

MISSISSIPPI UNIFIED CERTIFICATION PROGRAM (UCP)

PREAMBLE

Federal regulations that became effective as of March 4, 1999, require each direct recipient of funding from the United States Department of Transportation to establish a Disadvantaged Business Enterprise (DBE) Program. The purpose of the program is to prohibit unlawful discrimination, to establish a goal for minority participation, to establish procedures for meeting those goals whenever possible by race neutral means, to create a level playing field, and to achieve that amount of DBE participation that would be obtained in a non-discriminatory market place. The regulations also require all recipients of funding by the United States Department of Transportation to establish a Unified Certification Program. The Mississippi Unified Certification Program will follow all certification procedures and standards as set forth in 49 CFR Part 26, on the same basis as recipients. The Mississippi Unified Certification Program will cooperate fully with oversight, review, and monitoring activities of the USDOT and its operating administrations and implement USDOT directives and guidance concerning certification matters. The regulations may be found at 49 CFR Part 26.

PURPOSE

The Mississippi Unified Certification Program will provide “one-stop shopping” for applicants for DBE Certification as expressly required by 49 CRF Part 26.81(b)2 so that applicants are required to apply only once for DBE Certification that will be honored by all agencies and entities of the State of Mississippi that receive funds from the United States Department of Transportation. All obligations of recipients with respect to certification and non-discrimination will be carried out by participants of the Mississippi Unified Certification Program in accordance with 49 CRF Part 26.81(b)3. Recipient's DBE firms already certified by other entities in accordance with 49 CFR Part 26 will be grandfathered into the State of Mississippi's UCP.

BINDING EFFECTS OF COMMITTEE DECISION

The Unified Certification Program and the decisions of the Certification Committee, as defined herein, shall be on behalf of and binding on all participants within the State of Mississippi in matters for which they receive funding from the United States Department of Transportation.

PARTICIPATION IN THE UNIFIED CERTIFICATION PROGRAM

The United States Department of Transportation provides funding to State and local entities through the following:

- (1) Federal Highway Administration
- (2) Federal Transit Administration
- (3) Federal Aviation Administration

The Federal Highway Administration provides funding to the Mississippi Department of Transportation.

The Federal Transit Administration (FTA) provides funding to the Mississippi Department of Transportation, the City of Hattiesburg, the City of Jackson, the Coast Transit Authority, and other direct recipients of FTA funding meeting the requirements of 49 CFR Part 26. The Federal Aviation Administration provides funding to the following: The Mississippi Department of Transportation, the Golden Triangle Regional Airport Authority, the City of Greenville, the Gulfport-Biloxi Regional Airport Authority, the Hattiesburg-Laurel Regional Airport Authority, the Jackson Municipal Airport Authority, the Meridian Airport Authority, the Tupelo Airport Authority and the general aviation airport owners in the state that receive funds on an intermittent basis that may make them subject to the provisions of 49 CFR Part 26.

Each direct recipient of funding from the United States Department of Transportation is required by 49 CFR Part 26 to have an approved Disadvantaged Business Enterprise Program. Each recipient is required to follow the procedures of an approved Unified Certification Program to the extent that if there is a dispute between the Unified Certification Program and an approved Disadvantaged Business Enterprise Program, the procedure contained herein shall take precedence and shall be continual.

APPLICATION FORM

The Mississippi Unified Certification Program will require that all applicants complete the uniform application that will be adopted as part of the final rule to begin the certification process. The use of that form is required by 49 CFR Part 26, no other forms will be acceptable. The application form may be obtained by writing or calling the Mississippi Department of Transportation's DBE Liaison Officer at:

DBE Liaison Officer
Post Office Box 1850
Jackson, MS 39215-1850
Telephone Number: (601) 359-7466
Facsimile Number: (601) 576-4504

The form may also be obtained from any other participant receiving funding from the United States Department of Transportation as defined on page one (1) under "Participation in the Unified Certification Program". The names, addresses, and telephone numbers for the contact persons for each of those participants are attached as Exhibit "A" to this program.

