

**MEMORANDUM OF UNDERSTANDING
REGARDING THE ADOPTION OF THE TEXAS DEPARTMENT OF
TRANSPORTATION'S FEDERALLY-APPROVED DISADVANTAGED BUSINESS
ENTERPRISE PROGRAM BY THE CAMINO REAL REGIONAL MOBILITY AUTHORITY**

This Memorandum of Understanding ("MOU") is by and between the **TEXAS DEPARTMENT OF TRANSPORTATION ("TxDOT")**, an agency of the State of Texas; and **the CAMINO REAL REGIONAL MOBILITY AUTHORITY ("CRRMA")** a political subdivision of the State of Texas.

Whereas, from time to time the CRRMA receives federal funds from the Federal Highway Administration ("FHWA") through TxDOT to assist the CRRMA with the construction and design of projects partially or wholly funded through FHWA; and

Whereas, the CRRMA, as a sub-recipient of federal funds, is required by 49 CFR 26, to implement a program for disadvantaged business enterprises ("DBEs"), as defined by 49 CFR 26 ("DBE Program"); and

Whereas, TxDOT has implemented a Disadvantaged Business Enterprise Program (DBE Program) that is approved by FHWA pursuant to 49 CFR part 26; and

Whereas, certain aspects of the CRRMA's procurement of construction and design services are subject to review and/or concurrence by TxDOT as a condition of receiving federal funds from FHWA through TxDOT; and

Whereas, the CRRMA and TxDOT undertake substantially similar roadway construction projects and design projects and construct and design their respective projects using substantially the same pool of contractors; and

Whereas, the CRRMA desires to implement a federally compliant DBE Program by adopting the TxDOT approved program, as recommended by FHWA; and

Whereas, TxDOT and the CRRMA find it appropriate to enter into this Memorandum of Understanding to memorialize the obligations, expectations and rights each has as related to the CRRMA's adoption of the TxDOT DBE Program to meet the federal requirements.

Now, therefore, TxDOT and the CRRMA, in consideration of the mutual promises, covenants and conditions made herein, agree to and acknowledge the following:

(1) TxDOT has developed a DBE Program and annually establishes a DBE goal for Texas that is federally approved and compliant with 49 CFR 26 and other applicable laws and regulations.

(2) The CRRMA is a sub-recipient of federal assistance for construction projects and design projects and, in accordance with 49 CFR § 26.21, must comply with a federally approved DBE Program. The CRRMA receives its federal assistance through TxDOT. As a sub-recipient, the CRRMA has the option of developing its own program or adopting and operating under TxDOT's federally approved DBE Program. The FHWA recommends that sub-recipients, such as the CRRMA, adopt the DBE program, administered through TxDOT, and the CRRMA by its prescribed protocol adopted the TxDOT DBE Program on April 16, 2009.

(3) This Memorandum of Understanding evidences FHWA's and TxDOT's consent to the adoption of the TxDOT DBE Program by the CRRMA to achieve its DBE participation in federally assisted Construction

and Design Projects.

(4) The parties will work together in good faith to assure effective and efficient implementation of the DBE Program for the CRRMA and for TxDOT.

(5) The CRRMA and TxDOT have agreed upon the following delegation of responsibilities and obligations in the administration of the DBE Program adopted by the CRRMA:

(a) The CRRMA will be responsible for project monitoring and data reporting to TxDOT. The CRRMA will furnish to TxDOT any required DBE contractor compliance reports, documents or other information as may be required from time to time to comply with federal regulations. TxDOT will provide the necessary and appropriate reporting forms to the CRRMA.

(b) The CRRMA will recommend contract-specific DBE goals consistent with TxDOT's DBE guidelines and in consideration of the local market, project size, and nature of the good(s) or service(s) to be acquired. The CRRMA's recommendation may be that no DBE goals are set on any particular project or portion of a project or that proposed DBE goals be modified. The CRRMA and TxDOT will work together to achieve a mutually acceptable goal; however, TxDOT will retain final decision-making authority regarding DBE goals.

(c) TxDOT will cooperate with the CRRMA in an effort to meet the timing and other requirements of the CRRMA's projects.

(d) The CRRMA will be solely responsible for the solicitation and structuring of bids and bid documents to procure goods and services for its projects that use federal funds and will be responsible for all costs and expenses incurred in its procurements.

(e) The DBEs eligible to participate on TxDOT construction projects or design projects also will be eligible to participate on the CRRMA construction projects or design projects that are subject to the DBE Program. The DBEs will be listed on TxDOT's website under the Texas Unified Certification Program (TUCP).

(f) The CRRMA will conduct reviews and provide reports with recommendations to TxDOT concerning any DBE Program compliance issues that may arise due to project specific requirements such as Good Faith Effort (GFE), Commercially Useful Function (CUF), etc. The CRRMA and TxDOT will work together to achieve a mutually acceptable goal, however, TxDOT will retain final decision-making authority on those issues and reserves the right to perform compliance reviews by TxDOT's Office of Civil Rights. The CRRMA shall provide TxDOT with a listing of sanctions that will be assessed against contractors for violation of federal DBE regulations and its procedures for investigation of violations and assessment of sanctions for documented violations.

(g) The CRRMA will designate a liaison officer to coordinate efforts with TxDOT's DBE Program administrators and to respond to questions from the public and private sector regarding the CRRMA's administration of the DBE Program through TxDOT.

(h) The CRRMA will be responsible for providing TxDOT with DBE project awards and DBE Commitments, monthly DBE reports, DBE Final Reports, DBE shortfall reports, and annual and updated goal analysis and reports.

(i) TxDOT will be responsible for maintaining a directory of firms eligible to participate in the

DBE Program, and providing business development and outreach programs. The CRRMA and TxDOT will work cooperatively to provide supportive services and outreach to DBE firms in the CRRMA area .

(j) The CRRMA will submit DBE semi-annual progress reports to TxDOT.

(k) The CRRMA will participate in TxDOT sponsored training classes to include topics on Title VI of the Civil Rights Act of 1964, DBE Annual Goals, DBE Goal Setting for Construction Projects and Design Projects, DBE Contract Provisions, and DBE Contract Compliance, which may include issues such as DBE Commitments, DBE Substitution, and Final DBE Clearance. TxDOT will include DBE contractors performing work on CRRMA projects in the DBE Education and Outreach Programs.

(l) The Executive Director of the CRRMA will implement all federal requirements, including those stated in Attachments A through C, which are incorporated as though fully set out herein for all purposes.

(m) In accordance with 23 CFR 200.1, the CRRMA shall develop procedures for the collection of statistical data (race, color, religion, sex, and national origin) of participants in, and beneficiaries of State highway programs, i.e., relocated person(s), impacted citizens and affected communities; develop a program to conduct Title VI review of program areas; and conduct annual reviews of special emphasis program areas to determine the effectiveness of program area activities at all levels. TxDOT, in accordance with federal law, may conduct compliance reviews by TxDOT's Office of Civil Rights .

(6) In the event there is a disagreement between TxDOT and the CRRMA about the implementation of the TxDOT DBE Program by the CRRMA the parties agree to meet within ten (10) days of receiving a written request from the other party of a desire to meet to resolve any disagreement. The parties will make good faith efforts to resolve any disagreement as efficiently as is reasonably possible in consultation with FHWA. Non-compliance by the CRRMA can result in restitution of federal funds to TxDOT and withholding of further federal funds upon consultation with FHWA.

(7) This Memorandum of Understanding becomes effective upon execution by all parties and automatically renews each year unless a party notifies the other party of its intent to terminate the agreement.

(8) If this Memorandum of Understanding is terminated for any reason, the CRRMA will be allowed reasonable time in which to seek approval from FHWA for an alternative DBE Program, without being deemed non-compliant with 49 CFR Part 26.

(9) This Memorandum of Understanding applies only to projects for which the CRRMA is a sub-recipient of federal funds through TxDOT. The CRRMA may also implement a Minority and Women-Owned Small Business Enterprise (M/W/SBE) policy and program that applies to projects for which it is not a sub-recipient of federal funds through TxDOT and which are not subject to the TxDOT DBE Program. The CRRMA may, at its option, use some aspects of the TxDOT DBE Program and other similar programs in implementing its other policies and programs for its non-federally funded projects.

(10) The following attachments to this Memorandum of Understanding are incorporated as if fully set out herein for all purposes: Attachment A - FHWA Memorandum HCR-1/HIF-1 (relating to access required by the Americans with Disabilities Act of 1990 and Section 504 of the Rehabilitation Act of 1973); Attachment B - SPECIAL PROVISION 000-461; and Attachment C - 49 CFR §26.13

(contractual assurances).

