

# **Disadvantaged Business Enterprise DBE Program**

**City Utilities of Springfield, Missouri**



**Fiscal Year 2009**

DEPARTMENT OF TRANSPORTATION DBE PROGRAM – 49 CFR PART 26



U.S. Department  
of Transportation  
**Federal Transit  
Administration**

REGION VII  
Iowa, Kansas,  
Missouri, Nebraska

901 Locust Street  
Suite 404  
Kansas City, MO 64106  
816-329-3920  
816-329-3921 (fax)

February 12, 2009

John Penrose  
DBE Liaison Officer  
PO Box 551  
Springfield, MO 65801-0551

Re: DBE Goal for Federal Fiscal 2009  
Vendor ID 1828

Dear Mr. Penrose:

In accordance with the regulations on Participation of Disadvantaged Business Enterprises (DBEs) Program in the Department of Transportation's Financial Assistance Program, 49 CFR Part 26, the Federal Transit Administration's (FTA) Office of Civil Rights has reviewed the DBE goal submitted by City Utilities of Springfield, Missouri.

We examined the overall goal you submitted for FY2009. You submitted an overall DBE goal of 0% for the period of October 1, 2008 through September 30, 2009. You project that you will meet 100% of your overall goal through race neutral means. FTA's review considered the overall goal as well as the description of the data and methodology used in arriving at the overall goal, including the base figure calculation and evidence supporting the calculations; adjustments, if any, made to the base figure and the evidence supporting the adjustments; a summary of the relevant evidence in your jurisdiction; the projection of the proportion of your overall goal that you will meet through race neutral as opposed to race conscious means and the basis of your projections; and the evidence of public participation in setting your overall goal.

After reviewing this information, we have determined that the goal setting methodology used is consistent with the requirements of 49 CFR Part 26.45 and that you have followed the requirements for public participation in setting your overall goal consistent with 49 CFR Part 26.45(g). We have also accepted your projection of your overall goal that you expect through race neutral means. That projection is subject to modification during the fiscal year as provided in 49 CFR Part 26.51.

As you are aware, you must submit separate overall DBE goals for programs funded by the Federal Highway Administration and the Federal Aviation Administration.

If you have any questions or need assistance, you may telephone me at 816-329-3928 or contact me via email at [Thomas.harris@dot.gov](mailto:Thomas.harris@dot.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas C. Harris". The signature is fluid and cursive, with a long horizontal stroke at the end.

Thomas C. Harris  
Civil Rights Officer

Cc: Paula Schwach, Counsel, Region 7 (Electronic)

# Supplemental Annual Insert

## Fiscal Year 2008-2009

### **Positions and Responsibilities:**

1. DBE Liaison Officer (DBELO) (III.A):
  - a. John Penrose, 417-831-8413, Manager-Purchasing
2. Administrative Reconsideration Official (V.F):
  - a. Kyle McClure, 417-831-8370, Director-Public Policy/Governmental Relations

### **Certification**

City Utilities has elected to accept DBE certifications from any agency complying with the requirements of the US Department of Transportation (USDOT) regulations 49 CFR Part 26 and/or the Unified Certification Process (UCP). At the present time those agencies include Missouri Department of Transportation (MoDOT), Bi-State Development Agency (dba Metro), Lambert Airport Authority, Kansas City Area Transit Authority (KCATA), and the City of Kansas City, Aviation.

For information about the certification process or to apply for certification, firms should contact Carol Crawford (Buyer Analyst) @ 417-831-8333 or [carol.crawford@cityutilities.net](mailto:carol.crawford@cityutilities.net)

### **Introduction and Challenges**

In accordance with the Department of Transportation (DOT) requirements found in 49 Code of Federal Regulations (CFR) Part 26, recipients (i.e., City Utilities) are required to establish an overall annual goal for participation of Disadvantage Business Enterprises (DBEs) in DOT Assisted contracts. Recipients are required to submit their annual goals to the Federal Transit Administration (FTA) by August 1. The recommended annual goal is for FTA-assisted contracts.

In calculating our DBE goal for this year, City Utilities has reviewed all known projected FTA funded capital projects and has reviewed all known FTA funded non-capital projects that will be charged directly to operating expenses on City Utilities Transit Income Statement, Form 427.

City Utilities has been fortunate in FY 2003 thru FY 2006 to have successful DBE contractors for concrete work, bus turnouts and sidewalks that is reflected in our DBE goal attainment. However, new bidding opportunities for construction work for bus turnouts, sidewalks, and the like for FY 2009 will not exist, which will result in a significant challenge to achieve any FY

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2009 goal. Additionally, there are no Federally Certified DBE firms (in accordance with 49 CFR Part 26) within the Springfield Metropolitan Statistical Area (SMSA) for FY 2009 bidding opportunities. For example, the design work for the bus transfer facility, bus shelter solar panels, bus fare passes, bus parts, bus equipment.

