certified by a recipient. Such certification does not preclude the Department from determining that the purported DBE, or another firm that has used or attempted to use it to meet DBE goals, should be suspended or debarred.

(d) The Department may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the DBE program whose conduct is subject to such action under 49 CFR part 31.

(e) The Department may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program or otherwise violates applicable Federal statutes.

§ 26.109 What are the rules governing information, confidentiality, cooperation, and intimidation or retaliation?

(a) Availability of records. (1) In responding to requests for information concerning any aspect of the DBE program, the Department complies with provisions of the Federal Freedom of Information and Privacy Acts (5 U.S.C. 552 and 552a). The Department may make available to the public any information concerning the DBE program release of which is not prohibited by Federal law.

(2) Notwithstanding any provision of Federal or state law, you must not release information that may be reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting documentation. However, you must transmit this information to DOT in any certification appeal proceeding under §26.89 in which the disadvantaged status of the individual is in question.

(b) Confidentiality of information on complainants. Notwithstanding the provisions of paragraph (a) of this section, the identity of complainants shall be kept confidential, at their election. If such confidentiality will hinder the investigation, proceeding or hearing, or result in a denial of appropriate administrative due process to other parties, the complainant must be advised for the purpose of waiving the privilege. Complainants are advised that, in some circumstances, failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing. FAA follows the procedures of 14 CFR part 16 with respect to confidentiality of information in complaints.

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

(d) Intimidation and retaliation. If you are a recipient, contractor, or any other participant in the program, you must not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by this part or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. If you violate this prohibition, you are in noncompliance with this part.


APPENDIX A TO PART 26—GUIDANCE CONCERNING GOOD FAITH EFFORTS

I. When, as a recipient, you establish a contract goal on a DOT-assisted contract, a bidder must, in order to be responsible and/or responsive, make good faith efforts to
meet the goal. The bidder can meet this require-
ment in either of two ways. First, the
bidder can meet the goal, documenting com-
mittments for participation by DBE firms sub-
contractors or suppliers, if the bidder can doc-
ument adequate good faith efforts. This means
that the bidder must show that it took all
necessary and reasonable steps to achieve a
DBE goal or other requirement of this part
which, by their scope, intensity, and appro-
priateness to the objective, could reasonably
be expected to obtain sufficient DBE partici-
pation, even if they were not fully success-
ful.

II. In any situation in which you have es-
established a contract goal, part 26 requires
you to use the good faith efforts mechanism of
this part. As a recipient, it is up to you to
make a fair and reasonable judgment wheth-
er a bidder that did not meet the goal made
adequate good faith efforts. It is important
for you to consider the quality, quantity,
and intensity of the different kinds of efforts
that the bidder has made. The efforts em-
ployed by the bidder should be those that
one could reasonably expect a bidder to take
if the bidder were actively and aggressively
trying to obtain DBE participation sufficient
to meet the DBE contract goal. Mere pro
forma efforts are not good faith efforts to
meet the DBE contract requirements. We
emphasize, however, that your determina-
tion concerning the sufficiency of the firm's
good faith efforts is a judgment call: meeting
quantitative formulas is not required.

III. The Department also strongly cautions
you against requiring that a bidder meet a
contract goal (i.e., obtain a specified amount
of DBE participation) in order to be awarded
a contract, even though the bidder makes an
adequate good faith efforts showing. This
rule specifically prohibits you from ignoring
_bona fide_ good faith efforts.

IV. The following is a list of types of ac-
tions which you should consider as part of
the bidder's good faith efforts to obtain DBE
participation. It is not intended to be a man-
datory checklist, nor is it intended to be ex-
clusive or exhaustive. Other factors or types
of efforts may be relevant in appropriate
cases.

A. Soliciting through all reasonable and
available means (e.g. attendance at pre-bid
meetings, advertising and/or written notices)
the interest of all certified DBEs who have
the capability to perform the work of the
contract. The bidder must solicit this inter-
est within sufficient time to allow the DBEs
to respond to the solicitation. The bidder
must determine with certainty if the DBEs
are interested by taking appropriate steps to
follow up initial solicitations.

B. Selecting portions of the work to be per-
formed 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 eco-
nomically feasible units to facilitate DBE
participation, even when the prime con-
tractor might otherwise prefer to perform
these work items with, or without, DBEs.

C. Providing interested DBEs with ade-
quate information about the plans, specifica-
tions, and requirements of the contract in a
timely manner to assist them in responding
to a solicitation.

D. (1) Negotiating in good faith with inter-
ested DBEs. It is the bidder’s responsibility
to make a portion of the work available to
DBE subcontractors and suppliers and to se-
lect those portions of the work or material
needs consistent with the available DBE sub-
contractors and suppliers, so as to facilitate
DBE participation. Evidence of such negotia-
tion includes the names, addresses, and tele-
phone numbers of DBEs that were consid-
ered; a description of the information pro-
vided 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.

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

E. Not rejecting DBEs as being unqualified
without sound reasons based on a thorough
investigation of their capabilities. The con-
tractor’s standing within its industry, mem-
bership in specific groups, organizations, or
associations and political or social affili-
atations (for example union vs. non-union em-
ployee status) are not legitimate causes for
the rejection or non-solicitation of bids in
the contractor’s efforts to meet the project
goal.

F. Making efforts to assist interested DBEs
in obtaining bonding, lines of credit, or in-
surance as required by the recipient or con-
tractor.

G. Making efforts to assist interested
DBEs in obtaining necessary equipment, sup-
plies, materials, or related assistance or
services.

H. Effectively using the services of avail-
able minority/women community organiza-
tions; 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.

V. In determining whether a bidder has made good faith efforts, you may take into account the performance of other bidders in meeting the contract. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts.