



**GOVERNMENT OF PUERTO RICO**  
**Puerto Rico Highway and Transportation Authority**

**DISADVANTAGED BUSINESS ENTERPRISE  
PROGRAM  
PUERTO RICO HIGHWAY AND TRANSPORTATION  
AUTHORITY**

Yomarie Pacheco Sánchez, Esq.  
Director, Civil Rights Office  
PO Box 42007 Minillas Station  
San Juan, PR 00940-2007  
PH: (787) 721-8787 Ext. 1740  
FX: (787) 721-2621  
YPacheco@dtop.pr.gov  
Revised October 2017



## TABLE OF CONTENTS

I.	POLICY .....	4
II.	INTRODUCTION.....	6
III.	DEFINITIONS .....	7
IV.	RESPONSIBILITY FOR DBE PROGRAM IMPLEMENTATION .....	13
	<u>LIAISON OFFICER &amp; RECONSIDERATION OFFICIAL</u> .....	13
V.	ADMINISTRATIVE REQUIREMENTS.....	14
	<u>FINANCIAL INSTITUTIONS</u> .....	14
	<u>DBE PROGRAM</u> .....	15
	<u>DIRECTORY</u> .....	15
	<u>OVER-CONCENTRATION</u> .....	15
V. a.	<u>FOSTERING SMALL BUSINESS</u> .....	16
	<u>SMALL BUSINESS PROGRAM</u> .....	17
VI.	DETERMINING, MEETING AND COUNTING OVERALL ANNUAL DBE GOAL FOR FEDERALLY ASSISTED CONTRACTS .....	18
	<u>MEANS OF ATTAINING THE GOAL</u> .....	19
	<u>RACE-NEUTRAL MEASURES IMPLEMENTATION</u> .....	20
	<u>PROJECT/INDIVIDUAL CONTRACT GOAL SETTING</u> .....	22
	<u>TVM CERTIFICATION</u> .....	22
	<u>GOOD FAITH EFFORTS</u> .....	23
	<u>COUNTING DBE PARTICIPATION</u> .....	27
VII.	REQUIRED CONTRACT PROVISIONS .....	28
	<u>NON-DISCRIMINATION ASSURANCE</u> .....	28
	<u>JOINT VENTURES</u> .....	29
	<u>PROMPT PAYMENT CLAUSE</u> .....	30
	<u>LEGAL AND CONTRACT REMEDIES</u> .....	31
	<u>CONTRACTOR REPORTING REQUIREMENTS</u> .....	31
	<u>MONITORING PAYMENTS TO DBES</u> .....	31
VIII.	CERTIFICATION STANDARDS.....	32
	<u>PROCESS</u> .....	32
	<u>BURDENS OF PROOF</u> .....	33
	<u>GROUP MEMBERSHIP DETERMINATIONS</u> .....	34
	<u>BUSINESS SIZE DETERMINATIONS</u> .....	34
	<u>SOCIAL AND ECONOMIC DISADVANTAGE DETERMINATIONS</u> .....	35
	<u>REBUTTAL OF PRESUMPTION OF DISADVANTAGE</u> .....	35
	<u>8(A) AND SDB FIRMS</u> .....	36

## TABLE OF CONTENTS

	<b><u>OWNERSHIP DETERMINATIONS</u></b> .....	36
	<b><u>CONTROL DETERMINATIONS</u></b> .....	39
	<b><u>OTHER CONSIDERATIONS</u></b> .....	43
<b>IX.</b>	<b><u>CERTIFICATION PROCEDURES (SUBPART E)</u></b> .....	45
	<b><u>UNIFIED CERTIFICATION PROGRAM</u></b> .....	45
	<b><u>CERTIFICATION PROCEDURES</u></b> .....	46
	<b><u>INTERSTATE CERTIFICATION</u></b> .....	47
	<b><u>PERSONAL NET WORTH</u></b> .....	47
	<b><u>RECERTIFICATION</u></b> .....	49
	<b><u>NO CHANGE AFFIDAVITS &amp; NOTICES OF CHANGE</u></b> .....	49
	<b><u>CERTIFICATION DENIALS / SUSPENSIONS /APPEALS</u></b> .....	50
	<b><u>DECERTIFICATION &amp; REMOVAL PROCEDURES</u></b> .....	51
	<b><u>STATUS OF THE FIRM DURING PROCEEDING</u></b> .....	53
	<b><u>CERTIFICATION APPEALS</u></b> .....	54
<b>X.</b>	<b><u>RECORDKEEPING, MONITORING AND ENFORCEMENT</u></b> .....	55
<b>XI.</b>	<b><u>PUBLIC PARTICIPATION PROCESS</u></b> .....	56
	<b><u>ATTACHMENTS</u></b> .....	58
<b>APPENDIX A</b>	<b>- DBE PROGRAM CONTRACT PROVISIONS</b>	
<b>APPENDIX B</b>	<b>- CERTIFICATION OF DBE UTILIZATION (CDBEU)</b>	
<b>APPENDIX C</b>	<b>- CERTIFICATION OF CONTRACTOR, CONSULTANT OR OFFEROR FOR DBE GOAL ANNUAL STATE GOAL</b>	
<b>APPENDIX D</b>	<b>- NO-CHANGE AFFIDAVIT</b>	
<b>APPENDIX E</b>	<b>- ORGANIZATIONAL CHART</b>	
<b>APPENDIX F</b>	<b>- YEARLY REVIEW LETTER</b>	
<b>APPENDIX G</b>	<b>- UNIFORM REPORT</b>	
<b>APPENDIX H</b>	<b>- UCP AGREEMENT</b>	
<b>APPENDIX I</b>	<b>- FTA PROGRAM APPROVAL LETTER</b>	





## GOVERNMENT OF PUERTO RICO

Puerto Rico Highway and Transportation Authority

### **I.**

### **DBE POLICY**

The Puerto Rico Highway and Transportation Authority of the Commonwealth of Puerto Rico (PRHTA) acting through the Secretary of Transportation, hereby expresses its commitment to support the policy of providing the fullest possible participation of firms owned and controlled by socially and economically disadvantaged individuals in programs and projects receiving federal assistance under the DOT programs. It is the policy of the PRHTA that no person shall be excluded from participation, denied the benefits of, or otherwise discriminated against in relation with the award and performance of any contract covered by this Program, on the grounds of race, color, sex, or national origin. In this regard, the PRHTA is committed to a program of providing equal opportunity and affirmative action to disadvantaged business enterprises and small businesses as defined under DOT's Regulation. Implementation of the DBE Program by the PRHTA is a legal obligation and failure to carry out its terms shall be treated as a violation whereby sanctions may be imposed as provided under 49 CFR Part 26. In administering the DBE Program, the PRHTA shall not use criteria or methods that would have the effect of defeating or substantially impairing accomplishments of the objectives of the program with respect to individuals of a particular race, color, sex, or national origin

The PRHTA DBE Policy Statement will be circulated through the Department among its personnel in the different levels of supervision as well as local governmental units, business organizations, the DBE and non-DBE business communities that perform work for us on DOT-assisted contracts and to the general public. This Policy Statement shall be published through the appropriate media and fully incorporated into the procurement process. From time to time PRHTA shall receive interpretations from USDOT, which shall be binding on PRHTA, sub-recipients, and contractors.

The purpose of the program is to implement the provision of 49 CFR Part 26, other pertinent regulations, and source legislation. These objectives are:

- a. To ensure nondiscrimination in the award and administration of USDOT-assisted contracts in the USDOT's highway, transit, and airport financial assistance programs;
- b. To create a level playing field on which DBEs and other small businesses can compete fairly for USDOT- assisted contracts;
- c. To ensure that USDOT's DBE program is narrowly tailored in accordance with applicable law;



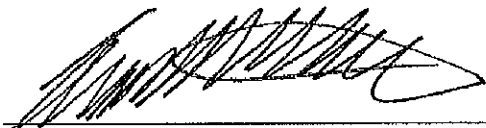
Revised October 2017

- d. To ensure that only firms that fully meet the eligibility standards specified in 49 CFR Part 26 are permitted to participate as DBEs;
- e. To help remove barriers to the participation of DBEs and other small businesses in USDOT-assisted contracts;
- f. To promote the use of DBEs in all types of federally-assisted contracts and procurement activities conducted by recipients.
- g. To assist the development of firms that can compete successfully in the marketplace outside the DBE program,
- h. To provide appropriate flexibility to recipients of federal financial assistance in establishing and providing opportunities for DBEs and other small businesses.

The PRHTA shall work to establish a level playing field for DBE contractors to compete for federally assisted highway construction and transportation projects as prime contractors, subcontractors and consultants. It is intended to provide opportunities to DBEs so they can graduate from the DBE program and perform as prime or as subcontractors without DBE program assistance.

Ms. Yomarie Pacheco Sánchez, Esq., Director of Civil Rights Office has been delegated as the DBE Liaison Officer. In this capacity Ms. Pacheco or her designee is responsible for implementing all aspects of the DBE Program. Implementation of the DBE Program is accorded the same priority as compliance with all other legal obligations incurred by the PRHTA in its financial assistance agreements with the Department of Transportation.

As Secretary of the DTPW and Executive Director of the Puerto Rico Highway and Transportation Authority, I have distributed this Policy Statement to DBE and non-DBEs business communities that perform work for us on DOT-assisted contracts, through the general media to the public, and to all department key personnel and bureaus.



Carlos A. Contreras Abonte, PE, PTOE  
Secretary of the DTPW / Executive Director  
Puerto Rico Highway and Transportation Authority

27-Abril-2017

# **PUERTO RICO HIGHWAY AND TRANSPORTATION AUTHORITY**

## **DISADVANTAGED BUSINESS ENTERPRISE PROGRAM**

### **II. INTRODUCTION**

The Puerto Rico Highway and Transportation Authority (PRHTA) Disadvantaged Business Enterprise Program (DBE) applies to FHWA / FTA projects and the following funding sources: (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 21st Century (TEA-21), Pub. L. 105-178, 112 Stat. 107. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, 119 Stat. 1144; and Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405. (b) Federal transit funds authorized by Titles I, III, 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. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, 119 Stat. 1144; and Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405. (c) Airport funds authorized by 49 U.S.C. 471010, et seq. The DBE Program does not apply to contracts in which USDOT financial assistance does not participate.

On February 2, 1999, new regulations codified at 49 CFR Part 26 were published in the Federal Register to amend 49 CFR Part 23. The new regulations codified at 49 CFR Part 26 are effective as of March 4, 1999, thereby, requiring each primary recipient (PRHTA) of specified federal aid to develop, and implement a DBE Program consistent with 49 CFR Part 26 as a condition to receiving federal aid funding. The regulations make clear that the 10 percent statutory goal is an “aspirational” goal contained in ISTEA and TEA-21 that applies to the Department of Transportation on a national level, not to individual recipients. Thus, the national 10 percent goal is not tied to recipients' goal-setting decisions. Recipients set yearly overall goals based on what will achieve a level playing field in their own programs without regard to the national goal. The regulations require primary recipients to establish yearly overall goals based on the availability of DBEs ready, willing and able to participate in public works construction; requires primary recipients to use race-neutral means to achieve annual DBE participation goals, and mandate size limits on certified DBEs.

### III. DEFINITIONS

1. **AFFILIATION** - has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR part 121, except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when either directly or indirectly one concern controls or has the power to control the other; or a third party or parties controls or has the power to control both; or an identity of interest between or among parties exists that affiliation may be found. In determining whether affiliations exist, 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 statutory cap on the participation of firms in the DBE program.
2. **AFFIRMATIVE ACTION** - taking specific steps to eliminate discrimination and its effects, to ensure nondiscriminatory results and practices in the future, and to involve disadvantaged business enterprises fully in contracts and programs funded by the DOT.
3. **ALASKA NATIVE** - a citizen of the United States who is a person of one fourth (1/4) 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.
4. **ALASKA NATIVE CORPORATION (ANC)** - 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 USC 1601, et seq.).
5. **APPLICANT** - one who submits an application, request or plan to be approved by an official or by a primary recipient as a condition to eligibility for assistance; and "application" means such an application, request or plan.
6. **COMMERCIALY USEFUL FUNCTION (CUF)** - a DBE is responsible for execution of a distinct element of the work of a contract or subcontract and carries out its responsibilities by actually performing, managing and supervising the work involved, or provides professional services.
7. **COMPLIANCE** - a recipient has correctly implemented the requirements of 49 CFR Part 26.



8. **CONSULTANT** - an individual, firm or partnership who contracts with the PRHTA to provide services for engineering, management, business management, surveying, environmental, hazardous materials, subsurface utility engineering, and other services which require a rigorous, logical, science based approach for data acquisition to be used in the development of highway construction plans.
9. **CONTRACT** - 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.
10. **CONTRACT GOAL** - percentage of DBE participation established by -PRHTA, if required, for a USDOT- Assisted Contract.
11. **CONTRACTOR** - one who participates, through a contract or subcontract (at any tier), in a USDOT-assisted highway, transit, or airport program.
12. **DEPARTMENT-DOT** - 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).
13. **DISADVANTAGED BUSINESS ENTERPRISE / DBE** - a for-profit small business concern 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 whose management and daily business operation are controlled by one or more of the socially and economically disadvantaged individuals who own it.
14. **DTPW / PRHTA** - Department of Transportation and Public Works / Puerto Rico Highway and Transportation Authority
15. **FOSTERING OF SMALL BUSINESS ENTERPRISES** - facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles for their participation as prime contractors or subcontractors.
16. **GOOD FAITH EFFORTS** - efforts to achieve a DBE goal or other requirement of the DBE Program which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirements.
17. **IMMEDIATE FAMILY MEMBERS** – father, mother, husband, wife, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother –in-law or father-in-law.
18. **JOINT-VENTURE** - an association of a DBE firm and one or more other firm to carry out a single business enterprise for profit for which purpose they combine properties, capital,

efforts, skills and knowledge; in which the DBE is responsible for a distinct, clearly defined portion; whose share in capital contribution, control, management, risk and profit are commensurate with its ownership interest.

19. **LESSEE** - a business or person that leases or is negotiating to lease, property from a recipient on the recipient's or Department's facility for the purpose of operating a transportation related activity or for the provision of goods or services to the facility or the public on the facility.
20. **LOSP - LIAISON OUTREACH AND SERVICES PROGRAM** - Cooperative Agreements with chambers of commerce and trade associations to provide liaison services between the USDOT, its grantees, recipients, contractors, subcontractors and minority-owned and disadvantaged business enterprises.
21. **NAICS - North American Industrial Classification System** - replaces the Standard Industrial Classification Code (SIC) designation which best describes the primary business of a firm. Until further notice or amended, the Standard Industrial Classification (SIC) from 1997 is still applicable for determining classification of a small business concern.
22. **NONCOMPLIANCE** - that a recipient has not correctly implemented the requirements of 49 CFR Part 26.
23. **OEOPB** – Office of Equal Opportunity Program Bureau
24. **OFFEROR** - an individual, firm, or partnership who submits a proposal for consideration for Design Consultant services.
25. **OPERATING ADMINISTRATION or OA** – 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.
26. **PERSONAL NET WORTH** - 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.
27. **PRESIDENT AND GENERAL MANAGER** - President of the Metropolitan Bus Authority.

28. **PRHTA** - Puerto Rico Highway and Transportation Authority
29. **PRHTA EXECUTIVE DIRECTOR** - Executive Director for the Puerto Rico Highway and Transportation Authority.
30. **PRIMARY INDUSTRY CLASSIFICATION** - six digit North American Industry Classification Systems (NAICS) Code designation which best describes the primary business of a firm. The NAICS Code designations are described in the North American Industry Classification Systems Manual.
31. **PRIMARY RECIPIENT** - a recipient to which USDOT financial assistance is given and passes some or all of it on to another recipient.
32. **PRINCIPAL PLACE OF BUSINESS** - business location where the individuals who manage the firm's day-to-day operations spend most working hours and where top management's business records are kept. If the offices from which management is directed and where business records are kept are in different locations, the recipient will determine the principal place of business for DBE program purposes.
33. **PRMBA** - means Puerto Rico Metropolitan Bus Authority.
34. **PROGRAM** - any undertaking on a recipient's part to use USDOT financial assistance, authorized by the laws to which this part applies.
35. **PROPOSAL** - a proposition compiled and developed in response to an RFP.
36. **PRPA** - Puerto Rico Ports Authority
37. **PRPA EXECUTIVE DIRECTOR** - Executive Director for the Puerto Rico Ports Authority
38. **PRSTC** - means Puerto Rico Safety Traffic Commission.
39. **PRSTC EXECUTIVE DIRECTOR** - Puerto Rico Safety Traffic Commission Executive Director
40. **RACE-CONSCIOUS MEASURE** - program that is focused specifically on assisting DBEs.
41. **RACE-NEUTRAL MEASURE** - program that is, or can be, used to assist all small businesses. For purposes of this part, race-neutral includes gender-neutrality.
42. **RECIPIENT** - any entity, public or private, to which USDOT 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.
43. **REGULAR DEALER** - firm that own, operate, or maintain 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. 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. 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 dealer's own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis. Packagers, brokers, manufacturer's representatives, or other persons who arrange or expedite transactions are not regular dealers.

- 44. **REQUEST FOR PROPOSAL (RFP)** - all documents, including those attached or incorporated by reference, used for soliciting proposals.
- 45. **SECRETARY** - the Secretary of the U. S. Department of Transportation or his/her designee.
- 46. **SECRETARY DTPW** - Secretary of the Puerto Rico Department of Transportation and Public Works
- 47. **SET-ASIDE** - contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.
- 48. **SMALL BUSINESS ADMINISTRATION (SBA)** - United States Small Business Administration.
- 49. **SMALL BUSINESS CONCERN** - firms seeking to participate as DBEs in USDOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration Regulations implementing it (13 CFR Part 121) that also does not exceed the cap on average annual gross receipts specified in 26.65(b).
- 50. **SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUAL** - any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is:
  - a) Individual whom the PRHTA finds to be a socially and economically disadvantaged individual on a case-by-case basis.
  - b) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged;
    - 1) **Black Americans**, which includes persons having origins in any of the Black racial groups of Africa;

- 2) **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;
- 3) **Native Americans**, which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
- 4) **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, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;
- 5) **Subcontinent Asian Americans**, which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives islands, Nepal or Sri Lanka;
- 6) **Women** and **Any** additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.
51. **STATE GOAL** – determination calculated annually as a percentage, of the level of DBE participation on assisted contracts, expecting absentee the effects of discrimination.
52. **TRANSIT VEHICLE MANUFACTURER (TVM)** – is a manufacturer of vehicles used by PRHTA for the primary purpose of public mass transportation (e.g. buses, railcars, vans). The term does not apply to firms, which rehabilitate old vehicles, or to manufacturers of locomotives or ferryboats. It refers to distributors of, or dealers in transit vehicles with respect to the requirements of Section 26.49 of 49 CFR Part 26.
53. **TREN URBANO (TUO)** – TREN URBANO Office in charge of the direction maintenance, and administration of the turnkey project.
54. **UNIFIED CERTIFICATION PROCESS (UCP)** – an entity that provides a one-stop shopping service to applicants seeking DBE certification and must comply with all provisions of this rule concerning certification and nondiscrimination. The PRHTA certification is being used by all the municipalities of the Commonwealth as well as all agencies who receive federal aid funds.
55. **USDOT-ASSISTED CONTRACT** - any contract between a recipient and a contractor (at any tier) funded in whole or in part with USDOT financial assistance, including letters of credit or loans guarantees, except a contract solely for the purchase of land.

56. **WOMEN; AND ANY** additional group whose members are designated as socially and economically disadvantaged by SBA, at such time as the SBA designation becomes effective.
57. **YOU** – refers to a recipient, unless a statement in the text of this part or the context requires otherwise.

