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**IDAPA 39
TITLE 01
Chapter 04**

39.01.04 - RULES GOVERNING DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

000. LEGAL AUTHORITY.

This rule is adopted by the Idaho Transportation Board under authority contained in Sections 40-204, 40-317, and 40-319, Idaho Code. (5-13-91)

001. TITLE AND SCOPE.

The U.S. Department of Transportation requires that recipients of Financial Assistance develop and implement a Disadvantaged Business Enterprise Program, "to carry out the Department of Transportation's policy of supporting the fullest possible participation of firms owned and controlled by minorities and women, (MBEs) in Department of Transportation programs." This rule supplements and explains provisions of 49 CFR 23 related to: (1) Certification of DBEs, (2) Decertification and Appeal Process, (3) DBE Goals, and (4) Contract Performance. (5-13-91)

002. INTENT.

These Rules shall be interpreted consistent with 49 CFR Part 23 and all policies and procedures of the U.S. Department of Transportation. Where these Rules conflict with "standard industry practice", 49 CFR 23 and all underlying policies and procedures shall take precedence. (5-13-91)

003. -- 009. (RESERVED).

010. DEFINITIONS.

Definitions are taken directly from or derived from 49 CFR 23, 13 CFR 121, or from U.S. Department of transportation instruction and guidelines related to the Disadvantaged Business Enterprise Program. (5-13-91)

01. Affiliate. Persons are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or, a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following suspension or debarment of a person which has the same or similar management, ownership, or principal employees as the suspended, debarred ineligible, or voluntarily excluded person. (5-13-91)

02. Applicant. Any firm applying for certification as a DBE. (5-13-91)

03. Broker. An agent who negotiates or arranges for the provision of goods or services but who does not physically take possession of materials or supervise services provided. (5-13-91)

04. Business Enterprise. Any legal entity which is organized in any form other than as a joint venture (e.g. sole proprietorship, partnership, corporation, etc.) to engage in lawful commercial transactions. (5-13-91)

05. Certification. The process by which an applicant is determined to be a bona fide DBE. The business may apply for certification by submitting the required documentation to ITD's Civil Rights Section. Firms holding certification under the Small Business Administration's (SBA) 8(a) program automatically qualify for certification in the Disadvantaged Business Enterprise Program upon written verification from SBA. (5-13-91)

06. Certification Committee. A Committee of ITD employees established to determine applicants' eligibility to be certified as DBEs and to determine DBEs eligibility to retain their certification. (5-13-91)

07. Commercially Useful Function. A DBE is considered to perform a commercially useful function when it is responsible for execution of a distinct element of the work of a contract and carries out its responsibilities by actually performing, managing, and supervising the work involved. (5-13-91)

08. Disadvantaged Business. A small business concern. (5-13-91)

a. Which is at least fifty-one percent (51%) owned by one (1) or more socially and economically

disadvantaged individuals, or in the case of any publicly owned business, at least fifty-one percent (51%) of the stock of which is owned by one (1) or more socially and economically disadvantaged individuals; and (5-13-91)

b. Whose management and daily business operations are controlled by one (1) or more of the socially and economically disadvantaged individuals. (5-13-91)

09. DBE (Disadvantaged Business Enterprise). A firm certified as eligible to participate in the Disadvantaged Business Enterprise Program. (5-13-91)

10. Economically Disadvantaged Individuals. Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities, as compared to others in the same or similar line of business and competitive market area who are not socially disadvantaged. In determining the degree of diminished credit and capital opportunities of a socially disadvantaged individual, consideration will be given to both the disadvantaged individual and the applicant concern with which he or she is affiliated. (5-13-91)

11. Equipment Lessor. A firm that leases equipment only (no operators) and whose leasable equipment is owned by or registered to the equipment lessor firm. (5-13-91)

12. Federal-Aid Contract. Any contract including consultant agreements or modifications of a contract between ITD (or other governmental agency) and a contractor which is paid for in whole or in part with U.S. DOT financial assistance. (5-13-91)

13. Goals. A percentage of the dollar amount of a project or consultant contract that will be awarded to DBEs. A contractor or consultant must obtain the services or products of Disadvantaged Businesses which equal or exceed the DBE percentage goal stated in the contract or demonstrate good faith efforts to do so. (5-13-91)

