

**LEE COUNTY PORT AUTHORITY  
DISADVANTAGED BUSINESS ENTERPRISE PROGRAM**

**Policy Statement & Objectives 49 CFR (Part 26.1, 26.23)**

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

It is the policy of the Authority to ensure that DBEs, as defined in part 26, have an equal opportunity to receive and participate in DOT-assisted contracts awarded by the Authority.

It is also our policy:

- ➔ To ensure nondiscrimination in the award and administration of DOT-assisted contracts;
- ➔ To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
- ➔ To ensure that the DBE Program is narrowly tailored by utilizing race neutral/race conscious means;
- ➔ To ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
- ➔ To help remove barriers to the participation of DBEs in DOT-assisted contracts; and
- ➔ To assist the development of firms that can compete successfully in the market place outside the DBE Program.

The Port Authority has designated the following individual as our Disadvantaged Business Enterprise Liaison Officer (DBELO): Charles F. Taylor, Senior Manager, Office of Small Business Development, SWFIA, 11000 Terminal Access Road, Suite 8671, Fort Myers, FL 33913, Phone: (239) 590-4625, e-mail: [cftaylor@flylcpa.com](mailto:cftaylor@flylcpa.com). In that capacity, the Senior Manager is responsible for implementing all aspects of the DBE program and ensuring that the Authority complies with all provisions of 49 CFR Part 26. Mr. Taylor has direct, independent access to the Executive Director concerning DBE program matters. The DBELO has adequate staff assigned to the DBE program on a full-time basis.

By: \_\_\_\_\_  
**Robert M. Ball, A.A.E.**  
**Executive Director**  
**Lee County Port Authority**

**LEE COUNTY PORT AUTHORITY DISADVANTAGED BUSINESS ENTERPRISE  
(DBE) PROGRAM**

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## **Section 1.2 – Application of 49 CFR Part 26**

49 CFR Part 26 regulations are applicable to Recipients of the following types of funds:

- A. Federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, 105 Stat. 1914, or Titles I, III, and V of the Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21), Pub. L. 105-178m 112 Stat. 107.
- B. Federal Transit funds Authorized by Titles I, II, V and VI of ISTEA, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA-21, Pub. L. 105-178.
- C. Airport funds authorized by 49 U.S.C. 47101, et seq.
  - 1. (Reserved)
  - 2. If a Recipient is letting a contract, and that contract is to be performed entirely outside the United States, its territories and possessions, Puerto Rico, Guam, or the Northern Marianas Island, 49 CFR Part 26 does not apply to the contract.
  - 3. If a Recipient is letting a contract in which DOT financial assistance does not participate, 49 CFR Part 26 does not apply to the contract.

## **Section 1.3 - DOT Contract Assurances (26.13)**

- A. The Authority is a recipient of DOT funds in excess of \$250,000.
- B. The Authority will continue to carry out its DBE program until all DOT funds are expended.
- C. Each financial assistance agreement the Authority signs with a DOT operating administration (or a primary recipient) will include the following assurance:

The Authority 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 Authority 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 Authority'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 the Authority 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.).

Each contractual agreement with a contractor (and each subcontract the Prime Contractor signs with a Subcontractor) must include the following assurance:

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.

## **SECTION II – DEFINITIONS USED**

### **Section 2.1 Applicable Definitions**

The definitions of 49 CFR Part 26.5 are incorporated in the Authority's DBE Program.

- A. 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.
    - (a) One concern controls or has the power to control the other; or
    - (b) A third party or parties controls or has the power to control both; or
    - (c) 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.
- B. 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.
- C. 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.)
- D. Compliance means that a recipient has correctly implemented the requirements of this part.

- E. 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.
- F. Contractor means one who participates, through a contract or subcontract (at any tier), in a DOT-assisted highway, transit, or airport program.
- G. 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).
- H. 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.
- I. 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.
- J. 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.
- K. Immediate family member means father, mother, husband, wife, son, daughter, brother, grandmother, grandfather, grandson, granddaughter, mother-in-law, or father-in-law.
- L. 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 United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, or community resides. See definition of “Tribally-owned concern” in this section.
- M. 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.

- N. Native Hawaiian means any individual whose ancestors were natives, prior to 1778, of the area, which now comprises the State of Hawaii.
- O. Native Hawaiian Organization means any community service organization serving Native Hawaiians in the State of Hawaii, which is a non-for-profit organization, chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.
- P. Noncompliance means that a recipient has not correctly implemented the requirements of this part.
- Q. 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.
- R. 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.
- S. Primary Industry Classification means the four-digit Standard Industrial Classification (SIC) code designation that 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)).
- T. Primary Recipient means a recipient to which DOT financial assistance is extended and who passes some or all of it on to another recipient.
- U. 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 office from which management is directed and where business records are kept in different locations, the recipient will determine the principal place of business for DBE program purposes.
- V. Program means any undertaking on a recipient’s part to use DOT financial assistance, authorized by the laws to which this part applies.
- W. Race-conscious measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

- X. 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.
- Y. 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.
- Z. Secretary means the United States Secretary of Transportation or his/her designee.
- AA. Set-aside means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.
- BB. Small Business Administration or SBA means the United States Small Business Administration.
- CC. 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 regulation implementing it (13 CFR Part 121) that also does not exceed the cap on average annual gross receipts specified in §26.65(b).
- DD. 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:
    - a. “Black Americans,” which includes persons having origins in any of the Black racial groups of Africa;
    - b. “Hispanic Americans,” which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
    - c. “Native Americans,” which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
    - d. “Asian-Pacific Americans,” which includes 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, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;

- e. "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
- f. Women;
- g. Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

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

In the event that said definitions are revised or amended, such changes will automatically be incorporated hereto.

### **SECTION III – DETERMINING DBE ELIGIBILITY (26.61 - 73)**

#### **Section 3.1 Ownership**

- A. In determining whether the socially and economically owners in a firm own the firm, the Authority must consider all the facts in the record, viewed as a whole. To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.
  - 1. In the case of a corporation, such individuals must own at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding.
  - 2. In the case of a partnership, 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged individuals. Such ownership must be reflected in the firm's partnership agreement.
  - 3. In the case of a limited liability company, at least 51 percent of each class of member interest must be owned by socially and economically disadvantaged individuals.
  - 4. The firm's ownership by socially and economically disadvantaged individuals must be real, substantial and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interest, as demonstrated by the substance, not merely the form, of arrangements.