#### **IV. RESPONSIBILITY FOR DBE PROGRAM IMPLEMENTATION**

##### **Liaison Officer & Reconsideration Official**

The DBE Liaison Officer designated for the Program is the Director of the Office of Civil Rights and shall have direct, independent access to the Chief Executive Officer concerning DBE program matters. Currently, this position is headed by the Director of the Office of Civil Rights, Yomarie Pacheco Sánchez, Esq., who is responsible for the required duties of the Office. The Director will have the full cooperation of all Bureau Heads and Staff, which are involved in any programs which is affected by 49 CFR Part 26. The Civil Rights Director, as DBE Officer, is responsible for the overall administration, implementation and monitoring all aspects of the DBE program. Is assisted by the Deputy Director of the Office of Civil Rights, Ana Iris Del Moral, who continues managing and administering the DBE program on a day to day basis, in compliance with the federal regulations codified at 49 CFR Part 26. The Civil Rights Office Director is also assisted in her duties by the Deputy Director and Coordinators for the following programs: On the Job Training (OJT Supportive Service Program), Title VI and ADA Program, Equal Opportunity and Contract Compliance. The Staff in these programs report directly to the Director of the CRO. The Deputy Director is jointly responsible for coordinating all aspect of the DBE Program activities within the Department's responsibilities. Those efforts include the following, but are not limited to:

- Gathers and reports statistical data and other information as required by DOT/FTA/FHWA.
- Review third party contracts and purchase requisitions for compliance with the DBE program requirements.
- Work with the PRHTA to implement compliance with their overall annual goals.
- Ensures that bid notices and requests for proposals are available to DBEs in a timely manner.
- Identifies contracts and procurements so that DBE goals are included in solicitations (both race-neutral methods and contract specific goals) and monitors results.
- Analyzes progress toward goal attainment and identifies ways to improve progress.
- Participates in pre-bid meetings to explain and monitor compliance with the DBE Program requirements.

- Advise on DBE matters and achievements.
- Chairs the DBE Advisory Committee, if implemented.
- Participates with legal counsel and consultant to evaluate and/or determine contractor compliance with good faith efforts.
- Provides DBEs with information and assistance in preparing bids, obtaining bonding, insurance and other supportive services.
- Plans and participates in DBE Training seminars.
- Provides outreach to DBEs and community organizations to advise them of contract/subcontract opportunities.
- Certifies DBEs according to the criteria set by DOT and acts as liaison to the Uniform Certification Process.
- Maintain an updated directory of certified DBEs.
- Investigates and facilitates the resolution of project related disputes involving DBEs.
- Maintain copies of bids, plans, blueprints and specifications for interested DBE's perusal.

The designated Reconsideration Official for the DBE Program shall be the Secretary of the Board of Bids, Mr. Carlos Lloveras, PE. The Reconsideration Official shall be available to the procurement process staff in the event that the apparent low bidder/Offeror has failed to meet the established DBE participation contract goals and/or to document good faith efforts. Additionally, it is expected that all Departments/Bureaus directly involved with DBE participation, development, solicitation advertisement, selection and award of contracts, agreements, leases, etc., shall give their full cooperation to the DBE Liaison Officer to assure full compliance with this Program.

## **V. ADMINISTRATIVE REQUIREMENTS**

### **Financial Institutions**

In the Commonwealth of Puerto Rico, most of the banks and financial institutions are owned, operated and controlled by individuals that are by definition socially and economically disadvantaged. These banks are used extensively by both minority and non-minority business enterprises doing business with PRHTA on Federal and non-Federally assisted contracts. Additionally, PRHTA utilizes Puerto Rico's own Government Development Bank (minority owned) for major commonwealth funding/state projects. The PRHTA shall continue to identify financial institutions owned and controlled by socially and economically disadvantaged individuals. The PRHTA shall make every reasonable effort to encourage prime contractors and

subcontractors to utilize such institutions. Information on the availability of such institutions can be obtained by calling PRHTA's Office of Civil Rights.

### **DBE PROGRAM**

PRHTA as primary recipient receiving funds authorized (FHWA/FAA/FTA) for construction, transportation, planning, capital and/or operating assistance who will award prime contracts (excluding transit vehicle purchases) which exceeds \$250,000 must submit a DBE program up-date every three years conforming to this part by August 1 to the concerned operating administration (OA) as long as we remain in compliance and no significant changes occur. It will apply to all sub-recipients, local public agencies who award federally assisted contract under 49 CFR Part 26 and 23. Once the program has been approved, it counts for all of the DOT- federally assisted program.

### **DIRECTORY**

The PRHTA maintains a directory identifying all firms eligible to participate as DBEs. The Directory lists the firm name, address, telephone, and fax number, date of most recent certification, NAICS numbers, and type of work the firm has been certified to perform as a DBE, contact person, E-mail, and any other relevant information. The Directory hard copy is distributed yearly and revised copies made available at the end of December. It is available through our web page ([www.DTOP.gov.pr](http://www.DTOP.gov.pr)) and up-dated electronically every time a firm is newly certified, certification is officially removed, expired or out of the market.

Additionally, the PRHTA has established working relationships with the following organizations: Small Business Administration, Associated General Contractors of Puerto Rico, Manufacturer Association, Women Affairs Commission, Chamber of Commerce, Professional Engineers and Surveyors Association, Professional Architects Association, and Minority Business Development Agency-U.S. Department of Commerce.

### **Over-Concentration**

If the PRHTA identifies an over-concentration of DBEs in a particular trade/sub trade area, it will take necessary steps to implement a program designed to address the issue of over-concentration. Currently, PRHTA has not identified over concentration in any particular trade or sub trade.



**V. a. FOSTERING SMALL BUSINESS PARTICIPATION (§26.39)**

The regulatory requirement of 49 CFR, 26.39 Fostering Small Business is incorporated as part of the contract requirements under the DBE Program and DBE Program Contract Provision. It is still the intent of the PRHTA to keep making good faith efforts to facilitate race gender neutral participation on proposed federal projects as part of its good faith implementation of the DBE program. PRHTA is taking steps to foster competition by small business concerns with the approval of DOT and FHWA/FTA to eliminate obstacles to their participation including, but not limited to:

- (1) Eliminating unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors;
- (2) In multi-year design build contracts (e.g. mega projects), requiring bidders on the prime contract to specify elements of the contract or specific subcontract that are of a size that small business, including DBEs, can reasonably perform.
- (3) On prime contracts not having DBE contract goals, requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work involved.
- (4) Identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures consisting of small businesses, including DBEs, to compete for and perform prime contracts.
- (5) Implementing the overall goal wholly through race/neutral-gender measures, ensuring that a reasonable numbers of prime contracts are of a size that small businesses, including DBEs, can reasonably perform.

The Authority's DBE Program is intended to ensure nondiscrimination in the award and administration of DOT-assisted contracts in the PRHTA highway, transit, airport, and highway safety assistance programs. Our program is race-gender neutral which allows all small business concerns to participate in subcontracting opportunity. 49 CFR, section 26.39 explicitly requires that small business enterprise have the opportunity to compete along with DBEs in the participation of highway/transportation projects. Regulation (§26.39) explicitly requires that small business enterprise have the opportunity to compete along with DBEs in the participation of highway/transportation projects. PRHTA is taking steps to foster competition by small business concerns with the approval of DOT and FHWA/FTA to eliminate obstacles to their participation. A requirement of good faith effort of the DBE Program, is to include the active implementation to foster small business participation. The DBE Program is open to all small

businesses (DBEs and non-DBEs alike), regardless of their location, subject to the same size standards and, consequently, compete with similarly-sized businesses and there are no limits on the number of contracts that can be awarded to firms participating in the DBE Program. Assistance shall be provided to small business, including DBEs, in overcoming barriers to DBE Program participation in all methods of procurement. Businesses requiring management and technical assistance can be identified through unsolicited requests for assistance. PRHTA staff and DBE Program contact person shall offer the following assistance to DBEs and other small businesses:

- Information on its organization and contractual needs;
- Instructions for preparation of bid specifications, procurement policy procedures, and general bid requirements, if needed and previous assistance requested through the Office of Bid and Contracts;
- Projected procurement opportunities;
- Instruction of job performance requirements.

The Office of Bids and Contract will provide information to those firms interested in obtaining plan and specifications all the information needed to participate in our contracting opportunities

### **Small Business Program**

The PRHTA Civil Rights Office is responsible for identifying and implementing innovative acquisition operating processes, such as payment processes and strategies to encourage and assist small business enterprises. The PRHTA's small business activities are directed to provide assistance in the participation of federally funded project side by side with DBE's. The activities of the program include, but are not limited to, assisting small businesses in learning how to do business with the Agency; participating in forums to hear about and address small business issues; developing and implementing methods for outreach and promotion of small businesses to the public, the agency and different municipalities which may need assistance in the promotion of the DBE Program. We have developed informative brochures and other written material and marketing tools that promote small businesses and DBE participation in federal contracts. Additionally, Civil Rights Office coordinates, facilitates and maintains the PRHTA's e-mail posted on the Office of Civil Rights Web site whose main purpose is to assist small business with information regarding certification, doing business with the Agency, outreach events, and any other assistance requested, etc. The Office of Civil Rights disseminate information for all small businesses and provides expertise and advocacy for the Agency efforts to comply with

federal requirements for statewide participation of all PRHTA qualified small businesses, including DBE's in contracting opportunities.

## **VI. DETERMINING, MEETING AND COUNTING OVERALL ANNUAL DBE GOAL FOR FEDERALLY ASSISTED CONTRACTS**

The PRHTA as a recipient of USDOT funds is mandated by USDOT to establish a state goal for the utilization of DBEs on USDOT-assisted contracts. The PRHTA overall goal is expressed as a percentage of all Federal-aid total payments going to prime contractors and subcontractors performing USDOT-assisted contracts that is paid to DBEs. This state goal is based on demonstrable evidence of the availability of ready, willing and able DBEs relative to the universe of all businesses participating on PRHTA USDOT-assisted contracts. The USDOT requires a two-step process for setting the state DBE goal. The first step is to establish a base figure for the relative availability of DBEs. The second step is to adjust the base figure in order to determine the state DBE goal. To establish the base figure, the PRHTA has gathered information with respect to the relative number of bids or quotes submitted by DBEs and non DBEs on past USDOT-assisted prime contracts or subcontracts in the previous year utilizing the monthly bidder reports, bidder list participation at pre-bid and bid meetings, subcontracts commitments and consultant/professional services in order to comply with Part 26.45 (c) (2). At a minimum, the relative number of DBE bids or quotes has been examined: construction prime contracts, construction subcontracts, and professional services/design prime/subcontracts. An overall base figure will be determined by dividing the number of participants and DBE possible bidders and quote by the number for all businesses to derive a base figure for the relative availability of DBEs in the PRHTA market.

In adjusting the base figure, the PRHTA will consider, at a minimum, the following:

- Past utilization of DBEs on USDOT-assisted contracts;
- Any future changes in the volume and distribution of contract dollars by category of work;
- Potential DBE contractors who may not qualify for re-certification;
- And other factors as referenced by 49 CFR Part 26. 45(d).

The PRHTA will establish its DBE goal on a three year basis. The goal will be submitted for USDOT approval by August 1. The PRHTA will publish a notice announcing that the proposed goal and its rationale will be available for review during normal business hours at PRHTA's Office of Civil Rights for 30 days following the date of the notice. This notice shall inform the public that PRHTA and USDOT will accept comments on the state goal for 45 days

from the date of the notice. The notice will include the addresses to which comments may be sent. The notice will be published in general circulation media and available minority-focused media and trade association publications. The address to which comments may be sent is PRHTA, Office of Civil Rights, P.O. Box 42007 Minillas Station, San Juan, Puerto Rico 00940-2007.

PRHTA will request approval of its proposed DBE goal to allow time for compliance with the public participation requirements of 49 CFR Part 26.45(g) and detailed in Section XI of the DBE Program.

### **Means of Attaining the Goal**

The vast majority of contractors doing work for the PRHTA agencies for both federal-aid and non-federal-aid projects are minority contractors. This is due to our homogeneous situation as Hispanics, in which almost all of the firms seeking contracts with the PRHTA will classify under that definition. For the purpose of determining compliance with DBE utilization/participation requirements, no distinction will be made between firms certified as DBE and Women Business Enterprise (WBE).

Overall goals are based on a projection of the number and types of federal contracts awarded by the applicant and a projection of the number and the relative availability of DBEs likely to compete for contracts. Following a three year review, a new goal will be set. The Puerto Rico Highway and Transportation Authority / Department of Transportation established an overall DBE participation goal of 27% up to FFY 2020 on Federal financially assisted projects.

The following is a summary of the methodology used to calculate and achieve this goal. PRHTA-DTPW projects derive the substantial majority of their DBE participation through subcontracting and it is absolutely essential that all DBE and non-DBE firms that quote be included. The PRHTA calculated its goal utilizing bidders' list records available at the Board of Bids, provided by the Contract Administration Office. This list consists of all participants' bids or quotes that were presented as either a prime or a subcontractor on USDOT assisted contracts and subcontracts in the preceding federal fiscal year. This bidder's list is maintained by the Board of Bids and is updated by the Board's secretary. The list includes company name, address, physical address of the company, phone, fax, contact person, e-mail address for DBE's and non DBE's. The purpose of this data is to provide us accurate data as possible about the universe of contractors and subcontractors for use in helping set the overall goals.

The PRHTA reviewed the current capacity of DBEs to perform work on next future DOT assisted contracts as measured by the volume of work DBEs have performed in recent years and

has concluded that this capacity is adequate. No disparity studies have been conducted within our jurisdiction nor are any planned because of the Commonwealth's homogeneous ethnic composition/make-up and the volume of contracts awarded to individuals who by definition could be presumed to be socially and economically disadvantaged. The Commonwealth of Puerto Rico presents a unique situation when compared to the situation in the Continental United States, in the treatment of equal opportunity and affirmative action to disadvantaged business enterprises. As previously stated the almost homogeneous characteristic of the population of individuals of Hispanic origin will require the development of innovative programs to achieve the purpose and intents of the US DOT's DBE program. Unlike the majority of States, most of the DOT-assisted contracts in Puerto Rico are awarded to firms that are owned and controlled by individuals who by definition would be considered socially and economically disadvantaged. With the new rule, it is anticipated that overall goals attainments for the DBE program will be reviewed every three (3) years rather than annually. The DBE Program in Puerto Rico should be one of (1) maintaining the level of DBE participation, (2) exploring areas in which the program intent is not being reached, and (3) upgrading the capabilities of DBEs.

Based on the unique situation in Puerto Rico, the PRHTA expects to meet most if not all of its overall DBE goal through race-neutral means. This may involve the redesign of the PRHTA contracting processes to encourage small business participation on providing assistance in obtaining bonding and financing; providing technical assistance; providing assistance to start-up firms, and assisting DBEs in utilizing emerging technology. If the on-going review of PRHTA projects reveals that DBE utilization for the three year period will fall substantially below its overall annual projected goal, then the PRHTA will utilize race conscious measures. As a state highway and transportation agency, if the *Uniform Report of DBE Awards or Commitments and Payments*, is less than the overall goal applicable to that federal fiscal year, within 90 days an analysis and corrective action will be developed and submitted to the appropriate operating administration for approval of the end of fiscal federal year.

### **Race-neutral Measures Implementation**

Race-neutral measures shall be employed, prior to implementing race conscious measures, which may include but is not being limited to:

- ☐ Certification of applicant firms regardless of race, color, sex, and national origin;
- ☐ Arranging solicitations, timeframes for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE and other small business

participation by making contracts more accessible to small businesses, by means such as those provided under §49 CFR 26.39;

- ☐ Provide assistance in overcoming limitations such as inability to obtain bonding or financing;
- ☐ Providing technical assistance and other services;
- ☐ Carrying out information and communication programs on contracting procedures and specific contract opportunities;
- ☐ Develop and improve immediate and long- term business management, record keeping and financial and accounting responsibility;
- ☐ Providing services to help DBEs and other small businesses improve long-term development, increase opportunities to participate in a variety of work, handle increasingly significant projects and achieve self-sufficiency;
- ☐ Ensure distribution of the DBE directory through print and electronic means to the widest feasible audience of potential prime contractors;
- ☐ Providing at pre-bid meetings the distribution of information to facilitate both DBE and small businesses with services & opportunities.

The Commonwealth of Puerto Rico presents a unique situation when compared to the Continental United States in the treatment of equal opportunity and affirmative action programs in that the PRHTA will meet its overall goal by using race-neutral means of facilitating DBE participation. In meeting our overall goal, we will attempt to obtain DBE participation from race-neutral participation and through race-conscious measures. However, if after implementing race neutral contracting measures for at least one year the PRHTA determines that DBE utilization will fall substantially below the overall goal, then the PRHTA shall implement race conscious measures the second year to meet the overall goal. The PRHTA will adjust the estimated breakout of race-neutral participation as needed to reflect actual DBE participation in accordance with 49 CFR Part 26.51 (f).

For reporting purposes race-neutral DBE participation includes, but is not necessarily limited to the following:

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

The annual goal shall be a performance standard for measuring progress toward the achievement of the anticipated level of DBE participation and a partial means for assessing compliance with the Department's regulations.

Under 49 CFR Part 26, the principal race-conscious tool available for recipients is setting individual contract goals. Under these regulations, the PRHTA will not institute a race-conscious quota program for USDOT-assisted contracts. Additionally, Puerto Rico law precludes the use of set-asides. Procedures to implement other corrective action deemed appropriate to remediate egregious instances of discrimination shall be established, as permitted by law. If the PRHTA has reason to believe the Authority will not meet its overall annual goal, contract specific goals may be established by PRHTA.

### **Project/Individual Contract Goal Setting**

Individual contract goals will be used only, if race neutral measures prove unsuccessful toward achieving our overall annual goal. To that end, contract goals will only be used for contracts that have subcontracting opportunities. Items to be considered in establishing individual contract goals will include, but not limited to: category of work, location of the work, and the availability of DBEs to perform that particular work. To be responsive, prime construction contractors, or prime design or other consultants bidding/submitting proposals for which DBE contract goals have been established must either meet or exceed the goals or show Good Faith Efforts to meet the goals. Each individual contract goal established for any particular contract/project shall be coordinated with the Office of Civil Rights and the Office of Project Controls.

### **TVM Certification**

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

The 2014 DBE Regulation updates now requires FTA recipients to report transit vehicle procurements awards. Effective November 2014, FTA recipients are required to submit, within thirty (30) days of making an award, the name of the successful bidder and the total dollar value of the contract. Only eligible TVMs may bid on FTA-assisted transit vehicle procurements. Recipients must use the online *Transit Vehicle Award Reporting Form* to report the required information on transit vehicle procurement awards.

## **Good Faith Efforts**

If needed, PRHTA will set individual contract goals. The basic obligation of bidders is to make Good Faith Efforts (GFE) to meet the goal pursuant to 49 CFR Part 26. This obligation can be satisfied by: documenting that the bidder has obtained commitments for sufficient DBE participation to meet the goal, or documenting that the bidder has made good faith efforts to meet the goal even though the bidder did not obtain enough DBE participation.