(11) The following procedure shall be observed by the parties in regard to any notifications:

(a) Any notice required or permitted to be given under this Memorandum of Understanding shall be in writing and may be effected by personal delivery, by hand delivery through a courier or a delivery service, or by registered or certified mail, postage prepaid, return receipt requested, addressed to the proper party, at the following address:

CAMINO REAL REGIONAL MOBILITY AUTHORITY
Raymond L. Telles
Executive Director

Hand Delivery:

2 Civic Center Plaza, 9th Floor
El Paso, Texas 79901

Registered or Certified Mail (Return receipt requested):

Camino Real Regional Mobility Authority
2 Civic Center Plaza, 9th Floor
El Paso, Texas 79901

TEXAS DEPARTMENT OF TRANSPORTATION
R. D. Brown, BOP Development Section Director
Office of Civil Rights
125 E. 11th Street
Austin, Texas 78701-2483

(b) Notice by personal delivery or hand delivery shall be deemed effective immediately upon delivery, provided notice is given as required by Paragraph (a) hereof. Notice by registered or certified mail shall be deemed effective three (3) days after deposit in a U.S. mailbox or U.S. Post Office, provided notice is given as required by Paragraph (a) hereof.

(c) Either party hereto may change its address by giving notice as provided herein.

(12) This Memorandum of Understanding may be modified or amended only by written instrument, signed by both the CRRMA and the Texas Department of Transportation and dated subsequent to the effective date of this MOU. Except as authorized by the respective parties, no official, employee, agent, or representative of the parties has any authority, either express or implied, to modify or amend this MOU.

(13) The provisions of this MOU are severable. If any clause, sentence, provision, paragraph, or article of this MOU, or the application of this MOU to any person or circumstance is held by any court of competent jurisdiction to be invalid, illegal, or unenforceable for any reason, such invalidity, illegality, or unenforceability shall not impair, invalidate, nullify, or otherwise affect the remainder of this MOU, but the effect thereof shall be limited to the clause, sentence, provision, paragraph, or article so held to be invalid, illegal, or unenforceable, and the application of such clause, sentence, provision, paragraph, or

article to other persons or circumstances shall not be affected; provided, however, the CRRMA and TxDOT may mutually agree to terminate this Memorandum of Understanding.

(14) This Memorandum of Understanding shall not be construed in any way as a waiver by the parties of any immunity from suit or liability that parties may have by operation of law, and the parties hereby retain all of their respective affirmative defenses.

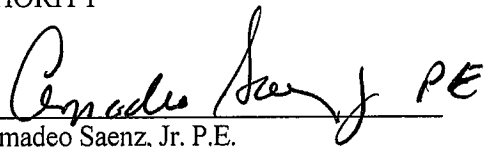
(15) In accordance with 49 CFR part 26.13, the CRRMA will ensure that all contractors or subcontractors working on any Federal DOT-assisted contracts for the CRRMA comply with the applicable requirements concerning discrimination. Failure by the contractor to carry out these requirements is a material breach of contract and the CRRMA will terminate the contract or other such remedy as deemed appropriate by TxDOT.

(16) In accordance with 49 CFR part 26.29, the CRRMA will ensure that all contractors or subcontractors working on any Federal DOT-assisted contracts for the CRRMA comply with the prompt pay provisions established by TxDOT.

EXECUTED in duplicate originals by TxDOT and the CRRMA, acting through each duly authorized official and effective on the latest date signed.

The signatories below confirm that they have the authority to execute this MOU and bind their principles.

TEXAS DEPARTMENT OF TRANSPORTATION
AUTHORITY

By: 
Amadeo Saenz, Jr. P.E.
Executive Director

Date: 4/28/09

CAMINO REAL REGIONAL MOBILITY

By: 
Raymond L. Telles
Executive Director

Date: APRIL 16, 2009

Clarification of FHWA's Oversight Role in Accessibility



Memorandum

U.S. Department of Transportation

Federal Highway Administration

Subject: ACTION: Clarification of FHWA's Oversight Role in Accessibility

Date: 9-12-06

From: Frederick D. Isler
Associate Administrator for Civil Rights
King W. Gee
Associate Administrator for Infrastructure

Reply to Attn of: HCR-1
HIF-1

To: Associate Administrators
Chief Counsel
Chief Financial Officer
Directors of Field Services
Resource Center Director and Operations Managers
Division Administrators
Federal Lands Highway Division Engineers

The Federal Highway Administration (FHWA) recognizes the need for the transportation system to be accessible to all users. The purpose of this memorandum is to clarify FHWA's role and responsibility to oversee compliance on pedestrian access required by the Americans with Disabilities Act of 1990 (ADA) and Section 504 of the Rehabilitation Act of 1973 (Section 504). Since 1978, FHWA has promoted accessible transportation systems through technical assistance and guidance on ADA and Section 504. In addition, accessibility improvements are eligible for Federal-aid funding.

The FHWA is responsible for implementation of pedestrian access requirements from the ADA and Section 504. This is accomplished through stewardship and oversight over all Federal, State, and local governmental agencies ("public agencies") that build and maintain highways and roadways, whether or not they use Federal funds on a particular project.

Policy

In February 2000, the FHWA issued a policy providing technical guidance to integrate facilities for pedestrians, including persons with disabilities, into the transportation infrastructure. The guidance can be found at www.fhwa.dot.gov/environment/bikeped/design.htm#d4.

The ADA and Section 504 do not require public agencies to provide pedestrian facilities. However, where pedestrian facilities exist they must be accessible. Furthermore, when public agencies construct improvements providing access for pedestrians, the completed project also must meet accessibility requirements for persons with disabilities to the maximum extent feasible.

Planning

Title 23 requires that long-range transportation plans and transportation improvement programs, in both statewide and metropolitan planning processes, provide for the development and integrated management and operation of accessible transportation systems and facilities.

Additionally, State DOTs and Metropolitan Planning Organizations (MPOs) must certify (at least biennially for State DOTs and annually for MPOs) that the transportation planning process is being carried out or conducted in accordance with all FHWA, Federal Transit Administration and other

applicable Federal statutory and regulatory requirements [see 23 CFR 450.220 and 23 CFR 450.334, respectively]. Further, 23 CFR 450.316(b)(3) requires the metropolitan planning process to identify actions necessary to comply with the ADA and Section 504.

Transition Plans

The ADA and Section 504 require State and local governments with 50 or more employees to perform a self-evaluation of their current services, policies, and practices that do not or may not meet ADA requirements. The public agency must develop a Transition Plan addressing these deficiencies. This plan assesses the needs of persons with disabilities, and then schedules the required pedestrian accessibility upgrades. The Transition Plan is to be updated periodically, with its needs reflected in the processes utilized by State DOTs, MPOs, and transit agencies to develop the Statewide Transportation Improvement Programs and metropolitan Transportation Improvement Programs.

Projects

Public agencies should work to meet accessibility requirements throughout the project delivery process. Issues surrounding pedestrian accessibility should be addressed at the earliest stage possible to reduce or prevent conflicts with other right-of-way, planning, environmental, and design considerations. This could include the acquisition of right-of-way and use of special plan details for specific locations to remove barriers. Projects requiring pedestrian accessibility include projects for new construction and projects altering existing street and highway facilities.

New Construction

All projects for new construction that provide pedestrian facilities must incorporate accessible pedestrian features to the extent technically feasible, without regard to cost. The development process should ensure accessibility requirements are incorporated in the project.

Alterations

Alterations shall incorporate accessibility improvements to existing pedestrian facilities to the extent that those improvements are in the scope of the project and are technically feasible, without regard to cost. Projects altering the usability of the roadway must incorporate accessible pedestrian improvements at the same time as the alterations to the roadway occur. See *Kinney v. Yerusalim*, 9 F.3d 1067 (3d Cir. 1993), cert. denied, 511 U.S.C. 1033 (1994). Alterations are changes to a facility in the public right-of-way that affect or could affect access, circulation, or use by persons with disabilities.

The FHWA has determined that alterations are projects that could affect the structure, grade, function, and use of the roadway. Alteration projects include reconstruction, major rehabilitation, structural resurfacing, widening, signal installation, pedestrian signal installation, and projects of similar scale and effect.

Maintenance

Maintenance activities are not considered alterations. Therefore, maintenance projects do not require simultaneous improvements to pedestrian accessibility under the ADA and Section 504. The U.S. Department of Justice (DOJ) and the courts consider maintenance activities to include filling potholes. The FHWA has determined that maintenance activities include actions that are intended to preserve the system, retard future deterioration, and maintain the functional condition of the roadway without increasing the structural capacity. Maintenance activities include, but are not limited to, thin surface overlays (nonstructural), joint repair, pavement patching (filling potholes), shoulder repair, signing, striping, minor signal upgrades, and repairs to drainage systems.

As part of maintenance operations, public agencies' standards and practices must ensure that the day-to-day operations keep the path of travel open and usable for persons with disabilities, throughout the year. This includes snow and debris removal, maintenance of pedestrian traffic in work zones, and correction of other disruptions. Identified accessibility needs should be noted and incorporated into the transition plan.

Accessibility Design Criteria for Sidewalks, Street Crossings, and Trails **Sidewalks and Street Crossings**

Where sidewalks are provided, public agencies shall provide pedestrian access features such as continuous, unobstructed sidewalks, and curb cuts with detectable warnings at highway and street crossings. 28 CFR 35.151(c), referencing 28 CFR Part 36, App. A, ADA Accessibility Guidelines (ADAAG). The FHWA encourages the use of ADAAG standards. If pedestrian signals are provided, they must have a reasonable and consistent plan to be accessible to persons with visual disabilities.

