

Disadvantaged Business Enterprise Program Plan for Federal Transit Administration Programs

Prepared by NDOT Civil Rights Office
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NEBRASKA

Good Life. Great Journey.

DEPARTMENT OF TRANSPORTATION



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Nebraska Department of Transportation Disadvantaged Business Enterprise Program Policy Statement

The Nebraska Department of Transportation (NDOT) has established a Disadvantaged Business Enterprise (DBE) program in accordance with the requirements of the U.S. Department of Transportation (USDOT) and the [Code of Federal Regulations, Title 49, Subtitle A, Part 26](#) (49 CFR Part 26). NDOT has received federal financial assistance from USDOT, and as a condition of receiving this assistance, NDOT has signed an assurance that it will comply with the requirements of 49 CFR Part 26.

It is the policy of NDOT 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 NDOT's 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 to applicable federal and state law;
4. to ensure that only firms that 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;
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.

The NDOT Civil Rights Compliance Manager, has been delegated as the DBE Liaison Officer (DBELO). In that capacity, the DBELO is responsible for implementing all aspects of the NDOT DBE program funded through the Federal Highway Administration (FHWA), Federal Transit Administration (FTA), and Federal Aviation Administration (FAA) programs. Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by NDOT in its financial assistance agreements with USDOT.

This policy statement is published on the [NDOT website](#) and a notice of availability of the policy statement has been distributed to all offices of NDOT; subrecipients of FHWA, FTA, and FAA funds; as well as DBE and non-DBE businesses that perform work on USDOT-assisted contracts in Nebraska.

Vicki Kramer, Director

Date

Subpart A – General Requirements

Section 26.1 Objectives

The objectives include the bulleted list found in the policy statement on the first page of this document.

Section 26.3 Applicability

NDOT is the recipient of federal transit funds authorized by Divisions A and C of the Bipartisan Infrastructure Law (BIL), Public Law 117-58.

As a recipient of federal funds from FTA, NDOT has established its DBE program in accordance with 49 CFR Part 26 and has committed to ensuring compliance on all FTA-funded transportation projects through monitoring, reporting, and goal setting. NDOT distributes federal transportation funds to local public agencies, non-profit agencies, and tribal agencies throughout Nebraska. As a condition of receipt of funding, these subrecipients must adopt the NDOT FTA DBE Program Plan.

Section 26.5 Definitions

A list of terms used in this document and their definitions can be found in Appendix A: Terms and Definitions.

Section 26.7 Non-discrimination Requirements

NDOT 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 based on race, color, sex, or national origin.

In administering its DBE program, NDOT 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

The NDOT Transit Program Specialist and NDOT DBELO will coordinate to produce and submit a semiannual report to FTA on or by June 1 and December 1 each year in the Transit Award Management System (TrAMS) to ensure accurate and timely reporting of DBE Participation to FTA. The submitted form of June 1 will cover the reporting period from October 1 through March 31. The submitted form of December 1 will cover the reporting period from April 1 through September 30.

NDOT's reports will reflect payments made to DBEs on USDOT-assisted contracts by NDOT and its subrecipients. Subrecipients receiving FTA funds will submit a DBE activity report to NDOT semiannually through the Local Assistance Division's Nebraska Public Transit Portal. The DBE activity report gathers awards/commitments; contracts, purchase orders, and invoices; payments on ongoing contracts; and total payments on contracts completed during the reporting period. The information on the activity report will be combined for all subrecipients and additional contract and payment information maintained by NDOT to populate the report that is sent to FTA.

Bidders List

The NDOT Civil Rights Office will coordinate with other offices within NDOT, subrecipients receiving bids on FTA-funded projects, and consultants overseeing FTA-funded projects to develop and maintain a bidders list to provide as accurate data as possible about the universe of DBE and non-DBE contractors and subcontractors who have sought work (successfully or unsuccessfully) on NDOT USDOT-assigned contracts for use in setting the overall DBE goal(s). The following information will be obtained about DBE and non-DBE contractors and subcontractors who seek to work on NDOT USDOT-assisted contracts and the information will be entered into a system designated by the USDOT:

- Firm name;
- Firm address including zip code;
- Firm's status as a DBE or non-DBE;
- Race and gender information for the firm's majority owner;
- NAICS code applicable to each scope of work the firm sought to perform in its bid;
- Age of the firm; and
- Annual gross receipts of the firm, to be specified by each firm indicating what gross receipts bracket they fit.

NDOT must collect the data from all bidders of federally assisted contracts by requiring the firm's information be submitted with their bids or initial responses to negotiated procurements. NDOT must enter the data into a USDOT-designated system no later than December 1 following the fiscal year in which the relevant contract was awarded.

DBE Records Retention and Reporting

For each DBE-certified firm, NDOT will retain a record of the firm's complete application package and Declarations of Eligibility, change notices, and on-site visit reports. These records will be retained in accordance with all applicable record retention requirements of NDOT's financial assistance agreement. Other certification or compliance-related records will be retained for a minimum of 3 years or as required by the [Records Retention and Disposition Schedules](#) of the State of Nebraska (State), unless otherwise provided by applicable record retention requirements for the financial assistance agreement, whichever is longer. These records will be filed and archived using means acceptable under State law and policy.