When the PRHTA sets an individual contract goal, if applicable, a completed Certification of DBE Utilization (CDBEU) shall be required at the time of the bid submittal. The Bid Evaluation Committee (BEC) shall make sure that all required DBE participation information is complete and accurate before recommending award of the contract. The BEC members are Carlos Lloveras, P.E. Director of Contract Administration, Juan C. Rivera Ortiz, President, Board of Bids, Angel M. Ortiz, Vice-President and Finance Office Deputy Director, and Migdalia Carrión Alers, PE, Design Office, or its designees. If it is determined that the apparent successful bidder has failed to meet the minimum DBE participation requirements as evidenced by review of the Certification of DBE Utilization before award of contract, the Board of Bid provide the bidder/proposer the opportunity to meet the DBE goal through DBE commitments (CDBEU) and will grant three (3) calendar days to the lowest bidder after the bid letting to provide PRHTA with good faith documentation. The decision as to whether or not the good faith effort is acceptable will be made jointly by staff from the Office of Civil Rights and the Board of Bids before contract award.

The information contained in the Certification of DBE Utilization must be complete, detailed, accurate, and in final form at the time it is submitted to the PRHTA for approval. This form will be evaluated prior to the award of the contract. Failure to submit this document in proper form and accuracy shall be cause for not awarding the contract. All bidders are required to list on the Certification of DBE Utilization the following information:

Award of the contract will be conditioned on meeting the requirements of this section:

- a. The names of DBE subcontractors and suppliers that will participate in the contract;
- b. A description of the item and work that each DBE will perform. To count toward meeting a goal, each DBE firm must be certified in a NAICS code applicable to the kind of work the firm would perform on the contract;
- c. The real dollar value of the subcontract participation of each DBE firm listed;
- d. Written documentation of the bidder's/offeror's commitment to use DBE (CDBEU) subcontractor's / suppliers whose participation it's submitted to meet the good faith efforts;



- e. Written confirmation (CDBEU affidavit) for each listed DBE firm that is participating in the contract in the kind and amount of work provided in the prime contractor commitment.
- f. If the contract goal is not met, evidence of good faith efforts. The documentation of good faith efforts (GFE) must include copies of each DBE and Non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract.

In race conscious measures, all bidders/proposers will be required to adequately document good faith efforts in accordance with Appendix A of 49 CFR Part 26. If the decision is made to reject the good faith effort, the bidder has the right to request administrative reconsideration within five (5) days of notification. If the bidder requests administrative reconsideration, the bidder can choose to submit a written narrative supporting its good faith effort submittal or to appear in person.

The PRHTA will provide for an administrative reconsideration review of the decision that a bidder failed to comply with the good faith effort requirements of the program. Within three (3) working days, the bidder will have the opportunity to meet with and to submit its written evidence/argument to the PRHTA's Reconsideration Official. The PRHTA's Reconsideration Official will be Mr. Juan C. Rivera Ortiz, PE, President of the Board of Bids or his designee. PRHTA's Reconsideration Official will not take part in the original determination that the bidder/offeror failed to present adequate good faith efforts. The PRHTA will provide a written decision of the reconsideration determination, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so. The result of the reconsideration process is not administratively appealable to the USDOT.

If the apparent low bidder or successful contractors, or consultants cannot meet the established DBE contract goal, if applicable, or fail to show good faith efforts towards overall goal and proposes a reduced DBE goal, then the bidder/offeror shall document and submit its justification for not meeting the goal and its documented demonstration of good faith efforts at the time of the bid opening. This justification is a documented demonstration of good faith efforts by the bidder/offeror, which must, in the end, show that the contractor/ consultant had actively and aggressively sought out DBEs to participate in the project. Mere pro forma efforts are not the necessary and reasonable steps that indicate good faith efforts. The PRHTA will consider the quality, quantity, and intensity of the different kinds of efforts that were made in trying to obtain DBE participation sufficient to meet the DBE contract goal as set forth in Appendix A to and 49 CFR PART 26.

The following is a list of types of actions in which the PRHTA will consider as part of the bidder's/offeror's Good Faith Efforts to obtain DBE participation. This list is not intended to be a

mandatory checklist, nor is it intended to be exclusive or exhaustive, as other factors or types of efforts may be relevant in appropriate cases. This demonstration should include, but not be limited to, the following:

- a. Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The bidder/offeror must solicit this interest within sufficient time to allow DBEs to respond to the solicitation. The bidder/offeror must determine with certainty if DBEs are interested by taking appropriate steps to follow up initial solicitations.
- b. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.
- c. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.
- d. Negotiating in good faith with interested DBEs. It is the bidder's/offeror's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors, sub-consultants and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting or sub-consulting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.

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

- e. Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's or consultant's standing within its industry,

membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's or consultant's efforts to meet the project goal.

- f. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient, contractor or consultant.
- g. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

Effectively using the services of available minority/women community organizations; minority / women contractor's groups; local, state, federal private, non-profit minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs. DBE prime contractors are required to meet goals and make good faith efforts on the same basis as non-DBE prime contractors. DBEs can count toward goals the work that they commit to performing with their own forces. DBE prime contractors will be expected to make the same outreach efforts as other bidders and to document good faith efforts in situations where they do not fully meet contract goals.

The Prime contractor may not terminate a listed DBE firm for convenience and then perform the work with its own forces without the PRHTA's written consent. When a contractor is terminated, or fails to complete its work on the contract for any reason, the prime contractor is required to find another DBE subcontractor to substitute for the original DBE or make good faith efforts to do so to the extent need to meet the contract goal established by the PRHTA. Examples of actions which may not be acceptable as reasons for failure to meet the DBE goal:

- a. DBE unable to provide performance and/or payment bonds.
- b. Rejection of reasonable DBE bid based solely on price.
- c. DBE would not agree to perform all or most of the work of the contract.
- d. Union versus non-union status.
- e. Prime contractor normally would perform all or most of the work of the contract.
- f. Solicitation by mail or telephone only.

If the PRHTA lets a master contract for "design-build" or "turnkey" contract or similar legally binding instrument to a contractor or consultant who in turn lets subsequent subcontracts for the work of the project, the PRHTA may establish a DBE contract goal for the project. The master contractor or consultant then establishes DBE contract goals, as appropriate, for the subcontracts it lets. The PRHTA shall maintain oversight of the master contractor's or consultant's activities to ensure that they are conducted consistent with the requirements of the PRHTA DBE Program and 49 CFR Part 26.

The PRHTA requires that the successful bidder/offeror, or subsequently the prime contractor or consultant, not terminate for convenience a DBE subcontractor or sub-consultant listed in the Certification of DBE Utilization, or an approved substitute DBE firm, and then propose to perform the PRHTA prior written consent.

### **Counting DBE Participation**

DBE credit will be counted only for work performed by the DBE firm. PRHTA will count the participation of a DBE manufacturer as 100 percent of the value paid for materials furnished which becomes a permanent part of the project. It will count also 60 percent value of the cost of supplies and materials obtained by the DBE for the work of the contract which becomes a permanent part of the project, including supplies purchases or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliates). A supplier of bulk items must own and operate distribution equipment for the bulk item and need not warehouse the items. Bulk items include steel, rock, sand and asphalt. The PRHTA will count from a DBE broker (arranges or expedites transactions), a 100 percent of the fee or commission received by the DBE broker for the materials purchased and resold to the contractor which becomes a permanent part of the project.

For DBE trucking where applicable, 100 percent of the amount paid to the DBE trucker will be counted when the trucker follows these guidelines:

1. Use trucks owned or long term leased by the certified DBE trucker;
2. Use trucks owned and operated by certified DBE owner/operators;
3. Use trucks owned and driven by the owner, regardless of race or sex.

One of the key requirements of the DBE Program is that a commercially useful function be performed. This is defined as: "being responsible for execution of a contract or a distinct element of the work by actually performing, managing and supervising the work involved." This requirement is monitored by PRHTA project administrator and field personnel who are assigned to the project and by Civil Rights Coordinator through on-site project visits. Contractors, DBEs and all employees are required to fully cooperate with Civil Rights personnel conducting the field audits. Failure of a DBE to perform a commercially useful function will result in that work not being counted toward the prime contractor's DBE goal. In certain cases it could lead to removal of eligibility of the DBE, and in cases of deliberate fraud, it could lead to criminal or civil prosecution of both the prime contractor and the DBE firm. The DBE must manage the work that has been contracted including scheduling daily operations, ordering equipment and materials, preparing and submitting certified payrolls, and hiring and firing employees. No DBE

credit will be given towards goals if firm is not certified at the time of award or if it loses its certification.

All work must be performed with the DBE's own workforce, and must make all operational and managerial decisions of the firm. The DBE shall negotiate the cost, arrange delivery and pay for the materials and supplies for the job. No credit toward the DBE goal will be given to the cost of materials or supplies paid directly by the prime contractor for the DBE.

## **VII. REQUIRED CONTRACT PROVISIONS**

### **Non-discrimination Assurance**

Each contract the PRHTA enters into with a contractor, consultant or recipient on a USDOT-assisted project shall ensure that such contract and subcontracts include the DBE Program Contract Provisions described in Appendix A.

The recipient will not discriminate on the basis of race, color, national origins or sex in the award of and performance of any DOT-assisted contract or in the administration of its DBE program requirements of 49 CFR Part 26. The recipient shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contract. The recipient's DBE program, as required by 49 CFR Part 26 and Part 23 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 49 CFR 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.*) Failure by the contractor to carry out these requirements is a material breach of contract, which may result in termination of the contract or other such remedy as PRHTA deems appropriate.

PRHTA assurances according to 49 CFR Part 29 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 49 CFR part 26. PRHTA shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. PRHTA 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 PRHTA of its failure to carry out its

approved program, the Department may impose sanctions as provided for under 49 CFR 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.).

The contractor, sub recipient 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, which may include, but is not limited to:

1. Deduct 10% from the amount contractor announced on the Certification of DBE Utilization it would pay the DBE firm.
2. Deduct the amount of work not accomplished by DBEs from the money due or to become due to the contractor.
3. Initiation of appropriate debarment or decertification proceedings.
4. Termination of the contract.
5. Referral of any unlawful actions to the appropriate enforcement agencies.
6. Other actions as appropriate, at the discretion of the PRHTA. These sanctions are specified in the DBE Special Provision on contract documents.

### **Joint Ventures**

For purposes of the DBE program (FHWA /FTA), a joint venture is defined as an association of a 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 shares in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest. §26.55(b)

Joint ventures are intended to have a business structure set forth in a signed written agreement that clearly and specifically defines the participation of each party in the contribution of property, capital, management efforts, skills and knowledge. The joint venture should operate in accordance with a written agreement. Any business structure that meets the Part 26 and 23 definition will be considered a joint venture for purposes of counting participation, regardless of the name attributed to the business structure in the written agreement.

The review of joint venture agreements is comprised of: (1) confirming that the firm participant is a certified DBE in the applicable trade; (2) making a determination that the agreement meets the definition of a joint venture under the regulation; (3) determining the appropriate credit based on the distinct and clearly defined portion of the work performed by the DBE. Once PRHTA has reviewed the joint venture agreement to ensure that it meets the definition of a joint venture in accordance with the regulation (i.e., in terms of the various areas being commensurate with ownership interest) PRHTA should proceed to a review of the distinct, clearly defined portion of the work assigned to the DBE in order to determine how to count DBE participation towards the overall goal.

It is the responsibility of PRHTA to monitor the operation of the joint venture to ensure that is operating as intended and approved, and that the participation is real and meaningful. Should PRHTA find that this is not the case, PRHTA could find the joint venture in default of its contract. In addition, if the DBE is found to give up an element of control in the joint venture, PRHTA should immediately review the firm's certification eligibility or refer the matter to the certifying authority, and where appropriate, initiate decertification of the firm in accordance with § 26.87. If any joint venture firm is created, PRHTA shall take step to monitor including, at a minimum, the following elements: • Annual verification of the status of the firms certification eligibility • Periodic review of the managing entity's meeting minutes and reports • On-site visits with the joint venture participants, managers, project managers • Review of any documentation, including financial reports and agreements, necessary to ensure compliance with the agreement.

### **Prompt Payment Clause**

To ensure that all obligations under contracts awarded to DBEs are met, the PRHTA will review DBE's involvement efforts during the performance of the contract. Prime contractors or design consultants shall pay all subcontractors or sub-consultants (regardless of tier) their respective subcontract amount for PRHTA accepted work within fifteen (15) calendar days after the contractor or consultant receives payment for such work from the PRHTA. The prime or major contractor or consultant will be required to submit payment information detailing all payments made to DBEs and non-DBEs within fifteen (15) calendar days *after the contractor receives payment for such work*. A prime contractor or consultant shall be required to fully document any alleged disputes with its subcontractors. The contractor shall ensure that all situations in which regularly scheduled payments are not made to subcontractors are reported to the PRHTA. If the prime contractor is found to be in violation or fails to abide by the prompt payment mechanisms, the PRHTA shall

impose sanctions as stated under Compliance Procedures. PRHTA does not allow prime contractors to withhold retainage payments on subcontractors unless agreed to between the parties. If a retainage is agreed, it shall exceed the percentage established by article 109.06. d (1) of the General Provisions. In those instances where retainage is withheld, the contractor shall further be required to release retainage payments to the subcontractors (regardless of tier) within thirty (30) calendar days of satisfactory completion of the subcontractor's work irrespective of the tier. Final completion of a subcontractor's work will be determined by the PRHTA or its designee. This process will be expedited as soon as the Authority or its designee is advised that the subcontract work is satisfactorily. Within ten (10) days from the notification, the Authority or its designee will complete final inspection and authorize final payment and release.

### **Legal and Contract Remedies**

The Puerto Rico Highway and Transportation Authority/Department of Transportation and Public Works shall follow the requirements set forth in 49 CFR Part 26 by including DBE clauses in all agreements and contracts with recipients of federal-assisted agreements. The PRHTA shall enter into an agreement with all recipients binding such recipients to the requirements of the DBE Program.

## **CONTRACTOR REPORTING REQUIREMENTS**

### **Monitoring Payments to DBEs**

PRHTA will require prime contractors to maintain records and documents of payments to DBEs for three years following the performance of the contract. These records will be made available for inspection upon request by any authorized representative of the PRHTA or USDOT. This reporting requirement also extends to any certified DBE subcontractor. PRHTA project administrator shall monitor and track the actual DBE participation through contractor and subcontractor reports and payments. The project administrators shall keep a running tally of actual payments to DBE firms for work committed to them at the time of contract award. This will be made through monthly payment certifications from time of contract award. Prime contractors/consultants will be required to submit monthly certification of subcontract payment reports to the project administrator detailing payments and changes to DBE participation and subcontracts and provide appropriate documentation to verify such payments. PRHTA prepared a form to track down payments performed to subcontractors at project site. A form must be signed by a company representative and contain the name of the prime contractors, subcontractors, consultants, the non-DBE firm's name and the DBE and the project number, the



amount paid, and the date of payment to the DBE or non-DBE for the reporting period only. Copy of the form is sent to the Civil Rights office and to the Construction Area Office for corroboration. PRHTA Civil Rights (DBE) Coordinator will perform interim audits of contract payments when on project site reviews to ensure that the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts stated in the schedule (CDBEU) of DBE participation to ensure that DBE commitments are being met. DBE Form -1 shall be part of the prompt payment clause where project administrators will follow up items paid by the Prime, regardless of the tiers to its subcontractors.

PRHTA will bring to the attention of the Department of Transportation any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the DOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in §26.109. PRHTA also will consider similar action under its own legal authorities, including responsibility determinations in future contracts. 49 CFR Part 26 lists the regulations, provisions, and contract remedies available to PRHTA in the event of non-compliance with the DBE regulation by a participant in our procurement activities.

## **VIII. CERTIFICATION STANDARDS (Subpart D)**

### **Process:**

PRHTA will use the certification standards of Subpart D of Part 26 and the certification procedures of Subpart E of Part 26 to determine the eligibility of firms to participate as DBEs in DOT-assisted contracts and to assure that all applicants receive due process according to the federal regulations. To be certified as a DBE, a firm must meet all certification eligibility standards and criteria set forth in 49 CFR Part 26. We will make our certification decisions based on the facts as a whole. Once a firm has been certified as a DBE, it shall remain certified for a period of three (3) years, unless and until its certification has been removed through the procedures as set forth in 49 CFR, Part 26.87. DBE firms will not be required to reapply for certification during this three-year period, unless the factual basis on which the certification was made changes. Each year, on the anniversary date, every certified DBE firm must submit a signed, sworn notarized statement that the firm remains disadvantaged by meeting the size standard and has no changes in ownership or control that would affect eligibility. The statement must be accompanied by the qualifying owner's personal tax return, personal financial statement, the company tax return and/or the company financial statement. Failure to cooperate by the assigned date will result in removal of the eligibility. PRHTA will notify each certified DBE firm in writing 60 days prior to the due date.

Failure to respond by due date is deemed a failure to cooperate and will result in removal from the DBE directory. Our Certification Application Form and documentation requirements are found in Appendix C to this program. For information about the certification process or to apply for certification, firms should contact: PRHTA, Office of Civil Rights, P.O. Box 42007 Minillas Station, San Juan, Puerto Rico 00940-2007, (787) 721-8787 Ext. 1740 / 1741, e-mail: [adelmoral@dtop.pr.gov](mailto:adelmoral@dtop.pr.gov).

In the event we propose to remove a DBE's certification, we will follow procedures consistent with 49 CFR Part 26.87. The process is found in our Uniform Certification Program Agreement-Attachment A of the UCP Agreement (Appendix B). This program sets forth these procedures in detail to ensure separation of functions in a decertification. We have determined that a DBE Evaluation Committee will serve as the decision makers in decertification proceedings. We have established an administrative "firewall" to ensure that members of the DBE Evaluation Committee will not have participated in any way in the decertification proceeding against the firm (including in the decision to initiate such a proceeding).

If we deny a firm's application or decertify it, it may not reapply until 12 months period have passed from our action.

### **Burdens of Proof**

Firms seeking certification have the burden of demonstrating to the PRHTA, by a preponderance of the evidence, that it meets the requirements of this DBE Program concerning group membership or individual disadvantage, business size, ownership and control. The PRHTA must rebuttably presume that members of the designated groups identified in 26.67(a) are socially and economically disadvantaged. This means that these individuals do not have the burden of proving to the PRHTA that they are socially and economically disadvantaged as per 49 CFR Part 26.67. However, applicants have the obligation to provide to PRHTA or its consultant information concerning their economic disadvantaged status.

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 to the PRHTA, by a preponderance of the evidence, that they are socially and economically disadvantaged (see Appendix E of 49 CFR 26). The PRHTA determines 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.

### **Group Membership Determinations:**

If the PRHTA 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 to the individual to demonstrate, by a preponderance of the evidence, that he/she is a member of the group. In making such a determination, it shall consider whether the person has held himself 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. In these cases, it shall be required to the applicant to produce appropriate documentation. If the PRHTA 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 PRHTA decisions concerning membership in a designated group are subject to the certification appeals procedure.

### **Business Size Determinations:**

To be an eligible DBE, a firm (including its affiliates) shall be an existing small business, as defined by Small Business Administration (SBA) standards. The PRHTA applies current SBA business size standards found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in USDOT-assisted contracts. Even if it meets the requirements in 49 CFR 26, 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 CFR 121.402), over the firm's previous three fiscal years, in excess of \$22.41 million dollars. USDOT adjusts this amount for inflation from time to time and PRHTA will adopt any modification. Currently, for example, the following business size standards apply:

- General Contractors: Average annual gross receipts for the three preceding fiscal years not to exceed \$23,980,000.
- Specialty Trade Contractor: Average annual gross receipts for the three preceding fiscal years not to exceed \$14,000,000.
- Engineering & Surveying Services: Average annual gross receipts for the three preceding fiscal years not to exceed \$14,000,000
- Architectural Services: Average annual gross receipts for the three preceding fiscal years not to exceed \$7,000,000

## **Social and Economic Disadvantage Determinations**

The PRHTA must rebuttably presumed that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans or other minorities found to be disadvantaged by the Small Business Administration (SBA), are socially and economically disadvantaged individuals. The PRHTA requires applicants to submit a signed certification (including notarized personal net worth) that each presumptively disadvantaged qualifying owner is, in fact, socially and economically disadvantaged. In determining net worth, the PRHTA excludes 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 (ANC). However, PRHTA will exclude any of the following that the Alaska Native 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 \$2000 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.

