



Community Development Department

DATE: March 15, 2022
FROM: Ben Ehreth, AICP, Community Development Director
ITEM: Revision to City of Bismarck DBE Program Plan for Transit

REQUEST:

The Bismarck-Mandan Metropolitan Planning Organization (MPO) requests approval for an update to the City of Bismarck’s Disadvantaged Business Enterprise (DBE) Program Plan for Transit. This document was previously approved in December 2021 as an addendum to the City of Bismarck’s DBE Program Plan. The current revisions are requested by the Federal Transit Administration (FTA) and must be made before final FTA concurrence is provided.

Please place this item on the March 22, 2022 City Commission meeting agenda.

BACKGROUND INFORMATION:

The DBE Program Plan for Transit describes activities undertaken to meet federal requirements on contracts with Disadvantaged Business Enterprises (DBE). The DBE Program Plan for Transit was approved in December 2021, and was supplied to FTA for closure of a 2021 Triennial Finding. Upon review of the submitted DBE Program Plan, FTA requested two changes to the plan before final FTA concurrence.

- 1) The City Administrator should sign page one of the document, where indicated.
- 2) The DBE Program Plan should address the stated threshold for small businesses and small business contracts, as it does not comply with recommendations of the Small Business Administration (SBA).

MPO Staff reviewed federal guidance and the NDDOT’s DBE Program Plan, which acts as a reference plan for the DBE Program Plan for Transit. Thru consultation with FTA, Bis-Man Transit, and the City of Bismarck’s Legal Department, it has been determined that the best way to address FTA’s second concern is to remove paragraph one under Section 26.39 (page 10) and reaffirm the plan.

A revised version of the DBE Program Plan for Transit is attached for consideration of the Bismarck Board of City Commisisoners. The omitted paragraph has been stricken. Additionally, the City Administrator's signature has been added to the electronic document.

Upon Commision approval, the MPO will forward the final DBE Program Plan to FTA for concurance and conclusion of this 2021 Triennial Finding.

RECOMMENDED CITY COMMISSION ACTION:

Staff recommends the Bismarck City Commission approve the revised DBE Program Plan for Transit, as an addendum to the existing City of Bismarck DBE Program Plan.

STAFF CONTACT INFORMATION:

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Rachel Drewlow | Bis-Man MPO Executive Director, 355-1852 or rdrewlow@bismarcknd.gov

Deidre Hughes | Bis-Man Transit Executive Director, 258-6817 or dhughes@bismantransit.com

Disadvantage Business Enterprise Program for Transit **49 CFR Part 26**

Bismarck, North Dakota

The City of Bismarck (City), as a Federal Transit Administration grantee, has established a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the U.S. Department of Transportation (USDOT), 49 CFR Part 26 for Transit services. The City receives federal financial City from Department of Transportation. As a condition of receiving this assistance, the Department has signed an assurance that it complies with 49 CFR Part 26.

It is the policy of the City to ensure that DBE's, as defined in part 26, have an equal opportunity to receive and participate in DOT-assisted contracts. It is also the City Policy:

1. Ensure nondiscrimination in the award and administration of DOT- assisted contracts;
2. Create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
3. Ensure that the DBE Program is narrowly tailored in accordance with applicable law;
4. Ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
5. Help remove barriers to the participation of DBEs in DOT assisted contracts;
6. Promote the use of DBEs in all types of federally-assisted contracts and procurement activities;
7. Assist the development of firms that can compete successfully in the market place outside the DBE Program; and
8. Make appropriate use of the flexibility afforded to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

Rachel Drewlow has been delegated as the DBE Liaison Officer for the City's DBE Program regarding transit. In that capacity, she is responsible for implementing all aspects of the DBE program. Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by the City in its financial assistance agreements with DOT.

The City has disseminated this policy statement to the Bismarck Board of City Commissioners and all of the components of our organization. This statement has been distributed to DBE and non-DBE business communities that may perform work on DOT-assisted contracts. The distribution was accomplished through public notice and public hearings held during regular City Commission meetings and in published newspapers of regional circulation.