Sidewalks and street crossings generally should use the guidelines the Access Board is proposing for public rights-of-way. The FHWA distributed an information memorandum on November 20, 2001, stating that *Designing Sidewalks and Trails, Part II, Best Practices Design Guide* can be used to design and construct accessible pedestrian facilities. This report provides information on how to implement the requirements of Title II of the ADA. *Designing Sidewalks and Trails for Access* is the most comprehensive report available for designing sidewalks and street crossings and contains compatible information on providing accessibility with information published by the Access Board in the ADAAG. This report can be found at www.fhwa.dot.gov/environment/sidewalk2.

When the Access Board completes guidelines for public rights-of-way and they are adopted by the United States Department of Transportation and DOJ as standards under the ADA and Section 504, they will supersede the currently used standards and criteria.

When Federal-aid highway program funds are used for parking facilities, or buildings such as transit facilities, rest areas, information centers, transportation museums, historic preservation projects, or other projects where pedestrians are expected, the project must meet the current applicable accessibility standards, whether or not the project is within the public right-of-way. The ADAAG includes special provisions for building alterations and for historic preservation projects.

Shared Use Paths and Trails

The design standards for shared use paths and trails are specific to the function of the path or trail:

- Shared use paths and pedestrian trails that function as sidewalks shall meet the same requirements as sidewalks. Where shared use paths and pedestrian trails cross highways or streets, the crossing also shall meet the same requirements as street crossings, including the provision of detectable warnings.
- Shared use paths and pedestrian trails that function as trails should meet the accessibility guidelines proposed in the Access Board's *Regulatory Negotiation Committee on Accessibility for Outdoor Developed Areas Final Report* found at www.access-board.gov/outdoor/outdoor-rec-rpt.htm. This report also has guidelines for Outdoor Recreation Access Routes (routes connecting accessible elements within a picnic area, camping area, or a designated trailhead).
- Recreational trails primarily designed and constructed for use by equestrians, mountain bicyclists, snowmobile users, or off-highway vehicle users, are exempt from accessibility requirements even though they have occasional pedestrian use.

Most trailside and trailhead structural facilities (parking areas, restrooms) must meet the ADAAG standards.

Technical Feasibility and Cost

When constructing a new transportation facility or altering an existing transportation facility, a public agency should consider what is included within the scope of the project. For elements that are within the scope of the project, the ADAAG provides that "Any features of a...facility that are being altered and can be made accessible shall be made accessible [i.e., made to conform with ADAAG] within the scope of the alteration." ADAAG 4.1.6(j). The only exception to this rule is where conformity with ADAAG is "technically infeasible," meaning that "existing structural conditions would require removing or altering a load-bearing member which is an essential part of the structural frame [e.g., in the case of a highway project, a bridge support]; or because other existing physical or site constraints prohibit modification of addition of elements, spaces, or features which are in full and strict compliance with the minimum requirements for new construction and which are necessary to provide accessibility." ADAAG 4.1.6(j).

Where making an alteration that meets accessibility requirements is technically infeasible, the public agency must ensure that the alteration provides accessibility to the "maximum extent feasible." If a public agency believes that full ADAAG compliance is technically infeasible, the public agency should document that the proposed solution to the problem meets the "maximum extent feasible" test. With respect to any element of an alteration that is within the scope of the project and is not technically infeasible, DOJ guidance provides that under ADAAG standards "cost is not a factor." DOJ Technical Assistance Manual for Title II of the ADA, II-6.3100(4). Consequently, if the accessibility improvement is technically feasible, the public agency must bear the cost of fully meeting ADAAG standards.

However, cost may be a factor in determining whether to undertake a stand-alone accessibility

improvement identified in a Transition Plan. For example, if an existing highway, not scheduled for an alteration, is listed in the public agency's Transition Plan as needing curb cuts, the public agency may consider costs that are "unduly burdensome." The test for being unduly burdensome is the proportion of the cost for accessibility improvements compared to the agency's overall budget, not simply the project cost.

If the project alters any aspect of the pedestrian route, it must be replaced with accessible facilities. Additional work outside of the scope and limits of the project altering a facility is at the discretion of the agency. However, any features not conforming to ADA requirements outside the project scope should be added to the Transition Plan.

FHWA Responsibilities

The FHWA is responsible for ensuring public agencies meet the requirements of the ADA and Section 504 for pedestrian access for persons with disabilities. Under DOJ regulations, FHWA divisions must work with their State DOTs, MPOs, and local public agencies to ensure ADA and Section 504 requirements are incorporated in all program activities for all projects within the public right-of-way regardless of funding source. Program activities include project planning, design, construction, and maintenance. Furthermore, FHWA is responsible for ensuring accessibility requirements for projects that are not within public right-of-way, but use funding through FHWA. This includes parking areas, information centers, buildings, shared use paths, and trails. Divisions have a legal responsibility to work with State agencies or other recipients to ensure ADA and Section 504 requirements are incorporated into all projects using funding through FHWA.

For all projects that use Federal funds as part of the financing arrangements, the division offices need to periodically:

- Review those projects, where they have oversight responsibilities, for accommodation of pedestrians. The divisions shall not approve Federal funding for projects that do not adequately provide pedestrian access for persons with disabilities where the project scope and limits include pedestrian facilities in the public right-of-way.
- Review the Stewardship Agreement to ensure pedestrian accessibility requirements are included, as appropriate.
- Review the State DOT, MPO, and/or local jurisdiction processes, procedures, guidelines, and/or policies that address ADA in transportation planning and programming processes and how accessibility commitments are addressed in transportation investment decisions.
- Assist transportation agencies in updating their Transition Plans. The United States Department of Transportation Section 504 regulation requires FHWA to monitor the compliance of the self-evaluation and Transition Plan of Federal-aid recipients (49 CFR 27.11). The ADA deadline for completing the accessibility improvements within the Transition Plan was in 1995. For those State and local governments that have not performed the self-evaluation and prepared a plan, it is critical that they complete the process.
- Encourage and facilitate training for FHWA personnel on accessible pedestrian features.
- Ensure pedestrian accessibility compliance through periodic program reviews of recipients' highway planning, design, and construction activities.
- In addition, the Federal Lands Highway Divisions should ensure that each direct Federal construction project fulfills both policy guidance on pedestrian access and meets the minimum ADA and Section 504 accessibility requirements.

For all highway, street and trail facilities, regardless of whether Federal funds are involved, the division offices need to:

- Perform onsite review of complaints about accessibility and report the findings of the review to HCR-1.
- Make presentations and offer training on pedestrian accessibility at meetings, conferences, etc.

- In contacts with State and local officials, encourage them to develop procedures for incorporating pedestrian accessibility into their projects.

Additional Information and Resources

A Web site with questions and answers concerning recurring issues, training opportunities, and background legal information on FHWA's responsibilities under the ADA and Section 504 is located at <http://www.fhwa.dot.gov/civilrights/index.htm>. This memorandum has been reviewed and approved by the U.S. Department of Transportation General Counsel as consistent with applicable disability law.

Questions concerning these obligations may be directed to:

- For Accessibility Policy: Candace Groudine, Bob Cosgrove, Office of Civil Rights
- For Design Standards: William A. Prosser, Office of Program Administration
- For Trails: Christopher Douwes, Office of Natural and Human Environment
- For Construction and Maintenance: Christopher Newman, Office of Asset Management
- For Legal: Lisa MacPhee, Office of the Chief Counsel



This page last modified on March 6, 2007

[FHWA Home](#) | [Civil Rights Home](#) | [Feedback](#)



United States Department of Transportation - **Federal Highway Administration**

Questions and Answers About ADA/Section 504

These questions and answers are presented to help FHWA and its State and local transportation department partners better understand roles and responsibilities to provide accessible transportation facilities under the Americans with Disabilities Act of 1990 (ADA) and the Rehabilitation Act of 1973 (Section 504). These questions and answers are derived from extensive experience and input from the FHWA Offices of Civil Rights, Infrastructure, Chief Counsel, and Planning, Environment, and Realty. Like all guidance material, these questions and answers are not, in themselves, legally binding and do not constitute regulations. These Q&As explain the FHWA's position on the implementation of the ADA and Section 504. These questions and answers have been reviewed and approved by the U.S. Department of Transportation General Counsel as consistent with applicable disability law.

The FHWA Offices of Civil Rights, Infrastructure, Chief Counsel, and Planning, Environment, and Realty developed these questions and answers and approved them as consistent with the language and intent of the ADA and Section 504. The questions and answers outlined in this document are to be applied to Federal, State, and local governmental agencies; hereafter called "public agencies" or "agencies."

Public Agencies covered by ADA and Section 504

1. What authority requires public agencies to make public right of way accessible for all pedestrians with disabilities?
2. What do these statutes require public agencies to do?
3. Does the ADA require public agencies to provide pedestrian facilities?
4. What is FHWA's responsibility for assuring access for persons with disabilities?
5. What public agencies must provide accessible pedestrian walkways for persons with disabilities?
6. Can a public agency make private individuals or businesses responsible for ADA and Section 504 mandated pedestrian access?
7. What United States Department of Justice (USDOJ) and United States Department of Transportation (USDOT) regulations govern accessibility requirements?
8. What is FHWA's authority to implement ADA and Section 504 requirements?
9. What is the public right of way?