## **Rebuttal of Presumption of Disadvantage**

If the statement of personal net worth (Determination of Social and Economic Disadvantage -PNW- (Appendix-D) and accompanying documents that an individual submits shows the individual's personal net worth exceeds \$1,320,000 the individual's presumption of economic disadvantage is rebutted. The PRHTA is not required to have a proceeding in order to rebut the presumption of economic disadvantage in this case. If the PRHTA 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, then it may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. In such a proceeding, the PRHTA has the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. The PRHTA may require the individual to produce information relevant to the determination of his or her disadvantage. When an individual's presumption of social and economic disadvantage has been rebutted, his or her ownership and control of the firm in

question cannot be used for purposes of DBE eligibility under this subpart unless and until he/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 net worth exceeds \$1,320,000, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage. In making these determinations, the PRHTA shall use the guidance found in Appendix E of 49 CFR Part 26 and section 26.67. Applicants shall provide sufficient information to permit such determinations.

### **An 8(a) and SDB Firms**

If a firm applying for certification has a current, valid certification from or is 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 a SDB), the PRHTA may accept the firm's 8(a) or SDB certification in lieu of conducting its own certification proceeding, just as the PRHTA may accept the certification of another USDOT recipient for this purpose. However, it is not required to do so.

### **Ownership Determinations**

To be an eligible DBE, the firm shall be at least 51 percent owned by socially and economically disadvantaged individuals.

- In the case of a corporation, such individuals shall own at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding.
- In the case of a partnership, socially and economically disadvantaged individuals shall own 51 percent of each class of partnership interest. Such ownership shall be reflected in the firm's partnership agreement.
- In the case of a limited liability company, socially and economically disadvantaged individuals shall own at least 51 percent of each class of member interest.

The firm's ownership by socially and economically disadvantaged individuals shall be real, substantial and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The disadvantaged owners shall 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. All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Except as provided in this paragraph, 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:

- The beneficial owner of the securities or assets held in trust for a disadvantaged individual and the trustee is the same or another such individual; or

- The beneficial owner of a trust is a disadvantaged individual who, rather than the trustee, exercises control over the management, policy-making and daily 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.

- The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests shall 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.

The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership:

- The owner's expertise must be in a specialized field, of outstanding quality, in areas critical to the firm's operation, indispensable to the firm's potential success, specific to the type of work the firm performs, and documented in the records of the firm. These records shall clearly show the contribution of expertise and its value to the firm.
- The individual whose expertise is relied upon shall have a significant financial investment in the firm.

The PRHTA presumes all interests in a business or other assets obtained by the individual 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:

- 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
- Through inheritance, or otherwise because of the death of the former owner, are held by a social and economically disadvantaged individual for the purposes of determining ownership.

However, PRHTA will not presume as 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 consideration, from any non-disadvantaged individual or non-DBE firm involved in the same firm for which the individual is seeking certification or an affiliate of that firm.
- A firm involved in the same or similar line of business; or engaged in an ongoing business relationship with the firm; or an affiliate of the firm, for which the individual is seeking certification.

To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual shall demonstrate to the PRHTA, by clear and convincing evidence, that the gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE. That, 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.

The PRHTA applies the following rules in situations in which marital assets form a basis for ownership of a firm:

- a) 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, PRHTA deems 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. PRHTA does not count a greater portion of joint or community property assets toward ownership than state or commonwealth law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.
- b) 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 shall be included as part of the firm's application for DBE certification.

The PRHTA shall consider the following factors in determining the ownership of a firm. However, PRHTA shall 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, other than the types set forth in 49 CFR 26.69 paragraph (h);
- 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 or 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, PRHTA shall give particularly close and careful scrutiny to the ownership and control of the firm to ensure that it is owned and controlled, in substance as well as in form, by a socially and economically disadvantaged individual.

### **Control Determinations**

In determining whether socially and economically disadvantaged owners control a firm, the PRHTA shall consider all the facts in the record, viewed as a whole. 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.

- a) In determining whether a potential DBE is an independent business, the PRHTA shall scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support and other resources.
- b) The PRHTA shall 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 firm's compromise the independence of the potential DBE firm.
- c) The PRHTA shall 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.
- d) In considering factors related to the independence of a potential DBE firm, the PRHTA shall consider the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.

A DBE firm shall not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There shall 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). The socially and economically disadvantaged owner(s) shall 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.

- A disadvantaged owner shall hold the highest officer position in the company (e.g., chief executive officer or president).
- In a corporation, disadvantaged owners shall control the board of directors.
- In a partnership, one or more disadvantaged owners shall serve as a general partner, with control over all partnership decisions.

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 shall not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm. The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policy making 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 shall be revocable, and the socially and economically disadvantaged owners shall 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 shall be such that the PRHTA can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management and policy.

The socially and economically disadvantaged owners shall 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 and 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 shall 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 policy making. Generally, expertise limited to office management, administration or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

The PRHTA will examine whether the socially and economically disadvantaged persons who own and control a potential DBE firm of that type possess the required licenses to operate the firm. However, the PRHTA shall not deny certification solely on the grounds that the person lacks the license or credential. The PRHTA takes 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:

- a) The PRHTA shall 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 PRHTA 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.
- b) In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, the PRHTA shall 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.

In order to be viewed as controlling a firm, a socially and economically disadvantaged owner can not 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.

- a) 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 PRHTA shall make a judgment about the control the socially and economically disadvantaged owner exercises vis-a-vis other persons involved in the business as the PRHTA- does in other situations, without regard to whether or not the other persons are immediate family members.
- b) If the PRHTA 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.

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 PRHTA, by clear and convincing evidence that:

- a) The transfer of ownership and/or control 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 formerly owned and/or controlled the firm.

In determining whether a firm is controlled by its socially and economically disadvantaged owners, the PRHTA shall consider whether the firm owns equipment necessary to perform its work. However, the PRHTA 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.

The PRHTA shall 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 needs to demonstrate to the PRHTA only that it's socially and economically disadvantaged owners are able to control the firm with respect to that type of work. The PRHTA will not, in this situation, require that the firm be re-certified or submit a new application for certification, but the PRHTA will verify the disadvantaged owner's control of the firm in the additional type of work.

A business operating under a franchise or license agreement may be certified if it meets the standards in this DBE Program. Further that the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the PRHTA generally will not consider the restraints relating to standardized quality, advertising, account 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 some other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

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.

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 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 Considerations**

The prime contractor is responsible for ensuring that the DBE committed to undertake work under a federally funded contract as a subcontractor must perform a commercially useful function (CUF). Considering whether a company made under the DBE program in general, a commercial useful function, belongs exclusively to the participation of companies that have already been certified as DBE. The PRHTA will not consider commercially useful function issues in any way in making decisions about whether to certify a firm as a DBE. It will 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. The PRHTA will evaluate the eligibility of a firm on the basis of present circumstances. PRHTA will not deny a firm DBE certification 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; and will not refuse to certify a firm solely on the basis that it is a newly formed firm.

DBE firms and firms seeking DBE certification shall cooperate fully with PRHTA 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. Also, 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. 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. 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 PRHTA certifies 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. The PRHTA shall only consider certification of such a subsidiary if there is cumulatively 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals. The following examples illustrate how this cumulative ownership provision works:

- Example 1: Socially and economically disadvantaged individuals own 100 percent of a holding company, which has a wholly owned subsidiary. The subsidiary may be certified, if it meets all other requirements.
- Example 2: Disadvantaged individuals own 80 percent of the holding company, which owns 51 percent of a subsidiary. The subsidiary may be certified, if all other requirements are met.
- Example 3: Disadvantaged individuals own 80 percent of the holding company, which in turns owns 70 percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by disadvantaged owners is 56 percent (80 percent of the 70 percent). This is more than 51 percent, so the PRHTA may certify the subsidiary, if all other requirements are met.
- Example 4: Same as Example 2 or 3, but someone other than the socially and economically disadvantaged owners of the parent or holding company controls the subsidiary. Even though the subsidiary is owned by disadvantaged individuals, through the holding or parent company, the PRHTA will not certify it because it fails to meet control requirements.
- Example 5: Disadvantaged individuals own 60 percent of the holding company, which in turn own 51 percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by disadvantaged individuals is about 31 percent. This is less than 51 percent, so the PRHTA cannot certify the subsidiary.
- Example 6: The holding company, in addition to the subsidiary seeking certification, owns several other companies. The combined gross receipts of the holding companies and its subsidiaries are greater than the size standard for the subsidiary seeking certification and/or the gross receipts cap. Under the rules concerning affiliation, the subsidiary fails to meet the size standard and cannot be certified.

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. PRHTA will not require a DBE firm to be pre-qualified as a condition for certification unless the Department requires all firms that participate in its contracts and subcontracts to be pre-qualified. 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 DBE Program size standards. Such a firm must be controlled by socially and economically disadvantaged individuals, previously defined.

## **IX. CERTIFICATION PROCEDURES (Subpart E)**

### **Unified Certification Program**

The PRHTA is the leading member of a Unified Certification Program (UCP) approved by the US on May 22, 2003. This agreement was up-dated on July 29, 2015 to include Luis Muñoz Marín International Airport administrative facilities (APP) Aerostar Holding, LLC, to comply with FTA/FAA requirement for 49 CFR Part 26 and 49 CFR Part 23 (concessionaires). The PRHTA Unified Certification Program consists now of four (4) certifying Agencies for the Government of Puerto Rico, that have signed an agreement, form part of the process and perform DBE certification for the Island of Puerto Rico. The agreement is between the PRHTA, Metropolitan Bus Authority, Ports Authority, and Aerostar Holdings, LLC, and all other Island municipalities included, and are required to participate in the DBE program 49 CFR Part 26 and Part 23. All agencies and municipalities receiving federal financial assistance from the federal DOT have signed a letter stating their support for the PRHTA-UCP. Those letters of support were submitted as part of the PRHTA submission to the Federal DOT for UCP approval. The agreement specifies that the UCP will follow all certification procedures and standards of this part, on the same basis as the PRHTA; that the UCP shall cooperate fully with oversight, review and monitoring activities of USDOT and its operating administrations; and that the UCP shall implement USDOT directives and guidance concerning certification matters. The agreement commits the PRHTA and other recipients to ensuring that the UCP has sufficient resources and expertise to carry out the requirements of this part.

The UCP makes all certifications on behalf of all USDOT recipients in Puerto Rico with respect to participation in the USDOT DBE Program. Certification decisions by the UCP shall be binding on all USDOT recipients. The UCP provides “one-stop shopping” to applicants for certification, in which an applicant is required to apply only once for a DBE certification and will be honored by all recipients in the Commonwealth of Puerto Rico. The UCP is not required to process an application for certification from a firm having its principal place of business outside of Puerto Rico if the firm is not certified by the UCP in the state in which it maintains its principal place of business. The “home state” UCP shall share its information and documents concerning the firm with other UCPs that are considering the firm’s application. A UCP may accept the certification of

any other UCP or USDOT recipient as long as it complies with regulation requirements and is certified in his home state.

The UCP certifying entities are responsible for certifying and maintaining a centralized DBE database directory that is regulated by 49 CFR Part 26. The PRHTA has agreed to serve as the host for maintaining the UCP DBE Database directory for all firms certified by the UCP (including those from other states certified under the provisions of this section), as the information required by section 26.31 of the federal regulations. PRHTA makes the UCP DBE directory available to the public electronically, on the Internet, as well as in print. The UCP DBE Directory electronic version is up dated on a monthly basis, by including new additions, deletions and changes as soon as they are made sharing the information with other states. A hard copy Directory shall be available on a yearly basis. The UCP is committed in providing to the DOCR by January 1 of each year information requested , in compliance with MAP-21 and 49 CFR Part §26.11. The table submitted will represents all the certified DBE firms excluding airport concessionaires and includes the information on location of women, socially and economically disadvantaged individuals and individuals who are women and are otherwise socially and economically disadvantaged.

### **Certification Procedures**

The PRHTA will ensure that only firms certified as eligible DBEs under this section participate as DBEs in PRHTA DBE Program. The PRHTA will determine the eligibility of firms as DBEs consistent with the standards of subpart D of 49 CFR Part 26. The PRHTA will take the following steps in determining whether a DBE firm meets the defined certification standards:

- Perform an on-site visit to the offices of the firm. The PRHTA must interview the principal officers of the firm and review their resumes and/or work histories. It must 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 or adjacent local areas. The PRHTA may rely upon the site visit report of any other recipient with respect to a firm applying for certification;
- If the firm is a corporation, analyze the ownership of stock in the firm;
- Analyze the bonding and financial capacity of the firm;
- Determine the work history of the firm, including contracts it has received and work it has completed;
- 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;

- 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;
- Require potential DBEs to complete and submit an appropriate application form. The PRHTA will make sure the applicant attests to the accuracy and truthfulness of the information on the application form. This shall be done either in the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths.
- The PRHTA will review all information on the form prior to making a decision about the eligibility of the firm. It will prohibit the release of personal financial information associated with determining net worth and related certification eligibility issues.

### **Interstate Certification**

When a firm currently certified in its home state applies to PRHTA for DBE certification, it must provide a complete copy of the application form, all supporting documents, and any other information they have submitted to its home base state or any other state related to firm's certification. This includes affidavits of no change and any notices of changes that it may have submitted, as well as any correspondence they have had with or any other recipient concerning the application or status as a DBE firm.

The applicant firm must also provide any notices or correspondence from other states related to the status as a DBE firm or certified DBE in those states. The applicant firm must inform, if they have been denied certification or decertified, or subject to a decertification action and provide all documentation. An On-Site Visit report from their home state is a must to obtain certification with PRHTA, which will support their certification in their home base state. PRHTA may require if the On-site Report of the home state is more than five years old, an affidavit affirming that the facts in the on-site report remain true and correct. The main responsibility for certification as a DBE rests with the initial determination of eligibility certification on the base home state by granting the status of reciprocity by PRHTA with the other state. PRHTA will request a copy of the site visit review report from its home state for the applicant firm, any updates and evaluation of the firm based in a timely manner. Not complying with such requests in a timely manner is noncompliance with §26.85. Interstate certification will not be treated as new certifications.

### **Personal Net Worth**

PRHTA will require all disadvantaged owners of applicant firms and of currently-



certified DBEs whose eligibility under 49 CFR Part 26 PRHTA reviews, to submit a statement of personal net worth. Appendix D sets forth the Personal Net Worth Form (PNW) and the documentation respondents must submit with it.

When another recipient, in connection with its consideration of the eligibility of a firm, makes a written request for certification information that the PRHTA has obtained about that firm (e.g., including application materials or the report of a site visit, the PRHTA must promptly make the information available to the other recipient.

When another USDOT recipient has certified a firm, PRHTA will take one of the following actions:

- a) Make an independent certification decision based on documentation provided by the other recipient, augmented by any additional information the PRHTA requires the applicant to provide; or
- b) Require the applicant to go through the PRHTA's application process without regard to the action of the other recipient.

The PRHTA will safeguard from disclosure to unauthorized persons information gathered as part of the certification process that may be reasonably regarded as proprietary or other confidential business information, consistent with applicable Federal, State and local law. Once the PRHTA has certified a DBE, it shall remain certified for a period of at least three years unless and until its certification has been removed through appropriate procedures. The PRHTA will not require DBEs to reapply for certification as a condition of continuing to participate in the program during this three-year period, unless the factual basis on which the certification was made changes. DBEs must inform the PRHTA or UCP in writing of any change in circumstance affecting their ability to meet size, disadvantaged status, ownership or control requirements of this part or any material change in the information provided in their application form.

- a) Changes in management responsibility among members of a limited liability company are covered by this requirement.
- b) The DBE must attach supporting documentation describing in detail the nature of such changes.
- c) 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 or of an unsworn declaration executed under penalty of perjury of the laws of the United States. The DBE must provide written notification within 30 days of the occurrence of the change. If the DBE fails to make timely notification of such a change, the DBE will be deemed to have failed to cooperate under this DBE Program.

## **Recertification**

All DBEs must provide to the PRHTA, 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 PRHTA has been notified. 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. If the DBE fails to provide this affidavit in a timely manner, the DBE will be deemed to have failed to cooperate under 49 CFR Part 26.

## **No Change Affidavits and Notices of Changes**

PRHTA will require all DBEs to inform PRHTA, in a written affidavit, of any change in its circumstances affecting its ability to meet size, disadvantaged status, ownership or control criteria of 49 CFR Part 26 or of any material changes in the information provided with the DBE's application for certification.

We also require all owners of all DBEs we have certified to submit, on the anniversary date of their certification, a "no change" affidavit (Appendix E) meeting the requirements of 26.83(j). The text of this affidavit is the following:

"I swear (or affirm) that there have been no changes in the circumstances of (name of DBE firm) affecting its ability to meet the size, disadvantaged status, ownership, or control requirements of 49 CFR part 26. There have been no materials changes in the information provided with (name of DBE)'s application for certification, except for any changes about which you have provided written notice to the [*Name Recipient*] under 26.83(j). [*Name of firm*] meets Small Business Administration (SBA) criteria for being a small business concern and its average annual gross receipts (as defined by SBA rules) over the firm's previous three fiscal years do not exceed '\$23.98 million for DBE or \$56.42 million for ACDBE'. We require DBEs to submit with this affidavit documentation of the firm's size and gross receipts. We will notify all currently certified DBE firms of these obligations in writing at least 60 days before the certification expires. This notification will inform DBEs that to submit the "no change" affidavit, their owners must swear or affirm that they meet all regulatory requirements of part 26, including personal net worth. Likewise, if a firm's owner knows or should know that he or she, or the firm, fail to meet a part 26 eligibility requirement (e.g., personal net worth), the obligation to submit a notice of change applies. The

PRHTA will make decisions on applications for certification within 90 days of receiving from the applicant firm all information required under this part. The PRHTA may 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. If a reasonable extension of additional time is needed in order to obtain final recommendation from the Eligibility Committee, we will write to the firm the problems encountered and the need for more additional time in order to make a final determination. PRHTA'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 CFR Section 26.89.

### **Certification Denials / Suspensions / Appeals**

When the PRHTA denies a request by a firm, which is not currently certified with Puerto Rico's DBE Program, the PRHTA 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 upon written request. PRHTA establishes a time period of no more than twelve months that must elapse before the firm may reapply to the DTPW-PRHTA for certification. The time period for reapplication begins to run on the date the certification was denied. If PRHTA makes an administratively final denial of certification concerning a firm, the firm may appeal the denial to the USDOT.

### **Suspension**

A DBE certification will be immediately suspended when:

1. An individual owner whose ownership and control of the firm are necessary to the firm's certification dies or is incarcerated
2. There is adequate evidence to believe that there has been a material change in circumstances that may affect the eligibility of the DBE firm to remain certified
3. The DBE fails to notify the party or PRUCP in writing of any material change in circumstances or fails to timely file an affidavit of no change under §26.83j

In determining the adequacy of the evidence to issue a suspension the PRUCP shall consider all relevant factors, including how much information is available and the credibility of the available information. Written notice must be sent immediately by certified mail, return receipt requested, to the last known address of the owner(s) of the DBE. Following receipt of the Notice of Suspension, if the DBE believes it is no longer eligible, it may voluntarily withdraw from the

program, in which case no further action is required. If the DBE believes that its eligibility should be reinstated, it must provide information demonstrating that the firm is eligible notwithstanding its changed circumstances. Within 30 days of receiving this information, the PRUCP must either lift the suspension and reinstate the firm's certification or commence an expedited decertification action. If the recipient commences a decertification proceeding, the suspension remains in effect during the proceeding.