- Each calendar year, NDOT will submit to USDOT's Departmental Office of Civil Rights the following information:
- The number and percentage of in-state and out-of-state DBE certifications by gender and ethnicity (Black American, Asian-Pacific American, Native American, Hispanic American, Subcontinent-Asian Americans, and non-minority);
- The number of DBE certification applications received from in-state and out-of-state firms and the number found eligible and ineligible;
- The number of decertified firms:
 - Total in-state and out-of-state firms decertified;
 - Names of in-state and out-of-state firms decertified because a socially and economically disadvantaged owner (SEDO) exceeded the personal net worth cap;
 - Names of in-state and out-of-state firms decertified for excess gross receipts beyond the relevant size standard.

- The number of in-state and out-of-state firms summarily suspended;
- The number of in-state and out-of-state applications received for an individualized determination of social and economic disadvantage status;
- The number of in-state and out-of-state firms certified whose owner(s) made an individualized showing of social and economic disadvantaged status.

Section 26.13 Federal Financial Assistance Agreement

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

Assurance: 26.13(a)

Each financial assistance agreement NDOT signs with FTA (or a primary recipient) will include the following assurance:

The NDOT shall not discriminate based on race, color, national origin, or sex in the award and performance of any FTA-assisted contract or in the administration of its DBE program or the requirements of [49 CFR Part 26](#). NDOT shall take all necessary and reasonable steps under [49 CFR Part 26](#) to ensure nondiscrimination in the award and administration of FTA-assisted contracts.

The NDOT DBE program, as required by [49 CFR Part 26](#) and as approved by FTA, is incorporated by reference in this assurance. Implementation of this program is a legal obligation, and failure to carry out its terms shall be treated as a violation of this assurance. Upon notification to NDOT of its failure to carry out its approved program, FTA may impose sanctions as provided for under [49 CFR Part 26](#) and may, in appropriate cases, refer the matter for enforcement under [18 United States Code \(USC\) 1001](#) and/or the Program Fraud Civil Remedies Act of 1986 ([31 USC 3801 et seq.](#)).

Assurance: 26.13(b)

NDOT will ensure the following clause is included in each FTA-funded contract it signs with a contractor and each subcontract the prime contractor signs with a subcontractor:

The contractor, subrecipient, or subcontractor shall not discriminate based on 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 the recipient deems appropriate, which may include, but is not limited to:

1. *withholding of 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

NDOT is required to have a DBE program that meets the requirements of [49 CFR Part 26](#) because it receives planning, capital, and/or operating assistance. NDOT is not eligible to receive USDOT financial assistance unless USDOT has approved this DBE program and NDOT is in compliance with it and [49 CFR Part 26](#). NDOT will continue to carry out this program until all funds from USDOT financial assistance have been expended. NDOT does not have to submit regular updates of this DBE Program Plan if it remains in compliance. However, significant changes in this DBE Program Plan, including those required by regulatory updates, will be submitted for USDOT approval.

Section 26.23 Policy Statement

The Policy Statement is included on the first page of this program.

Section 26.25 DBE Liaison Officer (DBELO)

The following individual has been designated as the DBELO for NDOT:

Kimberly Baker
Civil Rights Compliance Manager/DBELO
1500 Nebraska Parkway
Lincoln, NE 68502

Phone: 402-479-4544

Email: kimberly.k.baker@nebraska.gov

In coordination with other appropriate officials, the DBELO is responsible for developing, implementing, and monitoring the DBE program and ensuring that NDOT complies with all provisions of [49 CFR Part 26](#). The DBELO has direct, independent access to Vicki Kramer, NDOT Director, concerning DBE program matters and reports administratively to the Deputy Director of Administration. An organizational chart displaying the DBELO's position in the organization is provided in Appendix B: DBE Program Organizational Chart.

The DBELO has a staff of six full-time employees and two on-call civil rights professional services consultants to carry out the NDOT Civil Rights program, including the DBE program. The DBELO supplements resources with consultant staff through on-call contracts as needed. The DBELO coordinates with other NDOT offices for the administration of the program as appropriate.

The duties and responsibilities of the DBELO include the following:

- Implement the NDOT DBE program in compliance with [49 CFR Part 26](#).
- Oversee and designate staff and resources in the development or execution of the NDOT DBE program to ensure compliance with [49 CFR Part 26](#).
- Incorporate the requirements of the NDOT DBE program into the appropriate manuals, directives, and policies relating to their respective areas of operations.
- Assist the agency divisions, contractors, and FTA subrecipients in understanding, implementing, and complying with the requirements of the NDOT DBE program and [49 CFR Part 26](#).

