsideration by a
17 division director who did not have any role in the original
18 determination. The contractor will be given the opportunity to
19 provide written documentation and/or meet with the division
20 director to discuss the issues. A written determination will be
21 issued to the contractor by the division director. The
22 determination is not administratively appealable to USDOT.

23 (d) DBE certification.

1 (1) Responsibility. The department will participate in a
2 Unified Certification Program (UCP) pursuant to 49 CFR 26.81. A
3 UCP agreement with other USDOT [~~DOT~~] recipients in the state
4 will be signed by the department by March 2002. The agreement
5 will provide one-stop shopping for firms applying for DBE
6 certification so that an applicant is required to apply only
7 once for a DBE certification that will be honored by all USDOT
8 [~~DOT~~] recipients in the state. Within 90 days after receiving
9 all information required from the applicant, the department will
10 certify a small business as a DBE if it qualifies with all
11 certification standards of Subpart D of 49 CFR Part 26. With
12 written notification to the firm, the department may extend the
13 time period for an additional 60 days. [~~Firms are certified for~~
14 ~~a three-year period.~~] Once firms are certified, an [An] annual
15 affidavit[7] affirming that there have been no changes affecting
16 the firm's eligibility[7] is required. The department must be
17 notified, in writing, within 30 days of any change affecting the
18 eligibility of a firm. The notice must take the form of an
19 affidavit sworn to by the owners of the firm and properly
20 notarized and executed under penalty of perjury of the laws of
21 the United States.

22 (2) Requests for certification. A business must submit a
23 written request for certification as a DBE using an application

1 form approved by the department. A DBE firm must file an annual
2 affidavit to maintain its certification. [~~A DBE firm may renew~~
3 ~~its certification using an abbreviated application unless the~~
4 ~~following situations require that the long form be completed.~~]

5 [~~(A) a DBE's certification has lapsed;~~]

6 [~~(B) the firm's previous application was withdrawn; or~~]

7 [~~(C) there is a change of ownership or control of a~~
8 ~~certified firm at any time.~~]

9 (3) Out-of-state firms. An out-of-state firm must be
10 certified by the UCP in the state in which it maintains its
11 principal place of business.

12 (4) Certification standards. A firm must meet each of
13 the eligibility standards of Subpart D of 49 CFR Part 26 to be
14 certified. A firm seeking certification has the burden of
15 demonstrating by a preponderance of the evidence that it meets
16 the certification standards. DBE firms and firms seeking DBE
17 certification shall cooperate fully with department requests for
18 information relevant to the certification process. Failure or
19 refusal to provide such information will result in denial [~~is~~
20 ~~grounds for denial or removal~~] of certification. To the extent
21 permitted by law, the department will safeguard from disclosure
22 to unauthorized persons information gathered as part of the
23 certification process that may reasonably be regarded as

1 proprietary or other confidential business information.
2 Confidential information may be provided to a third party only
3 with the written consent of the individual to whom the
4 information pertains. An exception to this requirement is when
5 personal financial information would have to be provided to
6 USDOT [~~DOT~~] as part of the administrative record. USDOT [~~DOT~~]
7 will treat the information as confidential.

8 (A) Applicant firms must submit a signed, notarized
9 certification that each presumptively disadvantaged owner is, in
10 fact, socially and economically disadvantaged.

11 (B) Each socially and economically disadvantaged
12 individual making up the 51% social and economic disadvantaged
13 ownership in the applicant firm must submit a signed, notarized
14 statement of personal net worth, with appropriate supporting
15 documents. If the personal net worth statement exceeds
16 \$750,000, the individual's presumption of economic disadvantage
17 is rebutted, the individual is no longer eligible for
18 participation in the DBE program and cannot regain eligibility.

19 (C) Determinations of ownership and control will be
20 made in accordance with 49 CFR \$26.69 and \$26.71, respectively.

21 (5) Certification categories.

22 (A) Schedule A. This category includes, but is not
23 limited to, trucking firms, manufacturers, regular dealers,

1 construction firms, general contractors, franchisees or
2 licensees, and specialty contractors. A firm may apply for DBE
3 status using the Schedule A application form.

4 (i) Construction firms, general contractors, trucking
5 firms, and specialty contractors. The department will certify a
6 firm as a DBE if it meets all other certification requirements
7 set forth in Subpart D of 49 CFR Part 26. The firm will be
8 certified for the specific types of work in which the socially
9 and economically disadvantaged owner(s) have the ability to
10 control the firm.