14. Gross Receipts. Means the annual average gross revenue of the concern taken for the last three (3) fiscal years. Gross revenue includes revenues from sales of products and services, interest, rents, fees, commissions and/or whatever other sources derived, but less returns and allowances, sales of fixed assets, inter-affiliate transactions between a concern and its domestic and foreign affiliates, and taxes collected for remittance (and if due, remitted) to a third party. Such revenues shall be measured as entered on the regular books of account of the concern whether on a cash, accrual, or other basis of accounting acceptable to the U.S. Treasury Department for the purpose of supporting Federal income tax returns, except when a change in accounting method from cash to accrual or accrual to cash has taken place during such three (3) year period, or when the completed contract method has been used. Gross receipts of a concern that has been in business for less than three (3) complete fiscal years means its total receipts for the period it has been in business divided by the number of weeks including fractions of a week, that it has been in business and multiplied by fifty-two (52). (5-13-91)

15. Independent. An independent firm is one that is not inextricably associated with another firm through ownership, affiliation, sharing of employees, facilities, profits and losses. If there is an "umbilical cord" relationship between the disadvantaged-owned business and a non-DBE company, the firm is not an independent business. The factors which are reviewed by ITD in determining independent status pursuant to 49 CFR 23.53 (2) include the date the business was established, adequacy of resources for the work involved, and the degree to which financial, equipment leasing, business and other relationships with non-minority firms vary from normal industry practice. When the requirements of the DBE Program conflict with standard industry practice, the former will prevail. (5-13-91)

16. ITD. Idaho Transportation Department. (5-13-91)

17. Managerial Control. The demonstrated power to hire and fire personnel and to make independent and unilateral business decisions which guide the future and destiny of the business including responsibility for signature on insurance, bonds, payroll checks, letters of credit, contractual, banking service and other agreements. In addition, 49 CFR 23.53 (a) (4) provides that, "...When the actual management of the firm is contracted out to individuals other than the owner, those persons who have the ultimate power to hire and fire the managers can, for the purposes of this part, be considered as controlling the business." Following are examples of documents attesting to managerial control: (5-13-91)

a. Corporate Bylaws and Partnership Agreements or other agreements should be free of restrictive language which dilutes the disadvantaged individual or woman's control, thus preventing him/her from making those decisions which affect the destiny of the business. (5-13-91)

b. Disadvantaged individuals or women should be able to show clearly, through the production of documents, the areas of control such as, but not limited to authority and responsibility to sign payroll checks and letters of credit; authority to negotiate and signature responsibility for insurance and or bonds; authority to negotiate for banking services; and authority to enter into contractual negotiations with signature responsibility. (5-13-91)

c. Agreements for support services that do not impair the disadvantaged person's or woman's control of the company are permitted as long as the owner's power to manage the company is not restricted or impaired. (5-13-91)

18. **Manufacturer.** A firm that produces goods from raw materials on its own premises or substantially alters them before resale and may, in addition, package, ship or deliver the goods. (5-13-91)

19. **Net Fee.** The fees or commissions charged for providing a bona fide service, such as professional, technical, consultant or managerial services and assistance in the procurement of essential personnel, facilities, equipment, materials or supplies required for performance of the contract, provided that the fee or commission is determined by ITD to be reasonable and not excessive as compared with fees customarily allowed for similar services: (5-13-91)

a. **Hauler, trucker, delivery service firms:** The fees charged for delivery of materials and supplies required on a job site (but not the cost of the materials and supplies themselves when the firm(s) is not also the manufacturer of or a regular dealer in the materials and supplies, provided that the fee is determined by ITD to be reasonable and not excessive as compared with fees customarily allowed for similar services. (5-13-91)

b. **Agents:** The fees or commissions charged for providing any bonds or insurance specifically required for the performance of the contract, provided that the fee or commission is determined by ITD to be reasonable and not excessive as compared with fees customarily allowed for similar services. (5-13-91)

20. **Operational Control.** Actual execution of the primary functions of the business. The extent to which the disadvantaged individual or woman actually operates the business will rest upon the peculiarities of the industry in which the business is a part. Specifically, in the construction industry, especially among smaller contractors, it is reasonable to expect the owner to be knowledgeable of all aspects of the business and take an active role in day-to-day operations. (5-13-91)

a. The disadvantaged individual or woman should have the experience in the industry for which certification is sought. (5-13-91)

b. The disadvantaged individual or woman should show that he/she can independently make basic decisions pertaining to the daily operations of business. This does not necessarily rule out the disadvantaged individual or woman owner seeking paid or unpaid advice and assistance. It does, however, mean that the DBE owner currently possesses the knowledge to weigh all advice given and make an independent determination. (5-13-91)

c. The disadvantaged individual or woman should have some technical competence in the industry for which certification is sought. Technical competence in this sense does not mean expert knowledge; however, it does mean the disadvantaged individual or woman should have a working knowledge of the technical requirements of the business needed to operate in the industry. (5-13-91)