Transition plans

10. What authority requires public agencies to make transition plans?
11. What should a transition plan include?
12. How does the transition plan relate to a public agency's transportation planning process?
13. What public agencies must make a transition plan?
14. When should the FHWA review an agency's transition plan?
15. When and how should a transition plan be updated?

Projects Covered by the ADA and Section 504

16. What projects must provide pedestrian access for persons with disabilities?
17. What projects constitute an alteration to the public right of way?
18. What activities are not considered to be alterations?

Timing of Accessibility Improvements

19. Does a project altering a public right of way require simultaneous accessibility improvements?
20. When does the scope of an alteration project trigger accessibility improvements for people with disabilities?
21. Do maintenance activities require simultaneous improvements of the facility to meet ADA standards?
22. When should accessible design elements be incorporated into projects in the public right of way?

Cost

23. How does cost factor into a public agency's decision in its transition plan concerning which existing facilities must comply with ADA and Section 504 pedestrian access requirements?
24. For a new project planned outside of the transition plan, with ADA accessibility improvements required to make the facility readily accessible and useable by individuals with disabilities, can cost be a reason not to complete an ADA-required accessibility improvement?
25. For an alteration project planned outside of the transition plan, with ADA accessibility improvements required within the scope of the project, can cost be a reason to decide what ADA-required improvements will be completed?
26. What role does the "maximum extent feasible" standard play for ADA accessibility requirements in altered projects?
27. What should a public agency do when it does not control all of the public right of way required to provide access for persons with disabilities?
28. Can a public agency delay compliance with the ADA and Section 504 on alteration projects through a systematic approach to schedule projects?

Elements of Accessible Design

29. What are the elements of an accessible design?

Funding

30. What sources of funding may be used to comply with ADA and Section 504 requirements?

Maintenance

31. What obligation does a public agency have regarding snow removal in its walkways?
32. What day-to-day maintenance is a public agency responsible for under the ADA?

Criteria

33. What accessibility training is available?
34. Where is information on the criteria to be used in developing accessible facilities?

Public Agencies covered by ADA and Section 504

1. *What authority requires public agencies to make public right-of-way accessible for all pedestrians with disabilities?*
Public rights-of-way and facilities are required to be accessible to persons with disabilities through the following statutes: Section 504 of the Rehabilitation Act of 1973 (Section 504) (29 U.S.C. §794) and Title II of the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. §§ 12131-12164). The laws work together to achieve this goal. (9-12-06)
2. *What do these statutes require public agencies to do?*
These statutes prohibit public agencies from discriminating against persons with disabilities by excluding them from services, programs, or activities. These statutes mean that the agency must provide pedestrian access for persons with disabilities to the agency's streets and sidewalks, whenever a pedestrian facility

exists. Regulations implement this requirement by imposing standards for accessible features such as curb cuts, ramps, continuous sidewalks, and detectable warnings. (9-12-06)

3. *Does the ADA require public agencies to provide pedestrian facilities?*

No. However, when a public agency provides a pedestrian facility, it must be accessible to persons with disabilities to the extent technically feasible.

4. *What is FHWA's responsibility for assuring access for persons with disabilities?*

FHWA is responsible for ensuring access for persons with disabilities in four areas:

1. For surface transportation projects under direct FHWA control (e.g., Federal Lands projects): FHWA is responsible for ensuring that project planning, design, construction, and operations adequately address pedestrian access for people who have disabilities.
2. For Federally funded surface transportation projects that provide pedestrian facilities within the public right-of-way: FHWA is responsible for ensuring that the public agencies' project planning, design, and construction programs provide pedestrian access for persons with disabilities. FHWA-funded projects outside of the public right-of-way, such as Transportation Enhancement projects, must also adhere to these requirements.
3. For pedestrian facilities within the public right-of-way, or any other FHWA enhancement project, regardless of funding source: FHWA is responsible for investigating complaints. 28 CFR §§ 35.170 – 35.190.
4. FHWA should provide or encourage accessibility training for Federal, State, and local agencies and their contractors.

FHWA does not have ADA oversight responsibilities for projects outside of the public right-of-way that do not use Federal surface transportation program funds. (9-12-06)

5. *What public agencies must provide accessible pedestrian walkways for persons with disabilities?*

All State and local governmental agencies must provide pedestrian access for persons with disabilities in compliance with ADA Title II. 42 U.S.C. §12131(1). Federal, State, and local governments must provide pedestrian access for persons with disabilities in compliance with Section 504 standards. 29 U.S.C. §794(a). (9-12-06)

6. *Can a public agency make private individuals or businesses responsible for ADA and Section 504 mandated pedestrian access?*

No. The public agency is responsible for providing access for persons with disabilities. Private entities with joint responsibility for a public right-of-way, such as a private tenant on public property, are responsible for accessibility for persons with disabilities on the public right-of-way under Title II of ADA. The lease or other document creating this legal relationship should commit the private party to ensuring accessibility. In addition, public/private partnership relationships for the public right-of-way retain accessibility obligations to persons with disabilities under Title II. If the private entity eventually takes over the right-of-way in its entirety, then the private entity becomes responsible for accessibility for persons with disabilities under the private entity's obligations under Title III of the ADA. (9-12-06)

7. *What United States Department of Justice (DOJ) and United States Department of Transportation (DOT) regulations govern accessibility requirements?*

The DOJ ADA regulation is 28 CFR Part 35. The DOT Section 504 regulation at 49 CFR Part 27 governs public agencies, with the ADA incorporated at 49 CFR §27.19. Additional regulations drafted specifically for recipients of the Federal Transit Administration are at 49 CFR Part 37. (9-12-06)

8. *What is FHWA's authority to implement ADA and Section 504 requirements?*

The DOJ regulations designate the DOT as the agency responsible for overseeing public agencies' compliance with the ADA. 28 CFR §35.190(b)(8). The DOT has delegated to the FHWA the responsibility to ensure ADA compliance in the public right-of-way and on projects using surface transportation funds. (9-12-06)

9. *What is the public right-of-way?*

The public right-of-way consists of everything between right-of-way limits, including travel lanes, medians, planting strips, sidewalks, and other facilities. (9-12-06)

Transition plans

10. *What authority requires public agencies to make transition plans?*

The ADA requires public agencies with more than 50 employees to make a transition plan. 28 CFR §35.150(d). (9-12-06)

11. *What should a transition plan include?*

The transition plan must include a schedule for providing access features, including curb ramps for walkways. 28 CFR §35.150(d)(2). The schedule should first provide for pedestrian access upgrades to State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas. 28 CFR §35.150(d)(2). The transition plan should accomplish the following four tasks:

1. identify physical obstacles in the public agency's facilities that limit the accessibility of its programs or activities to individuals with disabilities;
2. describe in detail the methods that will be used to make the facilities accessible;
3. specify the schedule for taking the steps necessary to upgrade pedestrian access to meet ADA and Section 504 requirements in each year following the transition plan; and
4. indicate the official responsible for implementation of the plan. 28 CFR §35.150(d)(3). (9-12-06)

12. *How does the transition plan relate to a public agency's transportation planning process?*

The ADA transition plan is intended to identify system needs and integrate them with the State's planning process. The transition plan and its identified needs should be fully integrated into the public agency's Statewide Transportation Improvement Program (STIP) and metropolitan Transportation Improvement Program (TIP). Agencies should incorporate accessibility improvements into the transportation program on an ongoing basis in a variety of ways:

1. Any construction project that is programmed must meet accessibility requirements when built.
2. Accessibility improvements identified in the transition plan that are not within the scope of an alteration project should be incorporated into the overall transportation planning process. This can be accomplished through the development of stand-alone accessibility projects.
3. As a means to identify ADA compliance needs, during scheduling maintenance activities, the agencies should identify ADA accessibility needs and incorporate them into the overall transportation planning process. (9-12-06)

13. *What public agencies must make a transition plan?*

The ADA requires any public agency with more than 50 employees to make a transition plan setting forth the steps necessary to make its facilities accessible to persons with disabilities. 28 CFR §35.150(d). (9-12-06)

14. *When should the FHWA review an agency's transition plan?*

DOT Section 504 regulation requires FHWA to monitor the compliance of the self-evaluation and transition plans of Federal-aid recipients (49 CFR §27.11). The FHWA Division offices should review pedestrian access compliance with the ADA and Section 504 as part of its routine oversight activities as defined in their stewardship plan. (9-12-06)

15. *When and how should a transition plan be updated?*

An agency's transition plan should have been completed by January 26, 1992, and should be based on updates of the self-evaluation conducted to comply with the requirements of Section 504. 28 CFR §35.105. The plan should be updated periodically to ensure the ongoing needs of the community continue to be met. The transition plan should be coordinated appropriately with the STIP and the TIP. Changes to the plan shall be made available to the public for comment. The public agency should specifically target any local community groups representing persons with disabilities for comment, to ensure that the agency is meeting the local priorities of the persons with disabilities in that community. If a public agency has never completed a transition plan, the Division should inform the public agency to complete a transition plan now and review that public agency's completed transition plan.