COMPLETION OF APPLICATION FORM

The completed application form should be returned to the Mississippi Department of Transportation's DBE Liaison Officer at the address shown above.

LEAD AGENCY

The Mississippi Department of Transportation will serve as the lead agency for all entities located in Mississippi which receive funding from the United States Department of Transportation through either the Federal Highway Administration, the Federal Transit Administration or the Federal Aviation Administration.

The Mississippi UCP shall provide sufficient resources and expertise to carry out the requirements of 49 CFR Part 26.81. The Mississippi Department of Transportation, serving as lead agency, will utilize the Office of Civil Rights to initially process applications, maintain the database, which includes all updates. The Audit Division of the Mississippi Department of Transportation will continue to provide resources to review PNW statements for all applicants seeking DBE certification. MDOT will provide additional staffing as needed to ensure that the UCP is administered in full compliance with Federal Regulations. All other DOT recipients that have employees serving on a certifying subcommittee have agreed to dedicate the necessary personnel and resources from within their existing budgets to ensure that the UCP is administered in full compliance with Federal Regulations.

As the lead agency, the Mississippi Department of Transportation will require applicants seeking to be certified for participation in a Disadvantaged Business Enterprise Program approved by the United States Department of Transportation in accordance with 49 CFR Part 26 to complete and submit the appropriate application form. Applicants will also be required to attest to the accuracy and truthfulness of the information provided on the form.

The DBE Liaison Officer for the Mississippi Department of Transportation will review all applications for completeness and determine the type of work or services the applicant desires to provide or perform. The types of work or service will be based on the North American Industry Classification System (NAICS) codes. Upon determination of the primary NAICS codes for such services or work, the application will be referred for further processing to the appropriate Sub-Committee as identified below.

COMMITTEE MEMBERSHIP

The Certification Committee will consist of three separate Sub-Committees made up of individuals familiar with the certification requirements of 49 CFR Part 26 to review and determine whether to certify a firm as eligible to participate as a DBE in the transportation industry. They are the (1) Public Transit Sub-Committee, (2) Aviation Sub-Committee and, (3) Transportation Sub-Committee. The Public Transit Sub-Committee will review all applicants desiring to provide services, materials, or commodities relating to public transit activities used for public transportation, the sale of fuel to operate such vehicles and other services pertaining to public transportation matters. The Aviation Sub-Committee will review vendors and aviation specific services and/or construction for airports. The Transportation Sub-Committee will review applicants who desire to perform any type of highway or related design, construction, planning or consultants dealing with such matters.

Each Sub-Committee will consist of (5) five members appointed from a pool of DOT recipients within their respective modes. A quorum shall consist of three (3)

members of the Sub-Committee. The members of the Public Transit Sub-Committee will be selected annually by the Mississippi Public Transit Association. The Mississippi Airports Association at its annual meeting will select the members of the Aviation Sub-Committee. The Chief Engineer of the Mississippi Department of Transportation will select the members of the Transportation Sub-Committee.

The appointing authority for each of the subcommittees will submit the names, addresses, and telephone numbers of those individuals appointed to each Sub-Committee to the DBE Liaison Officer. This list will also indicate the chairman of each Sub-Committee.

If the applicant desires to provide services or to perform work which will involve matters relating to more than one of the above named Sub-Committees, the Sub-Committees for which the applicant desires to provide services or work will meet jointly, and a quorum shall consist of three (3) members total representing each of the Sub-Committees involved. The Sub-Committee will vote as one body to certify the firm in each of the NAICS Code categories requested.

SUB-COMMITTEE CERTIFICATION MEETINGS

After the necessary information is obtained and after the on-site review, the Certification Sub-Committee Chairman shall call for a meeting which will be held monthly or as needed at a location to be determined by the Committee. During these meetings the subcommittee will determine if a firm is eligible to be certified under the DBE Program in accordance with 49 CFR Part 26. Meetings may be held via teleconference at the discretion of the Sub-Committee. If the Chairman of the Sub-Committee finds that there are no matters to be considered by the Sub-Committee in any particular month, the Chairman may notify the Sub-Committee members that the monthly scheduled meeting has been cancelled. In the event that the monthly meeting has been cancelled, a majority of the members of the Certification Sub-Committee may require the meeting to be held. The Certification Sub-Committee may meet at any other time upon 24 hours notice as called by a majority of the members of the Sub-Committee. The applicant shall have the right to appear before the Sub-Committee; and the Sub-Committee, in its discretion, shall have the right to require the applicant to be present.