21. **Owner/Operator.** A person who owns (or leases on a long-term basis) and operates one (1) truck and has a valid agreement with the contractor or subcontractor. The owner/operator must bear the risk of loss. Owner/operators who lease must demonstrate there is no close or continued supervision of the operation of the truck by the company leasing the truck, and owner/operators may not work on a project upon which the lessor is a prime or subcontractor. Individuals operating leased trucks are considered owner/operators if they provide satisfactory evidence that they have a bona fide lease agreement. The vehicle must be registered in the name of the owner/operator. The evidence must show that the owner/operator is independently established in his/her own trucking

- business and that he/she has total responsibility for cost items such as: (5-13-91)
- a. Maintenance; (5-13-91)
 - b. Insurance (comprehensive, collision, liability, etc.); (5-13-91)
 - c. Permits, base plates, licenses and taxes; (5-13-91)
 - d. Fuel and oil; (5-13-91)
 - e. Major and minor repairs; (5-13-91)
 - f. Ferry charges and tolls; (5-13-91)
 - g. Driver's remuneration. (5-13-91)
22. Ownership. As a customary incident of ownership, fifty-one percent (51%) (or more) of a firm's owners should be able to elect the Board of Directors without the cooperation of shareholders owning the remaining voting shares. In the case of a disadvantaged owner or a woman owner, holding nominal title to corporate shares would not accord the disadvantaged owner or woman owner the customary incidents of ownership where the female or disadvantaged person's right to vote such stock or elect the Board of Directors is subject to the discretion of a nondisadvantaged person or male. Or if a nondisadvantaged person(s) or male(s) exerts unreasonable influence over a disadvantaged person or female who owns one hundred percent (100%) of stock in such a way that it impairs their ability to function as the owner, the disadvantaged person or female does not enjoy the customary incidents of ownership. Under these circumstances, these applicant firms would not meet the "ownership" eligibility criteria. (5-13-91)
23. Small Business Concern. A small business as defined pursuant to Section 3 of the Small Business Act (15 U.S.C. 632(a)) and relevant regulations promulgated pursuant thereto. (5-13-91)
24. Social Disadvantage. An individual described as socially disadvantaged must meet the following standards: (5-13-91)
- a. The individual's social disadvantage must stem from his or her color, national origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society or other similar cause beyond the individual's control. The individual cannot establish social disadvantage on the basis of factors which are common to small business persons who are not socially disadvantaged. (5-13-91)
 - b. The individual must demonstrate that he or she has personally suffered social disadvantage, not merely claim membership in a non-designated group which could be considered socially disadvantaged. (5-13-91)
 - c. The individual's social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries. (5-13-91)
 - d. The individual's social disadvantage must be chronic, long-standing, and substantial, not fleeting or insignificant. Typically, a number of incidents illustrating a person's social disadvantage, occurring over a substantial period of time, would be necessary to make a successful claim. Usually, only by demonstrating a series of obstacles which have impeded one's progress in the business world can an individual demonstrate chronic, long-standing, and substantial social disadvantage. (5-13-91)
 - e. The individual's social disadvantage must have negatively affected his or her entry into, and/or advancement in, the business world. The closer the individual can link social disadvantage to impairment of business opportunities, the stronger the case. (5-13-91)
25. Socially and Economically Disadvantaged Individuals. Those individuals who are citizens of the United States (or lawfully admitted permanent residents) who are Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans and any other minorities or individuals found to be

disadvantaged by the Small Business Act (15 U.S.C.632(a)). Individuals in the following groups are rebuttably presumed to be socially and economically disadvantaged. Using federal guidelines, ITD will determine, on a case-by-case basis whether individuals who are not members of one of the following groups are socially and economically disadvantaged. (5-13-91)

- a. Black Americans. Which includes persons having origins in any of the Black racial groups of Africa; (5-13-91)
 - b. Hispanic Americans. Which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race; (5-13-91)
 - c. Native Americans. Which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians; (5-13-91)
 - d. Asian-Pacific Americans. Which includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the U.S. Trust Territories of the Pacific, and the Northern Marianas; and (5-13-91)
 - e. Asian-Indian Americans. Which includes persons whose origins are from India, Pakistan, and Bangladesh. (5-13-91)
 - f. Women. Which includes women of any race. (5-13-91)
26. Small Business Administration Firms. Firms certified under the Small Business Administration's 8(a) program are conclusively presumed to be socially and economically disadvantaged. (5-13-91)
27. Supplier. A firm that maintains an inventory, sells goods to many contractors and the public, carries goods manufactured by several different companies and packages and ships goods. The firm does not manufacture or alter the goods it supplies. (5-13-91)

011. -- 099. (RESERVED).