The actual dollars for FY 2009 and FY 2010 have the potential of increasing, depending on the results of a bus transfer facility study that is being reviewed and potential renovations to our bus parking facility and City Utilities of Springfield would revise our DBE Goal. Currently, no building design, scope of work, timeline, nor total funding exists.

**Step 1: Determining a Base Figure for the Overall Goal**

The method City Utilities chose to calculate the baseline figure for the relative availability of “ready, willing, and able” DBEs in our market area is taken from Example 1 in 49 CFR §26.45. Although most of our business is done within Greene County, it was determined the Springfield Metropolitan Statistical Area (SMSA) represented the substantial majority of ready, willing and able contractors, subcontractors and vendors that City Utilities does business with in regards to FTA funded contracts. The SMSA consist of Greene, Christian, Polk, Webster and Dallas Counties in Missouri. City Utilities believes that during the past five (5) years significant participation came from the SMSA, despite our local, regional and national advertising efforts for our FTA-funded contracts.

The numerator for this figure was the number of certified DBEs in our geographical market area using MoDOT’s DBE directory within the NAICS codes that City Utilities anticipates spending DOT funds. The denominator represents the total number of ALL firms in our geographical market area within the NAICS codes that City Utilities anticipates spending DOT funds for Fiscal Year 2009. The denominator data was derived from U.S. Census Bureau’s current County Business Patterns (Year 2005) for the Springfield Metropolitan Statistical Area (SMSA) consisting of Greene, Christian, Polk, Webster and Dallas Counties in Missouri.

**Step 1: Formula**

Using NAICS Codes from U.S. Census Bureau for the Springfield Metropolitan Statistical Area (SMSA) consisting of Greene, Christian, Polk, Webster and Dallas Counties in Missouri.

MoDOT Certified DBE Firms:

NAICS 441310 (0 firms) + NAICS 334514 (0 firm) + NAICS 423610 (0 firm) +  
NAICS 541310 (0 firms) = 0 firms

Divided (/) By:

Total Available Firms in SMSA:

NAICS 441310 (84 firms) + NAICS 334514 (1 firm) + NAICS 423610 (13 firms) +  
NAICS 541310 (45 firms) = 143 firms

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BASE AVERAGE PERCENTAGE: Equals  $0/143 = 0.00\%$

**Step 2: Adjustment to Base Figure**

After calculating the Base Figure of 0.00 %, it was determined that Step 2 was not applicable.

City Utilities of Springfield, Missouri DBE Achieved Participation  
By Fiscal Year

Fiscal Year	DBE Participation (1)	DBE Break Out (2)	
		RN	RC
2005	18.07 %	17.43	.64
2006	18.23 %	18.23	0
2007	12.91 %	12.91	0
2008	10.43 %	9.40	1.03

- (1) New form “Uniform report of DBE awards of commitments & payments” started in 2005. Figures based on figures reported to FTA on semi-annual reports.  
(2) Percentage based on what was paid to DBE Contractors.  
RN=Race Neutral, RC=Race Conscious from FTA semi-annual reports

**Breakout of Estimated Race-Neutral and Race-Conscious Participation**

This year, City Utilities estimates that in meeting the overall proposed goal for DBE participation will be race-neutral participation.

In order to ensure that our DBE program will be narrowly tailored to overcome the effects of discrimination, as the year progresses, we will adjust the estimated breakout of race-neutral and race-conscious participation as needed to reflect actual DBE participation and we will track and report race-neutral and race conscious participation separately.

City Utilities uses the following, but not limited to, race-neutral means to increase DBE participation:

- Provide convenient times for pre-bids, pre-solicitation meetings, bid openings.
- Provide technical assistance as needed by Engineers or project managers on any bid.

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- Provide Risk Management assistance as needed on insurance, bonds, etc.
- Provide procurement assistance to all potential bidders as needed.
- Provide adequate notice of bid opportunities as needed (e.g., locally, regional and national)
- Provide DBE directory or directory web site to all potential bidders (e.g., contractors)
- Attend all prebids, presolicitation meetings to assist potential bidders with DBE guidance.
- No cost and no deposit for bid documents, drawings, specifications, etc.