The Certification Sub-Committee meeting or other regular or special called meeting will be held at a time and place to be determined by a majority of the members of the Sub-Committee of record.

CERTIFICATION STANDARDS

By October 31, 2002, Mississippi will have its UCP fully implemented in accordance with 49 CFR Part 26.81(a)(2). In determining whether a firm is eligible for DBE certification, the following standards will apply:

- (1) The firm seeking certification has the burden of demonstrating to the recipient, by a preponderance of the evidence, that it meets the requirements concerning group membership or individual disadvantage, business size, ownership, and control.

(2) The recipient will rebuttably presume that members of the designated groups identified in 49 C.F.R. 26.67(a) are socially and economically disadvantaged. This means that they do not have the burden of proving that they are socially and economically disadvantaged. However, applicants have the obligation to provide information concerning their economic disadvantage.

(3) Individuals who are not presumed to be socially and economically disadvantaged, and individuals concerning whom the presumption of disadvantage has been rebutted, have the burden of proving by a preponderance of the evidence, that they are socially and economically disadvantaged under the guidance set forth in Appendix "E" to 49 C.F.R. 26.

(4) The recipient will make determinations concerning whether individuals and firms have met their burden of demonstrating group membership, ownership, control, and social and economic disadvantage (where disadvantage must be demonstrated on an individual basis) by considering all the facts in the record, viewed as a whole.

RULES GOVERNING GROUP MEMBERSHIP DETERMINATIONS: [49 C.F.R. 26.63]

If the recipient has reason to question whether an individual is a member of a group that is presumed to be socially and economically disadvantaged, it will require the individual to demonstrate, by a preponderance of the evidence, that he or she is a member of the group. In making such a determination, the recipient will consider whether the person has held himself or herself out to be a member of the group over a long period of time prior to application for certification and whether the person is regarded as a member of the group by the relevant community. The recipient may, in its discretion, require the applicant to produce appropriate documentation of group membership. If the recipient determines that an individual claiming to be a member of a group presumed to be disadvantaged is not a member of a designated disadvantaged group, the individual must demonstrate social and economic disadvantage on an individual basis. The recipient's decisions concerning membership in a designated group are subject to the certification appeals procedure of 49 C.F.R. 26.89.

RULES GOVERNING BUSINESS SIZE DETERMINATIONS: [49 C.F.R. 26.65]

To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. The recipient will apply current SBA business size standards found in 13 C.F.R. 121 applicable to the type(s) of work the firm seeks to perform in USDOT-assisted contracts. Size determinations are made for the firms as a whole, not for just one division.

Even if it meets those requirements, a firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations (see 13 C.F.R. 121.402), over the firm's previous three fiscal years, in excess of \$28.5 million or as amended. The Secretary of Transportation adjusts this amount for inflation from time to time.

RULES DETERMINING SOCIAL AND ECONOMIC DISADVANTAGE: [49 C.F.R. 26.67]

(a) Presumption of disadvantage.

(1) The recipient rebuttably presumes that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific

Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. The recipient will require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

(2) The recipient requires each individual owner of a firm applying to participate as a DBE whose ownership and control are relied upon for DBE certification to submit a signed, notarized statement of personal net worth, with appropriate supporting documentation. In determining net worth, the recipient will exclude an individual's ownership interest in the applicant firm and the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). A contingent liability does not reduce an individual's net worth. The personal net worth of an individual claiming to be an Alaska Native will include assets and income from sources other than an Alaska Native Corporation and exclude any of the following which the individual receives from any Alaska Native Corporation: cash (including cash dividends on stock received from an ANC) to the extent that it does not, in the aggregate, exceed \$2,000 per individual per annum; stock (including stock issued or distributed by an ANC as a dividend or distribution on stock); a partnership interest; land or an interest in land (including land or an interest in land received from an ANC as a dividend or distribution on stock); and an interest in a settlement trust.