5. All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Except as provided in this paragraph (D), no securities of assets held in trust, or by any guardian for a minor, are considered as held by disadvantaged persons in determining the ownership of the firm, unless:
    - a. The beneficial owner of securities or assets held in trust is a disadvantaged individual, and the trustee in the same or another such individual; or
    - b. The beneficial owner of a trust is a disadvantaged individual who, rather than the trustee, exercises effective control over the management, policy making, and daily operational activities of the firm. Assets held in a revocable living trust may be counted only in the situation where the same disadvantaged individual is the sole grantor, beneficiary, and trustee.
  6. The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interest must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.
  7. The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership:
    - a. The owner's expertise must be –
      - (1) In a specialized field;
      - (2) Of outstanding quality;
      - (3) In areas critical to the firm's operations;
      - (4) Indispensable to the firm's potential success;
      - (5) Specific to the type of work the firm performs; and
      - (6) Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.
    - b. The individual whose expertise is relied upon must have a significant financial investment in the firm.
- B. For purposes of determining ownership, the Authority must always deem as held by a socially and economically disadvantaged individual, all interests in a business or other assets obtained by the individual –
1. As the result of a final property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce decree is inconsistent with this section; or
  2. Through inheritance, or otherwise because of the death of the former owner.

- C. For purposes of determining ownership, the Authority must presume as not being held by a socially and economically disadvantaged individual, all interest in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm who is
1. Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;
  2. Involved in the same or a similar line of business; or
  3. Engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.
- D. To overcome the presumption in paragraph C and permit the interests or assets to be counted, the disadvantaged individual must demonstrate to the Authority, by clear and convincing evidence, that –
- a. The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
  - b. The disadvantaged individual actually controls the management, policy and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.
- E. The Authority may consider the following factors in determining the ownership of a firm. However, the Authority will not regard a contribution of capital as failing to be real and substantial, or find a firm ineligible, solely because –
- a. A socially and economically disadvantaged individual acquired his or her ownership interest as the result of a gift, or transfer without adequate consideration.
  - b. There is a provision for the co-signature of a spouse who is not a socially and economically disadvantaged individual on financing agreements, contracts for the purchase and sale of real or personal property, bank signature cards, or other documents; or
  - c. Ownership of the firm in question or its assets is transferred for adequate consideration from a spouse who is not a socially and economically disadvantaged individual to a spouse who is such an individual. In this case, the Authority must give particularly close and careful scrutiny to the ownership and control of a firm to ensure that it is owned and controlled, in substance as well as form, by a socially and economically disadvantaged individual.

### **Section 3.2 Control**

- A. In determining whether socially and economically disadvantaged owners control a firm, the Authority must consider all the facts in the record, viewed as a whole.
- B. Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.
  - 1. In determining whether a potential DBE is an independent business, the Authority will scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.
  - 2. The Authority will consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm.
  - 3. The Authority will examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm.
  - 4. In considering factors related to the independence of a potential DBE firm, the Authority will consider the consistency of relationships between the potential DBE firm and non-DBE firms with normal industry practice.
- C. A DBE firm must not be subject to any formal or informal restrictions which limits the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm. This paragraph does not preclude a spousal co-signature on documents as provided for in 49 CFR Part 26-69 (j) (2).
- D. The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.
  - 1. A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president).
  - 2. In a corporation, disadvantaged owners must control the board of directors.

3. In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.
- E. Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.
  - F. The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.
  - G. The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.
  - H. If state or local law requires persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type must possess the required license or credential. If state or local law does not require such a person to have a license or credential to own and/or control a firm, the Authority will not deny certification solely on the ground that the person lacks the license or credential. However, the Authority may take into consideration the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.
    1. The Authority may consider differences in remuneration between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a firm as a DBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm. The Authority may determine that a firm is

controlled by its socially and economically disadvantaged owner although that owner's remuneration is lower than that of some other participants in the firm.

2. In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, the Authority may consider a difference between the remuneration of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the non-disadvantaged individual remains involved with the firm and continues to receive greater compensation than the disadvantaged individual.
- I. In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.
  - J. A socially and economically disadvantaged individual may control a firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, the Authority must make a judgment about the control the socially and economically disadvantaged owner exercises vis-à-vis other persons involved in the business as the Authority does in other situations, without regard to whether or not the other persons are immediate family members. If the Authority cannot determine that the socially and economically disadvantaged owners -- as distinct from the family as a whole -- control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.
  - K. Where a firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged individual, and the non-disadvantaged individual remains involved with the firm in any capacity, the disadvantaged individual now owning the firm must demonstrate to the Authority, by clear and convincing evidence, that:
    1. The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
    2. The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who formerly owned and/or controlled the firm.

- L. In determining whether a firm is controlled by its socially and economically disadvantaged owners, the Authority may consider whether the firm owns equipment necessary to perform its work. However, the Authority will not determine that a firm is not controlled by socially and economically disadvantaged individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.
- M. The Authority will grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm. To become certified in an additional type of work, the firm need demonstrate to the Authority only that it's socially and economically disadvantaged owners are able to control the firm with respect to that type of work. The Authority may not, in this situation, require that the firm be re-certified or submit a new application for certification, but the Authority will verify the disadvantaged owner's control of the firm in the additional type of work.
- N. A business operating under a franchise or license agreement may be certified if it meets the standards in 49 CFR Part 26 and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the Authority generally will not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided that the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.
- O. In order for a partnership to be controlled by socially and economically disadvantaged individuals, any non-disadvantaged partners must not have the power, without the specific written concurrence of the socially and economically disadvantaged partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.
- P. The socially and economically disadvantaged individuals controlling a firm may use an employee leasing company. The use of such a company does not preclude the socially and economically disadvantaged individuals from controlling their firm if they continue to maintain an employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

### **Section 3.3 Small Business Concern**

- A Regulations of the Small Business Administration (SBA), 13 CFR Part 121 (1-1- 00 Edition), contain guidelines and standards for determining eligibility as a "small business concern". The current guidelines are set forth as size Standard Industrial Classification

(SIC) Code Industry standards. However, effective October 1, 2000, 13 CFR Part 121 (Final Rule), by order of the SBA, will utilize the North American Industry Classification System (NAICS) to set business size standards. Therefore, the Authority will continue to incorporate 13 CFR Part 121, as amended, in its DBE Plan and Policy.