For reporting purposes, race-neutral DBE participation includes, but not necessarily limited to, the following: DBE participation through a prime contract a DBE obtains through customer competitive procurement procedures; DBE participation through a subcontract on a prime contract that does not carry a DBE goal; DBE participation on a prime contract exceeding a contract goal; and DBE participation through a subcontract from a prime contractor that did not consider a firm's DBE status in making the award.

### Public Comments

As required, City Utilities solicited public comment and/or advertised the DBE goal using the following methods below:

- Letter Notification: Both DBE and non-DBE contractors who have expressed interest in City Utilities' DOT-assisted procurements were notified in writing on May 27, 2008 as to why a DBE goal was required, the methodology for establishing a DBE goal, and were invited to the public DBE Goal presentation and public participation meeting on June 11, 2008 at City Utilities.
- Public Participation Meeting: Both DBE and non-DBE contractors who have expressed interest in City Utilities' DOT-assisted procurements were notified in writing of the public meeting that was held on June 11, 2008 at City Utilities facility. The meeting reviewed the methodology for establishing a DBE goal.
- Advertisement: Notice of the revised DBE Goal was placed in the local Springfield News-Leader newspaper December, 2008 with notice to contact City Utilities or FTA Region VII (with address) for additional information or to make comments.
- Advertisement: Notice of the revised DBE Goal was placed in the local minority UNITE publication on January 2009 with notice to contact City Utilities or FTA Region VII (with address) for additional information or to make comments.

DBE Goal Public Comments and Feedback: City Utilities and FTA did receive one comment to date from the public advertisement, regarding the overall goal proposed DBE goal for FY 2009. Information was communicated to FTA.

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**RESOLUTION**

WHEREAS, the Transit System of City Utilities of Springfield, Missouri (CU) participates in the United States Department of Transportation (DOT) program; and

WHEREAS, the Code of Federal Regulations, Title 49, Part 26, establishes procedures and requirements for the participation of Disadvantaged Business Enterprises (DBEs) in DOT programs; and

WHEREAS, the Board of Public Utilities, within the limits of the City Charter of Springfield, Missouri and the laws of the State of Missouri, affirms that it is the policy of CU to ensure that DBEs as defined in 49CFR, Part 26, have an equal opportunity to receive and participate in DOT-assisted contracts.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF PUBLIC UTILITIES OF THE CITY OF SPRINGFIELD, MISSOURI, that the document denominated "City Utilities of Springfield, Missouri Disadvantaged Business Enterprise (DBE) Program" revised to conform to the new DOT programs relating to DBEs, a copy of which has been made available to the Board for its inspection this date, be and is hereby adopted by the Board of Public Utilities; and

RESOLVED FURTHER, that the General Manager be and is hereby authorized to carry out the policies and procedures of this program; and

RESOLVED FURTHER, that this resolution supersedes all previous resolutions dealing with the same subject matter.

**CERTIFICATE**

The undersigned, Frank Evans, Secretary of the Board of Public Utilities of the City of Springfield, Missouri, does hereby certify under his hand and seal of said Board of Public Utilities, that the above and foregoing is a true and correct copy of a resolution adopted by the Board of Public Utilities of the City of Springfield, Missouri, at its regular meeting held on the 26th day of August 1999, pursuant to notice of time and place duly given to all members of said Board, at which meeting a quorum was presented and voted throughout.

Dated this 26th day of August, 1999.

Frank Evans, Secretary

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**I. POLICY**

**A & B. Objectives /Policy Statement (§26.1, 26.23, 26.3)**

City Utilities of Springfield, Missouri (City Utilities) has established a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 26. City Utilities has received Federal financial assistance from the Department of Transportation, and as a condition of receiving this assistance, City Utilities has signed an assurance that it will comply with 49 CFR Part 26.

It is the policy of City Utilities to ensure that DBEs, as defined in Part 26, have an equal opportunity to receive and participate in DOT-assisted contracts. It is also our policy to:

1. Ensure nondiscrimination in the award and administration of DOT-assisted contracts;
2. Create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
3. Ensure that the DBE Program is narrowly tailored in accordance with applicable law;
4. Ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs; and
5. Help remove barriers to the participation of DBEs in DOT-assisted contracts.

City Utilities has designated a DBE Liaison Officer who is named in the “Supplemental Annual Insert”. In that capacity, the DBE Liaison Officer is responsible for implementing all aspects of the DBE program. Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by City Utilities in its financial assistance agreements with the Department of Transportation.

City Utilities has disseminated this policy statement to the Board of Public Utilities of the City of Springfield, Missouri, and all the components of our organization. City Utilities has distributed this statement to DBE and non-DBE business communities that perform work for us on DOT-assisted contracts. This policy statement is included in this DBE Program which has been distributed to the DBE and non-DBE business community. Additionally, this DBE Program has been made available through advertisements, direct mailing to DBE firms, public access at libraries, and at City Utilities’ Purchasing Department.