11 (ii) Regular dealers. The department will certify a
12 firm as a DBE if it meets all other certification requirements
13 set forth in Subpart D of 49 CFR Part 26, engages in the
14 purchase and sale of the products as its principal business and
15 in its own name, is not a broker or packager; and

16 (I) owns, operates, or maintains a store,
17 warehouse, or other establishment in which materials, supplies,
18 articles, or equipment required for a contract are bought, kept
19 in stock, and regularly sold or leased to the public in the
20 usual course of business; or

21 (II) is a dealer in bulk items such as steel,
22 cement, gravel, stone, petroleum products, and asphalt products
23 not kept in stock which are distributed or delivered using

1 equipment owned or operated by the firm (Any supplementing of
2 regular dealers' own distribution equipment shall be by a long-
3 term lease agreement and not on an ad hoc or contract-by-
4 contract basis).

5 (iii) DBE manufacturer. The department will certify
6 a manufacturer as a DBE if it:

7 (I) meets all other certification requirements set
8 forth in Subpart D of 49 CFR Part 26; and

9 (II) operates or maintains a factory or an
10 establishment on-site that produces materials, supplies,
11 articles, or equipment to be used in a contract.

12 (iv) Franchisees or licensees. A business operating
13 under a franchise or license agreement will be certified by the
14 department if it meets all other certification requirements set
15 forth in Subpart D of 49 CFR Part 26, and the franchiser or
16 licensor is not affiliated with the franchisee or licensee.

17 (B) Schedule B - Joint venture.

18 (i) A joint venture may apply for DBE status using
19 the Schedule B application form for a specific project.

20 (ii) The department will certify the joint venture
21 if:

22 (I) one or more of the partners of the joint
23 venture is a certified DBE;

1 (II) the DBE partner is responsible for a clearly
2 defined portion of the work to be performed; and

3 (III) the DBE partner shares in the ownership,
4 control, management responsibilities, risks, and profits of the
5 joint venture.

6 (iii) When a DBE performs as a participant in a joint
7 venture the dollar value clearly attributable to the DBE's work
8 performed with its own forces will count toward the DBE goal.

9 [~~(C) Schedule O - Disadvantaged truck owner operator.~~]

10 [~~(i) An independent owner operator of one truck may~~
11 ~~apply for disadvantaged truck owner operator status using the~~
12 ~~Schedule O application form.~~]

13 [~~(ii) The department will certify a truck owner-~~
14 ~~operator who:~~]

15 [~~(I) does not have an employee/employer~~
16 ~~relationship with a prime contractor,~~]

17 [~~(II) is eligible in accordance with Subpart D of~~
18 ~~49 CFR Part 26,~~]

19 [~~(III) proves ownership of the truck,~~]

20 [~~(IV) proves ability to operate the truck,~~
21 ~~including, but not limited to, maintaining a commercial driver's~~
22 ~~license, and]~~

23 [~~(V) is responsible for maintaining the required~~

1 ~~insurance on the truck.]~~

2 (6) On-site review.

3 (A) The department will conduct an on-site review, in
4 accordance with 49 CFR §26.83, of any firm when:

5 (i) it applies for DBE certification for the first
6 time;

7 (ii) certification is challenged by a third party; or

8 (iii) the department questions its DBE eligibility.

9 (B) If the review involves a certified firm, the firm's
10 certification remains valid unless the CSTB notifies the firm in
11 writing that its certification is suspended during the review.

12 (C) If the on-site review indicates that the firm meets
13 eligibility standards, the firm will be certified or remain
14 certified.

15 (D) If the on-site review indicates that the firm does
16 not meet eligibility standards, the firm will be denied
17 certification in accordance with paragraph (8) of this
18 subsection.

19 (7) Certification maintenance ~~[renewals]~~. A DBE must
20 submit an annual sworn affidavit on the anniversary date of
21 certification, as set forth in 49 CFR §26.83(j), and continue to
22 meet certification standards set forth in 49 CFR Part 26 Subpart
23 D.

1 ~~[(A) DBE certifications are valid for three years with~~
2 ~~an annual affidavit required.]~~

3 ~~[(B) To be recertified, a firm must submit a written~~
4 ~~application in accordance with paragraph (2) of this~~
5 ~~subsection.]~~

6 ~~[(C) Renewals are subject to certification standards~~
7 ~~set forth in Subpart D of 49 CFR Part 26.]~~

8 (8) Denial or withdrawal of certification.