The ADA deadline for completing the improvements listed in the transition plans was January 26, 1995. For those State and localities that have not completed their self-evaluation and transition plans, it is critical that they complete this process. (9-12-06)

Projects Covered by the ADA and Section 504

16. *What projects must provide pedestrian access for persons with disabilities?*

Any project for construction or alteration of a facility that provides access to pedestrians must be made accessible to persons with disabilities. 42 U.S.C. §§ 12131 - 12134; 28 CFR §§ 35.150, 35.151; **Kinney v. Yerusalim**, 9 F.3d 1067 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994). (9-12-06)

17. *What projects constitute an alteration to the public right-of-way?*

An alteration is a change to a facility in the public right-of-way that affects or could affect access, circulation, or use. Projects altering the use of the public right-of-way must incorporate pedestrian access improvements within the scope of the project to meet the requirements of the ADA and Section 504. These projects have the potential to affect the structure, grade, or use of the roadway. Alterations include items such as reconstruction, major rehabilitation, widening, resurfacing (e.g. structural overlays and mill and fill), signal

installation and upgrades, and projects of similar scale and effect. (9-12-06)

18. *What activities are not considered to be alterations?*

The DOJ does not consider maintenance activities, such as filling potholes, to be alterations. The DOJ does consider resurfacing beyond normal maintenance to be an alteration. DOJ's ADA Title II Technical Assistance Manual, § II-6.6000, 1993.

The FHWA has determined that maintenance activities include actions that are intended to preserve the system, retard future deterioration, and maintain the functional condition of the roadway without increasing the structural capacity. These activities include, but are not limited to, thin surface treatments (nonstructural), joint repair, pavement patching (filling potholes), shoulder repair, signing, striping, minor signal upgrades, and repairs to drainage systems. (9-12-06)

Timing of Accessibility Improvements

19. *Does a project altering a public right-of-way require simultaneous accessibility improvements?*

Yes. An alteration project must be planned, designed, and constructed so that the accessibility improvements within the scope of the project occur at the same time as the alteration. 29 CFR § 35.151; **Kinney v. Yerusalim**, 9 F.3d 1067 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994).

The ADA does not stipulate how to perform simultaneous accessibility improvements. For example, a public agency may select specialty contractors to perform different specialized tasks prior to completion of the alteration project or concurrently with an ongoing project. (9-12-06)

20. *When does the scope of an alteration project trigger accessibility improvements for people with disabilities?*

The scope of an alteration project is determined by the extent the alteration project directly changes or affects the public right-of-way within the project limits. The public agency must improve the accessibility of only that portion of the public right-of-way changed or affected by the alteration. If a project resurfaces the street, for accessibility purposes the curbs and pavement at the pedestrian crosswalk are in the scope of the project, but the sidewalks are not. Any of the features disturbed by the construction must be replaced so that they are accessible. All remaining access improvements within the public right-of-way shall occur within the schedule provided in the public agency's planning process. (9-12-06)

21. *Do maintenance activities require simultaneous improvements of the facility to meet ADA standards?*

No. Maintenance activities do not require simultaneous improvements to pedestrian accessibility under the ADA and Section 504. However, in the development of the maintenance scope of work identified accessibility needs should be incorporated into the transition process. (9-12-06)

22. *When should accessible design elements be incorporated into projects in the public right-of-way?*

FHWA encourages the consideration of pedestrian needs in all construction, reconstruction, and rehabilitation projects. If a public agency provides pedestrian facilities, those facilities must be accessible to persons with disabilities. A public agency is not relieved of its obligation to make its pedestrian facilities accessible if no individual with a disability is known to live in a particular area. This is true regardless of its funding source. DOJ's ADA Title II Technical Assistance Manual, § II-5.1000, 1993. (9-12-06)

Cost

23. *How does cost factor into a public agency's decision in its transition plan concerning which existing facilities must comply with ADA and Section 504 pedestrian access requirements?*

For existing facilities requiring accessibility improvements as scheduled in the transition plans, the public agency must provide accessibility improvements unless the cost of the upgrades is unduly burdensome. The test for being unduly burdensome is the proportion of the cost for accessibility improvements compared to the agency's overall budget, not simply the project cost. 28 CFR Part 35, App. A, discussion at §35.150, ¶¶ 4 – 7. The decision that pedestrian access would be unduly burdensome must be made by the head of a public agency or that official's designee, accompanied by a written statement of the reasons for the decision. 28 CFR §35.150(a)(3). (9-12-06)

24. *For a new project planned outside of the transition plan, with ADA accessibility improvements required to make the facility readily accessible and useable by individuals with disabilities, can cost be a reason not to complete an ADA-required accessibility improvement?*

No. Cost may not be a reason to fail to construct or delay constructing a new facility so that the facility is readily accessible to and useable by persons with disabilities under the ADAAG standards. 28 CFR §35.151(a); see DOJ Technical Assistance Manual for Title II of the ADA, II-6.3100(3). (9-12-06)

25. *For an alteration project planned outside of the transition plan, with ADA accessibility improvements required within the scope of the project, can cost be a reason to decide what ADA-required improvements will be completed?*

No. Cost may not be a reason for a public entity to fail to complete an ADA-required improvement within the

scope of an alteration project under the ADAAG standards. A public agency must complete any ADA-required accessibility improvements within the scope of an alteration project to the maximum extent feasible. 28 CFR §35.151(b); DOJ Technical Assistance Manual for Title II of the ADA, II-6.3100(4). (9-12-06)

26. *What role does the "maximum extent feasible" standard play for ADA accessibility requirements in altered projects?*

In an alteration project, the public agency must incorporate the ADA accessibility standards to the maximum extent feasible. 28 CFR §35.151(b). The feasibility meant by this standard is physical possibility only. A public agency is exempt from meeting the ADA standards in the rare instance where physical terrain or site conditions restrict constructing or altering the facility to the standard. ADA Accessibility Guidelines 4.1.6(1)(j). Cost is not a factor in determining whether meeting standards has been completed to the maximum extent feasible. DOJ's ADA Title II Technical Assistance Manual, § II-6.3200(3)-(4), 1993. No particular decisionmaking process is required to determine that an accessibility improvement is not technically feasible, but the best practice is to document the decision to enable the public agency to explain the decision in any later compliance review. (9-12-06)

27. *What should a public agency do when it does not control all of the public right-of-way required to provide access for persons with disabilities?*

The public agency should work jointly with all others with interests in the highway, street, or walkway to ensure that pedestrian access improvements occur at the same time as any alteration or new project. The ADA encourages this cooperation by making each of the public agencies involved subject to complaints or lawsuits for failure to meet the ADA and Section 504 requirements. 28 CFR §§ 35.170 – 35.178. (9-12-06)

28. *Can a public agency delay compliance with the ADA and Section 504 on alteration projects through a systematic approach to schedule projects?*

No. All pedestrian access upgrades within the scope of the project must occur at the same time as the alteration. *Kinney v. Yerusalim*, 9 F.3d 1067 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994). (9-12-06)

Elements of Accessible Design

29. *What are the elements of an accessible design?*

Public agencies have the choice of whether to follow the standards in the ADA Accessibility Guidelines (ADAAG) or the Uniform Federal Accessibility Standards (UFAS). 28 CFR §35.151(c); (appendix A to 28 CFR Part 36). FHWA encourages public agencies to use ADAAG. Under the ADAAG standards, an accessible design to a highway, street, or walkway includes accessible sidewalks and curb ramps with detectable warnings. 28 CFR §35.151(c) and (e) (curb ramps), ADAAG 4.3-4.5 (accessible routes), 4.7 (curb ramps with detectable warnings), 4.29 (detectable warnings). Continuously maintained sidewalks are required by the case of *Barden v. City of Sacramento*, 292 F.3d 1073 (9th Cir. 2002), cert. denied, 123 S.Ct. 2639 (2003). Accessible pedestrian signals and signs must be considered, with a reasonable and consistent plan to facilitate safe street crossings. 28 CFR §35.151(c); 23 U.S.C. §217(g)(2). (9-12-06)

Funding

30. *What sources of funding may be used to comply with ADA and Section 504 requirements?*

Federal Funding Opportunities for Pedestrian Projects and Programs

ACTIVITY	NH S	ST P	HSI P	RH C	T E	CMA Q	RT P	FT A	Tr E	B RI	40 2	PL A	TCS P	FL H	BY W	SRT S
Pedestrian plan		*	*			*						*	*			
Paved shoulders	*	*	*	*	*	*				*			*	*	*	
Shared-use path/trail	*	*	*		*	*	*			*			*	*	*	*

Recreation al trail						*							*		
Spot improvement program		*	*		*	*							*	*	*
Maps		*			*	*					*		*		*
Trail/highway intersection	*	*	*		*	*	*						*	*	*
Sidewalks, new or retrofit	*	*	*	*	*	*		*	*	*			*	*	*
Crosswalks, new or retrofit	*	*	*	*	*	*		*	*				*	*	*
Signal improvements	*	*	*	*	*	*							*		*
Curb cuts and ramps	*	*	*	*	*	*							*		*
Traffic calming		*	*	*									*		*
Safety brochure/book		*			*	*					*		*		*
Training	*	*	*		*	*	*				*		*		*