- Monitor and enforce agency, subrecipient, and contractor compliance with the NDOT DBE program and [49 CFR Part 26](#).
- Assist firms in applying for DBE certification in Nebraska.
- Ensure that only firms meeting the certification requirements and standards of the NDOT DBE program and [49 CFR Part 26](#) are certified in Nebraska.
- Maintain an accurate and up-to-date directory of certified DBE firms in Nebraska.
- Advise NDOT leadership on DBE matters and achievements.
- Work with appropriate divisions to set transit DBE goals.
- Identify contracts and procurements to determine if a DBE goal is appropriate and what DBE goal(s) should be included.
- Review third party contracts and purchase requisitions for compliance with this program.
- Analyze NDOT progress toward goal attainment and identify ways to improve progress.
- Ensure that bid notices and requests for proposals are available to DBEs in a timely manner.
- Provides DBEs with information and assistance in preparing bids, obtaining bonding and insurance.
- Plan and participate in DBE training seminars.
- Provide outreach to the DBEs and community organizations to advise them of opportunities.
- Gather and report statistical information as required by USDOT.

Section 26.27 DBE Financial Institutions

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

The NDOT DBELO investigated the availability of socially and economically disadvantaged financial institutions in Nebraska and in the states adjacent to Nebraska. NDOT will notify prime contractors of the availability of these institutions and will encourage the use of these institutions by way of a statement included in the letting notice. NDOT believes this notice provides reasonable encouragement given the already vigorous efforts of the Federal Deposit Insurance Corporation (FDIC) and the Office of the Comptroller of the Currency (OCC) Minority Depository Institution (MDI) programs.

NUCP-certified financial institutions are listed in the NDOT DBE directory. A list of nationwide current MDIs can be found on the FDIC website at [fdic.gov/regulations/resources/minority/mdi.html](https://www.fdic.gov/regulations/resources/minority/mdi.html).

Section 26.29 Prompt Payment Mechanisms

NDOT's Standard Specifications require all subcontractors performing work on DOT-assisted contracts 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 Section 26.29](#), NDOT's Standard Specifications require all contractors at every tier to include a Prompt Payment Clause in every subcontract. The Prompt Payment Clause shall stipulate:

- Payments to first-tier subcontractors for work satisfactorily completed shall be made by the contractor within 20 calendar days of receipt of progress payments from NDOT for said work.
- For lower-tier subcontracts the payment by any upper-tier subcontractor to a lower-tier subcontractor for work satisfactorily completed shall be made within 10 calendar days of receipt of progress payments from the upper-tier subcontractor for said work.
- The return of any and all retainage withheld by any upper-tier subcontractor shall be made within 30 calendar days after the satisfactory completion of the work by the lower-tier subcontractor.
- Subcontractors at any tier shall return to the Contractor or upper tier subcontractor, as the case may be, any and all overpayments that result from adjustments to measured and recorded quantities (as part of the preparation of subsequent progress payments or the final records) within 20 calendar days of receipt of written notice of the amount of overpayment.
- Subcontractors at any tier may not withhold from, delay, or postpone payment to lower-tier subcontractors without just cause and the written approval from the Department. All requests from the upper-tier subcontractor to withhold, delay, or postpone payment shall be submitted to the Department in writing, through the Contractor, describing the reason for the request, within 10 calendar days of receiving knowledge of the cause that supports the request.

Retainage

NDOT does not hold retainage from prime contractors. NDOT requires prime contractors to make prompt and full payment of any retainage kept by the prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed.

Monitoring of Prompt Payment

NDOT requires subrecipients to use an NDOT approved consultant to assist with contract administration and monitoring. The Contracted Consultant will acquire and report all payment information made to contractors and their subcontractors using means specified by NDOT. Contracted Consultants shall record and submit to NDOT the amount of the payment, whether the amount paid was subject to withholding, the date of payment, and the name of the contractor/subcontractor to which the payment was made. NDOT will regularly use the submitted information to determine whether prime contractors are making payments to subcontractors in a timely manner. Information pertaining to Prompt Payment Compliance is found on the [NDOT Contractor Information](#) website.

NDOT requires Contracted Consultants to perform DBE commercially useful function reviews and to perform reviews and report results on the transit Commercially Useful Function (CUF) form.

NDOT requires prime contractors to maintain records and documents of payments to subcontractors, including DBEs, for a minimum of 3 years. These records will be made available for inspection upon request by any authorized representative of NDOT or FTA. This reporting requirement extends to all subcontractors, both DBE and non-DBE.

Enforcement Actions for Noncompliance of Participants

The Contractor's failure to comply with the NDOT prompt payment specification is a breach of contract. Remedies for a breach of contract may include NDOT withholding progress payments to the Contractor, terminating the contract, or applying remedies described elsewhere in the contract.

Remedies shall be at the sole discretion of NDOT and in no event shall a subcontractor have rights, or cause of action, against NDOT.

The failure of any subcontractor to comply with applicable terms of these sections shall be communicated by the Contractor or upper-tier subcontractor to the subcontractor or lower-tier subcontractor, as the case may be, in writing and may result in NDOT withholding subcontract approval for future work.

Monitoring Contracts and Work Sites

NDOT reviews contracting records and actively monitors 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 performed by the DBEs to which the work was committed. Work site monitoring and verification of construction activities is performed through proactive observation, monitoring, and reporting. NDOT will maintain written certification that contracting records have been reviewed and monitored for this purpose.

Section 26.31 Directory

NDOT is a certifying member of the NUCP. The NUCP maintains a directory identifying all firms eligible to participate as DBEs across all USDOT programs, including transit. The NUCP provides a framework consistent with the elements required by [49 CFR Section 26.31](#). The purpose of the NUCP is to provide a single DBE directory for the State. The [NUCP agreement](#) is posted on the [NDOT Civil Rights Office](#) website.