Keith Hunke, Bismarck City Administrator

Date

GENERAL REQUIREMENTS

Section 26.1 Objectives

This program seeks to achieve several objectives:

- To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the transit financial assistance programs;
- To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
- To ensure that the City's DBE program is narrowly tailored in accordance with applicable law;
- To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs;
- To help remove barriers to the participation of DBEs in DOT-assisted contracts;
- To promote the use of DBEs in all types of federally-assisted contracts and procurement activities conducted by recipients;
- To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and
- To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs

Section 26.3 Applicability

The City of Bismarck is the recipient of Federal transit funds authorized by Titles I, III, V and VI of ISTEA, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA-21, Pub. L. 105-178. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. 109-59, 119 Stat. 1144; Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, 126 Stat. 405; and Title III of the Fixing America's Surface Transportation (FAST) Act, Pub. L. 114-94, 129 Stat. 1312.

Section 26.5 Definitions

The City will use terms in this program that have their meanings defined in 49 CFR §26.5.

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

Section 26.7 Non-discrimination Requirements

The City will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR Part 26 on the basis of race, color, sex, or national origin.

In administering its DBE program, The City will not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of

defeating or substantially impairing accomplishment of the objectives of the DBE program with respect to individuals of a particular race, color, sex, or national origin.

Section 26.11 Record Keeping Requirements

Reporting to DOT

The City will provide data about its DBE Program to the DOT as directed by DOT Operating administrations.

DBE participation will be reported to FTA as follows:

The City will transmit to FTA the information required for the “Uniform Report of DBE Awards or Commitments and Payments,” pursuant to the instructions found in Appendix B to Part 26. The City will similarly report the required information about participating DBE firms. All reporting will be done through the official Transit Award Management System (TrAMS) reporting system, or another format acceptable to FTA as instructed thereby.

Records retention and reporting:

The City will maintain records documenting a firm’s compliance with the requirements of 49 CFR Part 26. At a minimum, the City will keep a complete application package for each certified firm and all affidavits of no-change, change notices, and on-site reviews. These records will be retained in accordance with all applicable record retention requirements of the City’s financial assistance agreement. Other certification or compliance related records will be retained for a minimum of three (3) years unless otherwise provided by applicable record retention requirements for the financial assistance agreement, whichever is longer.

Section 26.13 Federal Financial Assistance Agreement

The City has signed the following assurances, applicable to all DOT-assisted contracts and their administration:

Assurance: - Each financial assistance agreement the City signs with a DOT operating administration (or a primary recipient) will include the following assurance:

The City 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 City 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 City 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 City of its failure to carry out its approved program, the Department may impose sanctions as provided for under 49 CFR Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 *et seq.*).

Contract Assurance: The City will ensure that the following clause is included in each DOT-funded contract it signs with a contractor (and each subcontract the prime contractor signs with a subcontractor):

The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate, which may include, but is not limited to:

1. Withholding monthly progress payments;
2. Assessing sanctions;
3. Liquidated damages; and/or
4. Disqualifying the contractor from future bidding as non-responsible.

SUBPART B – ADMINISTRATIVE REQUIREMENTS

Section 26.21 DBE Program Updates

The City is required to have a DBE program meeting the requirements of 49 CFR Part 26 as it will award prime contracts, the cumulative total value of which exceeds \$250,000 in FTA funds in a federal fiscal year. The City is not eligible to receive DOT financial assistance unless DOT has approved this DBE program and the City is in compliance with it and Part 26. The City will continue to carry out this program until all funds from DOT financial assistance have been expended. The City does not have to submit regular updates of the DBE program document, as long as it remains in compliance. However, significant changes in the program, including those required by regulatory updates, will be submitted for DOT approval.

Section 26.23 Policy Statement

The Policy Statement is elaborated on the first page of this DBE Program.