(b) Rebuttal of presumption of disadvantage.

(1) If the statement of personal net worth that an individual submits shows that the individual's personal net worth exceeds \$750,000, the individual's presumption of economic disadvantage is rebutted. The recipient will not have a proceeding to rebut the presumption of economic disadvantage in this case.

(2) If the recipient has a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged it may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. The recipient proceeding will follow the procedures of 49 C.F.R. 26.87.

(3) In such a proceeding, the recipient has the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. The recipient may require the individual to produce information relevant to the determination of his or her disadvantage.

(4) When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility unless and until he or she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds \$750,000, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage.

(c) *8(a) and SDB Firms.* If a firm applying for certification has a current, valid certification from or recognized by the SBA under the 8(a) or small and disadvantaged business (SDB) program (except an SDB certification based on the firm's self-certification as an SDB), the recipient may, in its discretion, accept the firm's 8(a) or SDB certification in lieu of conducting its own certification proceeding, just as it may accept the certification of another USDOT recipient for this purpose. The recipient, however, is not required to do so.

(d) Individual determinations of social and economic disadvantage. Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. The recipient will make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to the recipient, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds \$750,000 shall not be deemed to be economically disadvantaged. In making these determinations, the recipient will use the guidance found in Appendix E of 49 C.F.R. 26. The recipient requires that applicants provide sufficient information to permit determinations under the guidance of Appendix E of 49 C.F.R. 26.

RULES GOVERNING DETERMINATIONS OF OWNERSHIP: [49 C.F.R. 26.69]

(a) In determining whether the socially and economically disadvantaged participants in a firm own the firm, the subcommittee will consider all the facts in the record, viewed as a whole.

(b) 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.

(c) 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 interests, as demonstrated by the substance, not merely the form, of arrangements.

(d) All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Except as provided in this paragraph (d), no securities or assets held in trust, or by any guardian for a minor, are considered as held by disadvantaged persons in determining the ownership of a firm. However, securities or assets held in trust are regarded as held by a disadvantaged individual for purposes of determining ownership of the firm, if:

- (1) The beneficial owner of securities or assets held in trust is a disadvantaged individual, and the trustee is the same or another such individual; or
 - (2) 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.
- (e) The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests 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.
- (f) The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership:
- (1) The owner's expertise must be:
 - (i) In a specialized field;
 - (ii) Of outstanding quality;
 - (iii) In areas critical to the firm's operations;
 - (iv) Indispensable to the firm's potential success;
 - (v) Specific to the type of work the firm performs; and
 - (i) Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.
 - (2) The individual whose expertise is relied upon must have a significant financial investment in the firm.
- (g) The recipient will always deem as held by a socially and economically disadvantaged individual, for purposes of determining ownership, 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.
- (h) (1) The recipient will presume as not being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests 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:
- (i) Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;
 - (ii) Involved in the same or a similar line of business; or
 - (iii) Engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.

- (2) To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate to the recipient, by clear and convincing evidence, that:
 - (i) The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
 - (ii) 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.
- (i) The recipient must apply the following rules in situations in which marital assets form a basis for ownership of a firm:
 - (1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, the recipient will deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. The recipient will not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.
 - (2) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.
- (j) The recipient may consider the following factors in determining the ownership of a firm. However, the recipient will not regard a contribution of capital as failing to be real and substantial, or find a firm ineligible, solely because:
 - (1) A socially and economically disadvantaged individual acquired his or her ownership interest as the result of a gift, or transfer without adequate consideration, other than the types set forth in paragraph (h) of this section;
 - (2) 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 or sale of real or personal property, bank signature cards, or other documents; or
 - (3) 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 recipient will 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 in form, by a socially and economically disadvantaged individual.

RULES GOVERNING DETERMINATIONS CONCERNING CONTROL: [49 C.F.R. 26.63]

- (a) In determining whether socially and economically disadvantaged owners control a firm, the recipient will 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 recipient will scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.

(2) The recipient 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 recipient 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 recipient will consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.