Section 26.33 Overconcentration

NDOT is not aware of overconcentration in any work area. If NDOT determines that DBE firms are overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in that type of work, NDOT will take one or both of the following measures to address the overconcentration:

- Use incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which NDOT has determined that non-DBEs are unduly burdened.
- Vary the use of contract goals, to the extent consistent with [49 CFR Section 26.51](#), to ensure that non-DBEs are not unfairly prevented from competing for subcontracts.

NDOT will obtain the approval of FTA for its determination of overconcentration and the measures taken to address it.

Section 26.35 Business Development Programs

NDOT has a DBE Business Development Program (BDP) to assist firms in gaining the ability to compete successfully in the marketplace outside the DBE Program.

The purpose of the BDP is to provide selected DBE firms of demonstrated need a program of intensive business management training, technical training, and consultation/assistance that is tailored and designed to help each individual firm achieve self-established business objectives. The primary goals of the BDP are:

- To improve the capability and capacity of each DBE participant to successfully compete for and execute contracts, primarily in areas of work directly related to the construction, design, or planning of transportation projects;
- To achieve sustained business growth and profitability for program participants;
- To develop competencies in work types outside the participant's traditional areas of DBE participation; and
- To reduce or eliminate poor performance, delays in project completion, and delays in progress payments.

The DBE Development Stage of the BDP is designed to assist participants in overcoming their social and economic disadvantage by providing such training as may be needed to develop essential business knowledge, skills and abilities. The DBE Transitional Stage of the BDP is designed to assist participants in overcoming, insofar as practical, their social and economic disadvantage and to prepare them for sustained success upon graduating from the program. The business review portion of the BDP provides a level of proactive engagement and support that is conducive to the success of the participants and the achievement of BDP goals. Participants are graduated or discontinued upon achieving the BDP goals.

Section 26.37 Monitoring Responsibilities

NDOT requires subrecipients to use an NDOT approved consultant to assist with contract administration and monitoring for FTA funded capital improvement projects.

NDOT implements and carries out appropriate mechanisms to ensure compliance with [49 CFR Part 26](#) program requirements by all program participants, including prompt payment, and describes and sets forth these mechanisms in this DBE Program Plan.

NDOT actively monitors participation by maintaining a running tally of actual DBE attainments (e.g., payments made to DBE firms), including a means of comparing these attainments to commitments.

Monitoring Payments to DBEs and Non-DBEs

NDOT undertakes ongoing monitoring of prime payments to subcontractors over the course of any covered contract. Such monitoring activities are discussed above in Section 26.29 Prompt Payment Mechanisms.

Prompt Payment Complaints and Dispute Resolution

NDOT will take the steps discussed above in Section 26.29 Prompt Payment Mechanisms to resolve disputes as to whether work has been satisfactorily completed for purposes of [49 CFR Section 26.29](#).

Enforcement Actions for Noncompliance of Participants

NDOT will use the means discussed above in Section 26.29 Prompt Payment Mechanisms to enforce prompt payment mechanisms.

Monitoring Contracts and Work Sites

NDOT monitors contracts and work sites in the ways discussed in Section 26.29 Prompt Payment Mechanisms to ensure that work committed to DBEs at contract award or subsequently is performed by the DBEs to which the work was committed.

Section 26.39 Fostering Small Business Participation

NDOT has created a small business 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. NDOT provides technical assistance to subrecipients to ensure small business opportunities on its federally assisted contracting opportunities.

NDOT will continue to expand its resources and actions to assist small businesses and further foster small business participation on federally assisted contracts, including the following:

- Advertising all contracts, regardless of their size, to allow small businesses the opportunity to participate
- Encouraging and assisting subrecipients to structure federally assisted solicitations in a manner that will facilitate small business participation in their communities, including advertising solicitations on their websites
- Reviewing anticipated NDOT and subrecipient federally assisted procurements for potential set-asides for small businesses
- Providing resources to all small businesses via NDOT’s website, including:
 - a means by which prime contractors and subcontractors can solicit participation on contracts with and without DBE contract goals;
 - training opportunities relative to performing transportation projects or to aid small business enterprises in all facets of their business;
 - a list of contacts for the Civil Rights Office;
 - small business-related articles and information;
 - when appropriate, advertisements of federally funded contracting opportunities with subrecipients, to include goods and services opportunities.
- Partnering with the Nebraska Small Business Development Center (SBDC), Chambers of Commerce, the SBA Nebraska District office, and other local organizations to introduce small and disadvantaged businesses to federally assisted contracts and other resources

NDOT commits to assessing small business participation prior to the submittal of every triennial DBE overall goal. NDOT will continue to actively conduct outreach to organizations and agencies whose missions are to increase opportunities for small businesses.

Subpart C – Goals, Good Faith Efforts, and Counting

Section 26.43 Set-Asides or Quotas

NDOT does not use quotas in any way in the administration of this DBE program.