NHS National Highway System

TrE Transit Enhancements

STP Surface Transportation Program

BRI Bridge (HBRRP)

HSIP Highway Safety Improvement
Program

402 State and Community Traffic Safety Program

RHC Railway-Highway Crossing Program

PLA State/Metropolitan Planning Funds

TE Transportation Enhancement Activities	TCSP Transportation and Community and System Preservation Program
CMAQ Congestion Mitigation/Air Quality Program	FLH Federal Lands Highways Program
RTP Recreational Trails Program	BYW Scenic Byways
FTA Federal Transit Capital, Urban & Rural Funds	SRTS Safe Routes to School

32. Each program has its own specific requirements and provisions. Further details on these sources of funding may be found in the following memo: *Flexible Funding for Highways and Transit and Funding for Bicycle & Pedestrian Programs*, February 6, 2006, at www.fhwa.dot.gov/hep/flexfund.htm. (9-12-06)

Maintenance

31. *What obligation does a public agency have regarding snow removal in its walkways?*
A public agency must maintain its walkways in an accessible condition, with only isolated or temporary interruptions in accessibility. 28 CFR §35.133. Part of this maintenance obligation includes reasonable snow removal efforts. (9-12-06)
32. *What day-to-day maintenance is a public agency responsible for under the ADA?*
As part of maintenance operations, public agencies' standards and practices must ensure that the day-to-day operations keep the path of travel on pedestrian facilities open and usable for persons with disabilities, throughout the year. This includes snow removal, as noted above, as well as debris removal, maintenance of accessible pedestrian walkways in work zones, and correction of other disruptions. ADAAG 4.1.1(4). Identified accessibility needs should be noted and incorporated into the transition plan. (9-12-06)

Criteria

33. *What accessibility training is available?*
FHWA has the following training courses available:
1. National Highway Institute: Pedestrian Facility Design, Course Number 142045. See www.nhi.fhwa.dot.gov/training/brows_catalog.aspx, and search for Course 142045.
 2. Association of Pedestrian and Bicycle Professionals/FHWA: Designing Pedestrian Facilities for Accessibility. See www.apbp.org or contact: Judy Paul at 609-249-0020.
 3. Resource Center Civil Rights Team: Designing Pedestrian Facilities for Accessibility. Contact: Deborah Johnson at 410-962-0089.
34. *Where is information on the criteria to be used in developing accessible facilities?*
The following list of documents contains resources from several agencies and organizations
US Access Board: The Access Board is the Federal agency responsible for developing ADA design standards. The following publications on accessible pedestrian design are available on the Board's Web site at www.access-board.gov:
- Accessibility Guidelines (ADAAG)
 - Notice of Availability of Draft Public Rights-of-Way Guidelines
 - Accessibility Guidelines Accessible Public Rights-of-Way Design Guide
 - Pedestrian Access to Roundabouts
 - Detectable Warnings: Synthesis of US and International Practice
 - Accessible Pedestrian Signals
 - Advisory Committee Report: *Building a True Community*
 - Accessible Public Rights-of-Way

- o Interfacing Accessible Pedestrian Signals and Traffic Signal
- o Controllers

Call 1-800-872-2253, 1-800-993-2822 (TDD) to order the US Access Board Video, *Accessible Sidewalks: Design Issues for Pedestrians with Disabilities*

- o Program 1: Pedestrians who use wheelchairs
- o Program 2: Pedestrians who have ambulatory impairments
- o Program 3: Pedestrians who have low vision
- o Program 4: Pedestrians who are blind

The Federal Highway Administration: Pedestrian documents and reports are available at www.fhwa.dot.gov/environment/bikeped/publications.htm. A bicycle and pedestrian publications order form is at www.fhwa.dot.gov/environment/bikeped/order.htm.

Research and best practices design publications on pedestrian accessibility:

- o *Designing Sidewalks and Trails for Access, Part I, A Review of Existing Guidelines*, www.fhwa.dot.gov/environment/sidewalks/ (electronic formats only: hard copies out of print).
- o *Designing Sidewalks and Trails for Access, Part II, Best Practices Guide*, www.fhwa.dot.gov/environment/sidewalk2/ (electronic formats only: hard copies out of print, HTML version incorporates all the changes listed in the errata sheet: www.fhwa.dot.gov/environment/bikeped/errata.htm).
- o Design Guidance Accommodating Bicycle and Pedestrian Travel:
- o A Recommended Approach, A DOT Policy Statement on Integrating Bicycling and Walking into Transportation Infrastructure.
- o *Manual on Uniform Traffic Control Devices (MUTCD)* provides the standards for traffic control devices and includes guidance on Accessible Pedestrian Signals, Chapter 4E. and Temporary Traffic Control Elements, Chapter 6D. The MUTCD is available at <http://mutcd.fhwa.dot.gov>.
- o *Detectable Warnings Memorandum* (July 30, 2004).
- o *Detectable Warnings Memorandum* (May 6, 2002): FHWA and the US Access Board encourage the use of the latest recommended design for truncated domes.

Accessible Pedestrian Signals

- o *Synthesis and Guide to Best Practices Web site* - this Web site provides overall information on installation criteria and design considerations.
- o *Synthesis and Guide to Best Practices Article* - this article provides the latest recommended technical specifications for installing accessible pedestrian signals.
- o FHWA Pedestrian and Bicycle Safety - includes pedestrian and bicycle safety resources. http://safety.fhwa.dot.gov/ped_bike/ped/index.htm.
- o FHWA Pedestrian and Bicycle Safety Research - provides information on issues and research related to improving pedestrian and bicyclist safety. www.tfhr.gov/safety/pedbike/index.htm.

Other DOT Web sites

- o U.S. Department of Transportation Accessibility Web site - The Department is committed to building a transportation system that provides access for all Americans. See www.dot.gov/citizen_services/disability/disability.html.
- o *Bureau of Transportation Statistics (BTS), Freedom to Travel*,

(www.bts.gov/publications/freedom_to_travel/), a report on the travel issues for people who have disabilities.

Institute of Transportation Engineers

- Alternative Treatments for At-Grade Pedestrian Crossings (an informational report which documents studies on crosswalks and warrants used by various entities).
- ITE's Web site, www.ite.org/accessible/, has information on accessible intersection design, *Electronic Toolbox for Making Intersections More Accessible for Pedestrians Who are Blind or Visually Impaired*

Informational Web sites

- Accessible Design for the Blind: information and research on making travel safer and accessible for pedestrians with disabilities, www.accessforblind.org.
- The Pedestrian/Bicycle Information Center (sponsored by FHWA):
 - www.walkinginfo.org
 - www.bicyclinginfo.org

Definitions

Accessible.

Describes a site, building, facility, or portion thereof that complies with the ADA Accessibility Guidelines. (ADAAG 3.5)

Accessible Route.

A continuous unobstructed path connecting all accessible elements and spaces of a building or facility. Interior accessible routes may include corridors, floors, ramps, elevators, lifts, and clear floor space at fixtures. Exterior accessible routes may include parking access aisles, curb ramps, crosswalks at vehicular ways, walks, ramps, and lifts. (ADAAG 3.5)

Accessible Space.

Space that complies with the ADAAG. (ADAAG 3.5)

Alteration.

An alteration is a change to a building or facility that affects or could affect the usability of the building or facility or part thereof. Alterations include, but are not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, resurfacing of circulation paths or vehicular ways, changes or rearrangement of the structural parts or elements, and changes or rearrangement in the plan configuration of walls and full-height partitions. (ADAAG 3.5)

Further, each facility or part of a facility altered by, on behalf of, or for the use of, a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992. (28 CFR §35.151(b))

Circulation Path.

An exterior or interior way of passage from one place to another for pedestrians, including, but not limited to, walks, hallways, courtyards, stairways, and stair landings. (ADAAG 3.5)

Designated agency.

The Federal agency designated to oversee compliance activities for particular components of State and local governments. (28 CFR §35.104)

Detectable Warning.

A standardized surface feature built in or applied to walking surfaces or other elements to warn visually

impaired people of hazards on a circulation path. (ADAAG 3.5)

Discrimination.

Denying handicapped persons the opportunity to participate in or benefit from any program or activity. (28 CFR §35.149)

Facility.

All or any portion of buildings, structures, site improvements, complexes, equipment, roads, walks, passageways, parking lots, or other real or personal property located on a site. (28 CFR §35.104; ADAAG 3.5)

Maximum Extent Feasible.

In alteration projects, an ADA-required accessibility improvement must be installed to the maximum extent feasible; that is, to the maximum extent technically, or physically, feasible. (ADAAG 4.1.6(1)(j))

Public Entity.

- (1) Any State or local government;
- (2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government. (42 U.S.C. §12131)

Public Facility.

A facility or portion of a facility constructed by, on behalf of, or for the use of a public entity subject to title II of the ADA and 28 CFR Part 35 or 49 CFR §§ 37.41, 37.43. (28 CFR §35.104)

Public Use.

Describes interior or exterior rooms or spaces that are made available to the general public. Public use may be provided at a building or facility that is privately or publicly owned. (ADAAG 3.5)

Undue Burden.