- B. Any person who has a current certification from the SBA under Section 8(a) of the Small Business Act is considered to be socially and economically disadvantaged for purposes of the 1999 Final DBE Rule.

### **Section 3.4 Average Gross Receipts for Three-Year Period**

- A. The dollar financial ceiling list in 13 CFR Part 121 of the SBA refers to the average annual receipts earned by the firm, including its affiliates, for the previous three-year period. For example, the standard for electrical contractors is \$7 million, meaning that the firm is small if its average gross receipts in the three preceding years were \$7 million or less.
- B. Additionally, an individual who claims to own and control a firm applying for DBE certification and whose ownership and control are relied on for certification, cannot have a personal net worth that exceeds \$750,000. 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.

### **Section 3.5 Case-by-Case Determinations**

Persons who are not members of any of the presumptive groups listed in Section II "Definitions Used" may nevertheless be found to be socially and economically disadvantaged by the Authority on a case-by-case basis. For example, a disabled Vietnam veteran, an Appalachian white male or any other person may claim to be disadvantaged due to individual circumstances. If one of these individuals owns a business and applies for eligibility as a DBE, the Authority must determine, as part of the certification, whether that person qualifies as socially and economically disadvantaged. It is emphasized that these persons would have to make an individual showing of disadvantage rather than on the basis of group membership.

### **Section 3.6 Process for Determining DBE Eligibility**

- A. To ensure that its DBE Program benefits only eligible DBEs as defined by 49 CFR Part 26, the Authority will certify the eligibility of DBEs (see DBE Application for Certification).
- B. All socially and economically disadvantaged business enterprises interested in participating as eligible DBEs in contracting/subcontracting opportunities must be certified. Certification may be obtained by submitting an Application for DBE Certification and a Personal Statement of Net Worth (PSNW) to the Authority. If certification is granted, the DBE will be included in the Authority's DBE Directory. The

Authority will make a decision on an applicant's certification in a timely manner after receiving a complete DBE application and PSNW, including all necessary supporting documentation. The Authority does not charge a fee to an applicant who submits a DBE application and PSNW for certification.

- C. In accordance with the regulations establishing uniform standards for certifying the eligibility of DBE firms, and as part of the certification process, the Authority will take at least the following steps in determining whether a firm is eligible:
1. Perform an on-site visit to the offices of the firm and to any job sites on which the firm is working at the time of the eligibility investigation.
  2. Obtain the résumés or work histories of the principal Owners of the firm and personally interview these individuals.
  3. Analyze the Ownership of stock in the firm, if it is a corporation.
  4. Analyze the bonding and financial capacity of the firm.
  5. Determine the work history of the firm, including contracts it has received and work it has completed.
  6. Obtain or compile a list of equipment owned or available to the firm and the licenses of the firm and its key personnel to perform the work it seeks to do as part of the DBE program.
  7. Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program.
  8. Certification shall be in accordance with 49 CFR Part 26. When the Authority denies a request for certification from a firm not currently certified, it must provide the firm a written explanation of the reason for the denial, specifically referencing the evidence in the record that supports each reason for the denial in accordance with 49 CFR Part 26.85. All documents and other information on which the denial is based must be made available to the applicant, on request. DBEs and joint ventures may, however, correct deficiencies in their ownership and control and re-apply in twelve (12) months from the date of their denial, for certification for future contracts.
  9. All personal financial information submitted by DBEs to the Authority is strictly confidential and exempt from Freedom of Information Act requests in accordance with 49 CFR Part 26.67 (a) (2) (iii). The Authority will protect from disclosure confidential business information, consistent with or to the extent possible under state and federal law. Personal financial information may be provided to a third party only with the written consent of the individual to whom the information pertains, unless such party is authorized, by law, to receive such information.
  10. The initial Application for DBE Certification and PSNW should be submitted to:

Charles Taylor, Sr. Manager  
Office of Small Business Development  
Lee County Port Authority  
11000 Terminal Access Road, Suite 8671  
Fort Myers, Florida 33913  
Telephone No. (239) 590-4625  
FAX (239) 590-4621  
[cftaylor@swfia.com](mailto:cftaylor@swfia.com)

### **Section 3.7 Unified Certification Program (UCP)**

The State of Florida Unified Certification Program (FUCP) has been established, and approved. The implementation schedule calls for Florida to have its UCP fully operational by September 25, 2005.

## **SECTION IV - PROGRAM STRUCTURE AND RESPONSIBILITIES**

### **Section 4.1 Overall Responsibility for Authority's DBE Program**

As Chief Executive Officer of the Authority, the Executive Director will exercise overall responsibility and direction of the Authority's DBE Program; ensure compliance with 49 CFR Part 26; establish realistic goals in all DOT-assisted projects requiring goals (in accordance with 49 CFR Part 26) and to ensure aggressive participation at all staff levels toward the realization of such goals.

All DBE firms in Florida will be listed in a single DBE/UCP Directory. The Lee County Port Authority will certify only those businesses domiciled in Lee, Collier, Hendry, Glades and Charlotte Counties. The Directory is found at <http://www.bipincwebappps.com/biznetflorida>. You should visit the web site, and if for some reason your business name does not appear, or you find the information is inaccurate, contact your local UCP Certification office immediately.

The UCP in the state of Florida only applies to those businesses that qualify under USDOT Disadvantaged Business Enterprise requirements. This does not affect your status as MBE, WBE, HBE, BBE, CSBE etc. For these local and State programs, you must maintain your certification(s) separate and apart from your DBE certification under the Unified Certification Program

If you have any questions or concerns, please contact this office at 239-590-4625 or fax to 239-590-4621.

Mailing Address:  
Charles F. Taylor, Sr. Manager  
Office of Small Business Development  
Lee County Port Authority  
11000 Terminal Access Road, Suite 8671  
Fort Myers, Florida 33913-8899

## **Section 4.2 Staff Responsibilities**

Implementation of the DBE Program shall be the responsibility of the DBELO and shall include, but shall not be limited to, the following activities:

- A. Act as liaison between the Authority, DOT and the FAA.
- B. Maintenance of files and related record keeping, including literature, forms and reference materials pertaining to DBE matters. Generally keeping abreast of current trends, regulations and rulings affecting the DBE Program.
- C. Develop support staff for maintaining the DBE Program and work with all management/supervisory personnel to implement DBE policies and practices.
- D. Secure and submit statistical reports and data regarding DBE goals and objectives in accordance with federal requirements.
- E. Develop, manage and implement the DBE Program on a day-to-day basis, carrying out technical assistance activities for DBEs and disseminating information on available business opportunities so that DBEs are provided an equitable opportunity to participate in Authority contracts.
- F. The Authority will provide the DOT with updates representing significant changes in the Authority's DBE program.

## **Section 4.3 Activities to Ensure Participation**

The following activities are designed to ensure that DBEs have the maximum opportunity to participate in contracts. It is the responsibility of the DBELO to perform the following activities:

- A. Inform and communicate to DBEs the Authority's contracting procedures and specific contracting opportunities by planning and participating in training contractors of available business opportunities.
- B. Maintain a current DBE/UCP Directory as a source of identifying all DBEs currently certified by the Authority, and provide copies of the DBE/UCP Directory to prospective contractors desiring contract information for affected projects.
- C. E-mail copies of contract advertisements to those minority and women business enterprises listed in the Authority's DBE/UCP Directory, which are eligible to participate. Ensure subcontracting opportunities are published in a minority publication as well as a newspaper of general circulation in the area.
- D. Provide a blueprint reference library (cost free) for DBEs, during regular office hours of Authority.

- E. Assist in identifying problems confronting DBEs and work diligently to arrive at acceptable solutions.
- F. Present workable procedures to facilitate the receipt of timely progress payments by DBEs for work completed, following such request for payment.
- G. Encourage DBE attendance at pre-bid/pre-proposal meetings. Provide assistance to DBEs during the solicitation or bid period for any project, and assist with any explanation of documents, including language barriers, that may exist.
- H. Certify and monitor the eligibility of DBEs and joint venture DBEs named by prime contractors who are making proposals on a particular project in accordance with the criteria set by the DOT under 49 CFR Part 26.
- I. Provide assistance, to the extent possible, in obtaining bonding, financing and insurance which will enable DBEs to participate in LCPA contracting activities.
- J. Maintain a system of records and reports documenting:
  - 1. Specific efforts made to identify and award contracts to DBEs;
  - 2. Specific awards made to DBEs;
  - 3. All contract advertising prepared in accordance with procedures established by the Authority.
- K. The Authority will provide data about its DBE Program to the Department as directed by DOT operating Administrations.
- L. For all DOT-assisted contracts, in accordance with 49 CFR Part 26, the Authority will create and maintain a bidders list consisting of all firms bidding prime contracts and bidding or quoting subcontracts. For every firm, the following information must be included:
  - 1. Firm name;
  - 2. Firm address;
  - 3. Firm's status as a DBE or non-DBE;
  - 4. The age of the firm; and
  - 5. The annual gross receipts of the firm

For non-DBE firms, the above information will be obtained from the firm's audited financial statement submitted with their bid or proposal. For DBEs, the information will be obtained from their application and financial information submitted for certification. DBEs are not required to submit their financial information to Prime Contractors, but rather may submit such information directly to the DBELO.

#### **Section 4.4 Program Compliance**

The DBELO is responsible for reviewing and approving DBE subcontractor opportunities identified for all construction, architectural and engineering contracts, and all management and professional services contracts. Such opportunities will be identified as soon as the project scope is developed. In addition, the DBELO is responsible for monitoring the performance and actual utilization of DBEs as proposed at the time bids/proposals are opened, as well as throughout the term of the contract. In the event the DBE is unable to perform the work, and a substitution is necessary, the DBELO shall ensure that the contractor makes a good faith effort to replace the DBE subcontractor with a qualified DBE who is also certified with the Authority.

#### **Section 4.5 Banks and Financial Institutions Owned and Controlled by Minorities**

The Authority made an investigation in an effort to locate minority or woman owned banks or financial institutions in the 5 County areas of Lee, Charlotte, Hendry, Glades and Collier. Local banks were contacted, as well as the Chamber of Commerce and the Federal Reserve in Atlanta. The investigation revealed that there are no minority owned banks or financial institutions in the 5 County areas. The Authority will continue to investigate any minority owned bank or financial institution that opens an office and offers services to the 5 County areas community and make reasonable efforts to use these institutions. The Authority will also encourage prime contractors to use such institutions. Information on these institutions, should they come into existence in the 5 County areas, will be available to the public through the Authority's Office of Small Business Development.

#### **Section 4.6 Disadvantaged Business Enterprise Directory**

- A. The Authority will maintain a DBE/UCP Directory containing a current listing of all Authority-certified DBEs. This Directory will be on file in the office of the Authority and will be available during normal business hours for use by prospective contractors in identifying DBEs with skills particular to their contracting and business needs. Business hours are Monday-Friday, 8:30 A.M. - 5:00 P.M. The General Public can download the DBE/UCP Directory at <http://www.bipincwebappps.com/biznetflorida>.
- B. The Authority's DBE/UCP Directory, as well as copies of the Authority's DBE Policy, DBE application for certification, and Personal Statement of Net Worth is posted on the Authority's website at [www.flylcpa.com](http://www.flylcpa.com) for download.
- C. The Authority's DBE/UCP directory will be updated on a daily basis and will include the following information on Authority certified DBE firms:
  - Company Name.
  - NAIC Code of Company.
  - Name of DBE.
  - Address of DBE.
  - Work Phone Number.
  - FAX Number.
  - E-mail Address.

- Date Last Certified.

### **Section 4.7 Project Monitoring**

- A. 49 CFR Part 26 will be utilized to enforce the requirements of the Authority's DBE Program. In addition, the Authority will utilize any and all available federal, state, and local laws if the Authority's DBE program participants do not comply with the requirements of 49 CFR Part 26.
- B. The Authority will monitor all DOT funded contracts to ensure that it does not have an over concentration of DBEs in certain areas of work. Should an over concentration occur, the Authority will submit a recommended solution to the concerned DOT operating administration for its approval in accordance with 49 CFR Part 26.33.
- C. The DBELO will monitor all DOT funded contracts to ensure that work committed to DBEs at contract award is actually performed by the DBEs. The DBELO will review monthly progress payments to the prime contractor to ensure that DBE participation is credited toward overall or contract goals only when payments are actually made to DBE firms.