Section 26.45 Overall Goals

NDOT establishes an overall goal for DBE participation in FTA-assisted contracts. This goal covers a 3-year federal fiscal year period. In accordance with [49 CFR Section 26.45\(f\)](#), NDOT will submit its 3-year overall DBE participation goal to FTA by August 1 of the year in which the goal is due. The coming years in which NDOT must submit this updated overall DBE participation goal are 2026, 2029, and 2032, and every 3 years thereafter.

NDOT may adjust its 3-year overall goal during the 3-year period to which it applies to reflect changed circumstances. NDOT will submit such an adjustment to the FTA Region 7 Regional Civil Rights Officer for review and approval.

NDOT's overall DBE participation goal must be based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate on federally assisted contracts. The goal must reflect NDOT's determination of the level of DBE participation expected absent the effects of discrimination. NDOT's overall DBE participation goal is expressed as a percentage of all FTA funds that NDOT will expend in federally assisted contracts in the forthcoming 3 fiscal years.

A description of the methodology to calculate the overall goal and the most recent goal calculations can be found in Appendix C: NDOT Transit DBE Goal Setting Methodology.

In establishing an overall goal, NDOT must provide for consultation and publication. NDOT must consult with minority, women, 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 NDOT's efforts to establish a level playing field for the participation of DBEs. The consultation must include a scheduled, direct, interactive exchange (e.g., a face-to-face meeting, video conference, and teleconference) with as many interested stakeholders as possible focused on obtaining information relevant to the goal-setting process, and it must occur before NDOT is required to submit its methodology to FTA for review.

NDOT will document the consultation process in its goal submission. NDOT will not implement its proposed goal until this requirement is met.

In addition to the consultation described above, NDOT will publish a notice announcing the proposed overall DBE participation goal before submission to the FTA on August 1. The notice will be posted on the [NDOT website](#) and may be posted in any other sources (e.g., minority-focused media, trade association publications). If the proposed goal changes following review by FTA, the revised goal will be posted on the official internet web site.

The Overall Three-Year DBE Goal submission to FTA will include a summary of information and comments received, if any, during this public participation process and NDOT's responses to those comments.

NDOT will begin using the overall goal on October 1 of the relevant period, unless other instructions from FTA have been received.

Prior FTA Concurrence

NDOT understands that prior FTA concurrence with the overall DBE participation goal is not required. However, if FTA's review suggests that the overall goal has not been correctly calculated or that the method employed by NDOT for calculating goals is inadequate, FTA may, after consulting with NDOT, adjust the overall goal or require that the goal be adjusted by NDOT. The adjusted overall DBE participation goal is binding.

Section 26.47 Failure to Meet Overall Goals

NDOT understands that to be compliant with [49 CFR Part 26](#), an approved DBE program and overall DBE participation goal must be maintained, and this DBE program must be administered in good faith. Should DBE participation fall short of the overall DBE participation goal, NDOT cannot be penalized or treated by FTA as being in noncompliance with [49 CFR Part 26](#) unless NDOT fails to administer its DBE program in good faith.

NDOT understands that if the awards and commitments shown on the **award** report submitted to FTA at the end of any fiscal year are less than the overall DBE participation goal applicable to that fiscal year, a Shortfall Analysis composed of the following actions must be taken to be regarded by USDOT as implementing this FTA DBE program in good faith:

- Analyze in detail the reasons for the difference between the overall goal and the awards and commitments in that fiscal year.
- Establish specific steps and milestones to correct the problems identified in the analysis to enable the goal for the new fiscal year to be fully met.
- Within 90 days of the end of the fiscal year, prepare the analysis and corrective actions developed under paragraph (c)(1) and (2) of [49 CFR Section 26.47](#).
- Retain a copy of the Shortfall Analysis and corrective actions in records for a minimum of 3 years and make it available to FTA upon request.

Commented [JK1]: Referenced as Uniform Report in 2023 FTA PP

Section 26.49 Awards to Transit Vehicle Manufacturers

NDOT requires that each transit vehicle manufacturer (TVM) that quotes bids or proposes procurement in Nebraska must certify to NDOT that it is in compliance with this section.

Each TVM must establish an annual overall DBE percentage goal using [49 CFR Section 26.45](#) as a guideline. Each TVM may also establish contract-specific DBE goals with FTA concurrence. Each TVM must provide certification to NDOT that FTA has concurred with the TVM's overall and/or contract goal. Before accepting bids, NDOT confirms with FTA that the TVM has an approved DBE program and has submitted all required documentation. A TVM's failure to implement the DBE program in the manner prescribed this section and throughout 49 CFR part 26 will be deemed as non-compliant, will result in removal from FTA's certified TVM list, and will become ineligible to bid. NDOT's failure to comply with the requirements set forth in paragraph (a) of 49 CFR 26.49 may result in formal enforcement action or appropriate sanction as determined by FTA.

NDOT will submit the name of the successful bidder and the total dollar value of the contract in the manner prescribed in the grant agreement within 30 days of making the award.