(c) A DBE firm must not be subject to any formal or informal restrictions which limit 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 C.F.R. 26.71(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 economically 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 the 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 such a license or credential to own and/or control a firm, the recipient will not deny certification solely on the ground that the person lacks the license or credential. However, the recipient may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged-owners actually control the firm.

(i) (1) The recipient 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 recipient 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 recipient 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.

(j) 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.

(k) (1) 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 recipient will make a judgment about the control the socially and economically disadvantaged owner exercises vis-à-vis other persons involved in the business as in other situations, without regard to whether or not the other persons are immediate family members.

- (2) If the recipient 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.

(l) 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 recipient, 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.

(m) In determining whether a firm is controlled by its socially and economically disadvantaged owners, the recipient may consider whether the firm owns equipment necessary to perform its work. However, the recipient 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.

(n) The recipient 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 recipient only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. The recipient may not, in this situation, require that the firm be recertified or submit a new application for certification, but the recipient must verify the disadvantaged owner's control of the firm in the additional type of work.

(o) A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the recipient will generally 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.

(p) 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.

(q) 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.

OTHER RULES AFFECTING CERTIFICATION: [49 C.F.R. 26.73]

(a) (1) Consideration of whether a firm performs a commercially useful function or is a regular dealer pertains solely to counting toward DBE goals the participation of firms that have already been certified as DBEs. Except as provided in paragraph (a)(2) of this section, the recipient will not consider commercially useful function issues in any way in making decisions about whether to certify a firm as a DBE.

(2) The recipient may consider, in making certification decisions, whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program.

(b) The recipient will evaluate the eligibility of a firm on the basis of present circumstances. The recipient will not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of this part, nor will the recipient refuse to certify a firm solely on the basis that it is a newly formed firm.

(c) DBE firms and firms seeking DBE certification must cooperate fully with the recipient's requests (and USDOT requests) for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial or removal of certification.

(d) Only firms organized for profit may be eligible DBEs. Not-for-profit organizations, even though controlled by socially and economically disadvantaged individuals, are not eligible to be certified as DBEs.

(e) An eligible DBE firm must be owned by individuals who are socially and economically disadvantaged. Except as provided in this paragraph, a firm that is not owned by such individuals, but instead is owned by another firm -- even a DBE firm -- cannot be an eligible DBE.

(1) If socially and economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, the recipient may certify the subsidiary if it otherwise meets all requirements of this subpart. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.

(2) The recipient may certify such a subsidiary only if there is cumulatively 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals.

(f) Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is an independent business, owned and controlled by socially and economically disadvantaged individuals.

(g) A firm that is owned by an Indian tribe, Alaska Native Corporation, or Native Hawaiian organization as an entity, rather than by Indians, Alaska Natives, or Native Hawaiians as individuals, may be eligible for certification. Such a firm must meet the size standards of 49 C.F.R. 26.65. Such a firm must be controlled by socially and economically disadvantaged individuals, as provided in 49 C.F.R. 26.71.

CERTIFICATION PROCEDURES

UNIFORM CERTIFICATION PROCEDURE: [49 C.F.R. 26.81]

By October 31, 2002, the MDOT and all other recipients of funding by the United States Department of Transportation will operate under a Unified Certification Program meeting the requirements of 49 C.F.R. 26.81.

PROCEDURES FOLLOWED IN MAKING CERTIFICATION DECISIONS: [49 C.F.R. 26.83]

(a) The recipient will ensure that only firms certified as eligible DBEs under this section participate as DBEs in its program.

(b) The recipient will determine the eligibility of firms as DBEs consistent with the standards of subpart D of 49 CFR Part 26. The Mississippi UCP meets all the requirements of this part and this subpart that recipients are required to meet.