100. CERTIFICATION ELIGIBILITY REQUIREMENTS.

To ensure that the Disadvantaged Business Enterprise Program benefits only firms which are owned and controlled in both form and substance by one (1) or more disadvantaged individuals or women, ITD certifies the eligibility of firms requesting admittance to the DBE Program. An applicant firm must meet the following eligibility criteria: (5-13-91)

01. Firm Size. The firm's size cannot exceed the following limits: Type of Firm. Average Annual Gross Receipts For Three (3) Preceding Years OR Number of Employees. (5-13-91)
- a. General Contractor. Established in the Surface Transportation and Uniform Relocation Assistance Act (STURAA) of 1987 (or subsequent Transportation Acts) as revised by FHWA and incorporated by reference. (5-13-91)
 - b. Special Trade Contractors, Engineering Firms, and all other small businesses. Established in 13 CFR 121 and incorporated by reference.(5-13-91)
02. Uneligible Firms. A firm that exceeds these gross receipts or employee numbers is not eligible for certification, even if controlling interest is held by minorities or women. (5-13-91)
03. Majority Owner. The firm's majority owner(s) must be: (5-13-91)
- a. Member(s) of a disadvantaged group and be so regarded by other members of that group in the geographical area. See definition of socially and economically disadvantaged individuals; or (5-13-91)
 - b. Identified by the Small Business Administration to be socially and economically disadvantaged under Section 8(a) of the Small Business Act as amended (15 USC 637(A)); or (5-13-91)

c. Individual(s) who, although not a woman or member of one of the minority groups designated in 49 CFR 23, establishes social and economic disadvantage based on identification with another group. (5-13-91)

04. Disadvantaged Firm. The disadvantaged firm must be: (5-13-91)

a. Independent-not inextricably associated with another firm through ownership, affiliation, sharing of employees, facilities, profits, and losses. The firm must be able to function as a viable business in the larger business community and not be dependent on any other firm(s) for its survival. (5-13-91)

b. Owned by one (1) or more socially and economically disadvantaged individuals. At least fifty-one percent (51%) of a DBE firm must be owned by the disadvantaged individuals. Ownership must be real, substantial, and continuing. Ownership documents must reflect owner's right/obligation to share proportionately (at least fifty-one percent (51%) of the responsibilities, risks, and profits. Contributions of capital or expertise to acquire interest must be real and substantial. Securities cannot be held in trust or by a guardian. (5-13-91)

c. Controlled by one (1) or more disadvantaged individuals. The disadvantaged owners must demonstrate that they have both: operational Control-Independently make basic decisions in daily operations. (See definition.); managerial Control-Possess the power to hire and fire and to make independent and unilateral business decisions which guide the future and destiny of the business. (See definition.) (5-13-91)

101. DBE CERTIFICATION COMMITTEE AUTHORITY AND RESPONSIBILITY.

01. DBE Certification Committee Chairman. The Contract Compliance Officer will chair the four (4) person DBE Certification Committee. The Director or Deputy Director will appoint the remaining three (3) ITD employees to the DBE Certification Committee, one (1) each with expertise in accounting, law, and construction. (5-13-91)

02. DBE Certification Committee Member. Three (3) members of the DBE Certification Committee, one (1) of whom must be the Contract Compliance Officer, constitute a quorum to transact business. (5-13-91)

a. The DBE Committee is authorized to request any and all information and documentation from applicants necessary to determine eligibility for certification as a DBE. The requested information may include, but is not limited to tax records, canceled checks, payrolls, lease/rental agreements, records of affiliates, ownership documents, purchase agreements, etc. (5-13-91)

b. The DBE Committee is authorized to establish reasonable time limits for receipt of requested information or documentation. Failure of the applicant to furnish the documentation in the specified time is grounds for denying original certification or decertifying currently certified firms. (5-13-91)

c. The DBE Committee is authorized to determine the eligibility of applicant firms, issue certificates to those applicants that meet the criteria, and deny certification to firms which do not meet the criteria. (5-13-91)

d. The DBE Committee is authorized to decertify any DBE firm that no longer meets the eligibility criteria established in these rules and in 49 CFR 23. (5-13-91)