## **SECTION V – DBE PROJECT OPPORTUNITIES**

The purpose of the DBE Program is to identify opportunities for DBEs on all projects requiring construction/professional services and to ensure the availability of qualified DBEs who are ready, willing and able to provide their services. The DBELO will review proposed contracts in order to identify opportunities for participation by certified DBEs on proposed contracts for construction, engineering, architecture, and professional and management services. The level of participation will be determined on the basis of historic and actual DBE participation on previous projects and the availability of certified DBEs. The procedure for determining such participation will be as follows:

### **Section 5.1 Annual Review**

On an annual basis the Authority will review its five (5) year Capital Improvement Program and estimate a reasonable level of DBE participation on contracting and professional services projects to be bid or proposed during the upcoming fiscal year. Estimated levels of participation will be set forth as a "goal", representing a percentage of the total cost of a DOT-assisted project in accordance with 49 CFR Part 26. DBE Goals on DOT-assisted contracts will be set by utilizing Authority DBE Directories and Authority Bidder's Lists. After a race-neutral level of estimated DBE participation is made, race-conscious means (contract goals) will be utilized to achieve the remaining DBE participation of the DBE Goal.

### **Section 5.2 DBE Overall Goal Calculation Methodology for FY2004**

- A. Determining the Base Figure. The Authority utilized its bidders list to establish its base figure in establishing its DBE Goal as described in 49 CFR Part 26.45. During the review of the Authority's bidders list, only firms that were "ready, willing, and able" and bid on

the project were used. There were 19 active DBE firms and 100 overall active contractors including DBE's, Prime Contractors, Subcontractors, and Suppliers. Dividing the 100 firms on the bidders list into the 19 DBE firms gave the Authority a relative availability, or base figure, of 19%.

- B. Adjustment to the Base Figure. The Authority's DBE Goals for the previous three years (FY2004 = 19%, FY2003 = 20%, FY2002 = 21.5%) **Median is 20%**. Taking into account the median past participation, the base figure of 19% + median factor 20% = 39 divided by 2 = 19%) for DOT-funded DBE contracts for fiscal year 2005. There is no relevant disparity study available. No DBE participation was achieved on Authority projects that did not have a DBE Goal.
- C. Race Neutral and Race Conscious Breakout. The Authority believes it can meet the overall FY2005 DBE Goal of 19% through the use of Race-Neutral and Race Conscious means by the following:

19% Race-Neutral  
.0% Race-Conscious

Race Neutral means will include:

- a. DBE Prime Contract Awards
- b. DBE Participation on Contracts Without Contract Goals
- c. DBE Participation that Exceeds a Contract Goal

### **Section 5.3 Public Notice of DBE Goals on DOT-Assisted Contracts**

Annually, the Authority will give public notice of its DBE Goals on DOT-assisted contracts. Public Notice will be posted on the Authority's website <http://www.swfia.com> as well as in local media the Ft. Myers News Press and Community Voice newspaper. The Authority will accept comments from the public for forty-five (45) days from the date of such notice.

### **Section 5.4 Project Review on Construction/Engineering/Architectural/Professional Services Contracts**

- A. Ninety (90) days before the pre-bid or pre-proposal meeting for a project, the DBELO will meet with departmental staff to review the proposed scope of work for the project and identify potential areas of contracting.
- B. Once the final scope of work has been determined, the scope will be submitted to the DBELO with a detailed assessment of all subcontracting opportunities including suggestions for participation by DBEs on the project.

## **Section 5.5 Communication with FAA**

- A. On all DOT-assisted projects in accordance with 49 CFR Part 26, the DBE methodology will be communicated to the FAA by the DBE Liaison Officer no later than 30 to 60 days prior to the pre-bid or pre-proposal meeting.
- B. All documentation required by the FAA concerning proposed DBE goals or actual DBE participation accomplishments on construction, engineering, architectural and professional services contracts will be transmitted to the FAA by the DBELO on an annual basis on DOT Form 4630, and other reports as requested.

## **SECTION VI - PROCEDURES TO ENSURE GOOD FAITH EFFORTS**

### **Section 6.1 Bid/Proposal Information**

On all contracts for which contract goals have been established, the Authority shall inform all competitors that they will be required to submit DBE participation information to the Authority as part of their bid or proposal. Pertinent information regarding skills and services of DBEs will be available to prime contractors but will, in no way, relieve contractors of their responsibility to use any and all sources of information available to them in locating DBEs. Failure of a contractor to submit the DBE information stated below in their bid or proposal will render the bid or proposal non-responsive. If the Prime Contractor/Bidder cannot certify to meet the DBE goals, the following information should be provided as justification that the Prime Contractor/Bidder made Good Faith Efforts to meet the DBE goal:

- A. The names and addresses of DBE firms that will participate in the contract;
- B. A description of the work each named DBE firm will perform;
- C. The dollar amount of participation by each named DBE firm.
- D. Written documentation the bidder/proposer's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal; and
- E. Written confirmation in the form of a "Letter of Intent" signed by the DBE that it will be participating in the contract as provided in the prime contractor's bid or proposal.

### **Section 6.2 Good Faith Efforts**

- A. In all DOT-funded contracts, the apparent successful contractor shall satisfy the Authority that it has made good faith efforts to utilize DBEs in meeting the established DBE goal. "Good faith efforts" are those efforts that could reasonably be expected to result in DBE goal attainment by a contractor who aggressively and actively seeks to obtain DBE participation. Efforts that are merely "Pro Forma" are not "good faith efforts" to meet DBE goals. In determining whether or not the apparent successful

contractor has made such good faith efforts, some of the factors the Authority will consider are the following:

1. Whether the contractor attended any pre-solicitation or pre-bid/proposal meetings scheduled by the Authority to inform DBEs of contracting and subcontracting opportunities.
2. Whether the contractor advertised at least ten (10) days prior to bid opening or proposal submission in newspapers of general circulation, trade associations, and minority-focus media concerning subcontracting opportunities.
3. Whether the contractor provided written notice by certified mail at least ten (10) days prior to bid/proposal opening to a reasonable number of specific DBEs that their interest in the contract was being solicited.
4. Whether the contractor followed up initial solicitations of interest by contacting DBEs to determine with certainty whether the DBEs were interested.
5. 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).
6. Whether the contractor provided interested DBEs with adequate information about the plans, specifications or requirements of the contract.
7. Whether the contractor negotiated in good faith with interested DBEs, not rejecting DBEs as unqualified without sound reasons after a thorough investigation of their capabilities.
8. Whether the contractor made efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance required by the Recipient or contractor.
9. Whether the contractor effectively used the services of available minority community organizations; minority contractor groups; local, state and federal minority business assistance offices; and other organizations that provide assistance in the recruitment and placement of DBEs.
10. Whether the scope of work submitted by the contractor to any DBE contractor, DBE subcontractor, DBE sub-subcontractor, DBE supplier, DBE sub-supplier or DBE sub-sub-supplier, and so on, either directly or indirectly, was intended to achieve, in whole or in part, the specified DBE participation.
11. Whether the replies or quotes from DBEs in response to scopes of work submitted to them by contractors, either directly or indirectly, were fair and responsive.

12. Whether the contractor fairly represented the DBE quotations in the formulation of the contractor's bid as shown on the contractor's bid tabulation or other work documents to support the contractor's bid.
13. Whether all other bidders or proposers achieved the DBE goal but the apparent low bidder or proposer did not.
14. Whether the contractor or proposer contacted the Authority's DBELO for assistance in meeting the Authority's DBE project goal.

Bidders or Proposers who do not meet the DBE contract goal may alternately satisfy the "good faith efforts" requirement by documenting their efforts to do so. On a finding by the Authority that the bidder or proposer did not meet the DBE goal, after receiving such documentation, Bidders or Proposers are entitled, at their option, to the administrative reconsideration process described below.

- A. Any contractor who meets the DBE goal shall be deemed to have made the necessary good faith efforts without the need for further proof. Failure to meet these goals may be grounds for refusing to award the contract if, upon investigation by the Authority, such investigation shows that the contractor refused to make a good faith effort to meet the goal, or that the failure was due to discrimination.
- B. The Authority will require bidder(s) or proposer(s) to submit documents that show that bidder(s) or proposer(s) obtained enough DBE participation to meet the DBE goal. The individual responsible for making initial "Good Faith Efforts" determinations for the Authority will be:

Charles F. Taylor, Sr. Manager  
Office of Small Business Development  
Lee County Port Authority  
11000 Terminal Access Road, Suite 8671  
Fort Myers, Florida 33913-8899

## **SECTION VII - CONTRACTOR COMPLIANCE REQUIREMENTS**

### **Section 7.1 Required Contract Provisions**

#### **A. Contract Assurances**

Each financial assistance agreement signed with a DOT-operating administration or a primary recipient must include the following assurance:

The recipient 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 23 & Part 26. The recipient shall take all-necessary and reasonable steps under 49 CFR Part 23 & 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 23 & 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 the recipient of its failure to carry out its approved program, the department may impose sanctions as provided for under Part 23 & Part 26 and may, in appropriated 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.).

Each contractual agreement with a contractor (and each subcontract the Prime Contractor signs with a Subcontractor) must include the following assurance:

**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 23 & 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 and Release of Retainage Clause.** The Port Authority will include the following clause in each DOT-assisted prime contract, and the prime contractor will require all subcontractors to have this clause in their subcontracts:

“The prime contractor agrees to pay each subcontractor under this prime contract for satisfactory performance of its contract no later than fifteen (15) days from the receipt of each payment the prime contractor receives from the Authority. The prime contractor agrees further to return retainage payments to each subcontractor within forty five (45) days after acceptance by the recipient. Any delay or postponement of payment from the above referenced timeframe may occur only for good cause following written approval of the Authority. **This clause applies to both DBE and non-DBE subcontractors.**”

### **Section 7.2 Re-consideration of Lack of Good Faith Effort**

An appeal by the Bidder/Offeror/Contractor of the determination of the Senior Manager of The Office of Small Business Development of whether Contractor's initial efforts were made in “good faith” shall be submitted to:

Administrative Reconsideration Official  
Development Division  
Southwest Florida International Airport  
11000 Terminal Access Road, Suite 8671  
Fort Myers, Florida 33913

The Reconsideration Official will not play a role in the initial certification determination of a company nor will the Reconsideration Official play a role in the original determination that a Bidder or Offeror failed to meet the DBE goal or to document “good faith efforts”. As part of the

reconsideration, the Bidder/Offeror/Contractor will have the opportunity to provide written documentation or argument or meet in person concerning the issue of whether he or she should be certified, whether he or she met the DBE goal on a contract, or made adequate “good faith efforts” to do so. The Reconsideration Official will send the Bidder/Offeror/Contractor a written decision or reconsideration, explaining the basis for the finding that the Bidder/Offeror/Contractor did or did not meet the DBE 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.

### **Section 7.3 Sanctions for Non-Compliance**

In the event of the Contractor’s non-compliance with the Authority’s DBE policy or failure to meet the prescribed DBE goal set forth in this Contract, or to establish a good faith effort to do so, the Authority, after due process, may impose such contract sanctions as the Authority, the FAA or both may determine to be appropriate, including but not limited to:

1. Withholding of payments to the Contractor under the Contract until the Contractor complies; and/or
2. Cancellation, termination or suspension of the Contract in whole or in part; and/or
3. Suspension or debarment of Contractor from eligibility to contract with the Authority in the future or to receive bid packages or request for proposal (RFP) packages.

### **Section 7.4 Counting DBE Participation Toward Goals**

The Authority will count DBE participation toward overall and contract goals as provided in 49 CFR Part 26.55. The Authority will count only the value of the work actually performed by the DBE toward DBE goals on a contract in accordance with the following:

- A. One Hundred percent (100%) of that portion of a construction contract (or other contract not covered by 49 CFR Part 26.55 (a)(2)) that is performed by the DBE's own forces, including the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).
- B. One Hundred percent (100%) of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, toward DBE goals, provided the Authority determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.
  1. One Hundred percent (100%) of the value of the work subcontracted by one DBE subcontractor to another DBE subcontractor. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.