Robert E. Roundtree  
General Manager

Date: 8-26-99

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**C. Nondiscrimination (§26.7)**

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

In administering its DBE program, City Utilities 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.

**D. DBE Program Updates (§26.21)**

City Utilities will continue to carry out this program until all funds from DOT financial assistance have been expended, and will provide to DOT updates representing significant changes in the program.

**II. DEFINITIONS OF TERMS**

The terms used in this program have the meanings defined in 49 CFR §26.5 and are shown below.

Affiliation has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR Part 121.

(1) Except as otherwise provided in 13 CFR Part 121, concerns are affiliates of each other when, either directly or indirectly:

- (i) One concern controls or has the power to control the other; or
- (ii) A third party or parties controls or has the power to control both; or
- (iii) An identity of interest between or among parties exists such that affiliation may be found.

(2) In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

Alaska Native means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

Alaska Native Corporation (ANC) means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, et seq.).

Compliance means that a recipient has correctly implemented the requirements of this part.

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

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

Department or DOT means the U.S. Department of Transportation, including the Office of the Secretary, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).

Disadvantaged business enterprise or DBE means a for-profit small business concern --

- (1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and
- (2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

DOT-assisted contract means any contract between a recipient and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

Good faith efforts means efforts to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

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

Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. See definition of “tribally-owned concern” in this section.

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

Native Hawaiian means any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.

Native Hawaiian Organization means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

Noncompliance means that a recipient has not correctly implemented the requirements of this part.

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Operating Administration or OA means any of the following parts of DOT: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The "Administrator" of an operating administration includes his or her designees.

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

Primary industry classification means the four digit Standard Industrial Classification (SIC) code designation which best describes the primary business of a firm. The SIC code designations are described in the Standard Industry Classification Manual. As the North American Industrial Classification System (NAICS) replaces the SIC system, references to SIC codes and the SIC Manual are deemed to refer to the NAICS manual and applicable codes. The SIC Manual and the NAICS Manual are available through the National Technical Information Service (NTIS) of the U. S. Department of Commerce (Springfield, VA, 22261). NTIS also makes materials available through its web site ([www.ntis.gov/naics](http://www.ntis.gov/naics)).

Primary recipient means a recipient who receives DOT financial assistance and passes some or all of it on to another recipient.

Principal place of business means the business location where the individuals who manage the firm's day-to-day operations spend most working hours and where top management's business records are kept. If the offices from which management is directed and where business records are kept are in different locations, the recipient will determine the principal place of business for DBE program purposes.

Program means any undertaking on a recipient's part to use DOT financial assistance, authorized by the laws to which this part applies.

Race-conscious measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

Race-neutral measure or program is one that is, or can be, used to assist all small businesses. For the purposes of this part, race-neutral includes gender-neutrality.

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

Secretary means the Secretary of Transportation or his/her designee.

Set-aside means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

Small Business Administration or SBA means the United States Small Business Administration.

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

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

- (1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis.
- (2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
  - (i) "Black Americans," which include persons having origins in any of the Black racial groups of Africa;
  - (ii) "Hispanic Americans," which include persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
  - (iii) "Native Americans," which include persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
  - (iv) "Asian-Pacific Americans," which include persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;
  - (v) "Subcontinent Asian Americans," which include persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
  - (vi) Women;
  - (vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

Tribally-owned concern means any concern at least 51 percent owned by an Indian tribe as defined in this section.

You refers to a recipient, unless a statement in the text of this part or the context requires otherwise (i.e., 'You must do XYZ' means that recipients must do XYZ).

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**III. RESPONSIBILITY FOR DBE PROGRAM IMPLEMENTATION**

**A. DBE Liaison Officer (DBELO) (§26. 25)**

City Utilities has designated a DBE Liaison Officer (see “Supplemental Annual Insert” in this DBE Program) In that capacity, the DBELO, through subordinate personnel, is responsible for implementing all aspects of the DBE program and ensuring that City Utilities complies with all provisions of 49 CFR Part 26. The DBELO has direct, independent access to the General Manager concerning DBE program matters. An organizational chart displaying the DBELO’s position in the organization is available upon request from City Utilities’ Purchasing Department at 417-831-8363.