The decision to immediately suspend is not appealable to the US Department of Transportation. The failure of the PRUCP to either lift the suspension and reinstate the firm or commence a decertification proceeding, is appealable to the U.S. Department of Transportation as a constructive decertification.

### **Appeals**

Any firm which is notified of a certification denial or a proposed removal of its certification may request an informal hearing to the investigating (PRUCP) entity within 30 days of the date of the notice. Each entity (PRUCP's) has agreed upon the use of its Reviewer resources for its hearing process. The members of the PRUCP shall handle the hearings through its Office of Legal Counsel. At the informal hearing, the firm may respond to the reasons for the proposed removal or certification denial in person and provide information and arguments concerning why it should be or remain certified. In case of final denials or removals, records of meeting or hearings should be kept in case there is an appeal to USDOT under 49 CFR Part 26.89 and upon requested petition, provide a copy of the transcript to the USDOT

If the entity wants to file an appeal with the USDOT, it must send a letter to the following address: US Department of Transportation, Civil Rights, 1200 New Jersey Avenue SE, Washington, DC 20590-0001, within 90 days of the final decision notification. The letter must include information and setting forth a full and specific statement as to why the decision is erroneous, any significant fact that the PRUCP failed to consider, or which provisions of this Part the PRUCP did not properly apply. A decertified firm may reapply for certification within one (1) year period.

### **Decertification and Removal Procedures**

Any person may file a written complaint alleging that a currently certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. The PRHTA 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 the complainant's identity

must be protected as provided in 49 CFR 26. PRHTA will then, review its records concerning the firm, any material provided by the firm and the complainant and any other available information and may request additional information from the firm or conduct any other investigation that it deems necessary.

If the determination is, based on the review, that there is reasonable cause to believe that the firm is ineligible, then the PRHTA must provide written notice to the firm that the PRHTA proposes to find the firm ineligible, setting forth the reasons for the proposed determination. If PRHTA determines that such reasonable cause does not exist, then it must 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 must specifically reference the evidence in the record on which each reason is based.

If, based on notification by the firm of a change in its circumstances or other information that comes to the PRHTA's attention that there is reasonable cause to believe that a currently certified firm is ineligible, the PRHTA must 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 must specifically reference the evidence in the record on which each reason is based.

If the U.S Department of Transportation determines that information in the PRHTA certification records, or other information available, provides reasonable cause to believe that a firm certified by the PRHTA does not meet eligibility criteria of this part, the concerned operating administration (USDOT) may direct the PRHTA to initiate a proceeding to remove the firm's certification. The USDOT must provide the PRHTA and the firm, a notice setting forth the reasons for the directive, including any relevant documentation or other information. The PRHTA must immediately commence and prosecute a proceeding to remove eligibility.

A hearing will occur when PRHTA notifies a firm that there is reasonable cause to remove its eligibility as provided above, PRHTA will give the firm an opportunity for an informal hearing, at which time 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. In such a proceeding, the PRHTA bears the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part. The PRHTA 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, the PRHTA will provide a transcript of the hearing to USDOT and, on request, to the firm. PRHTA will retain the original record of the hearing. The PRHTA may charge the firm only for the cost

of copying the record. The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, PRHTA bears the same burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards, as would be the case during a hearing. Regarding separation of functions, the PRHTA will ensure that the decision in a proceeding to remove the firm's eligibility is made by an office and personnel that did not take 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. The PRHTA's method of implementing this requirement is as follows:

- The decision-maker shall be an individual who is knowledgeable about the certification requirements of the PRHTA DBE Program.

The PRHTA will not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to the PRHTA at the time of its certification of the firm. The PRHTA will 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 PRHTA that render the firm unable to meet the eligibility standards of this part;
- Information or evidence not available at the time the firm was certified;
- Information that was concealed or misrepresented by the firm in previous certification actions;
- A change in the certification standards or requirements of the USDOT since the PRHTA certified the firm; or
- A documented finding that the determination to certify the firm was factually erroneous.

Regarding notice of decision, PRHTA will provide the firm with a 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 decision and of the availability of an appeal to the USDOT. The PRHTA must send copies of the notice to the complainant in an ineligibility complaint or to the USDOT (concerned operating administration) that had directed the PRHTA to initiate the proceeding.

### **Status of the Firm during Proceeding:**

A firm remains an eligible DBE during the pendency of the PRHTA's proceeding to remove its eligibility. No credit is given towards goals if firm is not certified at the time of award; or for a firm that loses its certification. The firm does not become ineligible until the

issuance of the notice with the decision and the reason for ineligibility as a DBE. When the PRHTA removes a firm's eligibility, the following action will be taken:

When a prime contractor has made a commitment to using the ineligible firm, or the PRHTA has made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before the PRHTA issues the decertification notice, the ineligible firm's participation does not count toward any contract goal or the overall state goal. The PRHTA must direct the prime contractor to meet any contract goal with an eligible DBE firm or demonstrate to the PRHTA that it has made a good faith effort to do so.

If a prime contractor has executed a subcontract with the firm before the PRHTA 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 PRHTA 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 ineligibility notice was issued shall not count toward the PRHTA's overall goal, but may count toward any contract goal. There is an Exception: that is, If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, the PRHTA will continue to count its participation on that contract toward the overall and any contract goals. When the PRHTA makes an administratively final removal of a firm's eligibility under this section, the firm may appeal the removal to the USDOT pursuant to 49 CFR Part 26.89.

### **Certification Appeals**

Any firm which is denied certification or whose eligibility is removed may make an informal hearing and/or administrative appeal. The request for the informal hearing and/or administrative appeal must be made to the Office of the Legal Counsel of the PRDTPW within 30 days of the notice of denial or decertification. The request shall be addressed to:

**Legal Counsel  
Puerto Rico Department of Transportation and Public Works  
PO Box 41269  
San Juan, Puerto Rico 00940-1269**

It may also be hand delivered to Office of the Legal Counsel, Puerto Rico Department of Transportation and Public Works, Roberto Sánchez Vilella Government Center, South Building, 17<sup>th</sup> floor, De Diego Avenue, Santurce, Puerto Rico. After the internal Hearing/Appeal is solved,

if unfavorable to the firm, it may appeal PRHTA's decision to USDOT. Such Appeal, within 90 days of the written determination, shall be sent to:

**Department of Transportation  
Office of Civil Rights  
1200 New Jersey Avenue SE.  
Washington, DC 20590**

We will promptly implement any DOT certification appeal decisions affecting the eligibility of DBEs for our DOT-assisted contracting opportunities (e.g., certify a firm if DOT has determined that our denial of its application was erroneous).

## **X. RECORD KEEPING, MONITORING AND ENFORCEMENT**

### **BIDDERS LIST**

The PRHTA bidders list will consist of information about all DBE and non-DBE firms that bid or quote on federally assisted contracts. The purpose of this information is to allow the use of an approach and meet the requirement in determining the ready, willing, and able for Step 1 & 2, and determine future DBE overall goals methodology. The list will include all firms that bid on prime contracts or quote that are participating, or attempting to participate on federally-assisted contracts, including both DBEs and non-DBEs. We will take the list of attendees to the pre-bid meeting, bid meetings; the list of bid award report and signed contracts. From this information a list will be developed which will count all firms that are participating, or attempting to participate, on federally assisted contracts.

These reports include name, business address, phone number, project state/federal number, quantity and location of projects thereof. To extend the list, we will also take the companies included in the CDBEU participating as subcontractors, suppliers of materials and other services and any other information the Board of Bids may provide of business participation in federally funded projects. Once the list is refined and DBE firms are identified, we will determine the overall goal for DBE participation.

The Department monitors and tracks actual DBE participation through contractor and subcontractor reports of payments and other appropriate monitoring methods (DBE-1 Form). On a semi-annual basis, the Department receives data from the program areas identified above and also receives data semi-annually from the Uniform Report of DBE Awards or Commitments and Payments which are sent to FHWA and FTA. DBE participation is counted toward the statewide overall annual DBE goal, in accordance with the Federal regulations. The Board of Bids - is



responsible for all activities related to advertising, bid opening, award and approval for all of the PRHTA projects. All federal-aid projects are subject 49 CFR Part 26 and part 23.

The Board of Bids will collect this information each time there is a federally assisted project. The Board of Bids collect the information each time there is a pre-bid meeting for federally assisted project. The recollection of the information will be made manually and kept and used as reference measurement for review by any person or public wishing to know how overall goals were set. The list is actualized on a monthly basis including contract date, award and signed and with bidder's names and contract amounts. The Agency will follow up on any information required under 49 CFR Part 26 and 23 which the contractor is not able to provide.

### **MONITORING PAYMENTS TO DBEs**

The PRHTA will require prime contractors to maintain records and documentation of payments to DBEs during the performance of the contract and three (3) years after its completion. These records will be available for inspection upon request by any authorized representative of USDOT and PRHTA. Although not stipulated in the regulation, the DBE Civil Rights Coordinator periodically visits project sites, audits and monitors useful function and proper procedures in payments to DBEs, to ensure that the contractor is paying DBEs the actual amounts stipulated on the Certification of DBE Utilization.

### **REPORTING TO USDOT**

The PRHTA will continue to provide data about the DBE Program as directed by DOT operating administrations. Participation Reports will be furnished on a quarterly basis and submission of the biannual report *Uniform Report of DBE Commitments / Awards and Payments* supplied for the first half of federal fiscal year and second half by due date (June 1 and December 1).

## **XI. PUBLIC PARTICIPATION PROCESS**

PRHTA will consult with minority, women and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and PRHTA's efforts to establish a level playing field for the participation of DBEs.

Upon submission of the proposed PRHTA DBE Program and DOT approval of the proposed overall goal PRHTA will publish a notice announcing its proposed overall goal,

informing the public that the proposed goal and its rationale are available for inspection during normal business hours at PRHTA for 30 days following the date of the notice, and informing the public that PRHTA and USDOT will accept comments for 45 days from the date of the notice. The notice will state the address of PRHTA and USDOT where comments may be sent. The notice will be published in general circulation media and available minority-focused media and trade association publications.

## **ATTACHMENTS**

<b>APPENDIX A</b>	<b>-</b>	<b>DBE PROGRAM CONTRACT PROVISIONS</b>
<b>APPENDIX B</b>	<b>-</b>	<b>CERTIFICATION OF DBE UTILIZATION (CDBEU)</b>
<b>APPENDIX C</b>	<b>-</b>	<b>CERTIFICATION OF CONTRACTOR, CONSULTANT OR OFFEROR FOR DBE GOAL ANNUAL STATE GOAL</b>
<b>APPENDIX D</b>	<b>-</b>	<b>NO-CHANGE AFFIDAVIT</b>
<b>APPENDIX E</b>	<b>-</b>	<b>ORGANIZATIONAL CHART</b>
<b>APPENDIX F</b>	<b>-</b>	<b>YEARLY REVIEW LETTER</b>
<b>APPENDIX G</b>	<b>-</b>	<b>UNIFORM REPORT</b>
<b>APPENDIX H</b>	<b>-</b>	<b>UCP AGREEMENT</b>
<b>APPENDIX I</b>	<b>-</b>	<b>FTA PROGRAM APPROVAL LETTER</b>

**DBE PROGRAM CONTRACT PROVISIONS**

Puerto Rico Highway and Transportation Authority

***DISADVANTAGED BUSINESS PARTICIPATION IN USDOT ASSISTED CONTRACTS***

49 CFR, Part 26

**OBJECTIVE:**

The purpose of the DBE Program is to implement the provisions of 49 CFR, Part 26, other pertinent regulations, and source legislation. The objectives are: (a) To ensure nondiscrimination in the award and administration of USDOT-assisted contracts in the USDOT's highway, transit, and airport financial assistance programs; (b) To create a level playing field on which DBEs can compete fairly for USDOT-assisted contracts; (c) To ensure that USDOT's DBE program is narrowly tailored in accordance with applicable law; (d) To ensure that only firms that fully meet the eligibility standards specified in 49 CFR, Part 26 are permitted to participate as DBEs; (e) To help remove barriers to the participation of DBEs in USDOT-assisted contracts; (f) To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and (g) To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

**AUTHORITY:**

These Special Provisions are issued following guidelines found in 49 CFR Part 26 (as amended), effective March 4, 1999, under authorities cited at 23 U.S.C. 324; 42 U.S.C. 2000d et seq.; 49 U.S.C. 1615, 47107, 47113, 47123; Executive Order 12138, 3 CFR, 1979 Comp. p. 393; Sec. 1101(b), Pub. L. 105-178, 112 Stat. 107, 113; and in accordance with other directives contained in the DTPW's Disadvantaged Business Enterprise Program.

**NONDISCRIMINATION ASSURANCE:**

Each contract the PRHTA enters into with a contractor, consultant or recipient on a USDOT-assisted project shall ensure that such contract and subcontracts include the DBE Program Contract Provisions described herewith.

The PRHTA will not discriminate on the basis of race, color, national origins, or sex in the award of and performance of any DOT-assisted contract or in the administration of its DBE program requirements of 49 CFR Part 23 and 26. The PRHTA shall take all necessary and reasonable steps under 49 CFR, Part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contract. The PRHTA's DBE program, as required by 49 CFR, Part 26 and as approved by DOT, is incorporated by reference. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement.

The contractor, sub recipient 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.**

## DBE PROGRAM CONTRACT PROVISIONS

### POLICY:

It is the policy of the Puerto Rico Highway and Transportation Authority (PRHTA) to encourage and support the DBE Program and its objectives to the maximum extent possible. This rule shall be circulated throughout the PRHTA Construction Organizations, and DBE and non-DBE business communities that perform work with the PRHTA and other interested parties.

No person shall be excluded from participation in or denied the benefits of, or otherwise discriminated against in connection with the award and performance of any contract covered by this DBE Program or 49 CFR, Part 26 on the basis of race, color, sex or national origin.

In administering the DBE Program, the PRHTA shall not use criteria or methods that would have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex or national origin.

From time to time PRHTA shall receive interpretations from USDOT, which shall be binding on PRHTA, sub-recipients, and contractors.

### DEFINITIONS:

**COMMERCIALY USEFUL FUNCTION (CUF)** - means that a DBE is responsible for execution of a distinct element of the work of a contract or subcontract and carries out its responsibilities by actually performing, managing and supervising the work involved, or provides professional services.

**COMPLIANCE** – means that a recipient has correctly implemented the requirements of this part.

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

**CONTRACT GOAL** – means the percentage of DBE participation established by PRHTA, if required, for an USDOT-Assisted Contract.

**CONTRACTOR** – means one who participates, through a contract or subcontract (at any tier), in an USDOT-assisted highway, transit, or airport program.

**CRO** – means Civil Rights Office of the PRHTA.

**DEPARTMENT** – 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).

**CONSULTANT** – means an individual, firm or partnership that contracts with the PRHTA to provide services for engineering, business management, project management, surveying, environmental, hazardous materials, subsurface utility engineering, and other services which require a rigorous, logical, science based approach for data acquisition to be used in the development of PRHTA highway construction plans.

## DBE PROGRAM CONTRACT PROVISIONS

**DISADVANTAGED BUSINESS ENTERPRISE OR DBE** – means a for-profit small business concern, 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 whose management and daily business operation are controlled by one or more of the socially and economically disadvantaged individuals who own it.

**GOOD FAITH EFFORTS** – means efforts to achieve a DBE goal or other requirement of the DBE Program which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirements.

**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.

**NAICS** – North American Industrial Classification System – replaces the Standard Industrial Classification (SIC) codes designation, which best describes the primary business of a firm.

**NON-COMPLIANCE** – means that a recipient has not correctly implemented the requirements of 49 CFR, Part 26.

**OPERATING ADMINISTRATION (OA)** – means any of the following parts of USDOT: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and the Federal Transit Administration (FTA). The “Administrator” of any OA includes his or her designees.

**OVERALL DBE GOALS** - means the purposes of achieving a “level playing field” for ready, willing and able DBE firm seeking participation in federally assisted contract with PRHTA.

**OVER-CONCENTRATION** – means a condition in which DBE firms are being utilized in certain types of work to the extent that non-DBEs are unduly burdened from participating in this same type of work.

**PRHTA** - means the Puerto Rico Highway and Transportation Authority.

**PRIMARY INDUSTRY CLASSIFICATION** – means the four digits Standard Industrial Classification (SIC) code designation, which best describes the primary business of a firm. The SIC code designations are described in the standard Industry Classification Manual.

**PRIMARY RECIPIENT** – means a recipient to which USDOT financial assistance is given and passes some or all of it on to another recipient.

**PROGRAM** – means any undertaking on a recipient’s part to use USDOT financial assistance, authorized by the laws to which this part applies.

**RACE-CONSCIOUS MEASURE** – means a program that is focused specifically on assisting only DBEs, including women-owned DBEs.

**RACE-NEUTRAL MEASURE** – means a program that is, or can be, used to assist all small businesses. For purposes of this part, race-neutral includes gender-neutrality.

## DBE PROGRAM CONTRACT PROVISIONS

**READY, WILLING AND ABLE** – means, for the purpose of setting annual DBE goals, in the context of a DBE or non-DBE business, that it has the necessary license to perform work on USDOT-assisted contracts in its home state, is not currently suspended or debarred, and has demonstrated its interest in performing work on USDOT-assisted contracts by submitting a bid, proposal, or quotation as a prospective prime contractor, subcontractor, supplier, trucker, consultant, or other relevant business entity, on a Puerto Rico USDOT-assisted contract within the current or two (2) previous federal fiscal years, or such shorter duration as established by the Department.

**SECRETARY** – means the Secretary of the U. S. Department of Transportation or his/her designee.

**REGULAR DEALER** - means 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. 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. 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 dealer's own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis. Packagers, brokers, manufacturer's representatives, or other persons who arrange or expedite transactions are not regular dealers.

**SMALL BUSINESS ADMINISTRATION (SBA)** – means the United States Small Business Administration.

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

**SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUAL** – means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is:

Any individual whom the PRHTA finds to be a socially and economically disadvantaged individual pursuant to its DBE certification procedure. 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, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;

## DBE PROGRAM CONTRACT PROVISIONS

- (e) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives islands, Nepal or Sri Lanka;
- (f) Women; and
- (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.

**STATE GOAL** – means the PRHTA's determination, calculated annually as a percentage, of the level of DBE participation on Puerto Rico USDOT-Assisted Contracts, PRHTA expects absent the effects of discrimination.

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

### Pre-Award and Demonstration of Good Faith Efforts:

The Puerto Rico Highway and Transportation Authority (PRHTA) DBE Program is a race conscious / race neutral program, which means that Authority expects to achieve the DBE goal through the normal competitive bid process and contract specific goals as may be determined on a project-by-project basis on a USDOT- assisted individual project contracts. The PRHTA DBE public policy has an overall **Twenty seven Percent (27%)** DBE goal. From time to time, PRHTA will establish a contract goal in order to achieve the aforementioned goal. The PRHTA shall determine whether a bidder has made good faith efforts by documenting that it has obtained commitments for sufficient participation by DBE firms; or by showing that it took all necessary steps to achieve the objective of meeting the goal. On projects where items are not subject to subcontracting, PRHTA will not require DBE Utilization. However, changes in the scope of the project might require DBE subcontracting at a later stage.