2. A portion of the total dollar value of the contract performed by a DBE as a participant in a joint venture equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.
- C. Those expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract. The following factors are considered in determining commercially useful function.
1. A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, the Authority will evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.
  2. A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, the Authority will examine similar transactions, particularly those in which DBEs do not participate.
  3. If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, the Authority will presume that it is not performing a commercially useful function.
  4. When a DBE is presumed not to be performing a commercially useful function the DBE may present evidence to rebut this presumption. The Authority may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.
  5. The Authority's decisions on commercially useful function matters are subject to review by the concerned operating administration, but are not administratively appealable to DOT.
- D. The following factors are used in determining whether a DBE trucking company is performing a commercially useful function:
1. The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.

2. The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.
  3. The DBE receives credit for the total value of the transportation services it provides on the contract using trucks its owns, insures, and operates using drivers it employs.
  4. The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.
  5. The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE does not receive credit for the total value of the transportation services provided by the lessee, since these services are not provided by a DBE.
  6. For purposes of 49 CFR Part 26, a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.
- E. Expenditures with DBEs for materials or supplies will be counted toward DBE goals as provided in the following:
1. If the materials or supplies are obtained from a DBE manufacturer, count 100 percent of the cost of the materials or supplies toward DBE goals.
  2. A manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.
  3. If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies toward DBE goals.
- F. A regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.
1. To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.

2. A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.
  3. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers.
  4. With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, provided the Authority determines the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the materials and supplies themselves toward DBE goals, however.
- G. 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 Authority will not count the firm's participation toward any DBE goals, except as provided for in §26.87(i).
- Firms that have been denied initial certification as a DBE by the Authority may file an appeal with the Authority's Reconsideration Official. Should that appeal be denied, the Firm may further file an appeal to the DOT. The conditions for filing an appeal with the DOT, as well as the DOT's address, are specified in Section 9.
- H. The Authority will not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward the Authority's overall DOT-funded DBE goal.
- I. The Authority will not count the participation of a DBE subcontractor toward the prime contractor's DBE achievements or its overall goal until the amount being counted toward the goal has been paid to the DBE.

**Section 7.5 Procedure Relating to DBE Terminations or Changes During a Contract**

- A. Should the Contractor, or any of its subcontractors, sub-subcontractors, suppliers, sub-suppliers, or sub-sub-suppliers desire to alter or change the scope of work of a DBE subcontractor or supplier, or if the DBE subcontractor is unable to perform the work, the Contractor shall immediately notify the Authority, prior to taking any action and request written approval for the remedial steps which the contractor will take to comply with the DBE goal.
- B. A prime contractor shall be prohibited from terminating for convenience, a DBE subcontractor listed in response to 49 CFR Part 26.53 (b)(2) (or an approved substitute

DBE firm) and then perform the work of the terminated subcontractor with its own forces or those of an affiliate, without the Authority's prior written consent.

- C. When a DBE subcontractor is terminated, or fails to complete its work on the contract for any reason, the Authority will require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal the Authority established for the procurement.
- D. The Authority will include in each prime contract a provision for appropriate administrative remedies that it will invoke if the prime contractor fails to comply with the requirements of this Section. Failure to comply with the procedure relating to DBE terminations or changes during the contract will be a material violation of the contract and will invoke the Sanctions for Non-Compliance specified in this Policy.

### **Section 7.6 Contractor's Bids or Proposal Documents**

- A. All Invitations to Bid, Request For Proposals (RFP), or Request for Qualifications (RFQ) for construction, engineering, architectural, professional services and management contracts, prepared by contractors and/or subcontractors on DOT-funded Authority projects, having established Goals for DBE participation, will comply with the DBE requirements of 49 CFR Part 26 and the Authority's DBE Policy.
- B. Contractor's Bid, RFP or RFQ documents shall state that.... "Failure to comply with the requirements for participation by DBEs in the performance of the contract shall disqualify the contractor for award of the contract". Any precondition applicable to the project shall be fully explained in the bid specifications, RFP, or RFQ.

## **SECTION VIII – DECERTIFICATION**

### **Section 8.1 Third Party Complaints**

- A. Any third party may challenge whether the owner of a firm certified by the Authority or seeking certification, which is presumed to be socially and economically disadvantaged, actually is disadvantaged. The Authority may also make such a challenge. The DOT also may challenge a certification made by a Recipient. However, the disadvantaged status of an individual who has a current certification under Section 8(a) of the Small Business Act is not subject to challenge.
- B. The confidentiality of the complainant will be protected in accordance with 49 CFR Part 26.109 (b). The complaint may include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not continue to be certified. However, the Authority is not required to accept a general allegation that a firm is ineligible or an anonymous complaint.

## **Section 8.2 Authority-Initiated Proceedings**

If, based on notification by the firm of a change in its circumstances or other information that comes to the Authority's attention, the Authority may determine that there is reasonable cause to believe that a currently certified firm is ineligible to continue to be certified. At that time, the Authority will provide written notice to the firm that the Authority proposes to find the firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based.

## **Section 8.3 DOT Directive to Initiate Proceeding**

If the concerned DOT operating administration determines that information in the Authority's certification records, or other information available to the concerned DOT operating administration, provides reasonable cause to believe that an Authority-certified firm does not meet the eligibility criteria of 49 CFR Part 26, the concerned DOT operating administration may direct the Authority to initiate a proceeding to remove the firm's certification.

In so doing, the concerned DOT operating administration must provide the Authority and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information. The Authority will immediately commence and prosecute a proceeding to remove eligibility as provided in 49 CFR Part 26.87 (b).

## **Section 8.4 Notice of Decertification**

### **A. Hearing**

If a firm is notified that the Authority, either by third party challenge, Authority determination, or DOT determination, intends to remove the firm's DBE eligibility, the Authority shall give the firm an opportunity for an informal hearing in accordance with 49 CFR Part 26.87(d). The Authority will maintain a complete record of the hearing and provide a copy to the firm of the hearing if the firm requests. The Authority may charge the firm for the cost of copying the record of the hearing.

### **B. Status of Firm During Proceedings**

A firm shall remain an eligible DBE during the pendency of the Authority's proceeding to remove its eligibility. The firm does not become ineligible until the issuance of the notice provided for in 49 CFR Part 26.87 (g).