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

1. Gathers and reports statistical data and other information as required by DOT.
2. Reviews third party contracts and purchase requisitions for compliance with this program.
3. Works with all departments to set overall annual goals.
4. Identifies contracts and procurements so that DBE goals are included in solicitations (both race-neutral methods and contract-specific goals) and monitors results.
5. Analyzes City Utilities’ progress toward goal attainment and identifies ways to improve progress.
6. Participates in pre-bid meetings.
7. Participates with Purchasing to determine contractor compliance with good faith efforts.
8. Provides DBEs with information and assistance in preparing bids, obtaining bonding, and insurance.
9. Acts as liaison to the Uniform Certification Process (UCP) in Missouri .
10. Provides outreach to DBEs and community organizations to advise them of opportunities.
11. Maintains City Utilities’ updated directory on certified DBEs.

**IV. ADMINISTRATIVE REQUIREMENTS**

**A. DBE Financial Institutions (§26.27)**

It is the policy of City Utilities to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community, to make reasonable efforts to use these institutions, and to encourage prime contractors on DOT-assisted contracts to make use of these institutions. We have made efforts to identify and use such institutions. A listing of those institutions is available from City Utilities’ Purchasing’ Department at 417-831-8363 or 417-831-8377 (fax) .

**B. DBE Directory (§26. 31)**

City Utilities of Springfield, MO uses the Missouri Regional Certification Committee (MRCC) DBE Directory. The MRCC DBE Directory is located at MoDOT’s website. The MRCC DBE Directory is a compiled DBE Directory for the Unified Certification Program (UCP) consisting of such principal entities as City of St. Louis, Bi-State Development Agency (dba Metro), City of Kansas City, Kansas City Area Transportation Authority and Missouri Department of Transportation.

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**C. Overconcentration (§26.33)**

City Utilities has not identified any overconcentration of DBE firms in certain types of work.

**V. DETERMINING, MEETING, AND COUNTING OVERALL ANNUAL DBE GOALS FOR FEDERALLY-ASSISTED CONTRACTS.**

**A. Overall Goal Process (§26.45)**

City Utilities submits its overall goal to FTA on August 1 of each year. Before establishing the overall goal each year, City Utilities will consult with known minority, women's and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, to obtain information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and City Utilities' efforts to establish a level playing field for the participation of DBEs.

Following this consultation, we will publish a notice of the proposed overall goal, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at City Utilities' Purchasing Department for 30 days following the date of the notice, and informing the public that City Utilities and FTA will accept comments on the goals for 45 days from the date of the notice. This notice will be published in, but not limited to, Springfield, Missouri's local newspaper. The notice will include an address to which comments may be sent and where the proposal may be reviewed.

City Utilities will begin using its overall annual goal on October 1 of each year, unless given other instructions by FTA.

**B. Amount of Goal (§26.45)**

City Utilities' overall annual goal for each fiscal year is listed on the enclosed "Supplemental Annual Insert" in this DBE Program.

**C. Method (§26.45)**

The methodology City Utilities used to calculate its annual overall goal for each fiscal year is outlined on the enclosed "Supplemental Annual Insert" in this DBE Program.

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**D. Breakout of Estimated Race-Neutral and Race-Conscious Participation (§26.51)**

City Utilities will meet the maximum feasible portion of its overall annual goal by using race-neutral means for facilitating DBE participation. City Utilities uses race-neutral means to increase DBE participation. Some examples are:

1. Arrange solicitations, pre-bid meeting times, bid opening times, etc. in ways that accommodate DBE and other small business owners' schedules.
2. Provide assistance with reducing bonding requirements.
3. Provide technical engineering and risk management assistance.
4. Advertise in local and regional plan rooms for large dollar and construction projects.
5. Ensure adequate distribution of DBE directory.

City Utilities' overall goal is derived from percentages from race-neutral and race-conscious measures. Those percentages and a summary of those estimated breakouts are shown on the "Supplemental Annual Insert" in this DBE Program .

City Utilities will adjust the estimated breakout of race-neutral and race-conscious participation as needed to reflect actual DBE participation (see §26.51(f)), and City Utilities will track and report race-neutral and race-conscious participation separately. For reporting purposes, race-neutral DBE participation includes, but is not necessarily limited to, the following:

- DBE participation through a prime contract a DBE obtains through customary competitive procurement procedures;
- DBE participation through a subcontract on a prime contract that does not carry a DBE goal;
- DBE participation on a prime contract exceeding a contract goal; and
- DBE participation through a subcontract from a prime contractor that did not consider a firm's DBE status in making the award.

**E. Contract Goals (§26.51)**

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

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

City Utilities will express contract goals as a percentage of the total amount of a DOT-assisted contract.