03. Committee Voting. Each member of the Committee casts one (1) vote in determining whether applicants or DBE firms should be certified or decertified. In case of a tie vote, the Contract Compliance Officer is authorized to make the final decision. (5-13-91)

102. APPLICATION PROCESS FOR CERTIFICATION AS A DBE.

01. Application. A business requesting to be certified as a Disadvantaged Business Enterprise by ITD must submit to ITD a completed application with all accompanying documents. Forms can be obtained from the Civil Rights Section, ITD. Failure of an applicant to furnish all requested information will be grounds for denying certification. (5-13-91)

02. On-site Review of Applicant. Designated employees of ITD will conduct on-site reviews of applicant firms to verify that all eligibility requirements have been met. Failure of an applicant to furnish all requested information will be grounds for denying certification. (5-13-91)

03. Certification of Applicants. The DBE Certification Committee will evaluate all information submitted by the applicant and obtained from the on-site review to determine whether the applicant firm has met all eligibility requirements. Applicant firms approved by the Committee are notified and provided with certificates recognizing them as Disadvantaged Businesses under the DBE Program for the remainder of the calendar year in which the certificates are issued. (5-13-91)

04. Denial of the Applicant. If the application is not approved, the applicant is notified of the Committee's decision, the reason(s) for denying certification, and the procedure for appealing the decision or submitting a new application. (5-13-91)

103. -- 199. (RESERVED).

200. APPEAL PROCEDURE FOR DENIAL OF INITIAL CERTIFICATION.

If the owner(s) of an applicant firm believe they have been wrongly denied certification as a DBE by ITD's Certification Committee, he/she may file an appeal in writing to the U.S. Department of Transportation within one-hundred and eighty (180) days after the denial of certification as specified in 49 CFR 23.55. Appeals, signed and dated, should be sent to the United States Department of Transportation, 400 7th Street Southwest, Washington, DC 20590. (5-13-91)

201. RECERTIFICATION AS A DISADVANTAGED BUSINESS ENTERPRISE.

01. Recertification. Firms certified as DBEs must recertify each calendar year to maintain eligibility in the DBE program. Recertification forms are sent to DBE firms before January 1. Forms must be completed and returned to the Idaho Transportation Department by February 15. DBEs who have not recertified by February 15 will be required to complete another original application, furnish all related documentation, and be reviewed at their business location (On-site Review) as if they were new applicants. (5-13-91)

02. On-site Review. All DBE firms are required to resubmit original application forms and documents every third year after the year of original application. On-site Reviews will also be conducted every third year. (5-13-91)

03. Changes Within DBE Firms. DBE firms whose structure, ownership, or control have significantly changed are required to submit original application forms and supporting documentation within 30 days of the change. Failure to provide accurate information within the thirty (30) day period may result in decertification. (5-13-91)

202. CRITERIA FOR DECERTIFICATION OF DBE FIRMS.

Certified DBE firms may lose their eligibility and may be decertified for any of the following reasons: (5-13-91)

01. Rules. The independence, ownership, or control (both operational and managerial) of the DBE is not in accordance with these rules. (5-13-91)

02. Commercially Useful Function. The DBE fails to perform a "Commercially Useful Function" on a project and that failure constitutes part of a pattern of relationships with non-minority businesses that brings the DBE's independence and control into question. (5-13-91)

03. Investigation. The DBE's ethnicity or economic and socially disadvantaged status is successfully disproven as a result of an ITD investigation and review initiated in response to ITD concerns, third party complaints, or third party challenges. (5-13-91)

04. SBA Certification. The DBE firm has been decertified as an 8(a) firm by SBA, and ITD originally certified the firm based on SBA's certification. (5-13-91)

05. DBE Income Limits. The DBE's gross income for the last three (3) years exceeds the limits established by FHWA or SBA for participation in the DBE program. Following preparation of their annual income tax report, DBEs should notify ITD immediately if the limit has been exceeded. DBEs who exceed the gross income limit will be "graduated" from the program rather than decertified. (5-13-91)

06. Other Conditions. Any other condition, provision, or limitation of a DBE firm or its owners that conflicts with these rules or 49 CFR 23. (5-13-91)

203. -- 299. (RESERVED).