9 (A) An applicant who withdraws its application must
10 wait 12 months from the date of the withdrawal to reapply [~~may~~
11 ~~reapply at any time~~].

12 (B) The department will notify an applicant in writing
13 if certification is to be denied and set forth reasons for
14 denial.

15 (C) An applicant may answer the department's notice of
16 denial within 15 working days from the date of the denial.

17 (i) If the applicant does not answer within the 15-
18 day period, the denial of certification is final.

19 (ii) If an applicant answers within the 15-day
20 period, and the response resolves eligibility deficiencies, the
21 department will certify the applicant.

22 (iii) If an applicant answers within the 15-day
23 period, but does not resolve eligibility deficiencies, the

1 department will deny certification.

2 (iv) An applicant who has been denied certification
3 must wait 12 months from the date of denial to reapply for
4 certification.

5 (9) Certification challenges.

6 (A) Third party challenges.

7 (i) A third party may challenge the eligibility of a
8 certified firm or a firm seeking to be certified as a DBE.

9 (ii) A challenge must be made in writing, signed and
10 dated by the challenger, and set forth the factual basis for the
11 challenge.

12 (iii) After receiving a written challenge, the
13 department will determine if there is reason to believe that the
14 challenged party is in fact not eligible on the basis of the
15 information provided by the challenging party.

16 (iv) To the extent allowed by applicable law, the
17 identity of complainants will be kept confidential at the
18 complainant's election. Complainants will be advised that if
19 confidentiality hinders the investigation, the result may be
20 closure of the investigation or dismissal of the proceeding or
21 hearing.

22 (v) The department will review the challenged firm's
23 record, any material provided by the firm and the complainant,

1 and other available information. All parties to the complaint
2 must cooperate with the review.

3 (vi) If the department determines that there is
4 reasonable cause to believe that the firm is ineligible, the
5 department will provide a written notice to the firm proposing
6 to find the firm ineligible, setting forth the reasons for the
7 proposed determination, and offering the firm opportunity for an
8 informal hearing or an opportunity to present information and
9 arguments in writing.

10 (vii) If the department determines that there is not
11 reasonable cause to believe that the firm is ineligible, the
12 department will notify the complainant in writing of the
13 determination and the reason for it.

14 (B) Department challenges. If the department receives
15 information on changes to a firm or other information that
16 provides reasonable cause to believe that the firm is
17 ineligible:

18 (i) the department will provide a written notice to
19 the firm proposing ineligibility and the reasons for it; and

20 (ii) the firm will be given an opportunity for an
21 informal hearing or an opportunity to present information and
22 arguments in writing.

23 (10) Informal hearing.

1 (A) A firm may request an informal hearing no later
2 than 15 days from the date of notification of the department's
3 determination to remove its eligibility. The DBE certification
4 remains valid during department proceedings.

5 (B) The department will maintain a complete record of
6 the hearing.

7 (C) A department official who did not take part in the
8 actions leading to or seeking to remove the firm's eligibility
9 will preside over the hearing and make the decision regarding
10 the firm's eligibility.

11 (D) The department will not base a decision to
12 decertify a DBE [~~remove eligibility~~] on a reinterpretation or
13 changed opinion of information available at the time of
14 certification of the firm.

15 (E) The department will provide the firm a written
16 notice of the decision and reasons for it. A copy of the notice
17 will be sent to the complainant or the operating administration
18 that directed the proceeding.

19 (F) Any party aggrieved by the department's
20 determination may appeal to USDOT in accordance with §9.57 of
21 this subchapter.

22 (11) Decertification [~~Removal of eligibility~~]. Neither a
23 contractor nor the department shall receive credit towards the

1 contract or overall goal when a proposed DBE contractor or
2 subcontractor has its DBE certification [~~eligibility~~] removed
3 prior to contract execution. The contractor must substitute a
4 certified DBE firm for the decertified [~~ineligible~~] firm or
5 demonstrate that it has made a good faith effort to do so,
6 unless the decertification was caused solely by the decertified
7 [~~ineligible~~] firm having exceeded the size standard.

8 (12) DBE directory. The department will maintain and
9 make available to interested parties a directory of certified
10 DBEs. The directory will include a clearinghouse list of
11 organizations that provide assistance in the recruitment and
12 placement of DBEs for the purpose of linking contractors to
13 minority and women subcontractors.