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**F. Good Faith Efforts (§26.53)**

Information to be submitted

City Utilities treats bidders'/offerors' compliance with good faith efforts requirements as one of the factors to be considered when selecting lowest and best bid.

Each solicitation for which a contract goal has been established will require the bidders/offerors to submit the following information with their bid:

1. The names and addresses of DBE firms that will participate in the contract;
2. A description of the work that each DBE will perform;
3. The dollar amount of the participation of each DBE firm;
4. Written and signed documentation of commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;
5. Written and signed confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment;
6. The age of the firm;
7. The annual gross receipts of the firm; and
8. If the contract goal is not met, evidence of good faith efforts.

Demonstration of good faith efforts (§26.53)

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

A committee will be responsible for determining whether a bidder/offeror who has not met the contract goal has documented sufficient good faith efforts to be regarded as lowest and best bid. The committee is represented by personnel from Purchasing, the requesting department, and others as deemed necessary.

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

Administrative reconsideration (§26.53)

Within 14 days of being informed by City Utilities that it has not documented sufficient good faith efforts, a bidder/offeror may request administrative reconsideration. Bidders/offerors should make this request in writing to the reconsideration official as named on the "Supplemental Annual Insert" in this DBE Program. The reconsideration official will not have played any role in the original determination that the bidder/offeror did not make/document sufficient good faith efforts.

As part of this reconsideration, the bidder/offeror will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The bidder/offeror will have the opportunity to meet in person with the reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so. City Utilities will send the bidder/offeror a written decision on reconsideration,

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explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so.

The result of the reconsideration process is not administratively appealable to the Department of Transportation.

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

City Utilities will require a contractor to make good faith efforts to replace a DBE that is terminated or has otherwise failed to complete its work on a contract with another certified DBE, to the extent needed to meet the contract goal. City Utilities will require the prime contractor to notify the DBE Liaison Officer immediately of the DBE's inability or unwillingness to perform and provide reasonable documentation.

In this situation, City Utilities will require the prime contractor to obtain City Utilities' prior approval of the substitute DBE and to provide copies of new or amended subcontracts, or documentation of good faith efforts. Administrative remedies that City Utilities may use are:

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

**G. Counting DBE Participation (§26.55)**

City Utilities will count DBE participation toward overall and contract goals as provided in 49 CFR Part 26 §26.55.

**H. Quotas, Set-asides, and Penalties (§26.43, 26.47)**

City Utilities will not use quotas or set-asides in any way in the administration of this DBE program.

**I. Transit Vehicle Manufacturers (§26.49)**

City Utilities will require each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, to certify that it has complied with the requirements of this section. Alternatively, City Utilities may, at its discretion and with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of the TVM complying with this element of the program.

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**VI. REQUIRED CONTRACT PROVISIONS**

**A. Assurances (§26.13)**

Federal Financial Assistance Agreement Assurance

City Utilities has signed the following assurance, applicable to all DOT-assisted contracts and their administration:

City Utilities shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE Program or the requirements of 49 CFR Part 26. The recipient shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE Program, as required by 49 CFR Part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to City Utilities of its failure to carry out its approved program, the Department may impose sanctions as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).

Contract Assurance

City Utilities will ensure that the following clause is placed in every DOT-assisted contract and the Contractor will ensure that the following clause is placed in every contract with their subcontractors:

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

**B. Prompt Payment (§26.29)**

City Utilities will include the following clause in each DOT-assisted prime contract:

The prime contractor agrees to pay each subcontractor under this prime contract for satisfactory performance of its contract no later than 30 calendar days from the receipt of each payment the prime contractor receives from City Utilities. The prime contractor agrees further to return retainage payments to each subcontractor within 30 calendar days after the subcontractor's work is satisfactorily completed. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of City Utilities. This clause applies to both DBE and non-DBE subcontractors.

It is the responsibility of the subcontractors to notify City Utilities' DBE Liason Officer of prime contractor noncompliance with the above prompt payment provisions. Upon receipt of such notification, City Utilities will investigate and take appropriate action.

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**C. Monitoring and Enforcement Mechanisms (§26.37)**

City Utilities will require the prime contractor to submit a DBE Payment Affidavit with each progress payment, as well as prior to issuing final payment, to verify that the work committed to DBE subcontractors was actually performed by the DBEs listed in the prime contractor's bid. The prime contractor must submit these affidavits stating the work the DBEs performed and the actual amounts paid to the DBE subcontractors for the performance of this work. In addition to the prime contractor's signature on the affidavit, the DBE subcontractor will also be required to sign the affidavit certifying they have been paid for the completion of the work as described on the affidavit.