Section 26.51 Means Used to Meet Overall Goals

Breakout of Estimated Race-Neutral and Race-Conscious Participation

NDOT will meet the maximum feasible portion of its overall goal by using race- and gender-neutral means of facilitating race- and gender-neutral DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures or is awarded a subcontract on a prime contract that does not carry a DBE contract goal. Measures used to achieve this may include the following:

- Publicize construction project notices and consulting requests to encourage DBE firms and other small businesses to participate;
- Provide assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing);
- Provide a supportive services program for DBE firms and other small businesses designed to facilitate development of business management skills, project management skills, and use of supporting technologies that:
 - Recruits and enrolls DBE Firms
 - Develops DBE Participants Business Plan (BDP)
 - Proactively engages DBEs to achieve DBE BDP goals
 - Provides training to develop the essential business knowledge, skills and abilities of the Participant.
 - Assists DBEs transition from the program upon graduation
- Provide other technical assistance to DBE firms and other small businesses as needed;
- Identify and promote projects that can be unbundled in order to promote DBEs and other small businesses to perform as a prime;
- Identify and promote joint venture opportunities to allow DBE firms and other small businesses to perform prime contracts in cooperation; and
- Ensure that a reasonable number of prime contracts are of a size that DBE firms and other small businesses can reasonably perform.
- Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; provision of information in languages other than English, where appropriate);
- Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;
- Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;

- Ensuring distribution of the DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and
- Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

The breakout of estimated race-neutral and race-conscious participation can be found in NDOT's most recently approved FTA goal-setting methodology (see Appendix C).

NDOT will arrange solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses by means such as those provided under [49 CFR Section 26.39](#).

Contract Goals

NDOT will use race-conscious contract goals to meet any portion of the overall goal that it does not project being able to meet using race-neutral means. This will be accomplished by advertising all projects regardless of their size, providing outreach and training opportunities to DBEs, and doing subrecipient outreach in their local communities.

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

If it is determined that the FTA DBE participation goal can be met through race-neutral means, the program will be implemented without establishing specific contract goals during that year.

Section 26.53 Good Faith Efforts Procedures with a Contract DBE Goal

Award of Contract

The apparent successful bidder is the bidder (DBE or non-DBE) who submits the lowest bid, is qualified and responsible, and signs the proposal document accompanying the bid stating that the firm will perform the work of the contract and comply with the various regulations and special provisions, including the appropriate DBE special provisions and the DBE goal, when applicable. These provisions further require the contractor to identify, no later than 5 days after bid opening as a matter of responsibility, the DBE(s) that will be used in commitment of meeting any DBE goal requirement, or in providing documentation of its good faith efforts (GFE) to meet the DBE goal requirement if it was unable to do so.

After bids are opened and analyzed, NDOT sends a notice of intent to award to the apparent low bidder contingent on completion of all pre-award conditions. These conditions include, but are not limited to, completion and submission of the NDOT Required DBE Participation Form, which provides the following information:

- Names and addresses of all subcontractors that bid, successfully or unsuccessfully, on subcontracts on the project
- Names and addresses of the DBE subcontractors that will participate in meeting the contract goal

- A complete description (by item number or group, etc.) of the work each named DBE subcontractor 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;
- The dollar amount of participation by each named DBE subcontractor
- Written and signed documentation from the bidder of commitment to use a DBE subcontractor whose participation it submits to meet a contract goal.
- Written and signed confirmation from each DBE by 5:00 p.m. on the fifth calendar day following the letting that the DBE is participating in the contract as provided in the prime contractor's commitment.
- If the contract goal is not met, the apparent low bidder must submit evidence of GFEs, including 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.

The submitted bid and completed Required DBE Participation Form is reviewed by the NDOT Civil Rights Office to determine whether the apparent low bidder has committed to meet the DBE contract goal by using certified DBEs who will be performing or supplying specific contract items for which they are licensed and certified to perform and will be performing commercially useful functions. Then, if the DBE goal requirement is met, and all other requirements set forth in the contract are met, NDOT issues the *Notice to Proceed* to the contractor.

Note that once a contract has been awarded, the winning contractor is responsible for achieving the dollar amount of DBE participation committed to, both as a whole and for each individual DBE identified as part of the bid commitment, even if that amount exceeds the original DBE goal of the contract.

Good Faith Efforts

GFEs are those demonstrated efforts taken by a contractor in compliance with [49 CFR Section 26.53](#) to achieve a DBE goal on a federally assisted contract, and which, by their scope, intensity, and appropriateness to the objective, can be reasonably expected to achieve the goal. Guidance concerning the standards of GFEs can be found in [49 CFR Section 26.53](#).

It is the obligation of every contractor to demonstrate that it has made a GFE to retain a DBE to complete work on projects with DBE goals. The bidder/contractor can demonstrate that it has done so either by fulfilling the goal or providing documented evidence of GFEs.

The NDOT Civil Rights Office examines and evaluates bids and monitors contract performance using the "running tally" process to determine if a contractor has achieved or is likely to achieve the contract DBE goal. If not, the NDOT Civil Rights Office determines, in accordance with [49 CFR Section 26.53](#) and [49 CFR Part 26, Appendix A](#), if the contractor made GFEs to achieve the DBE goal and then issues a written notice of its determination to the contractor.

When evaluating documented GFEs, the NDOT Civil Rights Office will examine what efforts were made by the contractor, when they were made, and how intensely those efforts were undertaken.