300. CHALLENGE PROCEDURE.

Any third party may challenge the "socially and economically disadvantaged" status of any individual (except an individual who has a current 8(a) certification from the Small Business Administration) presumed to be socially and economically disadvantaged if that individual is an owner of a firm certified by, or seeking certification from, ITD as a disadvantaged business. The challenge must be written, signed and dated, and sent to the Contract Compliance Officer, ITD. The challenging party must include all available information relevant to a determination of whether the challenged party is in fact socially and economically disadvantaged. (5-13-91)

01. Challenged Party Information. All relevant information submitted by the challenging party is evaluated by the Certification Committee which determines, on the basis of the information provided, whether there is a reason to believe that the challenged party is in fact not socially and economically disadvantaged. (5-13-91)

a. If the Committee determines there is no reason to believe that the challenged party is not socially and economically disadvantaged, the Contract Compliance Officer informs the challenging party in writing. This terminates the proceeding. (5-13-91)

b. If the Committee determines there is reason to believe that the challenged party is not socially and economically disadvantaged, the Contract Compliance Officer notifies the challenged party in writing that his/her status as a socially and economically disadvantaged individual has been challenged. The notice identifies the challenging party and summarizes the grounds for the challenge. (5-13-91)

c. Within thirty (30) days, the challenged party must provide sufficient documentation to permit ITD to re-evaluate his/her status as a socially and economically disadvantaged individual. Failure to respond to the request constitutes acknowledgment of the allegations of the challenging party and ITD will decertify the challenged party. (5-13-91)

d. When information is provided by the challenged party within thirty (30) days, the Committee re-evaluates the information available and makes a proposed determination of the social and economic disadvantage of the challenged party. The Contract Compliance Officer notifies both parties of this proposed determination in writing, stating the reasons for the proposal and the offer of an informal hearing before the Certification Committee at which both parties can respond to the proposed determination in writing and in person. (5-13-91)

e. Following the informal hearing, if held, the Committee makes its final decision. Both parties are informed of the decision in writing, setting forth the reasons for its decision and: the challenged party's right to appeal to the Department under the Decertification Procedures; and the challenging party's right to appeal to U.S. DOT as provided in 49 CFR 23.73. (5-13-91)

f. During the pendency of a challenge under this section, the presumption that the challenged party is a socially and economically disadvantaged individual remains in effect. (5-13-91)

301. DECERTIFICATION PROCEDURES.

When ITD is made aware of irregularities (through complaints, challenges, or observations) in a DBE's operation which appear to conflict with eligibility requirements of the DBE Program, the following procedure is implemented: (5-13-91)

01. Investigation. Personnel selected by the Committee will investigate the allegations, collect available evidence and documentation, and present it to the Certification Committee for evaluation. If the information

supports the allegations, the Certification Committee will notify the DBE of the allegations by Certified Mail, requesting a written response within thirty (30) days. (5-13-91)

02. Burden of Proof. In all proceedings before the Committee the DBE firm has the burden of proof. (5-13-91)

03. Informal Meeting. The Certification Committee or the DBE owner may request that an informal meeting be held to obtain additional information and clarify alleged discrepancies. The DBE's attorney may be present, but the meeting will not be recorded or transcribed. The meeting will be held in Boise, Idaho. (5-13-91)

a. If all allegations are explained to the satisfaction of the Certification Committee, the DBE will be notified by letter of its findings. If additional allegations arise, ITD will again initiate the process of investigating and notifying the DBE. (5-13-91)

b. If the DBE fails to appear, or the Certification Committee determines the information provided confirms the allegations, ITD's Contract Compliance Officer will notify the DBE, by Certified Mail, of ITD's intent to decertify the firm, its reasons for doing so, and its right to appeal. (5-13-91)

c. If the DBE is dissatisfied with the decision of the Certification Committee, a formal hearing before the Director of ITD may be requested within thirty (30) days of the Certification Committee's decision. The Director shall appoint a qualified hearing officer to preside over the hearing. ITD shall have the burden of proof at the hearing. (5-13-91)

d. Unless otherwise provided in this Rule, the hearing shall be conducted in Boise, Idaho in accordance with IDAPA 39.01.01. The hearing officer's decision shall be final and conclusive unless appealed by the DBE. (5-13-91)