### **C. Separation of Functions**

The Authority's decision in a proceeding to remove a firm's eligibility will be made by an office and personnel who have not taken part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

In furtherance of this requirement, the Authority's method of implementing this requirement under its DBE Program is as follows:

That the decision maker in such circumstances will be an individual who is knowledgeable about the certification requirements of the Authority's DBE program and 49 CFR Part 26 and not subject to direction from the DBE Program Manager or DBELO.

The individual responsible for making "Removal of a firm's DBE eligibility determinations" for the Authority is:

Charles F. Taylor, Sr. Manager  
Office of Small Business Development  
Lee County Port Authority  
11000 Terminal Access Road, Suite 8671  
Fort Myers, Florida 33913  
Phone (239) 590-4625  
Fax (239) 590-4621  
[cftaylor@flylcpa.com](mailto:cftaylor@flylcpa.com)

**D. Grounds for Decision**

The Authority will not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to the Authority at the time of its certification of the firm. Rather, the Authority may base such a decision only on one or more of the following:

Changes in the firm's circumstances since the certification of the firm by the Authority that render the firm unable to meet the eligibility standards of 49 CFR Part 26;

Information or evidence not available to the Authority at the time the firm was certified;

Information that was concealed or misrepresented by the firm in previous certification actions by the Authority;

A change in the certification standards or requirements of the Department since the Authority certified the firm; or

A documented finding by the Department that the Authority's determination to certify the firm was factually erroneous.

**E. Notice of the Authority's Decision**

Following the Authority's decision, the Authority will provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice will inform the firm of the consequences of the Authority's decision and of the availability of an appeal to the Department of Transportation under §26.89. The Authority will send copies of the notice

to the complainant in an ineligibility complaint or the concerned DOT operating administration that had directed the Authority to initiate the proceeding.

**F. Effects of Removal of Eligibility**

When the Authority removes a firm's eligibility, the Authority will take the following action:

If a prime contractor has made a commitment to using the ineligible firm, or the Authority has made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed at the time the Authority issues the de-certification notice provided for in paragraph 49 CFR Part 26.87 (g), the ineligible firm will not count toward the contract goal or overall goal. The Authority will direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate to the Authority that it has made a good faith effort to do so.

If a prime contractor has executed a subcontract with the firm before the Authority has notified the firm of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE goal for the firm's work. In this case, or in a case where the Authority has let a prime contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after the Authority issued the notice of its ineligibility shall not count toward the Authority's overall goal, but may count toward the contract goal.

**Exception:** If the DBE's ineligibility is caused solely by the DBE having exceeded the size standard during the performance of the contract, the Authority may continue to count its participation on that contract toward overall and contract goals.

**SECTION IX – CHALLENGE PROCEDURES**

**Section 9.1 Action Firms May Take Following Decertification**

Following a decision by the Authority to remove a firm's eligibility under Section VIII, the firm may appeal the removal to the Department under §26.89. Firms that have been denied certification, whose certification has been removed, whose owner is determined not to be a member of a designated socially and economically disadvantaged group, or concerning whose owner the presumption of disadvantage has been rebutted, can appeal to the DOT within ninety (90) days of the Recipient's denial. The firm's appeal must be submitted in writing to:

U. S. Department of Transportation  
Office of Civil Rights  
400 7<sup>th</sup> Street, S.W., Room 2401  
Washington, D.C. 20590

The Department makes its decision on the appeal based solely on the entire administrative record. The Department does not make a de novo review of the matter and does not conduct a

hearing. Failure of the appellant to provide any information requested by the Department may be deemed a failure to cooperate in accordance with 49 CFR Part 26.109(c).

**Section 9.2 Actions the Authority May Take Following DOT Certification Appeal Decisions**

- A. If the Authority is the recipient from whose action an appeal under §26.89 is taken, the decision is binding. It is not binding on other recipients.
- B. If the Authority is the recipient to which a DOT determination under §26.89 is applicable, the Authority must take the following action:
  - 1. If the Department determines that the Authority erroneously certified a firm, the Authority must remove the firm's eligibility on receipt of the determination, without further proceedings on its part. Effective on the date of the Authority's receipt of the Department's determination, the consequences of a removal of eligibility set forth in §26.87(i) take effect.
  - 2. If the Department determines that the Authority erroneously failed to find reasonable cause to remove the firm's eligibility, the Authority must expeditiously commence a proceeding to determine whether the firm's eligibility should be removed, as provided in §26.87.
  - 3. If the Department determines that the Authority erroneously declined to certify or removed the eligibility of the firm, the Authority will certify the firm, effective on the date of its receipt of the written notice of Department's determination.
  - 4. If the Department determines that the Authority erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, the Authority will take appropriate corrective action as determined by the Department.
  - 5. If the Department affirms the Authority's determination, no further action is necessary.
- C. Where DOT has upheld the Authority's denial of certification or removal of eligibility from a firm, or directed the removal of a firm's eligibility, other recipients with whom the firm is certified may commence a proceeding to remove the firm's eligibility under §26.87. Such recipients must not remove the firm's eligibility absent such a proceeding. Where DOT has reversed the Authority's denial of certification or removal of eligibility from a firm, other recipients must take the DOT action into account in any certification action involving the firm. However, other recipients are not required to certify the firm based on the DOT decision.

**Section 9.3 Enforcement Actions That Apply to Firms Participating in the DBE Program**

- A. If a firm does not meet the eligibility criteria of subpart D of 49 CFR Part 26 and attempts to participate in a DOT-assisted program as a DBE on the basis of false, fraudulent, or

deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the Department may initiate suspension or debarment proceedings against the firm under 49 CFR Part 29.

- B.** If a firm, in order to meet DBE contract goals or other DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of subpart D of 49 CFR Part 26, the Department may initiate suspension or debarment proceedings against the firm under 49 CFR Part 29.
- C.** In a suspension or debarment proceeding brought under paragraph (A) or (B) of this section, the concerned DOT operating administration may consider the fact that a purported DBE has been certified by a recipient. Such certification does not preclude the Department from determining that the purported DBE or another firm that has used or attempted to use it to meet DBE goals, and should therefore be suspended or debarred.
- D.** The Department may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the DBE program whose conduct is subject to such action under 49 CFR Part 31.
- E.** The Department may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program or otherwise violates applicable Federal statutes.