Section 26.25 DBE Liaison Officer (DBELO)

The following individual has been designated as the DBE Liaison Officer for the City:

Rachel Drewlow
Executive Director, Bismarck-Mandan Metropolitan Planning Organization
PO Box 5503
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Office: 701.355.1852
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In that capacity, the DBELO is responsible for implementing all aspects of the DBE program and ensuring that the City complies with all provision of 49 CFR Part 26. The DBELO has direct, independent access to the President of the Bismarck Board of City Commissioners concerning DBE program matters. An organizational chart displaying the DBELO's position in the organization is included in Attachment A to this program.

The City has a staff of legal, financial, human resources, and MPO departments that assist in the administration of the program. The City also has a contract with Bis-Man Transit and Bis-Man Transit staff perform some program elements. The DBELO is housed within the Bismarck-Mandan MPO and is responsible for developing, implementing and monitoring the City's DBE program, in coordination with other appropriate officials. The duties and responsibilities include the following:

DBELO duties for DBE goal Compliance

1. Report on statistical data, which is provided by Bis-Man Transit, as required by DOT/ FTA (DBE semi-annual reports)
2. Final Reviews of third-party contracts and purchase requisitions for compliance with this program, at the quarterly review.
3. Assist Bis-Man Transit in development of three-year DBE goal by providing review and recommendations for improvement.
4. Advises the governing body, via email to City Administrator, on DBE matters and achievement, specifically the establishment/update of the DBE Goal.
5. Review DBE's Outreach Excel sheet during the annual Civil Rights Review. (DBE outreach, Inclusion of DBE goal in applicable solicitations, DBE response)
6. Reviews Shortfall Analysis and submits document to FTA.
7. Participates in procurement-planning meetings for the Operations Contract.
8. Review the tracking of contractor compliance and good faith efforts, specifically regarding the Operations Contract, during the annual Civil Rights Review.
9. Reviews contracting records which note the active monitoring of work sites to ensure that work committed to DBEs at contract award or subsequently is actually performed by the DBEs to which the work was committed. (see section 26.37)

Additional Activities Carried out by Bis-Man Transit to ensure DBE Plan Compliance

1. Gathers statistical data and other information as required by DOT/ FTA and provides to DBELO for reporting (DBE Semi-Annual Report).
2. Reviews third party contracts (i.e. operations contract) and purchase requisitions for compliance with this program.
3. Works to establish City's Transit three-year DBE goal for presentation and or acceptance by Bismarck City Commission.
4. Ensures that bid notices and requests for proposals are available to applicable DBEs in a timely manner. Reviews the NDDOT DBE Directory for eligible DBE vendors, and contacts them directly.

5. Identifies contracts and procurements exceeding the micro-purchase threshold (\$10,000), and include the DBE goals in the solicitations (both race-neutral methods and contract specific goals).
6. Monitor results of DBE outreach and inclusion of goal in applicable procurements. Note DBE's contacted, procurement, and DBE response in an excel spreadsheet.
7. Analyzes progress toward attainment of the DBE Goal and identifies ways to improve progress, by preparing a Shortfall Analyses.
8. Coordinates the procurement-planning meetings for the Operations contract.
9. Track contractor compliance and good faith efforts, specifically with the Operations Contract.
10. Refer DBEs and community organizations to NDDOT's DBE certification program on an annual basis.

Section 26.27 DBE Financial Institutions

It is the intent of the City, regarding Bis-Man Transit related contracts, to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community, to make reasonable efforts to use these institutions for Bis-Man Transit related contracts, and to encourage prime contractors on DOT-assisted contracts to make use of these institutions on Bis-Man Transit related contracts.

To determine which financial institutions are owned and controlled by socially and economically disadvantaged individuals, the NDDOT recommends contacting the following organizations:

- North Dakota Bankers Association
- North Dakota Department of Banking & Financial Institutions
- Independent Community Banks of North Dakota

Section 26.29 Prompt Payment Mechanisms

The City has established, as part of its DBE program, a contract clause to require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 30 days from receipt of each payment made to the prime contractor. The City will ensure prompt and full payment of retainage from the prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed. We will use the following method to comply with this requirement:

The City requires that all subcontractors performing work on DOT-assisted contracts be promptly paid for work performed pursuant to their agreements, in accordance with all relevant federal, state, and local law.