In the event the Contractor fails to submit these affidavits, City Utilities reserves the right to pursue all federal, state, and local remedies, including, but not limited to, liquidated damages and suspension and debarment.

City Utilities will bring to the attention of the Department of Transportation any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the DOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in §26.109. City Utilities also will consider similar action under our own legal authorities, including responsibility determinations in future contracts.

**D. Contractor Reporting Requirements (§26.55 )**

The Contractor will count DBE participation toward contract goals as provided in 49 CFR §26.55.

**VII. CERTIFICATION STANDARDS**

**A. Certification Standards (§§26.61 – 26.91)**

To be certified as a DBE, a firm must meet all certification eligibility standards of 49 CFR Subpart D of Part 26.

Information concerning Certification Standards is listed below and copies are available upon request from City Utilities' Purchasing Department at 417-831-8363.

- B. Burden of Proof (§26.61).**
- C. Group Membership Determination (§26.63).**
- D. Social and Economic Disadvantage (§26.67) (Appendix E).**
- E. Business Size Determination (§26.65)**
- F. Ownership Determination (§26.69)**
- G. Control Determination (§26.71)**
- H. Other Considerations (§26.73)**

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**VIII. CERTIFICATION PROCEDURES**

**A. Certification Procedures**

City Utilities of Springfield, MO does not do any DBE certifications, but uses the DBE certifications as shown on the MRCC DBE Directory to locate DBE's for City Utilities' Transit projects and procurements. The MRCC DBE Directory is located at MoDOT's website.

The MRCC DBE directory is a compiled DBE Directory for the Unified Certification Program (UCP) consisting of such principal entities as City of St. Louis, Bi-State Development Agency (dba Metro), City of Kansas City, Kansas City Area Transportation Authority, and Missouri Department of Transportation.

For information about the certification process or to apply for certification, firms should contact Carol Crawford (Buyer Analyst) 417-831-8333 or [carol.crawford@cityutilities.net](mailto:carol.crawford@cityutilities.net)

**B. Unified Certification Program (UCP) (§26.81)**

In general, the UCP shall provide "one-stop shopping" to applicants for certification, such that an applicant is required to apply only once for a DBE certification that will be honored by all recipients in the state.

The Disadvantaged Business Enterprise (DBE) requirements contained in 49 CFR Part 26 include a provision for a "one-stop" certification process. The Missouri Department of Transportation entered into a Memorandum of Understanding with four other partnering DBE certifying agencies in the State of Missouri, including the City of St. Louis, Bi-State Development Agency (dba Metro), Kansas City Area Transportation Authority, and the City of Kansas City. The partnering agencies form the Missouri Regional Certification Committee (MRCC).

Under the Memorandum of Understanding, the MRCC members agree that any and all firms certified as a DBE by any MRCC member shall be recognized as being certified in accordance with 49 CFR Part 26 and such certification will be accepted by all MRCC members.

City Utilities of Springfield, MO does not do any certification but uses the certifications as shown on the MRCC DBE directory to locate DBE's for their Transit related projects and procurements. The MRCC DBE directory is located at MoDOT's website.

The MRCC DBE directory is a compiled DBE Directory for UCP (City of St. Louis, Metro, City of Kansas City, Kansas City Area Transportation Authority and Missouri Department of Transportation).

**IX. RECORDKEEPING, MONITORING AND ENFORCEMENT (§26.11, 26.37)**

**A. Bidders List (§26.11)**

City Utilities will create a bidders list consisting of information about all DBE and non-DBE firms that bid or quoted on DOT-assisted contracts. The purpose of this requirement is to allow use of the

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bidders list approach to calculating overall goals. The bidders list will include the name, address, DBE/non-DBE status, age of the firm, and annual gross receipts of the firms.

City Utilities will collect this information in the following way:

Prime bidders will be required to report, with their bid, the following information on both themselves and all subcontractors:

1. Firm's address;
2. Firm's status as a DBE or non-DBE ;
3. The age of the firm; and
4. The annual gross receipts of the firm.

**B. Monitoring Payments to DBEs (§26.37)**

City Utilities will require prime contractors to maintain records and documents of payments to DBEs for three years following the performance of the contract. These records will be made available for inspection upon request by any authorized representative of City Utilities or DOT. This reporting requirement also extends to any certified DBE subcontractor.

City Utilities will require the Prime Contractor to keep a running tally of actual payments to DBE firms for work committed to them on this contract. City Utilities reserves the right to perform interim audits of contract payments to DBEs. This audit would review payments to DBE subcontractors to ensure that the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts stated in the schedule of DBE participation.