04. Appeal Procedure. If the DBE is dissatisfied with the decision of the ITD, the DBE's exclusive remedy is an appeal to the United States Department of Transportation in accordance with 49 CFR 23.55 and 23.73. A Notice of Appeal, setting out with specificity the grounds therefore, shall be filed with the Director of ITD within thirty (30) days of the decision. (5-13-91)

05. Appeal Responsibilities. Within thirty (30) days of the filing of the Notice of Appeal, the Director shall forward the entire record of the proceeding to the United States Department of Transportation at 400 7th Street Southwest, Washington, DC 20590. The record shall include a verbatim transcript of the hearing before the Director of ITD. The DBE shall be responsible for the cost of preparing the transcript. (5-13-91)

06. Stay of Enforcement. The filing of the Notice of Appeal does not itself stay enforcement of the Director's decision. The Director may grant, or the United States Department of Transportation may order, a stay upon appropriate terms. (5-13-91)

302.-- 399. (RESERVED).

400. DBE GOALS.

ITD establishes both statewide and contract-specific DBE goals on Federally-assisted projects: (5-13-91)

01. Publishing of DBE Goals. Notice of the proposed statewide DBE goal for Federally-assisted contracts is published in ten (10) major Idaho newspapers each year. (5-13-91)

02. Established DBE Goals for Contracts. DBE goals for each Federally-assisted contract are established by ITD based on location of the project, type of project, availability of qualified DBEs, estimated cost of the project or portions thereof, and consideration of line items with the most DBE subcontracting, services, or supplier potential. (5-13-91)

03. Goal Variations. Credit toward meeting the contract goal varies with the function(s) subcontracted by the DBE: (5-13-91)

- a. Construction firms (supply labor and materials to perform a discrete element of the work)...One hundred percent (100%). (5-13-91)
 - b. Owner/operator (driver and truck only)...One-hundred percent (100%). (5-13-91)
 - c. Manufacturers (must produce product from raw material or substantially alter product before resale)...One-hundred percent (100%). (5-13-91)
 - d. Equipment rental firms (equipment must be owned by and registered to DBE)...One-hundred percent (100%). (5-13-91)
 - e. Materials suppliers (must assume actual and contractual responsibility for materials)...Sixty percent (60%). (5-13-91)
 - f. Truckers, haulers (transport and deposit materials only)...Net Fee. (5-13-91)
 - g. Brokers, packagers, manufacturers' representatives (no credit for materials, transportation or other costs)...Net Fee. (5-13-91)
04. Certified DBEs. Certified DBEs bidding as prime contractors must also meet the DBE contract goal (or make all good faith efforts) utilizing other DBE contractors. (5-13-91)
05. Joint Venture Percentages to DBE Goal. A contractor may count toward its DBE goal only that portion of a joint venture equal to the percentage of ownership and control exercised by the certified DBE partner. (5-13-91)
06. DBE Brokers. A prime contractor may count toward its DBE goal only those expenditures to certified DBE firms that provide a Commercially Useful Function on the project. A subcontracting arrangement which inflates DBE participation for the sole purpose of meeting contract goals is not acceptable. A DBE firm acting as a middleperson or passive conduit (where the activity is not standard industry practice) is essentially a broker and is not performing a commercially useful function. (5-13-91)
07. Second-tier DEBs. Second-tier DBE subcontracts or supply contracts (whether with a DBE or non-DBE subcontractor) may be counted toward the prime contractor's DBE goal. However, if the first-tier subcontractor is unable or unwilling to perform, the prime contractor must assume responsibility for utilizing the second-tier DBE contractor or supplier listed on the commitment form submitted by the prime contractor. (5-13-91)
08. Elimination of DBE Work. If all or part of the work committed to a DBE subcontractor is eliminated from the project, ITD will determine on a case-by-case basis whether the contractor will be required to make up the deficiency if it reduced the creditable amount below the contract goal. ITD will base its decision on all circumstances, such as the amount of time left in the contract, the availability of DBE firms to do the remaining work, and the contractor's history of meeting DBE goals. (5-13-91)

401. CONTRACT PERFORMANCE.

Inclusion of a DBE goal in a Federally-assisted contract imposes the following requirements on DBEs: (5-13-91)