If a contract specific goal is established in any USDOT federal project, or to achieve the overall goal, PRHTA shall award the contract only to a bidder who meets the established goal or who makes good faith efforts to do so. The award of the contract will be conditioned on meeting the requirements of this section:

1. All bidders shall give written assurance (Certification of Consultant or Offeror for DBE State Goal) in their bid proposal to meet the established DBE aspiration state goal. The bidder's written assurance will be considered binding. Failure to make and/or abide by such written assurance shall be cause for not awarding the contract.
2. If PRHTA establishes a contract goal, all bidders shall abide by the contract goal, either by their own participation if they are certified DBE firms or by subcontracting applicable items on the contract. Whether a contract goal exists or on overall goals, bidders who are themselves certified DBE firms are only required to submit the Certification of Consultant or Offeror for DBE State Goal, but are encouraged to submit a Certification of DBE Utilization for those items in the contract which may be subcontracted. Once said certification is submitted, it shall be binding for the duration of the project, unless modified and approved by the Construction Area and the Civil Rights Office of Civil Rights.
3. Contractors who are not certified DBE firms are required to submit the Certification of DBE Utilization on those projects with items that may be subcontracted at the time of bid or if scope of project varies during its performance. Once said certification is submitted, it shall be binding for the duration of the project, unless modified and approved by the Construction Area and the Office of Civil Rights.



## DBE PROGRAM CONTRACT PROVISIONS

4. The information required in the Certification of DBE Utilization must be accurate, complete in every detail at the time it is submitted to the PRHTA for approval. This Certification of DBE Utilization will be evaluated prior to the award of the contract. Failure to submit Certification of DBE Utilization in proper form and accuracy shall be cause for the rejection of the proposal. Bidders submitting a CDBEU may do so at the time of bid opening, or within three (3) calendar days after the date of the bid opening. The document shall be subject to Construction Area and Civil Rights Office's approval. Bidders required to submit said Certification must list on the form the following information:
  - a. The names of DBE subcontractors and suppliers that will participate in the contract;
  - b. A description of the work that each DBE will perform, including its item number in the proposal schedule.
  - c. The dollar amount of the participation (actual proposed payment) of each DBE firm listed;  
A model showing how to submit this certification is included at the end of this document.
5. If the apparent low bidder cannot meet the established DBE contract goal (if established), or made efforts toward the overall goal and proposes a reduced DBE goal, the bidder shall document and submit its justification for not meeting the goal and its documented demonstration of good faith efforts at the time of the bid opening. This justification is a documented demonstration of good faith efforts by the bidder, which must, in the end, show that the contractor had actively and aggressively sought out DBEs to participate in the project. Mere *pro forma* efforts are not the necessary and reasonable steps that indicate good faith efforts. The PRHTA will consider the quality, quantity, and intensity of the different kinds of efforts that were made in trying to obtain DBE participation sufficient to meet the DBE contract or overall goal. The following is a list of types of actions, which the PRHTA will consider as part of the bidder's good faith efforts to obtain DBE participation. This list is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive, as other factors or types of efforts may be relevant in appropriate cases. This demonstration should include, but not be limited to, the following:
  - a. Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The bidder must solicit this interest within sufficient time to allow DBEs to respond to the solicitation. The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.
  - b. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own workforce.
  - c. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.
  - d. Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.

## DBE PROGRAM CONTRACT PROVISIONS

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

- e. Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.
  - f. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.
  - g. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
  - h. Effectively using the services of available minority/women community organizations; minority/women contractor's groups; local, state, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.
6. In determining whether a bidder has made good faith efforts, the PRHTA may take into account the performance of other bidders in meeting the contract goals. For example, when the apparent successful bidder fails to meet the aspirational goal, but others meet it, the PRHTA may reasonably raise the question of whether, with additional reasonable efforts; the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, the PRHTA may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts.
7. The good faith efforts documentation required to justify the proposed goal shall be based on efforts made by the prime contractor from the date of Invitation for Bids to the date of the bid opening. The PRHTA will not consider any effort made by the prime contractor after bid opening.
8. Examples of actions which may not be acceptable as reasons for failure to meet the DBE goal:
- a. Rejection of reasonable DBE bid based solely on price.
  - b. Mere convenience
  - c. Prime contractor normally would perform all or most of the work of the contract.
  - d. Solicitation by mail or telephone only.

## DBE PROGRAM CONTRACT PROVISIONS

The following are reasons to reject a DBE firm as subcontractor

- a. Firm declined offer in writing
  - b. Firm has a proven record of failure on PRHTA projects
  - c. Firm went out of business
9. If the bidder is able to demonstrate good faith efforts, the PRHTA may award the contract at the bidders' proposed DBE contract goal.
10. If the PRHTA determines that the bidder is unable to demonstrate good faith efforts, the PRHTA will reject the bidder's proposal, but shall provide to the bidder the opportunity for administrative reconsideration. As part of this reconsideration, the following guidelines apply:
- a. The bidder shall have the opportunity to provide written documentation or argument concerning the issue of whether the bidder met the DBE goal or made adequate good faith efforts to do so.
  - b. The PRHTA's decision on reconsideration shall be made by an official who did not take part in the original determination that the bidder failed to meet the DBE goal or make adequate good faith efforts to do so.
  - c. The bidder shall have the opportunity to meet in person with the PRHTA's reconsideration official to discuss the issue of whether it met the DBE goal or made adequate good faith efforts to do so.
  - d. The PRHTA shall send a written decision on the reconsideration, explaining the basis for finding that the bidder did or did not meet the DBE contract goal or make adequate good faith efforts to do so.
  - e. If the reconsideration decision finds that the bidder did meet the DBE goal or did make adequate good faith efforts to do so, the PRHTA may award the contract at the bidder's proposed DBE goal.
  - f. If the reconsideration decision finds that bidder did not meet the DBE goal or did not make adequate good faith efforts to do so, the PRHTA will not award the contract to that bidder, but will notify the next lowest responsible bidder that its bid proposal, with all required documentation therein, is being considered for award of contract.
  - g. The result of this reconsideration process is not administratively appealable to the USDOT.
11. The DBE goal committed by the successful bidder will become the established DBE goal for the project as a contract requirement. If, at the completion of the project, the prime contractor fails to meet its commitment, it will be required to document and justify why it failed to meet this commitment. The Penalty Provision as stated below will apply if the contractor fails to demonstrate good faith efforts to meet the DBE goal.
12. If the PRHTA lets for bid a "design-build" or "turnkey" contract, in which the PRHTA lets a master contract, or similar legally binding instrument, to a contractor, who in turn lets subsequent subcontracts for the work of the project, the PRHTA may establish a DBE goal for the project. The master contractor then establishes DBE contract goals, as appropriate, for the subcontracts it lets. The PRHTA shall maintain oversight of the master's contractor's activities to ensure that they are conducted consistent with the requirements of these Special Provisions, the PRHTA's DBE Program and 49 CFR Part 26 (as amended).

## DBE PROGRAM CONTRACT PROVISIONS

13. The PRHTA requires that the successful bidder, or subsequently the prime contractor, not terminate for convenience a DBE subcontractor listed in Certification of DBE Utilization, or an approved substitute DBE firm, and then propose to perform the work of the terminated subcontract with its own workforces or those of an affiliate, without the PRHTA's prior written consent. See the Termination / Substitution / Replacement of Listed DBE Firms provision below.

### COUNTING DBE PARTICIPATION:

1. When a DBE participates in a contract, only the value of the work actually performed by the DBE will be counted.
  - a. The entire amount (total dollar value) of that portion of a construction contract or other contract that is performed by the DBE's own forces will be credited. Included are the costs 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. Credit will be allowed for the entire amount 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 an USDOT-assisted contract. Credit will be allowed for fees considered reasonable and not excessive as compared with fees customarily allowed for similar services.
  - c. When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted only if the DBE's subcontractor is itself a certified DBE. Work that a DBE subcontracts to a non-DBE firm does not count.
2. When a DBE performs as a participant in a joint venture, credit for a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces will be allowed.
3. Credit to a DBE contractor will be allowed only if the DBE is performing a commercially useful function on the contract.
  - a. 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, installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, an evaluation will be made of 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.
  - b. 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, an examination of similar transactions, particularly those in which DBEs do not participate, will be performed.

## DBE PROGRAM CONTRACT PROVISIONS

- c. If a DBE does not perform or exercise responsibility for at least the percentage determined in the PRHTA Standard Specifications for Road and Bridge Construction of the total cost of its contract with its own forces, 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, it will be presumed that the DBE is not performing a commercially useful function.
  - d. When a DBE is presumed not to be performing a commercially useful function as provided above, the DBE might present evidence to rebut this presumption. It may be determined that the firm is performing a commercially useful function given the type of work involved and normal industry practices.
  - e. Decisions concerning commercially useful function matters are not administratively appealable to USDOT.
4. The following factors will be used to determine whether a DBE trucking firm is performing a commercially useful function. The PRHTA shall evaluate the amount of work subcontracted, industry practices and other relevant factors:
- a. 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 purposes of counting DBE participation.
  - b. The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.
  - c. The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
  - d. 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.
  - e. 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.
  - f. A lease arrangement or agreement shall 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 shall display the name and identification number of the DBE.
  - g. Prior to beginning work on a contract, the DBE must submit valid lease agreements to the PRHTA on all leased trucks and written agreements with owner/operators. Whether the agreement is with an owner/operator or trucks hired from a trucking firm, the agreement must include the:

## DBE PROGRAM CONTRACT PROVISIONS

1. Operator's Name;
  2. Social Security number;
  3. Federal Identification Number (FIN);
  4. Cab Card Number of the Truck;
  5. Description of the Truck and the Method of Payment.
5. The following factors are used in determining whether a DBE truck owner/operator will be credited:
- a. An Owner/Operator must own one (1) fully operational truck and operate it himself/herself for hire. The individual must possess a Commercial Driver's License and the truck must have a current registration and be properly licensed. If required, the firm must have the appropriate operating license and insurance. The individual must be an independent owner/operator and cannot be in an employee / employer relationship with a prime contractor.
  - b. Owner/Operator trucks may be utilized by the prime contractor to meet a DBE goal and must be covered by a fully executed written agreement.
  - c. For each owner/operator to be credited, the contractor or subcontractor must submit to the PRHTA, a valid agreement that includes or has attached the following information:
    1. Owner/operator's name;
    2. Social Security Number;
    3. Copy of Vehicle registration receipt;
    4. Current Vehicle license number;
    5. Truck Number;
    6. Method of payment (hour, ton, load).
  - d. The prime contractor may count towards its DBE participation; the total dollar value paid to an owner/operator for the haul. Payments to owner/operators must be certified to by the prime contractor prior to finalizing the project or as work progresses, as required by the PRHTA. If required, the owner must be shown on the prime contractor's certified payroll.
6. Expenditures with DBEs for Materials or Supplies:
- a. If the materials or supplies are obtained from a DBE manufacturer, 100 percent of the cost of the materials or supplies may be counted. For the purposes of this paragraph, 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.
  - b. If the materials or supplies are purchased from a DBE regular dealer, 60 percent of the cost of the materials or supplies may be counted.
  - c. With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, only 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 the job site, provided the PRHTA determines the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. No

## DBE PROGRAM CONTRACT PROVISIONS

*portion of the cost of the materials or supplies themselves may be counted toward DBE contract goals.*

7. All listed DBE firms must be certified by the PRHTA prior to the prime contractor's submission of Certification of DBE Utilization. If a firm is not currently certified as a DBE in accordance with approved certification standards at the time of the execution of the contract, the PRHTA may not count the firm's participation toward any DBE goals, except as provided for by the following, in regards to the effects of removal of eligibility by the PRHTA:
    - a. When a prime contractor has made a commitment to using the ineligible firm or the PRHTA has made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before the issue of a decertification notice, the ineligible firm will not count toward the DBE goal or overall goal. The PRHTA shall direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate that it has made good faith efforts to do so.
    - b. If a prime contractor has executed a subcontract with the firm before the PRHTA 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 towards its DBE goal for the firm's work. In this case, or in a case where the PRHTA has let a prime contractor to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after the PRHTA has issued the notice of its ineligibility shall not count toward the PRHTA's overall goal, but may count toward the contract goal.
    - c. Exception: If the DBE's ineligibility is caused solely by its having exceeded the size standard during its performance of the contract, the PRHTA may continue to count its participation on that contract toward overall and contract goals.
  8. The PRHTA may not count the dollar value of work performed under a contract with a firm, after it has ceased to be certified, toward the overall goal.
  9. The PRHTA may not count the participation of a DBE subcontractor toward the prime contractor's DBE achievements or the overall goal until the amount being counted toward the goal has been paid to the DBE.
  10. Over concentration shall be presumed to exist in a type of work, other than trucking work, when either of the following conditions has been met:
    - a. More than 50% of the total number of firms ready, willing and able to perform such work are comprised of DBE firms, or
    - b. More than 50% of the total Federal-aid dollars spent on such work during the previous federal fiscal year was earned by DBE firms.
- Over concentration shall be presumed to exist in trucking work when both the following conditions have been met:
- a. More than 80% of the total number of firms ready, willing and able to perform such work are comprised of DBE firms and,

## DBE PROGRAM CONTRACT PROVISIONS

- b. More than 80% of the total Federal-aid dollars spent on such work during the previous federal fiscal year was earned by DBE firms.

In the event a presumption of over concentration arises pursuant to the aforementioned sections, PRHTA shall make further investigation to determine if the presumption of over concentration in a type of work is rebutted by a review of the totality of the circumstances. Such review shall consider whether a false presumption of over concentration is resulting from extraneous influences such as the geographic location of the work versus the geographic location of the DBE and non-DBE firms involved, the number and size of contracts giving rise to the appearance of over concentration, and any other relevant factors affecting DBE or non-DBE participation in the type of work.

If over concentration in a type of work is deemed by PRHTA to exist, measures to address the over concentration will be devised. These measures may include the use of incentives, technical assistance, business development programs, mentor-protégé programs and other appropriate measures designated to assist DBE in performing work outside of the specific field in which it has been determined that non-DBEs are unduly burdened.

The PRHTA shall annually determine and document whether DBE firms are so over concentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in that type of work.

No credit for the use of DBEs in the type of work for which over concentration is determined by PRHTA to exist shall be given in the event a race-conscious DBE goal has been placed on a project. If PRHTA determines such reduced credit is required for a type of work on a project, PRHTA shall so notify prospective bidders in the Invitation for Bids.

### TERMINATION / SUBSTITUTION / REPLACEMENT OF LISTED DBE FIRMS:

1. The PRHTA requires that the prime contractor not terminate for convenience a DBE subcontractor listed in Certification of DBE Utilization, or an approved substitute DBE firm, and then perform the work of the terminated subcontract with its own workforce or those of an affiliate, without the PRHTA's prior written consent.
2. If a DBE subcontractor is terminated, or the DBE firm fails to complete its work on the contract for any reason, the PRHTA requires the prime contractor to make good faith efforts to find another certified DBE subcontractor to substitute for the original DBE firm. These good faith efforts shall be documented and directed at finding another certified DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to count DBE participation.
3. If a DBE subcontractor is unwilling or unable to perform the work of the commitment made to the prime contractor, the prime contractor shall immediately notify in writing the PRHTA's project manager, the Construction Area, and the Civil Rights Office, and request to be relieved of the commitment to use the named DBE. The prime contractor shall include with this request a justification and the good faith efforts made in dealing with the named DBE.
4. If the prime contractor's request to be relieved is approved by the PRHTA, the prime contractor shall immediately attempt to obtain sufficient DBE participation by subcontracting with other certified DBEs.



## DBE PROGRAM CONTRACT PROVISIONS

5. If the prime contractor is unable to replace the committed DBE with another or other certified DBE firms, the prime contractor shall evaluate the remaining items of work and shall document and submit the good faith efforts made to subcontract work with certified DBEs or to purchase materials or supplies from certified DBE suppliers for such remaining items. To demonstrate necessary, reasonable good faith efforts, the Contractor shall document the steps he has taken to replace any DBE subcontractor who is unable to perform successfully with another DBE subcontractor. Such documentation shall include but not be limited to the following:
  - (1) Copies of written notification to DBEs that their interest is solicited in subcontracting the work defaulted by the previous DBE subcontractor or in subcontracting other items of work in the contract.
  - (2) Efforts to negotiate with DBEs for specific sub bids including, at a minimum:
    - (a) The names, addresses, and telephone numbers of DBEs who were contacted.
    - (b) A description of the information provided to DBEs regarding the plans and specifications for portions of the work to be performed.
  - (3) For each DBE contacted but rejected as unqualified, the reasons for the Contractor's conclusion.
  - (4) Efforts made to assist the DBEs contacted, if needed, in obtaining bonding or insurance required by the Contractor.
6. The PRHTA may allow a DBE contract goal waiver; adjust the DBE goal accordingly as to submitted and accepted good faith efforts; or imposes penalties as may be appropriate, depending on the individual project's overall circumstances.

### PROMPT PAYMENT MECHANISMS TO SUBCONTRACTORS:

To ensure that all obligations under contracts awarded to DBEs are met, the PRHTA will review the contractor's DBE involvement efforts during the performance of the contract. Prime contractors shall pay all subcontractors their respective subcontract amount by electronic transfer, if available, for PRHTA accepted work within fifteen (15) calendar days after the contractor receives payment for such work from the PRHTA. The contractor will be required to submit documentation of all payments made to DBEs and non-DBEs irrespective of the tier within fifteen (15) calendar days after the contractor receives payment for such work. A prime contractor shall be required to fully document any alleged disputes with its subcontractors. The contractor shall ensure that all situations in which regularly scheduled payments are not made to subcontractors are reported to the PRHTA. If the prime contractor is found to be in violation or fails to abide by the prompt payment mechanisms, the PRHTA shall impose sanctions as stated under Compliance Procedures. PRHTA does not allow contractors to withhold retainage payments on subcontractors unless agreed to between the parties. In those instances where retainage is withheld, the contractor shall further be required to release retainage payment to the subcontractors within thirty (30) calendar days of satisfactory completion of the entire subcontractor's work and final payment for such work by the PRHTA, irrespective of the tier. Final completion of a subcontractor's work will be determined by the PRHTA or its designee. This process will be expedited as soon as the Authority or its designee is advised that the subcontract work is satisfactorily complete. Within ten (10) days from the notification the Authority or its designee will complete final inspection and authorize final payment and release of retainage.

## DBE PROGRAM CONTRACT PROVISIONS

### RECORD KEEPING REQUIREMENTS AND CERTIFICATION OF DBE UTILIZATION:

1. The prime contractor shall keep such records as necessary to ensure compliance with its DBE utilization obligations.
2. As requested, the prime contractor will submit all subcontracts and other financial transaction documentation executed with DBEs in such form, manner and content as prescribed by the PRHTA.
3. All such records must be retained by the prime contractor for at least three (3) years after project acceptance by the FHWA following the completion of the contract. These records shall be available for inspection by the PRHTA, the FHWA, the USDOT or other appropriately sanctioned Puerto Rico State Agencies or Federal Agencies or Departments.
4. The prime contractor's DBE liaison officer or designee shall provide the PRHTA with an accounting of payment made to the DBEs, including material supplies, contractors at all levels. This shall be furnished to the PRHTA for any given month by the end of the following month.
5. The PRHTA will conduct, at a minimum, an annual audit on selected construction projects to verify actual participation reported on Certification of DBE Utilization Participation.