(c) The recipient will take all the following steps in determining whether a DBE firm meets the standards of subpart D of this part:

(1) The Sub-Committee or its designee to whom the application has been referred will perform an on-site visit to the offices of the individual, partnership, or corporation seeking certification and will interview the principal officers of the applicant and review their resumes and/or work histories. The designee shall be a person familiar with certification requirements of 49 CFR Part 26 and appointed from the pool of DOT recipients. The recipient will also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in the recipient's jurisdiction or local area. The recipient may rely, in its discretion, upon the site visit report of any other recipient with respect to a firm applying for certification;

(2) If the firm is a corporation, analyze the ownership of stock in the firm;

(3) Analyze the bonding and financial capacity of the firm;

(4) Determine the work history of the firm, including contracts it has received and work it has completed;

(5) Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE Program and its preferred locations for performing the work, if any;

(6) Obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the DBE Program;

- (7) Require potential DBEs to complete and submit an appropriate application form and require that the applicant attest to the accuracy and truthfulness of the information provided on that application. This shall be done in the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths. The recipient will review all information on the form prior to making a decision about the eligibility of the firm.
- (d) When another recipient of USDOT funding, in connection with its consideration of the eligibility of a firm, makes a written request for certification information the recipient has obtained about that firm (e.g., including application materials or the report of a site visit, if the recipient has made one to the firm), the recipient will promptly make the information available to the other recipient.
- (e) When another USDOT recipient has certified a DBE firm, the recipient may, in its discretion, take any of the following actions:
- (1) Certify the firm in reliance on the certification decision of the other recipient;
 - (2) Make an independent certification decision based on documentation provided by the other recipient, augmented by any additional information recipient requires the applicant to provide; or
 - (3) Require the applicant to go through Mississippi UCP application process without regard to the action of the other recipient.
- (f) The recipient will safeguard from disclosure to unauthorized persons information gathered as part of the certification process that may reasonably be regarded as proprietary or other confidential business information, consistent with applicable Federal, state, and local law.
- (g) Once the recipient has certified a DBE, the firm will remain certified for a period of three years unless and until its certification has been removed through the procedures of 49 C.F.R. 26.87. The recipient will not require DBEs to reapply for certification as a condition of continuing to participate in the program during this three-year period, unless there is a change on the factual basis on which the certification was made. The DBE firm will be notified sixty days prior to its three-year anniversary date of the need for recertification. The owner of the DBE firm will be provided a no-change affidavit and a personal net worth statement with instructions to return with required supporting documentation. The DBE firm will have one month after its anniversary date to comply with the request. Failure to comply may be deemed as failure to cooperate as provided in 49 CFR 26.109 and may be grounds for appropriate action under 49 CFR 26.87 for removal of the DBE firm's eligibility.
- (h) All firms or individuals certified by the recipient as a DBE must inform the recipient in writing of any change in circumstances affecting their ability to meet size, disadvantaged status, ownership, or control requirements of this part or of any material change in the information provided in your application form.
- (1) Changes in management responsibility among members of a limited liability company are covered by this requirement.
 - (2) All DBEs must attach supporting documentation describing in detail the nature of such changes.
 - (3) The notice must take the form of an affidavit sworn to by the owners of the firm before a person who is authorized by state law to administer oaths. The individual or firm must provide the written notification within 30 days of the occurrence of the change. If any firm

fails to make timely notification of such a change, it will be deemed to have failed to cooperate under 49 C.F.R. 26.109(c).

(i) All DBEs certified by the recipient must provide to the recipient, every year on the anniversary of the date of their certification, an affidavit sworn to by the firm's owners before a person who is authorized by state law to administer oaths. This affidavit must affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material changes in the information provided in its application form, except for changes about which the DBE has notified the recipient under paragraph (h) of this section. The affidavit shall specifically affirm that the firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of the firm's size and gross receipts. Any DBE which fails to provide this affidavit in a timely manner will be deemed to have failed to cooperate under 49 C.F.R. 26.109(c).

(j) The appropriate Subcommittees as set forth presently herein will make decisions on applications for certification within 90 days of receiving from the applicant firm all information required under this part. The recipient may, in its discretion, extend this time period once, for no more than an additional 60 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension. The recipient's failure to make a decision by the applicable deadline under this paragraph is deemed a constructive denial of the application, on the basis of which the firm may appeal to USDOT under 49 C.F.R. 26.89.