- 01. Documentation Required. ITD must have received the application form and all requested documentation from a new DBE before the award date of the prime contract in order to have the amount of the DBE's subcontract credited toward the original DBE goal. (5-13-91)
- 02. Subcontracted Work. The work performed by a DBE must be work that might reasonably be expected to be subcontracted and has not been added to the job for the sole purpose of meeting the DBE (5-13-91)
- 03. Commercially Useful Function. The DBE subcontractor must perform a commercially useful function on the project. A commercially useful function (CUF) is defined using general industry practices. A DBE will be considered to perform a commercially useful function when it is responsible for execution of a distinct element of the work of a contract and carrying out its responsibilities by actively and independently performing,

managing and supervising the work. As such: (5-13-91)

a. The DBE must employ a labor force separate and apart from that employed by the prime contractor or other subcontractors on the project or their affiliates. It is acceptable for the DBE to employ people who have previously been employed by another firm involved in the contract provided those people were independently recruited by the DBE according to general industry practice. Transferring work crews from another employer or supplier to the DBE is NOT acceptable. (5-13-91)

b. The DBE must perform at least fifty percent (50%) of the work with his own work force. Not more than fifty percent (50%) of the DBE's contract can be subcontracted, and he/she remains responsible for the entire element of work. None of the work can be subcontracted back to the prime contractor. The work that a DBE subcontracts must be the primary function, or a logical extension of the primary function of the DBE, not an entirely unrelated function included for the purpose of meeting DBE goals. A DBE contractor must have a Public Works license for all work. (5-13-91)

c. The DBE must negotiate the subcontract and supervise the work contracted to him/her or independently hire a supervisor for the project. The DBE cannot employ any of the prime contractor's supervisors or other subcontractors' supervisors currently working on that project. A DBE supervisor and the DBE crew should be regular employees of the DBE. (5-13-91)

d. A DBE subcontractor may supplement his/her equipment by renting or leasing additional equipment from customary leasing sources or from the prime or other subcontractors on the project. However, not more than fifty percent (50%) of the equipment can be leased/rented. Equipment leased/rented from the prime or other subcontractor must be leased/rented at a competitive rate. Lease agreements and other documentation must be executed and available for inspection by ITD personnel. Operators for leased equipment cannot be the same as those employed by the prime contractor unless the equipment is leased from the prime contractor and is very specialized. All lease/rental arrangements must follow standard industry practice. (5-13-91)

e. The DBE must negotiate cost, arrange delivery and pay for materials and supplies required for the DBE's contract work. Invoices and canceled checks should be available for verification by ITD personnel. (5-13-91)

f. If a supplier will not accept payment from a DBE firm (due to nonexistent or weak credit history), the prime contractor may make payments by check, cosigned by the DBE. Under unusual circumstances, the prime contractor may pay for the DBE's materials and deduct the amount from payment to the DBE, providing the DBE and prime have executed a written agreement to that effect. The agreement must be approved by ITD personnel before the DBE commences work. (5-13-91)

g. DBE owner/operators must own and operate one (1) truck and have a valid agreement with the contractor or subcontractor which contains, or has attached, the following information: owner/operator's name; social security number; copy of vehicle registration receipt in the name of the DBE; current vehicle license number; vehicle identification number; and method of payment (hour, ton or load). (5-13-91)

402. -- 499. (RESERVED).

500. COMPLAINTS.

Any person who believes himself or herself, another person or any specific class of individuals to be subjected to a violation may file a complaint in writing, signed and dated, with the United States Department of Transportation, 400 7th Street Southwest, Washington, DC 20590. The complaint must be filed no later than one hundred eighty (180) days after the date of an alleged violation or the dates on which a continuing course of conduct in violation of this program was disclosed as provided in 49 CFR 23.73. (5-13-91)

501. SUSPENSION AND DEBARMENT.

The provisions of 49 CFR 23.87 are incorporated into these rules and included below for information: (5-13-91)

01. Referral. Suspension and debarment; referral to the Department of Justice. (5-13-91)

a. If, at any time, any person has reason to believe that any person or firm has willfully and knowingly

provided incorrect information or made false statements, or otherwise acted in a manner subjecting that person or firm to suspension or debarment action under 49 CFR Part 29, he or she may contact the appropriate (U.S.) DOT element concerning the existence of a cause for suspension or debarment, as provided in 49 CFR 29.17. (5-13-91)

b. Upon the receipt of information indicating a violation of 18 U.S.C. 1001, or any other Federal criminal statute, the (U.S.) Department (of Transportation) may refer the matter to the Department of Justice for appropriate legal action. (5-13-91)

502. -- 999. (RESERVED).