The City ensures prompt and full payment of retainage from the prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed. Pursuant to §26.29, the City has selected the following method to comply with this requirement:

1. The City will hold retainage from prime contractors and provide for prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract clause obligating the prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within 30 days after the City pays the prime contractor.
2. To enforce these prompt payment mechanisms, the City will include the federally required prompt payment clause, such as the following:

The contractor is required to pay its subcontractors performing work related to this contract for satisfactory performance of that work no later than 30 days after the contractor's receipt of payment for that work. In addition, the contractor is required to return any retainage payments to those subcontractors within 30 days after the subcontractor's work related to this contract is satisfactorily completed.

The contractor must promptly notify the Agency, whenever a DBE subcontractor performing work related to this contract is terminated or fails to complete its work and must make good faith efforts to engage another DBE subcontractor to perform at least the same amount of work. The contractor may not terminate any DBE subcontractor and perform that work through its own forces or those of an affiliate without prior written consent of the Agency.

Section 26.31 Directory

The City is a non-certifying member of the North Dakota Unified Certification Program (UCP). The UCP maintains a directory identifying all firms eligible to participate as DBEs, which contains all the elements required by §26.31.

The City uses the DBE directory available from the North Dakota Department of Transportation's (NDDOT) Disadvantaged Business Enterprise Program website at: <https://www.dot.nd.gov/divisions/civilrights/dbeprogram.htm> maintained by the State.

The Directory lists the firm's name, address, phone number, date of the most recent certification, and the type of work the firm has been certified to perform as DBE. In addition, the directory lists each type of work for which a firm is eligible to be certified by using the most specific NAICS code available to describe each type of work.

NDDOT revises this Directory frequently. Directory is available at the NDDOT webpage: [Civil Rights Certification and Compliance System - North Dakota Department of Transportation \(diversitycompliance.com\)](https://www.nd.gov/divisions/civilrights/dbeprogram.htm)

Section 26.33 Over-concentration

The City has not identified that over-concentration exists in the types of work that DBEs perform.

Section 26.35 Business Development Programs

The City has not established a Business Development Program.

Section 26.37 Monitoring Responsibilities

The City implements and carries out appropriate mechanisms to ensure compliance with 49 CFR Part 26 program requirements by all program participants, including prompt payment, and describes and sets forth these mechanisms in this DBE program.

Monitoring Payments to DBEs and Non-DBEs

The City will require prime contractors to maintain records and documents of payments to DBEs for three years following the performance of the contract. These records will be made available for inspection upon request by any authorized representative of the City or DOT. This reporting requirement also extends to any certified DBE subcontractor.

The City proactively reviews payments to contractors including DBEs not less than quarterly to ensure compliance. Payment reviews will evaluate whether the actual amount paid to DBE subcontractors is equivalent to the amounts reported to the City by the prime contractor.

Prompt Payment Complaints

Complaints by subcontractors regarding prompt payment requirements are handled according to the following procedure:

- The subcontractor shall attempt to resolve the discrepancy with the prime contractor
- If the subcontractor is unable to resolve the discrepancy after meeting with the prime contractor, the subcontractor shall present its complaint to the DBELO. In addition to the complaint, subcontractor shall provide documentation stating their efforts to resolve the discrepancy with the prime contractor.
- If the subcontractor is unable to resolve the discrepancy through the DBELO the subcontractor shall contact the City Administrator.

Enforcement Actions for Noncompliance of Participants

The City will provide appropriate means to enforce the requirements of §26.29. These means include:

- Advise subcontractors of the availability of the payment and performance bond to assure payment for labor and materials in the execution of the work provided for in the contract
- Issue a stop-work order until payments are released to subcontractors, specifying in the contract that such orders constitute unauthorized delays for the purposes of calculating liquidated damages if milestones are not met

Monitoring Contracts and Work Sites

The City reviews contracting records and engages in active monitoring of work sites to ensure that work committed to DBEs at contract award or subsequently (e.g., as the result of modification to the contract) is actually performed by the DBEs to which the work was committed. Work site monitoring is performed by project manager. Contracting records are provided to and reviewed by the DBELO. The City will maintain written certification that contracting records have been reviewed and work sites have been monitored for this purpose.

