

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

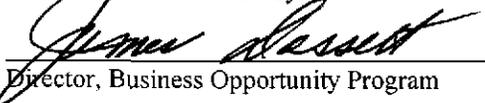
The Texas Transportation Commission (commission) finds it necessary to adopt amendments to §9.53, relating to the disadvantaged business enterprise program, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the adopted 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.

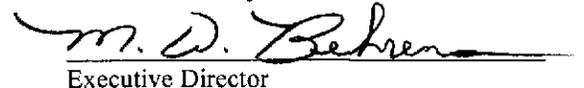
IT IS THEREFORE ORDERED by the commission that the amendments to §9.53 are adopted and are authorized for filing with the Office of the Secretary of State.

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

**110777 DEC 14 06**

Minute  
Number

Date  
Passed

1 Adoption Preamble

2 The Texas Department of Transportation (department) adopts  
3 amendments to §9.53, concerning the disadvantaged business  
4 enterprise (DBE) program. The amendments to §9.53 are adopted  
5 without changes to the proposed text as published in the October  
6 13, 2006 issue of the *Texas Register* (31 TexReg 8488) and will  
7 not be republished.

8

9 EXPLANATION OF ADOPTED AMENDMENTS

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

16

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

20

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

23

24 Subsection (d)(1) changes the DBE certification from three years  
25 to an open period conditioned upon no change in status and a

1 DBE's submission of an annual affidavit to this effect as  
2 required by 49 CFR Part 26, Subpart D.

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

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

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

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

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

1

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

11

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

18

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

23

24 Other revisions to §9.53 correct grammar and punctuation and do  
25 not substantively affect the rules.

1  
2 COMMENTS  
3 No comments on the proposed amendments were received.  
4  
5 STATUTORY AUTHORITY  
6 The amendments are adopted under Transportation Code, §201.101,  
7 which provides the Texas Transportation Commission with the  
8 authority to establish rules for the conduct of the work of the  
9 department.  
10  
11 CROSS REFERENCE TO STATUTE  
12 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.