14 (e) Contractor obligation. Department contracts involving
15 the expenditure of federal funds will include a contract
16 provision addressing DBE requirements.

17 (1) No assigned goal. A contract without an assigned
18 goal will include provisions that:

19 (A) encourage the use of minority business enterprises,
20 and disadvantaged business enterprises in subcontracting and
21 material supply activities;

22 (B) prohibit discrimination; and

23 (C) provide a method for reporting race-neutral DBE

1 participation.

2 (2) Assigned goal. A contract with an assigned goal will
3 include a provision which sets forth the requirements of this
4 paragraph.

5 (A) Commitments. The following requirements must be
6 satisfied by the contractor as a condition of contract award.

7 (i) Within the time specified in the contract or
8 proposal, the contractor must furnish a commitment agreement for
9 each certified DBE that will be used to meet the contract goal.
10 The commitment agreement must include:

11 (I) a statement that the contractor intends to
12 provide the DBE the opportunity to perform the subcontract;

13 (II) the items of work to be performed;

14 (III) the quantities of work or material;

15 (IV) the unit measure, unit price, and total cost
16 for each item;

17 (V) the total amount of the DBE commitment;

18 (VI) the original signatures of the contractor and
19 the proposed DBE; and

20 (VII) if the commitment involves a DBE material
21 supplier, an explanation of the function to be performed and a
22 description of any arrangements, including joint check
23 agreements, made with other material suppliers, manufacturers,

1 distributors, hauling firms, or freight companies.

2 (ii) DBE prime contractors may receive credit toward
3 the DBE goal for work performed by their own forces and work
4 subcontracted to DBEs. A DBE prime contractor must make a good
5 faith effort to meet the goals. In the event a DBE prime
6 contractor subcontracts to a non-DBE contractor, the amount paid
7 to the non-DBE contractor must be reported to the department.

8 (B) Good faith efforts. If the contractor is unable to
9 meet the goal, the contractor must document good faith efforts
10 taken to obtain DBE participation in accordance with applicable
11 contract provisions and pursuant to Appendix A of 49 CFR Part
12 26.

13 (3) Reporting.

14 (A) The contractor must submit periodic reports at
15 intervals specified in the contract using a report form
16 acceptable to the department that includes, but is not limited
17 to, identification of the DBE by name and vendor number. The
18 report must indicate the actual amount paid to each DBE. The
19 report must include the amounts paid in accordance with the DBE
20 commitment as outlined in subsection (e)(2)(A) of this section
21 and any race neutral participation. The report will also
22 include amounts paid by a DBE to non-DBE subcontractors and
23 haulers. The report must be submitted even if no payments were

1 made during the period being reported. When required by the
2 department, the contractor must attach proof of payment
3 including, but not limited to, copies of canceled checks.

4 (B) The contractor must submit a final report in
5 accordance with the contract, using a form acceptable to the
6 department which shows:

7 (i) the total paid to each DBE; and

8 (ii) if the contract goal is not met, a description
9 of good faith efforts taken in accordance with applicable
10 contract provisions.

11 (4) Credit for expenditures. A contractor awarded a
12 federal-aid contract will receive credit for payments made to a
13 DBE firm in accordance with 49 CFR §26.55.

14 (5) Commercially useful function (CUF).

15 (A) DBE subcontractors must perform a commercially
16 useful function required in the contract in order for payments
17 to be credited toward meeting the contract DBE goal. A DBE
18 performs a commercially useful function when it:

19 (i) is responsible for a distinct element of the work
20 of a contract; [~~and~~]

21 (ii) actually manages, supervises, and controls the
22 materials, equipment, employees, and all other business
23 obligations attendant to the satisfactory completion of

1 contracted work~~[]~~; and

2 (iii) the CUF otherwise complies with 49 CFR

3 §26.55(c)(1)-(4).

4 (B) The department may conduct an on-site review of a
5 DBE performance to determine that it is performing a
6 commercially useful function as part of its routine monitoring
7 program or in response to information or allegations that the
8 DBE is not performing a commercially useful function.

9 (C) If the department determines that a DBE firm is not
10 performing a commercially useful function under the contract,
11 the department may:

12 (i) initiate a review of the eligibility of the DBE
13 firm in accordance with subsections (d)(9) and (10) of this
14 section [~~suspend the DBE firm from the department's DBE program~~
15 ~~for a period to be determined by the department~~];

16 (ii) deny all credit if the prime contractor did the
17 work itself or directed another company to do the work, or deny
18 credit from the time the department determined [~~and notified the~~
19 ~~prime contractor~~] that the DBE did not perform a commercially
20 useful function; and

21 [~~(iii) review DBE certification; and~~]

22 (iii) [~~(iv)~~] revoke DBE certification if an

23 eligibility review indicates that the firm does not meet the

1 standards as described in subsection (d)(4) of this section.