In determining whether financial and administrative burdens are undue in making decisions program-wide in the transition plan, a public agency must consider all of that public agency's resources available for use in the funding and operation of the service, program, or activity. (29 CFR Part 35, App. A, discussion of §35.150, ¶ 6)

This page last modified on May 13, 2008

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United States Department of Transportation - **Federal Highway Administration**

SPECIAL PROVISION

000---461

Disadvantaged Business Enterprise in Federal-Aid Construction

1. **Description.** The purpose of this Special Provision is to carry out the U. S. Department of Transportation's (DOT) policy of ensuring nondiscrimination in the award and administration of DOT assisted contracts and creating a level playing field on which firms owned and controlled by individuals who are determined to be socially and economically disadvantaged can compete fairly for DOT assisted contracts. If the Disadvantaged Business Enterprise (DBE) goal is greater than zero, Article A, "Disadvantaged Business Enterprise in Federal-Aid Construction", of this Special Provision shall apply to this contract. If there is no DBE goal, Article B, "Race-Neutral DBE Participation", of this Special Provision shall apply to this contract. The percentage goal for DBE participation in the work to be performed under this contract will be shown on the proposal.

A. Article A. Disadvantaged Business Enterprise in Federal-Aid Construction.

1. **Policy.** It is the policy of the DOT and the Texas Department of Transportation (henceforth the "Department") that DBEs, as defined in 49 CFR Part 26, Subpart A and the Department's DBE Program, shall have the opportunity to participate in the performance of contracts financed in whole or in part with Federal funds. The DBE requirements of 49 CFR Part 26, and the Department's DBE Program, apply to this contract as follows:
 - a. The Contractor will solicit DBEs through reasonable and available means, as defined in 49 CFR Part 26, Appendix A and the Department's DBE Program, or show a good faith effort to meet the DBE goal for this contract.
 - b. The Contractor, subrecipient 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.
 - c. The requirements of this Special Provision shall be physically included in any subcontract.
 - d. By signing the contract proposal, the Bidder is certifying that the DBE goal as stated in the proposal will be met by obtaining commitments from eligible DBEs or that the Bidder will provide acceptable evidence of good faith effort to meet the commitment. The Department will determine the adequacy of a Contractor's efforts to meet the contract goal, within 10 business days, excluding national holidays, from receipt of the information outlined in this Special Provision under Section 1.A.3, "Contractor's Responsibilities." If the

requirements of Section 1.A.3 are met, the conditional situation will be removed and the contract will be forwarded to the Contractor for execution.

2. Definitions.

- a. "Department" means the Texas Department of Transportation.
- b. "DOT" means the U.S. Department of Transportation, including the Office of the Secretary, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).
- c. "Federal-Aid Contract" is any contract between the Texas Department of Transportation and a Contractor which is paid for in whole or in part with DOT financial assistance.
- d. "DBE Joint Venture" means an association of a DBE firm and 1 or more other firm(s) to carry out a single business enterprise for profit for which purpose they 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.
- e. "Disadvantaged Business Enterprise" or "DBE" means a firm certified through the Texas Unified Certification Program in accordance with 49 CFR Part 26.
- f. "Good Faith Effort" means efforts to achieve a DBE goal or other requirement of this Special Provision which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.
- g. "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."
- h. "Regular Dealer" is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a regular dealer, the firm must be an established, regular business that engages in, as its principal business and under its own name, the purchase and sale or lease of the products in question.

A regular dealer in such bulk items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock if it owns and operates distribution equipment for the products. Any supplementing of regular dealers own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis. Brokers, packagers, manufacturers' representatives, or other persons who arrange or expedite transactions shall not be regarded as a regular dealer.

- i. "Broker" is an intermediary or middleman that does not take possession of a commodity or act as a regular dealer selling to the public.

- j. **"Race-neutral DBE Participation"** means any participation by a DBE through customary competitive procurement procedures.
 - k. **"Race-conscious"** means a measure or program that is focused specifically on assisting only DBEs, including women-owned businesses.
 - l. **"Texas Unified Certification Program" or "TUCP"** provides one-stop shopping to applicants for certification, such that applicants are required to apply only once for a DBE certification that will be honored by all recipients of federal funds in the state. The TUCP by Memorandum of Agreement established six member entities to serve as certifying agents for Texas in specified regions.
3. **Contractor's Responsibilities.** These requirements must be satisfied by the Contractor.
- a. After conditional award of the contract, the Contractor shall submit a completed Form No.SMS.4901, "DBE Commitment Agreement" for each DBE he/she intends to use to satisfy the DBE goal or a good faith effort to explain why the goal could not be reached, so as to arrive in the Department's Business Opportunity Programs (BOP) Office in Austin, Texas not later than 5:00 p.m. on the 10th business day, excluding national holidays, after the conditional award of the contract. When requested, additional time, not to exceed 7 business days, excluding national holidays, may be granted based on documentation submitted by the Contractor.
 - b. DBE prime Contractors may receive credit toward the DBE goal for work performed by his/her own forces and work subcontracted to DBEs. A DBE prime must make a good faith effort to meet the goals. In the event a DBE prime subcontracts to a non-DBE, that information must be reported on Form No. SMS.4902.
 - c. A Contractor who cannot meet the contract goal, in whole or in part, shall make adequate good faith efforts to obtain DBE participation as so stated and defined in 49 CFR Part 26, Appendix A. The following is a list of the types of action that may be considered as good faith efforts. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.
 - Soliciting through all reasonable and available means (e.g. attendance at prebid meetings, advertising, and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The solicitation must be done within sufficient time to allow the DBEs to respond to it. Appropriate steps must be taken to follow up initial solicitations to determine, with certainty, if the DBEs are interested.
 - 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 Contractor might otherwise prefer to perform the work items with its own forces.

- 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.
 - Negotiating in good faith with interested DBEs to make a portion of the work available to DBE subcontractors and suppliers and 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 negotiations 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.
 - A Bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional cost involved in finding and using DBEs is not in itself sufficient reason for a bidders failure to meet the Contract DBE goal as long as such cost are reasonable. Also, the ability or desire of the Contractor to perform the work of the Contract with its own organization does not relieve the Bidder of the responsibility to make good faith effort. Contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.
 - 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 cause for the rejection or non-solicitation of bids and the Contractors efforts to meet the project goal.
 - Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or Contractor.
 - 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 Contractors' groups; local, state, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.
 - If the Program Manager of the BOP Office determines that the Contractor has failed to meet the good faith effort requirements, the Contractor will be given an opportunity for reconsideration by the Director of the BOP Office.
- d. **Should the bidder to whom the contract is conditionally awarded refuse, neglect or fail to meet the DBE goal or comply with good faith effort**

requirements, the proposal guaranty filed with the bid shall become the property of the state, not as a penalty, but as liquidated damages to the Department:

- e. The preceding information shall be submitted directly to the Business Opportunity Programs Office, Texas Department of Transportation, 125 E. 11th Street, Austin, Texas 78701-2483.
 - f. The Contractor shall not terminate for convenience a DBE subcontractor named in the commitment submitted under Section 1.A.3.a. of this Special Provision. Prior to terminating or removing a DBE subcontractor named in the commitment, the Contractor must have a written consent of the Department.
 - g. The Contractor shall also make a good faith effort to replace a DBE subcontractor that is unable to perform successfully with another DBE, to the extent needed to meet the contract goal. The Contractor shall submit a completed Form No.4901, "DBE Commitment Agreement," for the substitute DBE firm(s). Any substitution of DBEs shall be subject to approval by the Department. Prior to approving the substitution, the Department will request a statement from the DBE concerning it being replaced.
 - h. The Contractor shall designate a DBE liaison officer who will administer the Contractor's DBE program and who will be responsible for maintenance of records of efforts and contacts made to subcontract with DBEs.
 - i. Contractors are encouraged to investigate the services offered by banks owned and controlled by disadvantaged individuals and to make use of these banks where feasible.
4. Eligibility of DBEs.
- a. The member entities of the TUCP certify the eligibility of DBEs and DBE joint ventures to perform DBE subcontract work on DOT financially assisted contracts.
 - b. The Department maintains the Texas Unified Certification Program DBE Directory containing the names of firms that have been certified to be eligible to participate as DBE's on DOT financially assisted contracts. This Directory is available from the Department's BOP Office. An update of the Directory can be found on the Internet at <http://www.dot.state.tx.us/business/tucpinfo.htm>.
 - c. Only DBE firms certified at the time commitments are submitted are eligible to be used in the information furnished by the Contractor as required under Section 1.A.3.a. and 3.g. above. For purposes of the DBE goal on this project, DBEs will only be allowed to perform work in the categories of work for which they are certified.
 - d. Only DBE firms certified at the time of execution of a contract/subcontract/purchase order, are eligible for DBE goal participation.
5. Determination of DBE Participation. When a DBE participates in a contract, only the values of the work actually performed by the DBE, as referenced below, shall be counted by the prime contractor toward DBE goals:

- a. The total amount paid to the DBE for work performed with his/her own forces is counted toward the DBE goal. When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.
- b. A Contractor may count toward its DBE goal a portion of the total value of the contract amount paid to a DBE joint venture equal to the distinct, clearly defined portion of the work of the contract performed by the DBE.