**C. Reporting to FTA (§26.11)**

City Utilities will report DBE participation on a semi-annual basis, using the form titled "Uniform Report of DBE Awards or Commitments and Payments".

**X. PUBLIC PARTICIPATION AND OUTREACH EFFORTS (§26.15, 26.45, 26.51)**

Public participation and outreach efforts will be done in accordance with, but not limited to, §26.15; §26.45; and §26.51. Copies are available upon request from City Utilities' Purchasing Department at 417-831-8363.

Confidentiality

City Utilities will safeguard from disclosure to third parties information that may reasonably be regarded as confidential business information, consistent with Federal, state, and local law. Notwithstanding any contrary provisions of state or local law, City Utilities will not release personal financial information submitted in response to the personal net worth requirement to a third party (other than DOT) without the written consent of the submitter.

## **APPENDIX A to PART 26**

### **GUIDANCE CONCERNING GOOD FAITH EFFORTS**

I. When, as a recipient, you establish a contract goal on a DOT-assisted contract, a bidder must, in order to be responsible and/or responsive, make good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it does not meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took all necessary and reasonable steps to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.

II. In any situation in which you have established a contract goal, part 26 requires you to use the good faith efforts mechanism of this part. As a recipient, it is up to you to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. It is important for you to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made. The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere pro forma efforts are not good faith efforts to meet the DBE contract requirements. We emphasize, however, that your determination concerning the sufficiency of the firm's good faith efforts is a judgment call: meeting quantitative formulas is not required.

III. The Department also strongly cautions you against requiring that a bidder meet a contract goal (i.e., obtain a specified amount of DBE participation) in order to be awarded a contract, even though the bidder makes an adequate good faith efforts showing. This rule specifically prohibits you from ignoring bona fide good faith efforts.

IV. The following is a list of types of actions which you should consider as part of the bidder's good faith efforts to obtain DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

A. Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The bidder must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

B. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.

C. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.

D. (1) Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as

## **APPENDIX A to PART 26**

### **GUIDANCE CONCERNING GOOD FAITH EFFORTS**

to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.

(2) A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

E. Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.

F. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.

G. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

H. Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, state, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

V. In determining whether a bidder has made good faith efforts, you may take into account the performance of other bidders in meeting the contract. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts.

## APPENDIX E to PART 26

### **INDIVIDUAL DETERMINATIONS OF SOCIAL AND ECONOMIC DISADVANTAGE**

The following guidance is adapted, with minor modifications, from SBA regulations concerning social and economic disadvantage determinations (see 13 CFR 124.103(c) and 124.104).

#### **Social Disadvantage**

I. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. Social disadvantage must stem from circumstances beyond their control. Evidence of individual social disadvantage must include the following elements:

(A) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;

(B) Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and

(C) Negative impact on entry into or advancement in the business world because of the disadvantage. Recipients will consider any relevant evidence in assessing this element. In every case, however, recipients will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.

(1) Education. Recipients will consider such factors as denial of equal access to institutions of higher education and vocational training, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.

(2) Employment. Recipients will consider such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer or labor union; and social patterns or pressures which have channeled the individual into non-professional or non-business fields.

(3) Business history. The recipient will consider such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.

## APPENDIX E to PART 26

### **INDIVIDUAL DETERMINATIONS OF SOCIAL AND ECONOMIC DISADVANTAGE**

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

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

#### **Economic Disadvantage**

(A) General. Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.

(B) Submission of narrative and financial information.

(1) Each individual claiming economic disadvantage must describe the conditions which are the basis for the claim in a narrative statement, and must submit personal financial information.

(2) When married, an individual claiming economic disadvantage also must submit separate financial information for his or her spouse, unless the individual and the spouse are legally separated.

(C) Factors to be considered. In considering diminished capital and credit opportunities, recipients will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including personal income for the past two years (including bonuses and the value of company stock given in lieu of cash), personal net worth, and the fair market value of all assets, whether encumbered or not. Recipients will also consider the financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification, or, if not

## **APPENDIX E to PART 26**

### **INDIVIDUAL DETERMINATIONS OF SOCIAL AND ECONOMIC DISADVANTAGE**

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

(D) Transfers within two years.

(1) Except as set forth in paragraph (D)(2) of this appendix, recipients will attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust, a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to a concern's application for participation in the DBE program, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

(2) Recipients will not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(3) In determining an individual's access to capital and credit, recipients may consider any assets that the individual transferred within such two-year period described by paragraph (D)(1) of this appendix that are not considered in evaluating the individual's assets and net worth (e.g., transfers to charities).