### COMPLIANCE PROCEDURES AND PENALTIES:

Whenever the PRHTA believes that the contractor or any subcontractor or supplier on a USDOT-assisted contract may not be operating in compliance with the terms, conditions or requirements of this DBE Program, including but not limited to, encouraging fronting, brokering or the circumstance of a DBE not performing a commercially useful function as defined, the PRHTA will conduct an investigation. If it is found that the contractor or any subcontractor or supplier is not in compliance with the DBE Program or these Special Provisions, the non-compliant party will be notified in writing by the PRHTA. A compliance conference to discuss the area(s) of non-compliance may be held between the PRHTA and the non-compliant party or parties. In the event that the non-compliant party or parties fails or refuses to perform in compliance with the DBE Program or these Special Provisions, a "Notice of Non-Compliance" will be transmitted. If the non-compliant party or parties corrects the deficiencies, the "Notice of Non-Compliance" will be rescinded and the party or parties will be notified as to compliance. If the deficiencies are not corrected, the PRHTA will initiate administrative action against the non-compliant party or parties, which may include but not be limited to;

1. Deduct 10% from the amount contractor announced on the Certification of DBE Utilization it would pay the DBE firm.
2. Deduct the amount of work not accomplished by DBEs from the money due or to become due to the contractor.
3. Initiation of appropriate debarment or decertification proceedings.
4. Termination of the contract.
5. Referral of any unlawful actions to the appropriate enforcement agencies.
6. Other actions as appropriate, at the discretion of the PRHTA.

# CERTIFICATION OF DBE UTILIZATION

I HEREBY DO CERTIFY THAT IF \_\_\_\_\_

\_\_\_\_\_  
Contractor's name and address

Is awarded the contract for Project No. \_\_\_\_\_, said firm intends to formally contract with the DBE firm(s) detailed in Attachment "A" to provide services, material, or perform work, and receive payment in the established amount.

If for any reason, the contracts cannot be realized as stated, good faith efforts will be made to substitute with other DBE firm (s) for participation of equal or greater value. Any changes on the firms, work or payment herein certified must be submitted for Office of Civil Rights and Construction Area approval **prior** to subcontracting.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Authorized Signature

\_\_\_\_\_  
Title

\_\_\_\_\_  
Name (Print)

AFFIDAVIT No. \_\_\_\_\_

SWORN and subscribed before me by \_\_\_\_\_ of legal age

Name

resident of

\_\_\_\_\_  
marital status

\_\_\_\_\_  
occupation

known to me personally or whom I have identified by means of \_\_\_\_\_

Indicate # of government issued Id.

In Puerto Rico, this \_\_\_\_\_ day of \_\_\_\_\_.

\_\_\_\_\_  
Notary Public

# ATTACHMENT "A"

To Affidavit no. \_\_\_\_\_

Appendix C

## DBE FIRMS TO BE CONTRACTED FOR PROJECT \_\_\_\_\_

Name of DBE Firm (as it appears in the DBE Directory or Certification)	Address (as it appears in the DBE Directory or Certification)	Please Check One (X)		Item No.	Description of Services/Material or Work to be Performed by the Firm	Dollar Amount of Participation of DBE* (actual payment)
		Subcontractor	Supplier			
TOTAL						

IF ADDITIONAL SPACE IS REQUIRED, REPRODUCE THIS ATTACHMENT AS NEEDED

\*Sixty percent (60%) of the invoice amount of material/services purchased from DBE firm is the maximum allowable credit towards the DBE Utilization requirements

PUERTO RICO HIGHWAY AND TRANSPORTATION AUTHORITY

**CERTIFICATION OF CONTRACTOR, CONSULTANT OR OFFEROR FOR DBE  
ANNUAL STATE GOAL**

I hereby certify that I am the \_\_\_\_\_ and duly authorized  
(Title)  
representative of \_\_\_\_\_, whose address is \_\_\_\_\_  
(Firm)  
\_\_\_\_\_, and acknowledge  
and certify as follows:

- (a) Understand that the PRHTA's DBE Program has an annual state goal, which this firm will seek to attain according to the DBE Program provisions.
- (b) Agreed, as an express or implied condition for obtaining the contract, to comply by the provisions of Title 49 Code of the Federal Regulation Part 26 as it pertains to Disadvantaged Business.

Except as here expressly stated (if any):

I acknowledge that this certificate is to be furnished to the Puerto Rico Highway and Transportation Authority, in connection with this contract involving participation of Federal-Aid highway and transportation funds (if applicable), and is subject to applicable State and Federal laws, both criminal and civil (if applicable).

\_\_\_\_\_  
Authorized Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Name

**NO-CHANGE AFFIDAVIT**

I hereby affirm under penalty of perjury that the following statements and information are true and correct and include all material information necessary to identify and explain the operation of

\_\_\_\_\_  
**Name of Firm**

The information provided is solely to determine if the firm qualifies as a small business: (The corporate income tax return of the firm for the last year is attached). The gross receipts of the company for each of the last three (3) year are:

1. Year ending \_\_\_\_\_

\$ \_\_\_\_\_

2. Year ending \_\_\_\_\_

\$ \_\_\_\_\_

3. Year ending \_\_\_\_\_

\$ \_\_\_\_\_

The undersigned agrees to provide current, complete and accurate information in relation to the certification of the Firm as a DBE/ACDBE firm with the Unified Certification Program of the Commonwealth of Puerto Rico; and affirms that there have been no changes in the firm's circumstances affecting its ability to meet the size, disadvantaged status, ownership, or control requirements of 49 CFR Part 26. I affirm there have been no material changes in the information provided with \_\_\_\_\_ application for certification,

\_\_\_\_\_  
**Name of the Company**

except for any changes about which I have provided written notice to the UCP under 26.83 (I). The above mentioned firm meets Small Business Administration (SBA) criteria for being a small business concern and its average annual gross receipts (as defined by SBA rules) over the firm's previous three fiscal years do not exceed \$23.98 million for DBE or \$56.42 million for ACDBE.<sup>1</sup>

\_\_\_\_\_  
 Date

\_\_\_\_\_  
 Authorized Signature

**AFFIDAVIT NO.** \_\_\_\_\_

\_\_\_\_\_  
 Name (Print)

SWORN and subscribed before me by \_\_\_\_\_, of legal age, \_\_\_\_\_

\_\_\_\_\_  
 Name

\_\_\_\_\_  
 Resident of

\_\_\_\_\_  
 marital status

\_\_\_\_\_  
 occupation

\_\_\_\_\_, known to me personally or whom I have identified by means of \_\_\_\_\_

\_\_\_\_\_. In \_\_\_\_\_, Puerto Rico this \_\_\_\_\_ day of \_\_\_\_\_

Indicate # of government issued Id

20 \_\_\_\_\_.

\_\_\_\_\_  
 Notary Public

<sup>1</sup>Knowingly and willfully providing false information to the Federal government is a violation of 18 U.S.C. Section 1001 (False Statements) and could subject you to fines, imprisonment or both.







May 20, 2016

Mr.  
President

Dear Mr.:

The Puerto Rico Unified Certification Program (UCP) has completed its review of your No-Change affidavit and attachments submitted for annual review of your firm's certification as a disadvantaged business enterprise. Your firm will continue to be included in our DBE Directory of certified firms considered to participate in bid contracting, subcontracting opportunities, purchase, professional services, materials, etc., when such services are needed with the Department of Transportation and Public Works-Puerto Rico Highway and Transportation Authority (DTPW-PRHTA).

You are required to notify us, at any time, if the disadvantaged status of your firm changes. Failure to report such changes may result in your firm being decertified as provided in regulation 49 CFR, Part 26, 26.83 (h)(j).

Annually, you should submit a No-Change Affidavit along with your copy of your corporate income tax return on your certification letter anniversary date (**MAY 26**). If this information is not received your eligibility as such may be removed from the program.

If you have any question or doubts, you may contact the Civil Rights Office between the hours 7:30 a.m. to 4:00 p.m. - Monday through Friday at (787) 729-1562 or (787) 721-8787 ext. 1205/1356.

Cordially,

Ana Iris Del Moral  
Deputy Director  
Civil Rights Office

# Appendix G

UNIFORM REPORT OF DBE COMMITMENTS/AWARDS AND PAYMENTS									
**Please refer to the instruction sheet for directions on filling out this form**									
1 Submitted to (check only one)	<input checked="" type="checkbox"/> FHWA		<input type="checkbox"/> FAA		<input type="checkbox"/> FTA - Recipient ID Number				
2 AIP Numbers (FAA Recipients):									
3 Grant Number (FTA Recipients):									
4 Federal Fiscal year in which reporting period falls:	2015				4. Date This Report Submitted: 8-Apr-15				
5 Reporting Period	[ x ] Report due June 1 (for period Oct 1-Mar 31)				[ ] Report due Dec 1 (for period April 1-Sep 30)				
6 Name and address of Recipient	PUERTO RICO HIGHWAY AND TRANSPORTATION AUTHORITY PO BOX 42007 SAN JUAN, PR 00940-2007								
7 Annual DBE Goal(s):	Race Conscious Projection: 17%				Race Neutral Projection: 5%				
OVERALL Goal: 22%									
Awards/Commitments this Reporting Period									
A AWARDS/COMMITMENTS MADE DURING THIS REPORTING PERIOD (Total contracts and subcontracts committed during this reporting period)	A	B	C	D	E	F	G	H	I
	Total Dollars	Total Number	Total to DBEs (dollars)	Total to DBEs (number)	Total to DBEs/Race Conscious (dollars)	Total to DBEs/Race Conscious (number)	Total to DBEs/Race Neutral (dollars)	Total to DBEs/Race Neutral (number)	Percentage of total dollars to DBEs
8 Prime contracts awarded this period	\$ 34,228,538.70	24	\$ 3,676,011.00	6	\$ 3,676,011.00	6	\$ 3,676,011.00	6	11%
9 Subcontracts awarded/committed this period	\$ 4,994,720.00	32	\$ 4,994,720.00	32	\$ 4,994,720.00	32	\$ 4,994,720.00	32	100%
10 TOTAL	\$ 39,223,258.70	56	\$ 8,670,731.00	38	\$ 8,670,731.00	38	\$ 8,670,731.00	38	25.33%
BREAKDOWN BY ETHNICITY & GENDER									
B	A	B	C	D	E	F			
	Total to DBE (dollar amount)	Total to DBE (number)							
	Women	Men	Total	Women	Men	Total			
11 Black American	\$ -	\$ -	\$ -	0	0	0			
12 Hispanic American	\$ 235,030.00	\$ 8,435,701.00	\$ 8,670,731.00	4	34	38			
13 Native American	\$ -	\$ -	\$ -	0	0	0			
14 Asian-Pacific American	\$ -	\$ -	\$ -	0	0	0			
15 Subcontinent Asian Americans	\$ -	\$ -	\$ -	0	0	0			
16 Non-Minority	\$ -	\$ -	\$ -	0	0	0			
17 TOTAL	\$ 235,030.00	\$ 8,435,701.00	\$ 8,670,731.00	4	34	38			
Payments Made this Period									
C PAYMENTS ON ONGOING CONTRACTS (report activity of ongoing contracts)	A	B	C	D	E	F			
	Total Number of Contracts	Total Dollars Paid	Total Number of Contracts with DBEs	Total Payments to DBE Firms	Total Number of DBE Firms Paid	Percent to DBEs			
18 Prime and subcontracts currently in progress	31	\$ 311,367.00	1	\$ 20,873.00	1	6.70%			
TOTAL PAYMENTS ON CONTRACTS COMPLETED THIS REPORTING PERIOD									
D	A	B	C	D	E	F			
	Number of Contracts Completed	Total Dollar Value of Contracts Completed	DBE Participation Needed to Meet Goal (Dollars)	Total DBE Participation (Dollars)	Percent to DBEs				
19 Race Conscious	0	\$ -	\$ -	\$ -	#DIV/0!				
20 Race Neutral	0	\$ -	\$ -	\$ -	#DIV/0!				
21 Totals	0	\$ -	\$ -	\$ -	#DIV/0!				
22 Submitted by: Ana Iris Del Moral, Deputy Director-Civil Right Office	23. Signature: <i>Ana Iris Del Moral</i>		24. Phone Number: (787) 729-1562						

## UCP AGREEMENT

### PUERTO RICO UNIFIED CERTIFICATION PROGRAM AGREEMENT

This Unified Certification Program Agreement is entered by and between Puerto Rico Highway and Transportation Authority ("PRHTA"), represented by its Executive Director, Carmen A. Villar Prados; the Metropolitan Bus Authority, ("MBA"), represented by its President and General Manager, Héctor I. Santos Santos and Miguel A. Torres Diaz, P.E. Secretary of Public Works; the Puerto Rico Ports Authority, ("PRPA"), represented by its Executive Director Ms. Ingrid Colberg Rodríguez; the Municipalities included in Attachment B, represented by its main Official authorized to enter into agreements and by AEROSTAR Airport Holdings, LLC, ("AEROSTAR"), represented by its President and Chief Executive Officer, Mr. Agustín E. Arellano Rodríguez.

PRHTA, PRPA, MBA and AEROSTAR shall be referred to collectively as the Certifying "Parties". Any term not defined herein shall have the meaning ascribed in the DBE program regulations

*CP*  
*CP*  
*CP*  
WHEREAS: The PRHTA, PRPA and MBA established a Unified Certification Program pursuant to and in accordance with certain Uniform Certification Program Agreement dated December 3<sup>rd</sup>, 2003, (the "Agreement") amended on August 12, 2005, to include as party of the Fourth Part Municipalities that would agree to abide by the terms of the Agreement, particularly by its Sixth Clause which stated that PRHTA will serve as certifying agent for the Municipalities. The Municipalities are made part of this agreement as per Attachment B, once they sign the letter acknowledging the existence of this Agreement and their adherence to its terms and the corresponding 49 CFR Parts 23 & 26 where applicable.

*CP*  
WHEREAS: The Certifying Parties and the Municipalities are recipients of FTA, FHWA and/or FAA funds.


WHEREAS: On February 27, 2013, AEROSTAR became the operator of the Luis Muñoz Marín International Airport, (the "Airport"), pursuant to certain Lease Agreement entered by and between PRPA and AEROSTAR.



WHEREAS: On June 17, 2014, the FAA ordered the PRHTA, PRPA and MBA to include AEROSTAR in the Puerto Rico Unified Certification Program, ("PRUCP"). The Certifying Parties signed a Supplementary Agreement (Supplementary Agreement) on July 1, 2014, stating that AEROSTAR would be included as part of the PRUCP and the Parties would amend the original Agreement, determining how DBE and ACDBE certifications will be conducted in Puerto Rico.

WHEREAS: In order to avoid confusion, a revised Agreement is entered.

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the Parties and DOT recipients identified in Attachment B, intending to be legally bound, hereby agree to the following:

#### TERMS AND CONDITIONS

 FIRST: The PRUCP shall make all certification decisions on behalf of all DOT recipients in Puerto Rico with respect to participation in the DOT DBE Program. Certification decisions by the PRUCP shall be binding on all DOT recipients within Puerto Rico.

  
 SECOND: The PRHTA, as lead Agency and point of contact for the PRUCP with the USDOT shall maintain the unified DBE Directory required by 49 C.F.R. 26.31 and 26.81 for the PRUCP, while the other parties shall submit the information necessary to make updates, revisions, additions and/or corrections.


THIRD: Only firms certified as eligible DBEs by the parties to this agreement or by other states or territories of the US pursuant to written reciprocity agreements or interstate certification provisions in compliance with 49 CFR, Parts 23 and 26 shall participate in the program as DBEs. The PRUCP is not required to process an application for certification from a firm having its principal place of business outside the Commonwealth if it is not certified by the UCP in the state in which it maintains its principal place of business.

FOURTH: Each party shall follow all certification procedures and standards of 49 C.F.R. Parts 23 and 26 and certify qualified DBE applicants that meet the eligibility criteria set forth at 49 C.F.R. Parts 23 and 26, including the following:

- The USDOT Uniform Certification Application (Attachment 1) will be used as required by 49 CFR Parts 23 and 26 criteria.
- On-site visits (Attachment 2) are required as part of the certification process. The On-site visits report will be shared with other recipients upon request.
- The DBE, must provide to the PRUCP, every year on the anniversary of the date of the certification, an affidavit sworn to by the firm's owners affirming that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of 49 C.F.R. Parts 23 and 26 or any material changes in the information provided in its application form. The affidavit shall specifically affirm that the firm continues to meet the overall gross receipts cap of 49 C.F.R. Parts 23 and 26, documenting this affirmation with supporting documentation of the firm's size and gross receipts.


CPW  
MMA  
CPW


The DBE affidavit also has to affirm that the firm continues to meet SBA business size criteria.

- On-site reports for certified firms will be shared upon request from other UCPs pursuant to interstate certification requirements found in 49 CFR §26.85. All other certification information shall be shared or considered confidential in a manner consistent with 49 CFR §§26.67, 26.83 (g) and 26.109.

FIFTH: Communication among the Parties will include, but not limited to, telephone conversations, conferences and meetings; Correspondence among the Parties shall include, but not be limited to, electronic transmittals of data and information.

SIXTH: The Puerto Rico Municipalities are direct recipients of Federal funds that need to comply with the requirements of the 49 CFR Part 26. The PRHTA will be the certifying entity for the municipalities.

 SEVENTH: An On-site Visit Review (Attachment 2); Uniform Certification Letter (Attachment 3); Notification of Annual No-Change Affidavit Request (Attachment 4); and No-change Affidavit (Attachment 5) will be used by all the Parties of this PRUCP in accordance with applicable regulatory requirements. The Uniform Certification Letter will include the letterhead of the party making the certification decision.

 EIGHTH: During the review of the documents submitted by applicants, any of the parties to the PRUCP will assign its coordinator to perform, as required by 49 CFR, Part 26, the on-site visit review of the applicant's principal place of business. It will take place

where the individual(s) who control and manage the firm's day to day operations spend most working hours and where management's business record are kept. Each Party must advise the applicant within 30 days of the receipt of the application if it is complete and suitable for evaluation, and, if not, what additional information or action is required. Decisions by the PRUCP on certification applications must be made within 90-days of receiving a complete application. Once a final eligibility determination is made, a Uniform Certification Letter (Attachment 3) will be sent to the applicant, signed by the head of the Department (i.e. PRHTA and PRPA Executive Director, MBA President and General Mgr. and AEROSTAR DBE/ACDBE Liaison Officer) and mailed by certified mail, return receipt requested.

NINTH: The head of each certifying party must identify a Liaison Officer and provide a written notification to all other parties of the Liaison Officer's name and contact information.

TENTH: Each certifying party shall appoint a person or unit other than the DBE Liaison Officer, hereinafter referred to as the "Reviewer", who is knowledgeable about the certification requirements but did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility. In the event that the PRUCP or the USDOT determines that there is reasonable cause to believe a certified firm is ineligible for the Program, the Reviewer must conduct an informal hearing if requested and/or analyze all the information available and provided by the DBE. For the purposes of this agreement, the Reviewer assigned by each certifying Party shall be the Office of

Legal Counsel of the entity who is reviewing the eligibility decision. If the Reviewer finds

that a firm is still eligible, he/she shall notify the Liaison Officer that the eligibility criteria have been met, so that it may notify the firm.

ELEVENTH: If the Reviewer of the respective Office of the Legal Counsel agrees with the non-eligibility determination, it shall notify the Liaison Officer, who will in turn notify the Executive Director of each Authority so he/she may inform the firm of the final determination. If the Reviewer of AEROSTAR agrees with the non-eligibility determination, it shall so notify.

Said determination of denial of an application or de-certification of firm shall be made in writing, listing the reasons and evidence cited for such determination. The written notice of the decision and the reasons for it shall include the specific reference to the evidence in the record that supports each reason for the decision and the consequences of the decision and of the availability of an appeal to the US Department of Transportation. The firm may follow Appeals Procedure stated in Attachment A. An applicant denied certification may reapply one year after the date of the denial letter. All correspondence shall be sent via certified mail, return receipt requested.