COMMITTEE DECISION

Once the DBE Liaison Officer has received a completed application, including all necessary personal net worth information, the DBE Liaison Officer has 15 days to forward the application to the appropriate Sub-Committee. Within sixty (60) days of receiving the complete application, the Sub-Committee will complete the certification process and notify the DBE Liaison Officer of the Sub-Committee decision. All certifications by the MUCP shall be precertifications: i.e., certifications that have been made final before the due date for bids or offers on a contract on which a firm seeks to participate as a DBE. The DBE Liaison Officer will send notification of the Subcommittee's decision to the applicant within five (5) days.

RULES GOVERNING DENIALS OF REQUESTS FOR CERTIFICATION [49 C.F.R. 26.85]

(a) When the recipient denies a request by a firm, which is not currently certified by the State of Mississippi, to be certified as a DBE, the recipient will provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based will be made available to the applicant, on request.

(b) When a firm is denied certification (with the exception of a constructive denial), a time period of twelve months must elapse before the firm may reapply for certification under Mississippi's Unified Certification Program. The time period for reapplication begins to run on the date the explanation required by paragraph (a) of this section is received by the firm.

(c) When a subcommittee makes an administratively final denial of certification concerning a firm, the firm may appeal the denial to the USDOT under 49 C.F.R. 26.89. The appeals should be sent to:

The Department of Transportation
Office of Civil Rights
400 7th Street, S.W.
Room 5414
Washington, DC 20590

PROCEDURES USED TO REMOVE A DBE'S ELIGIBILITY: [49 C.F.R. 26.87]

- (a) Ineligibility complaints.
- (1) Any person may file with MDOT a written complaint alleging that a currently-certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. A DOT recipient is not required to accept a general allegation that a firm is ineligible or an anonymous complaint. 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. Confidentiality of complainants' identities will be protected as provided in 26 C.F.R. 109(b). Any such complaint should be mailed to the MDOT, Office of Civil Rights, DBE Liaison, Post Office Box 1850, Jackson, MS 39215-1850.
- (2) The DBE Liaison will review all complaints and refer them to the sub-committee that approved the DBE Certification. The appropriate Subcommittee will review the records concerning the firm, any material provided by the firm and the complainant, and other available information. The Subcommittee may request additional information from the firm or conduct any other investigation that it deems necessary.
- (3) If the Subcommittee determines, based on this review, that there is reasonable cause to believe that the firm is ineligible, it will provide written notice to the firm that it proposes to find the firm ineligible, setting forth the reasons for the proposed determination. If the Subcommittee determines that such reasonable cause does not exist, it will notify the complainant and the firm in writing of this determination and the reasons for it. All statements of reasons for findings on the issue of reasonable cause will specifically reference the evidence in the record on which each reason is based.
- (b) DOT Recipient - initiated proceedings.
- If, based on notification by the firm of a change in its circumstances or other information that comes to the recipient's attention, the recipient determines that there is reasonable cause to believe that a currently certified firm is ineligible, it's Subcommittee will provide written notice to the firm that it proposes to find the firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause will specifically reference the evidence in the record on which each reason is based.
- (c) USDOT directive to initiate proceeding.
- (1) If the concerned operating administration determines that information in the recipient's certification records, or other information available to the concerned operating administration, provides reasonable cause to believe that a firm the recipient certified does not

meet the eligibility criteria of this part, the concerned operating administration may direct the recipient to initiate a proceeding to remove the firm's certification.

(2) The concerned operating administration must provide the recipient and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.

(3) The recipient will immediately commence and prosecute a proceeding to remove eligibility as provided by paragraph (b) of this section.

(d) Hearing.

When the subcommittee notifies a firm that there is reasonable cause to remove its eligibility as provided in paragraph (a), (b), or (c) of this section, the Subcommittee will give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.

(1) In such a proceeding, the recipient bears the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part.

(2) The subcommittee will maintain a complete record of the hearing, by any means acceptable under state law for the retention of a verbatim record of an administrative hearing. If there is an appeal to USDOT under 49 C.F.R. Part 26.89, the subcommittee will provide a transcript of the hearing to USDOT and, on request, to the firm. The subcommittee will retain the original record of the hearing. The subcommittee may charge the firm only for the cost of copying the record.

(3) The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, the recipient bears the same burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards, as it would during a hearing.

(e) Separation of functions.

The subcommittee will ensure that the decision in a proceeding to remove a firm's eligibility is made by one of the three subcommittees that was not involved in the initial hearing.

(f) Grounds for Decision.

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

(1) Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part;

(2) Information or evidence not available to the recipient at the time the firm was certified;

(3) Information that was concealed or misrepresented by the firm in previous certification actions by the recipient;

(4) A change in the certification standards or requirements of the recipient since the recipient certified the firm; or

(5) A documented finding that the recipient's determination to certify the firm was factually erroneous.

(g) Notice of decision.

Following the recipient's decision, the recipient 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 recipient's decision and of the availability of an appeal to the Department of Transportation under C.F.R. 26.89. The recipient will send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that directed it to initiate the proceeding.

(h) Status of firm during proceeding.

(1) A firm remains an eligible DBE during the pendency of the recipient's proceeding to remove its eligibility.

(2) The firm does not become ineligible until the issuance of the notice provided for in paragraph (g) of this section.

(i) Effects of removal of eligibility.

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

(1) When a prime contractor has made a commitment to using the ineligible firm, or the recipient has made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before the recipient issues the decertification notice provided for in paragraph (g) of this section, the ineligible firm does not count toward the contract goal or overall goal. The recipient will direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate to the recipient that it has made a good faith effort to do so.

(2) If a prime contractor has executed a subcontract with the firm before the recipient 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 recipient 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 recipient issued the notice of its ineligibility shall not count toward the recipient's overall goal, but may count toward the contract goal.

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

(j) Availability of appeal.

When a subcommittee makes an administratively final removal of a firm's eligibility under this section, the firm may appeal the removal to the USDOT under 49 C.F.R. 26.89.

DBE DIRECTORY

The Mississippi Department of Transportation will compile and maintain a directory of all applicants which have been certified as Disadvantaged Business Enterprises in accordance with the guidelines and regulations of the United States Department of Transportation. The listing in the directory will be according to the NAICS code(s) for which the applicant has been certified. The DBE directory will designate the name of the individual, partnership, or corporation, its mailing address, telephone number, list of relevant NAICS codes, and the description of services or type of work for which it has achieved DBE certification through Mississippi's unified certification process in accordance with 49 CFR Part 26. The directory will be made available electronically and in print to the public; including all contractors, all recipients located within Mississippi which receive funding from the United States Department of Transportation and any other interested party or entity. The directory will be updated as soon as changes are made.

APPEALS PROCESS

If any applicant is denied certification as a DBE, the applicant will have a right to appeal to the United States Department of Transportation. The appeal must be in accordance with 49 CFR Part 26 and should be sent to:

U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
Room W35304
Washington, D. C. 20590

NON-DISCLOSURE

- (a) Availability of records
 - (1) In responding to requests for information concerning any aspect of the UCP, the USDOT complies with provisions of the Federal Freedom of Information (5 U.S.C. 552) and Privacy Acts (5 U.S.C. 552a). USDOT may make available to the public any information concerning the UCP release of which is not prohibited by Federal law.
 - (2) All DOT Recipients are required to safeguard from disclosure to unauthorized persons information that may reasonably be considered as confidential business information, consistent with Federal, state, and local law.
- (b) Confidentiality of information on complainants.
Notwithstanding the provisions of paragraph (a) of this section, the identity of complainants shall be kept confidential, at their election. If such confidentiality will hinder the investigation, proceeding or hearing, or result in a denial of appropriate administrative due process to other parties, the complainant must be advised for the purpose of waiving the privilege. Complainants are advised that, in some circumstances, failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing. FAA follows the

procedures of 14 C.F.R. 16 with respect to confidentiality of information in complaints.

(c) Cooperation.

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

(d) Intimidation and retaliation.

Any DOT recipient, contractor, or any other participant in the program, may not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by this part or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. Any violation of this prohibition will constitute noncompliance with this part.