2 (D) A DBE may not appeal the department's determination
3 regarding CUF to USDOT pursuant to 49 CFR §26.55(c)(5) [~~49 CFR~~
4 ~~§26.89~~].

5 (6) Subcontracting.

6 (A) A DBE contractor or subcontractor may not
7 subcontract more than 70% of a federal-aid contract. The DBE
8 shall perform not less than 30% of the value of the contract
9 work with:

10 (i) assistance of employees employed and paid
11 directly by the DBE;

12 (ii) employees leased from an employee leasing
13 company as set forth in 49 CFR §26.71(q); and

14 (iii) equipment owned or rented directly by the DBE.

15 (B) A contractor may not furnish work crews to a DBE
16 subcontractor.

17 (C) A DBE may lease equipment consistent with standard
18 industry practice. A DBE may lease equipment from the prime
19 contractor if a rental agreement, separate from the subcontract
20 specifying the terms of the lease arrangement, is approved by
21 the department prior to the DBE starting the work. However, the
22 cost of supplies purchased or equipment leased from the prime
23 contractor or its affiliates may not be counted toward the DBE

1 goal.

2 (i) If the equipment is of a specialized nature, the
3 lease may include the operator. If the practice is generally
4 acceptable within the industry, the operator may remain on the
5 lessor's payroll. The operation of the equipment shall be
6 subject to the full control of the DBE, for a short term, and
7 involve a specialized piece of heavy equipment readily available
8 at the job site.

9 (ii) For equipment that is not specialized, the DBE
10 shall provide the operator and be responsible for all payroll
11 and labor compliance requirements.

12 (D) The value of the work of any DBE subcontractor
13 (tiered subcontractor) may only be counted toward the DBE goal
14 if the DBE's subcontractor is itself a DBE under 49 CFR \$26.55.

15 (7) Substitutions. A contractor must request approval
16 from the department to substitute another firm for a DBE firm
17 listed on an approved commitment.

18 (A) A contractor must provide written justification for
19 a request to substitute a DBE firm, including, but not limited
20 to, demonstrating that the original firm is unable or unwilling
21 to carry out the terms of the subcontract.

22 (B) The department will contact the DBE to be displaced
23 and other parties as needed to determine if the DBE firm to be

1 displaced is willing and able to carry out the terms of the
2 contract.

3 (i) The term "unable" includes, but is not limited
4 to:

5 (I) a firm that does not have the resources and
6 expertise to finish the project;

7 (II) a firm that substantially increases the time
8 to complete the project causing liquidated damages; and

9 (III) a firm that creates a safety hazard.

10 (ii) If the displaced firm is unwilling or unable to
11 carry out the terms of the subcontract, the department will
12 notify the contractor in writing within five working days of the
13 request of its consent to the substitution. The contractor must
14 make a good faith effort to substitute another certified DBE
15 firm for the one being displaced if the cancellation of the DBE
16 subcontract results in the prime not meeting the contract goal.

17 (iii) If the firm to be displaced is willing and able
18 to carry out the terms of the subcontract, the department will
19 deny the substitution.

20 (C) Any party aggrieved by the determination effecting
21 the substitution of subcontractors may avail itself of the
22 complaint procedures under §9.57 of this subchapter.

23 (8) Prompt payment. The prime contractor must comply

1 with the contract clause requiring payment to subcontractors for
2 satisfactory performance of its contracts no later than 10 days
3 from receipt of the department's scheduled payment to the prime
4 contractor, as required by Government Code, §2251.022. Failure
5 to do so is a breach of the department's contract and will
6 subject the prime contractor to legal and contractual remedies
7 available to the department and the subcontractor under
8 Government Code, Chapter 2253, as applicable.

9 (9) Retainage. If the prime contractor withholds
10 retainage from the subcontractors, the prime contractor must
11 make full payment of retainage to the subcontractors within 30
12 days of any subcontractor's satisfactory completion of its work.
13 Failure to do so is a breach of the department's contract and
14 will subject the prime contractor to legal and contractual
15 remedies available to the department and the subcontractor under
16 Government Code, Chapter 2253, as applicable.