- (1) A Contractor may count toward its DBE goal only expenditures to DBEs that perform a commercially useful function (CUF) in the work of a contract or purchase order. A DBE is considered to perform a CUF 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 CUF, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself.

In accordance with 49 CFR Part 26, Appendix A, guidance concerning Good Faith Efforts, contractors may make efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services. Contractors may not however, negotiate the price of materials or supplies used on the contract by the DBE, nor may they determine quality and quantity, order the materials themselves, nor install the materials (where applicable), or pay for the material themselves. Contractors however, may share the quotations they receive from the material supplier with the DBE firm, so that the DBE firm may negotiate a reasonable price with the material supplier.

In all cases, prime or other subcontractor assistance will not be credited toward the DBE goal.

- (2) A DBE does not perform a CUF 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.

Consistent with industry practices and the DOT/Department's DBE program, a DBE subcontractor may enter into second-tier subcontracts, amounting up to 70% of their contract. Work subcontracted to a non-DBE does not count towards DBE goals. If a DBE does not perform or exercise responsibility for at least 30% of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, it will be presumed that the DBE is not performing a CUF

- (3) A DBE trucking firm (including an owner operator who is certified as a DBE is considered to be performing a CUF when the DBE is responsible for the management and supervision of the entire trucking operation on a particular contract and the DBE itself owns and operates

at least 1 fully licensed, insured, and operational truck used on the contract.

- (a) The Contractor receives credit for the total value of the transportation services the DBE provides on a contract using trucks it owns, insures, and operates using drivers it employs.*
- (b) 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.*
- (c) The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE lessees not to exceed the value of transportation services provided by the DBE-owned trucks on the contract. Additional participation by non-DBE lessees receive credit only for the fee or commission it receives as result of the lease arrangement.*
- (d) A lease must indicate that the DBE has exclusive use of and control over the trucks giving the DBE absolute priority for use of the leased trucks. Leased trucks must display the name and identification number of the DBE.*

- (4) When a DBE is presumed not to be performing a CUF the DBE may present evidence to rebut this presumption.

c. **A Contractor may count toward its DBE goals expenditures for materials and supplies obtained from a DBE manufacturer, provided that the DBE assumes the actual and contractual responsibility for the materials and supplies. Count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:**

- (1) If the materials or supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies toward DBE goals. (Definition of a DBE manufacturer found at 1A.c.(1) of this provision.)

For purposes of this Section (1.A.c.(1)), 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.

- (2) If the materials or supplies are purchased from a DBE regular dealer, count 60% of the cost of the materials or supplies toward DBE goals.

For purposes of this Section (1.A.5.c.(2)), a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the

public in the usual course of business:

- (A) 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.
 - (B) 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 as provided in the first paragraph under Section 1.A.5.c.(2), if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.
 - (C) Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of Section 1.A.5.c.(2).
- (3) With respect to materials or supplies purchased from DBE which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, provided you determine the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the materials and supplies themselves toward DBE goals.
 - (4) Count 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 a DOT-assisted contract, toward DBE goals, provided you determine the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.
- d. **If the Contractor chooses to assist a DBE firm, other than a manufacturing material supplier or regular dealer, and the DBE firm accepts the assistance, the Contractor may act solely as a guarantor by use of a two-party check for payment of materials to be used on the project by the DBE. The material supplier must invoice the DBE who will present the invoice to the Contractor. The Contractor may issue a joint check to the DBE and the material supplier and the DBE firm must issue the remittance to the material supplier. No funds shall go directly from the Contractor to the material supplier. The DBE firm may accept or reject this joint checking arrangement.**

The Contractor must obtain approval from the Department prior to implementing the use of joint check arrangements with the DBE. Submit to the Department, Joint Check Approval Form 2178 for requesting approval. Provide copies of cancelled joint checks upon request. No DBE goal credit will be allowed for the cost of DBE materials that are paid by the Contractor directly to the material supplier.

- e. **No DBE goal credit will be allowed for supplies and equipment the DBE subcontractor leases from the contractor or its affiliates.**
- f. **No DBE goal credit will be allowed for the period of time determined by the Department that the DBE was not performing a CUF. The denial period of time may occur before or after a determination has been made by the department. In case of the denial of credit for non-performance of a CUF of a**

DBE, the Contractor will be required to provide a substitute DBE to meet the contract goal or provide an adequate good faith effort when applicable.

6. Records and Reports.

- a. The Contractor shall submit monthly reports, after work begins, on DBE payments to meet the DBE goal and for DBE or HUB race-neutral participation. Report payments made to non-DBE HUBs. The monthly report is to be sent to the Area Engineer. These reports will be due within 15 days after the end of a calendar month. These reports will be required until all DBE subcontracting or material supply activity is completed. Form No. SMS.4903, "DBE or HUB Progress Report," is to be used for monthly reporting. Form No. SMS.4904, "DBE or HUB Final Report," is to be used as a final summary of DBE payments submitted upon completion of the project. The original final report must be submitted to the Business Opportunity Programs Office and a copy must be submitted to the Area Engineer. These forms may be obtained from the Department or may be reproduced by the Contractor. The Department may verify the amounts being reported as paid to DBEs by requesting copies of cancelled checks paid to DBEs on a random basis. Cancelled checks and invoices should reference the Department's project number.
- b. DBE subcontractors and/or material suppliers should be identified on the monthly report by Vendor Number, name, and the amount of actual payment made to each during the monthly period. Negative reports are required when no activity has occurred in a monthly period.
- c. All such records must be retained for a period of 3 years following completion of the contract work, and shall be available at reasonable times and places for inspection by authorized representatives of the Department or the DOT. Provide copies of subcontracts or agreements and other documentation upon request.
- d. Prior to receiving final payment, the Contractor shall submit Form SMS.4904, "DBE or HUB Final Report". If the DBE goal requirement is not met, documentation supporting Good Faith Efforts, as outlined in Section 1.A.3.c. of this Special Provision, must be submitted with the "DBE or HUB Final Report."
- e. Provide a certification of prompt payment, the Prompt Payment Certification Form 2177, to certify that all subcontractors and suppliers were paid from the previous months payments and retainage was released for those whose work is complete. Submit the completed form each month and the month following the month when final acceptance occurred at the end of the project.

- 7. Compliance of Contractor.** To ensure that DBE requirements of this DOT assisted contract are complied with, the Department will monitor the Contractor's efforts to involve DBEs during the performance of this contract. This will be accomplished by a review of monthly reports submitted to the Area Engineer by the Contractor indicating his progress in achieving the DBE contract goal, and by compliance reviews conducted on the project site by the Department.
- The Contractor shall receive credit toward the DBE goal based on actual payments to the DBE subcontractor. The Contractor shall notify the Area Engineer if he/she withholds or reduces payment to any DBE subcontractor. The Contractor shall submit

an affidavit detailing the DBE subcontract payments prior to receiving final payment for the contract.

Contractors' requests for substitutions of DBE subcontractors shall be accompanied by a detailed explanation which should substantiate the need for a substitution. The Contractor may not be allowed to count work on those items being substituted toward the DBE goal prior to approval of the substitution from the Department.

The prime Contractor is prohibited from providing work crews and equipment to DBEs. DBE Goal credit for the DBE subcontractors leasing of equipment or purchasing of supplies from the prime contractor or its affiliates is not allowed.

When a DBE subcontractor, named in the commitment under Section 1.A.3.a. of this Special Provision, is terminated or fails to complete its work on the contract for any reason, the prime contractor is required to make good faith efforts to find another DBE subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal.

A Contractor's failure to comply with the requirements of this Special Provision shall constitute a material breach of this contract. In such a case, the Department reserves the right to terminate the contract; to deduct the amount of DBE goal not accomplished by DBEs from the money due or to become due the Contractor, or to secure a refund, not as a penalty but as liquidated damages to the Department or such other remedy or remedies as the Department deems appropriate.

- B. *Article B. Race-Neutral Disadvantaged Business Enterprise Participation. It is the policy of the DOT that Disadvantaged Business Enterprises (DBE) as defined in 49 CFR Part 26 Subpart A, be given the opportunity to compete fairly for contracts and subcontracts financed in whole or in part with Federal funds and that a maximum feasible portion of the Department's overall DBE goal be met using race-neutral means. Consequently, if there is no DBE goal, the DBE requirements of 49 CFR Part 26, apply to this contract as follows:*

The Contractor will offer DBEs as defined in 49 CFR Part 26, Subpart A, the opportunity to compete fairly for contracts and subcontractors financed in whole or in part with Federal funds. Race-Neutral DBE and non-DBE HUB participation on projects with no DBE goal shall be reported on Form No. SMS.4903, "DBE or HUB Progress Report" and submitted to the Area Engineer each month and at project completion. Payments to DBEs reported on Form SMS.4903 are subject to the requirements of Section 1.A.5, "Determination of DBE Participation."

The Contractor, subrecipient 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.

Attachment C

120.13 What assurances must recipients and contractors make?

(a) Each financial assistance agreement you sign with a DOT operating administration (or a primary recipient) must include the following assurance:

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

(b) Each contract you sign with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance:

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.