Considerations in making the determination will include, but not be limited to, the following:

- Whether the contractor solicited DBEs through all reasonable and available means, allowing adequate time for response, and following up on initial solicitations.
- Whether the contractor selected portions of the work to be performed by DBEs in order to increase the likelihood of meeting the DBE goals (including, where appropriate, breaking down contracts into economically feasible units to facilitate DBE participation).

- Whether the contractor provided interested DBEs with information about the plans, specifications, and requirements of the contract in a timely manner. What is timely may vary, but timeliness is directly related to the size of the contract, the complexity in preparing bids or quotes, and the urgency of project circumstance. Larger contracts that require greater complexity in creating bids or quotes will demand more time to complete than smaller or simpler contracts. An urgent project timeline during a replacement of a DBE on an existing contract will increase the expectancy of rapid response to solicitations.
- Whether the contractor negotiated in good faith with interested DBEs, not rejecting DBEs as unqualified without sound reasons based on a thorough evaluation of their current capabilities and previous work.
- Whether the contractor made efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance required by NDOT or the bidder.
- Whether the contractor took into consideration all relevant factors in negotiating with and selecting subcontractors and suppliers, DBE and non-DBE, including, but not limited to, each firm's price and capabilities, as well as subcontract and overall project goals.
- Whether the contractor, in not selecting a DBE subcontractor for reason of costs alone, demonstrated that such costs were out of line with comparative costs observed in the current competitive marketplace.
- Whether the contractor, in not achieving the DBE goal, selected to self-perform work for which a qualified DBE firm was available and willing to perform that work.
- Whether the contractor made efforts to assist interested DBEs in obtaining equipment, supplies, materials, or related assistance or services.
- Whether the contractor effectively used the services of available community organizations, contractor's groups, government business assistance offices, or other resources that might assist in identifying DBE firms.

If a contractor is attempting to prove GFEs at the time of a bid, documentation of GFEs shall be provided by a contractor to the NDOT Civil Rights Office by the close of business on the fifth business day following the letting (not counting the day of the letting). Extensions to this time frame may be granted at the discretion of the NDOT Civil Rights Office, but requests for extension must be received in writing by the NDOT Civil Rights Office within the original 5 business days.

The NDOT Civil Rights Office will carefully examine and weigh the GFE documentation submitted by the contractor. The NDOT Civil Rights Office will determine whether the GFE submittal was sufficient to prove that the contractor made a GFE to retain and use DBE subcontractors. The determination on whether the GFE submittal was sufficient will be made by the close of business on the second business day following receipt of the GFE documentation (not counting the day of receipt). The NDOT Civil Rights Office will prepare a document that will include the analysis of GFE factors, the application of those factors to the facts at hand, and all evidence submitted by the contractor. This document will serve as the record of decision. The record of the decision will then be sent to the contractor both electronically and by mail.

In the context of GFEs at the time of letting, if the NDOT Civil Rights Office determines that the contractor has demonstrated GFEs, the bid will be accepted. If the NDOT Civil Rights Office determines the contractor failed to demonstrate GFEs, NDOT will refuse the bid.

In the context of GFEs during the execution of a contract, if a contractor fails to achieve their DBE commitment but the NDOT Civil Rights Office determines that the contractor demonstrated a GFE in attempting to achieve the goal, the contractor will not be found in breach of contract. However, if a

contractor fails to achieve the contract DBE commitment and the NDOT Civil Rights Office determines that the contractor failed to demonstrate a GFE, NDOT may find the contractor in breach of contract.

Administrative Reconsideration

If the NDOT Civil Rights Office determines that the contractor failed to demonstrate GFEs, either at the time of the bid or during the performance of a contract, the contractor may request administrative reconsideration in accordance with [49 CFR Section 26.53\(d\)](#). The request by the contractor for administrative reconsideration must be made in writing and received by the NDOT Civil Rights Office by the close of business on the fifth business day after the contractor has received notice of the determination (not counting the day that the notice was received). If the contractor fails to make such a request, they will be deemed to have waived their right to request administrative reconsideration, and the determination of the NDOT Civil Rights Office will stand.

In an administrative reconsideration of a determination of GFE, the final decision is made by an office and personnel who did not take part in the original finding and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions. In fulfillment of this requirement, the final decision in the administrative reconsideration will be made by an attorney with the Nebraska Attorney General's office at NDOT or by an NDOT executive with guidance from the Attorney General's office. The selection of an executive will depend on availability at the time of the administrative reconsideration. When available, the administrator will be the NDOT Construction Engineer, who has a familiarity with the DBE program and has served in the capacity of hearing officer for prior GFE administrative reconsiderations. The Attorney General's office at NDOT is familiar with the DBE program, has a long history of experience with various DBE issues, and is an expert in the interpretation and application of facts and laws.

The contractor will have the opportunity to provide written documentation, or argument concerning the issue of whether it met the goal or made adequate GFEs to do so, to the reconsideration official. The contractor can also meet in person with the reconsideration official to discuss the issue of whether it met the goal or made adequate GFEs to do so.

The NDOT DBELO will provide the reconsideration official with all evidence relating to the contractor's GFEs, as well as a written memorandum of analysis and conclusions. The NDOT DBELO will also meet with the reconsideration official to answer questions and discuss issues pertaining to the findings.