TWELFTH: The PRUCP may conduct a certification review of a certified DBE firm, including a new on-site review, three years from the date of the firm's certification, or sooner if appropriate in light of changed circumstances. To review their status as a DBE, annually the firms will submit the completed No-Change Affidavit (Attachment 5) with the required information regarding size and gross receipts to the PRUCP entity (PRHTA/PRPA/MBAA/AEROSTAR) where certification was requested, stating the ability to



meet size, disadvantage status, ownership or control requirement, on the anniversary date of said certification. The DBE must inform to the UCP in writing of any change in circumstances affecting the ability to meet size, disadvantaged status, ownership, or control requirements or any material change in the information provided in the application form, except for changes about which the DBE submitted a separate notarized Notice of Change.

THIRTEENTH: The certifying parties share a unified DBE Directory under this agreement. Once a firm is certified in the Commonwealth of Puerto Rico as a DBE, it will become part of the Directory that will be available in print on an annual basis to the general public containing information required in 49 CFR sections 26.31 and 26.81. It will also be available electronically through the internet, managed and owned by the PRHTA. The parties under this agreement will submit to the PRHTA the necessary information to keep the Directory updated. The Directory will be shared and made available through the web with the municipalities, other jurisdictions and the general public.

FOURTEENTH: The PRHTA must report to the Department of Transportation's Office of Civil Rights, by January 1, 2015, and each year thereafter, the percentage and location in the State of certified DBE firms in the PRUCP Directory controlled by women, socially and economically disadvantaged individuals (other than women) and individual who are women and are otherwise socially and economically disadvantaged individuals.

FIFTEENTH: This agreement will take effect on the date of approval by the USDOT Secretary as specified on 49 CFR, Part 26.81 and will remain in effect as 49 CFR, Part 26


requires. It may be amended in writing and at any time by mutual agreement between the Parties, subject to USDOT approval of significant changes. The Attachments are an integral part of this Agreement as follows:


Attachments:

A. Puerto Rico Unified Certification Program

1. Uniform Certification Application
2. On-site visit review
3. Uniform Certification letter
4. Notification of Annual No-Change Affidavit Request
5. No-change Affidavit

B. PRUCP – Municipalities signing letters

SIXTEENTH: If any provision of this Agreement is held to be contrary to the provisions of 49 CFR Part 23 and 26, the provisions of 49 CFR Part 23 and 26 will always prevail. Moreover, if any provision of this Agreement is held to be illegal, invalid or unenforceable, such provision shall be fully severable and this Agreement shall be construed as if such illegal, invalid or unenforceable provision had never comprised a part hereof. This Agreement supersedes the December 3<sup>rd</sup> 2003 Agreement and its amendment.

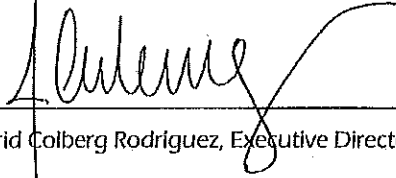
SEVENTEENTH: The undersigned parties hereby accept the terms of this Agreement and are hereby committed to administering the Disadvantaged Business Enterprise Program and PRUCP in compliance with 49 CFR Parts 23 and 26 as amended.

FOR THE PUERTO RICO HIGHWAY AUTHORITY (PRHTA)



Carmen A. Villar Prados  
Executive Director

FOR THE PUERTO RICO PORTS AUTHORITY (PRPA)

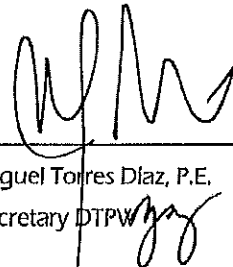


Ingrid Colberg Rodríguez, Executive Director

FOR THE METROPOLITAN BUS AUTHORITY (MBA)



Héctor I. Santos Santos,  
President and General Manager



Miguel Torres Díaz, P.E.  
Secretary DTPW

FOR AEROSTAR AIRPORT HOLDINGS, LLC (AEROSTAR)



Agustín Arellano, President and Chief Executive Officer

In San Juan, Puerto Rico, this 29<sup>th</sup> day of July, 2015

FOR THE MUNICIPALITIES;

The representatives of such as per list included in Attachment B

**PUERTO RICO UNIFIED CERTIFICATION PROGRAM  
(PRUCP) FOR DISADVANTAGED BUSINESS  
ENTERPRISES (DBE)**

**POLICY:**

The UCP regulations contained in 49 CFR, Part 26 require a "one-stop shop" certification process in each state by which recipients of Federal funds will follow all certification procedures and standards, will cooperate fully with oversight, review and monitoring activities of the US DOT and its operating administrations, will implement US DOT directives and guidance concerning certification matters, will commit to ensuring the PRUCP has sufficient resources and expertise to carry out Federal requirements specified in the regulations. The signatories to the PRUCP agreement, including those identified in Attachment B, agree to comply with the aforementioned provisions of 49 C.F.R. §26.81.

It is the policy of the Puerto Rico entities receiving Federal funds to encourage and support the PRUCP and its objective to the maximum extent possible. This policy shall apply to all recipients of USDOT financial assistance in Puerto Rico. They shall not discriminate on the basis of race, color, national origin or sex in the certification of firms owned by disadvantaged individuals for the award and performance of any USDOT-assisted contract nor in the administration of the PRUCP, nor the requirements of 49 CFR, Part 23 and 26. Criteria or methods that would have the effect of defeating or substantially impairing accomplishment of the objectives of the Program shall not be used with respect to certification. Recipients of USDOT-assisted contracts shall not

discriminate in the development, implementation and reciprocity of the PRUCP. Implementation of the PRUCP is a legal obligation and failure to carry out its terms shall constitute noncompliance with the regulations as provided in regulation 49 CFR Parts 23 and 26.

This Policy will be circulated through all the components of the PRUCP among the personnel of the different levels of supervision as well as with local governmental units, business organizations, the general public and appropriate media.

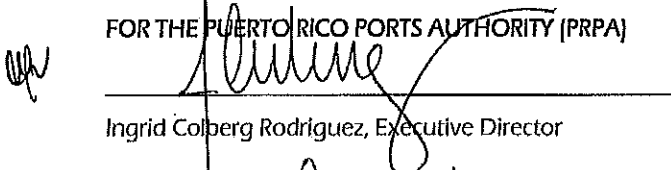
July 29, 2015

FOR THE PUERTO RICO HIGHWAY AUTHORITY (PRHTA)



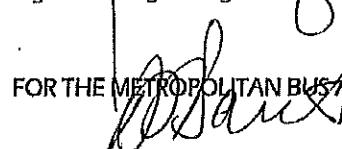
Carmen A. Villar Prados  
Executive Director

FOR THE PUERTO RICO PORTS AUTHORITY (PRPA)




Ingrid Colberg Rodriguez, Executive Director

FOR THE METROPOLITAN BUS AUTHORITY (MBA)

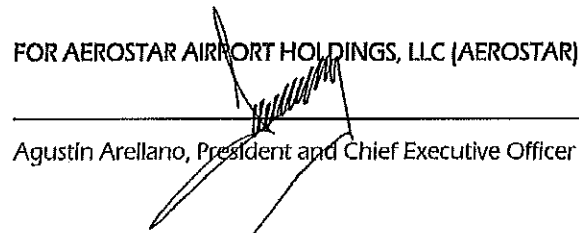


Héctor I. Santos Santos,  
President and General Manager



Miguel Torres Díaz, P.E.  
Secretary DTPW

FOR AEROSTAR AIRPORT HOLDINGS, LLC (AEROSTAR)



Agustín Arellano, President and Chief Executive Officer

**AUTHORITY AND RULE MAKING:**

Parties to the agreement are authorized to enter into agreements under their applicable entities laws. The state agencies (PRHTA, PRPA, MBA) and AEROSTAR understand that USDOT may issue a notice of proposed rulemaking (NPRM) to amend regulation 49 CFR, Part 23 and 26 as needed to establish new or altered responsibilities for USDOT recipients.

We do understand further that any new or altered responsibilities established by the US DOT that affects the responsibilities of recipients stated in this Agreement do not become binding on recipients until the issuance by US DOT of a final rule.

ah  
DPS  
KWC  
AA  
CYP

**CERTIFICATION:**

Applicants must complete the Uniform Certification Application (Attachment 1) provided by the entity in which certification is requested. Applicants shall supply all information that is requested therein, agree to supply any additional information as may be reasonably requested by the certifying entity and agree to be bound by all provisions governing the certification process. The PRUCP is not and cannot be required to take action in a case where applicants have not supplied the requested information. The UCP must advise the applicant within 30 days from the receipt of the application whether the application is complete and suitable for evaluation and, if not, what additional information or action is required. Applicant shall forward it as soon as possible. Any applicant who fails to supply all requested information within a reasonable period of time (30 days) shall have its file closed until a new request is received.

Applicant must be aware that:

- The disadvantaged owner must be U.S. citizen or lawfully admitted permanent resident of the United States.
- Owner(s) of firm must be socially and economically disadvantaged. (49 CFR, Part 26.67(a)).
- Disadvantaged Owner(s) must have a personal net worth (PNW) less than \$1,320,000 after excluding individual ownership interest in the firm and equity of primary residence.

- The DBE firm must be an existing small business as defined by the Small Business Administration (SBA), i.e. the firm's gross receipts averaged over the previous three (3) years must not exceed the size cap appropriate to the type of work the firm seeks to perform and meet USDOT gross receipt averaged over the previous three (3) years of no more than \$23.98 million, as it may be adjusted by the Secretary of Transportation from time to time. The ACDBE's gross receipt averaged over a the three (3) previous years must not exceed \$56.42 million, as it may be adjusted by the Secretary of Transportation from time to time. The following types of business have different size standards:
  - o Banks and financial institutions: \$1 billion in assets
  - o Car Rental companies: \$75.23 average annual gross receipts over a three (3) previous fiscal years
  - o Pay Telephones: 1,500 employees
  - o Automobile dealers: 350 employees
- Firm must be a "small business concern", 51% owned and controlled by disadvantaged individuals as required in 49 CFR Part 26.
- All certifications by the PRUCP shall be made final before the due date for bids or offers on a contract on which a firm seeks to participate as a DBE.

All firms will be certified in compliance with 49 CFR, Part 23 and 26 including specific work types. The PRUCP certifying parties –(PRHTA/MBA/PRPA/AEROSTAR) will use the North American Industry Classification System (herein after referred to as the "NAICS") codes and the components shall specify the code in the Uniform Certification Letter.



- MBA, PRPA and PRHTA shall individually be in charge of the review and certification process of applicants who normally do business with them. PRHTA shall handle the cases of the municipalities, as well as its own contractors. Due to the nature of its business, regional airport concessionaires shall be certified by PRPA and only under extraordinary circumstances shall the other components handle their certification. AEROSTAR will be responsible exclusively for the DBE and/or ACDBE new certifications and review of existing firms doing business at the Airport. Under no circumstances AEROSTAR shall evaluate and/or certify other airports or agency's DBEs or ACDBEs, unless the firm requesting certification intends to do business at or for the Airport as well.
- PRPA shall transfer any pending applications or certification files from contractors that do business with AEROSTAR and Aerostar shall continue any pending actions, reviews and monitor ongoing requirements pertaining to certified firms. PRPA shall forward any correspondence received from those applicants or DBE firms, to AEROSTAR. PRPA shall transfer the files with a list of the contents and a brief indication of the status. AEROSTAR shall notify any objections to receiving any of the files, in writing, within 10 working days of their receipt.
- On-site visit review is an eligibility criterion to deny or issue certification based on the information obtained from the on-site review and documentation provided. This review shall be performed using the questionnaire enclosed, Attachment 2.

APR  
M  
car  
CPR  
AA


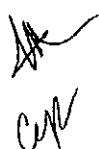
Attachment A

- All DBE's in the Directory will be required to submit an annual No-Change Affidavit (Attachment 5) and the supporting documents regarding size and gross receipts.
- The No-Change Affidavit and related size and gross receipts documents will be reviewed for completeness and accuracy to determine whether changes have occurred which may affect the status of the business as a bona fide DBE. An investigation may be requested to evaluate a DBE applicant as deemed appropriate.
- Applicants must comply with any other requirement stated in 49 CFR, Part 23 and 26.



**DECERTIFICATION:**

If the firm fails to maintain its status as a small business concern, or if changes in the firm's ownership, control, management or the 51% owners are no longer economically disadvantaged, the PRUCP must immediately commence a proceeding to remove eligibility. Any recipient, the USDOT, or third party who believes or has reasons to believe that the on-going DBE firm is no longer eligible to participate in the DBE program may submit a report or evidence supporting the reason not to consider the firm as such. A decision to decertify a firm may be based on:

- 
- Changes in the firm's circumstances
    - Ownership changes
    - Control Changes
    - Changes in owner's personal net worth causing the firm's disadvantaged owner(s) to exceed the personal net worth cap
    - Changes in gross receipts
  - Information or evidence not available at the time that the firm was certified
  - Information relevant to eligibility that has been concealed or misrepresented by the firm
  - A change in the certification standards or requirements of the Department since the firm's certification
  - A documented finding that the certification was erroneous
  - The firm has failed to cooperate
  - The firm exhibits a pattern of conduct indicating its involvement in attempts to subvert the intent or requirements of the DBE program
- 

- The firm has been suspended or debarred for conduct related to the DBE program.

Written notice must be provided to the firm stating that a PRUCP member proposes to remove their eligibility and the specific reasons for the proposed removal, including specific references to the evidence in the record that supports each reason for the decision. The firm has the opportunity for an informal hearing at which it may respond to the reasons for the proposed removal of eligibility and present arguments for maintaining its certification. The decision to remove a firm's eligibility if the firm has been suspended or debarred for conduct related to the DBE program shall not be subject to the hearing procedures.

The decision in proceeding to remove a firm's eligibility is made by the designated Reviewer of the certifying entity Office of Legal Counsel in the case of Aerostar and by the Executive Director in the case of the Authorities.


The firm must be notified in writing of the decision made as a result of the hearing or consideration of written information and arguments. The notice must state:


- The reason for the decision and must reference the specific evidence in the record that supports each reason.
- The consequences of the decision
- Appeal procedures under section 26.89

**SUMMARY SUSPENSION:**

A DBE certification will be immediately suspended when:

1. An individual owner whose ownership and control of the firm are necessary to the firm's certification dies or is incarcerated
2. There is adequate evidence to believe that there has been a material change in circumstances that may affect the eligibility of the DBE firm to remain certified
3. The DBE fails to notify the party or PRUCP in writing of any material change in circumstances or fails to timely file an affidavit of no change under §26.83j

 In determining the adequacy of the evidence to issue a suspension the PRUCP shall consider all relevant factors, including how much information is available and the credibility of the available information.

 Written notice must be sent immediately by certified mail, return receipt requested, to the last known address of the owner(s) of the DBE. Following receipt of the Notice of Suspension, if the DBE believes it is no longer eligible, it may voluntarily withdraw from the program, in which case no further action is required. If the DBE believes that its eligibility should be reinstated, it must provide information demonstrating that the firm is eligible notwithstanding its changed circumstances. Within 30 days of receiving this information, the PRUCP must either lift the suspension and reinstate the firm's certification or commence an expedited decertification action. If the recipient

Attachment A

commences a decertification proceeding, the suspension remains in effect during the proceeding.

The decision to immediately suspend is not appealable to the US Department of Transportation. The failure of the PRUCP to either lift the suspension and reinstate the firm or commence a decertification proceeding, is appealable to the U.S. Department of Transportation as a constructive decertification.

afw  
MDJ  
aw

AA

CMP

**APPEALS:**

Any firm which is notified of a certification denial or a proposed removal of its certification may request an informal hearing to the investigating (PRUCP) entity within 30 days of the date of the notice. Each entity (PRUCP's) has agreed upon the use of its Reviewer resources for its hearing process. The members of the PRUCP shall handle the hearings through its Office of Legal Counsel. At the informal hearing, the firm may respond to the reasons for the proposed removal or certification denial in person and provide information and arguments concerning why it should be or remain certified. In case of final denials or removals, records of meeting or hearings should be kept in case there is an appeal to USDOT under 49 CFR Part 26.89 and upon requested petition, provide a copy of the transcript to the USDOT

If the entity wants to file an appeal with the USDOT, it must send a letter to the following address: US Department of Transportation, Civil Rights, 1200 New Jersey Avenue SE, Washington, DC 20590-0001, within 90 days of the final decision notification. The letter must include information and setting forth a full and specific statement as to why the decision is erroneous, any significant fact that the PRUCP failed to consider, or which provisions of this Part the PRUCP did not properly apply.

A decertified firm may reapply for certification within one (1) year period.

**PUERTO RICO UNIFIED CERTIFICATION PROGRAM  
(PRUCP) – MUNICIPALITIES SIGNING LETTERS**

- |     |              |     |               |
|-----|--------------|-----|---------------|
| 1.  | Aguada       | 18. | Hormigueros   |
| 2.  | Aguas Buenas | 19. | Humacao       |
| 3.  | Añasco       | 20. | Juncos        |
| 4.  | Barceloneta  | 21. | Mayagüez      |
| 5.  | Bayamón      | 22. | Morovis       |
| 6.  | Cabo Rojo    | 23. | Patillas      |
| 7.  | Caguas       | 24. | Ponce         |
| 8.  | Camuy        | 25. | Salinas       |
| 9.  | Carolina     | 26. | San Juan      |
| 10. | Cataño       | 27. | San Lorenzo   |
| 11. | Cayey        | 28. | Toa Alta      |
| 12. | Cidra        | 29. | Toa Baja      |
| 13. | Corozal      | 30. | Trujillo Alto |
| 14. | Dorado       | 31. | Utuado        |
| 15. | Fajardo      | 32. | Vega Alta     |
| 16. | Guaynabo     | 33. | Villalba      |
| 17. | Hatillo      | 34. | Yauco         |

*CPN*  
*CPN*  
*CPN*  
*CPN*  
*CPN*





U.S. Department  
Of Transportation  
Federal Transit  
Administration

FTA Region IV

230 Peachtree Street NW  
Suite 800  
Atlanta, GA 30303

May 23, 2014

Ms. Ana Olivencia, Esq.  
Civil Rights Director/DBE Liaison Officer  
Puerto Rico Highway and Transportation Authority  
P.O. Box 42007 Minillas Station  
San Juan, Puerto Rico 00940

Re: DBE Program Review Concurrence; PRHTA – TEAM ID 5489

Dear Ms. Olivencia:

This letter is to confirm that the Federal Transit Administration (FTA) received the Puerto Rico Highway and Transportation Authority's (PRHTA) revised Disadvantaged Business Enterprise (DBE) Program on August 12, 2012 and subsequently additional information. This submission is required pursuant to Section 1101(b) of Transportation Equity Act for the 21st Century and 49 CFR Part 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation Programs."

First, my apologies for the delay finalizing our review. After reviewing PRHTA's complete DBE Program submission, we have determined the submission meets the requirements set out in the DBE regulations. FTA concurs with the PRHTA's DBE Program as of May 23, 2014.

Please note that if significant changes to your program occur, including a change in the DBE Liaison Officer, the PRHTA must submit an updated DBE Program to this office. Should you have any questions regarding this review determination, please contact me at (404) 865-5471 or at [Carlos.Gonzalez3@dot.gov](mailto:Carlos.Gonzalez3@dot.gov).

Thank you for your ongoing efforts to meet the FTA civil rights requirements.

Sincerely,

Carlos A. Gonzalez  
Region IV Civil Rights Officer

cc: Ana Iris Del Moral, Program Specialist, PRHTA (Electronic)  
Monica McCallum, FTA Regional Operations Division Chief (Electronic)  
Dr. Yvette G. Taylor, FTA Regional Administrator, Region IV (Electronic)