The reconsideration official will prepare and send to the contractor and the NDOT DBELO a record of decision explaining the basis for the finding that the contractor did or did not meet the goal or make adequate GFEs to do so.

The result of the administrative reconsideration process is not administratively appealable to USDOT.

Section 26.55 Counting DBE Participation

DBE participation will be counted toward overall and contract goals as provided in NDOT's standard specification in compliance with [49 CFR Section 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 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 [49 CFR Part 26, Subpart D](#) at the time of the execution of the contract, the firm's participation will not be counted toward any DBE goals except as provided in [49 CFR Section 26.87\(j\)](#).

Subpart D – Certification Standards

NDOT will use the certification standards of [49 CFR Part 26, Subpart D](#) 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. NDOT makes all certification decisions based on the facts provided by the potential DBE firm.

For information about the certification process or to apply for certification, firms should contact Kimberly Baker, the NDOT DBELO. She can be reached by mail, phone, or email at:

Kimberly Baker
Civil Rights Compliance Manager/DBELO
1500 Hwy 2
Lincoln, NE 68509

Phone: 402-479-4544

Email: kimberly.k.baker@nebraska.gov

The Nebraska Uniform Certification Application form and documentation requirements can be found on the [NDOT Civil Rights website](#).

Subpart E – Certification Procedures

Section 26.81 Unified Certification Programs

It is the policy of all Nebraska recipients of USDOT financial assistance (including FTA) that firms certified as DBEs will have a level playing field on which to participate in USDOT-assisted contracts. To help remove barriers that may exist to the participation of all eligible DBE firms, and in accordance with [49 CFR Section 26.81](#), NDOT has entered into an agreement establishing the Nebraska Unified Certification Program (NUCP).

The purpose of the NUCP is to simplify and create a more efficient DBE certification process. The NUCP will provide “one-stop shopping” for firms applying for DBE certification with recipients of USDOT financial assistance in Nebraska. This includes recipients of USDOT financial assistance from FHWA, FAA, and FTA. The NUCP will have one application, one certification process, and one certification decision, which will allow eligible firms to participate as DBEs anywhere in the state in the respective categories of work for which the firms are certified.

The NUCP will follow all DBE certification procedures and standards of [49 CFR Part 26](#) on the same basis as USDOT recipients. The NUCP will cooperate fully with all oversight, review, and monitoring activities of USDOT and its operating administrations. The NUCP will implement all USDOT directives and guidance concerning DBE certification matters.

NDOT, as the administrator of the NUCP, commits (or has committed) sufficient resources to ensure the NUCP can carry out the requirements of [49 CFR Part 26](#).

The full text of [NUCP](#) and the [Uniform Certification Application](#) can be found on the can be found on the [NDOT Civil Rights website](#).

For NDOT’s DBE Certification Standards and Procedures for all USDOT Programs, See Appendix D: DBE Certification Standards and Procedures for USDOT Programs. For information about the certification process or to apply for certification, firms should contact:

Kimberly Baker
Civil Rights Compliance Manager/DBELO
1500 Nebraska Parkway
Lincoln, NE 68502

Phone: 402-479-4544
Email: kimberly.k.baker@nebraska.gov

Subpart F – Compliance and Enforcement

Section 26.101 Compliance Procedures Applicable to NDOT

NDOT understands that if it fails to comply with any requirement of [49 CFR Part 26](#), NDOT may be subject to formal enforcement action under [49 CFR Section 26.103](#) or [49 CFR Section 26.105](#) or appropriate program sanctions by FTA, 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 FTA program, any actions permitted under 49 USC 53 or applicable FTA program requirements.

Section 26.109 Information, Confidentiality, Cooperation, and Intimidation or Retaliation

For each DBE-certified firm, NDOT will retain a record of the firm's complete application package and all Declarations of Eligibility, change notices, on-site reviews, and records documenting the firm's compliance with the requirements of [49 CFR Part 26](#) during the time the firm is certified and for 3 years following the firm's withdrawal, decertification, or other removal from the program.

Other certification- or compliance-related records will be retained for a minimum of 3 years or as required by the [Records Retention and Disposition Schedules](#) of the State, whichever is longer. These records will be filed and archived using means acceptable under State law and policy.

NDOT will safeguard from disclosure to third parties' personal information and information that may be regarded as confidential business information in a manner consistent with Federal and State law. Notwithstanding any contrary provisions of State law, NDOT will not release personal information submitted in response to the personal net worth requirement to a third party (other than USDOT) without the written consent of the submitter, including applications for DBE certification and supporting information. However, this information will be transmitted to USDOT in any certification appeal proceeding under [49 CFR Section 26.89](#) or to any other state to which the individual's firm has applied for certification under [49 CFR Section 26.85](#).

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

NDOT, contractors, and any other participant in the DBE program will not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by [49 CFR Part 26](#) or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [49 CFR Part 26](#). Any violator of this prohibition will be considered in noncompliance with [49 CFR Part 26](#).

Appendix A: Terms and Definitions

Appendix B: DBE Program Organizational Chart

Appendix C: Transit DBE Goal Setting Methodology

Appendix D: DBE Certification Standards and Procedures for USDOT Programs