Section 26.39 Fostering Small Business Participation

~~The NDDOT considers those contractors, subcontractors, consultants and subconsultants bidding under \$500,000 per year to be small business enterprises. For this intended program, the City utilizes the same threshold.~~

The implementation of a small business program is intended to facilitate compliance with the twin obligations in 49 CFR Part 26.51: (1) to meet the maximum feasible portion of the overall goal by using race/gender neutral means of obtaining DBE participation and (2) to establish DBE contract goals to meet any portion of the overall goal the Department is unable to meet using race/gender neutral means.

The City will continue to facilitate competition by small businesses by taking all reasonable steps to eliminate obstacles such as unnecessary or unjustified bundling or other contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors.

The City will continue to expand its processes that assist small business enterprises to further foster small business participation. These processes include the following:

- All projects are reviewed, in the development stage, to determine if it is feasible to unbundle large projects to such a size that small businesses can reasonably perform.
- All small business enterprises have the ability to access the Bis-Man Transit procurement webpage (<https://bismantransit.com/procurement/>) which posts the pre-bid addendums, notification of projects being let by, and other pertinent notifications regarding Bis-Man Transit's bid opening process.
- All small business enterprises may receive or view the DBE Newsletter, via the NDDOT website

- A means by which primes and subcontractors solicit participation on both race/gender conscious and race/gender neutral projects.
- Training opportunities relative to performing on transportation projects or to aid small businesses enterprises in all facets of their business.
- List of contacts for the Civil Rights Division.
- Small business-related articles and information.

SUBPART C – GOALS, GOOD FAITH EFFORTS, AND COUNTING

Section 26.43 Set-asides or Quotas

The City does not use quotas in any way in the administration of this DBE program.

Section 26.45 Overall Goals

Bis-Man Transit will establish an overall DBE goal, on behalf of the City, covering a three-year federal fiscal year period if it anticipates awarding DOT-funded prime contracts the cumulative total value of which exceeds \$250,000 in DOT funds during any one or more of the reporting fiscal years within the three-year goal period. In accordance with §26.45(f), The City will submit this Overall Three-year DBE Goal to FTA by August 1st of the year in which the goal is due, as required by the schedule established by and posted to FTA's website.

<https://www.transit.dot.gov/regulations-and-guidance/civil-rights-ada/dbe-three-year-goal-setting-submission-schedules>]

The DBE goals will be established in accordance with the two-step process as specified in 49 CFR §26.45. If the City does not anticipate awarding transit-related prime contracts the cumulative total value of which exceeds \$250,000 in DOT funds during any of the years within the three-year reporting period, an overall goal will not be developed. However, this DBE Program will remain in effect and the City will seek to fulfill the objectives outlined in 49 CFR Part 26.

- Step 1.** The first step is to determine a base figure for the relative availability of DBEs in the market area. Bis-Man Transit will use DBE Directory information and Census Bureau Data, or other alternative method that complies with §26.45 as a method to determine the base figure. The City understands that the exclusive use of a list of prequalified contractors or plan holders, or a bidders list that does not comply with the requirements of 49 CFR §26.45(c)(2), is not an acceptable alternative means of determining the availability of DBEs.
- Step 2.** The second step is to adjust, if necessary, the “base figure” percentage from Step 1 so that it reflects as accurately as possible the DBE participation the recipient would expect in the absence of discrimination. Adjustments may be made based on past participation, information from a disparity study (to the extent it is not already accounted for in the base goal), and/or information about barriers to entry to past competitiveness of DBEs on contracts. Bis-Man Transit, in conjunction with the City, will examine all of the evidence available in its jurisdiction to determine what adjustment, if any, is needed. If the evidence does not suggest an adjustment is necessary, then no adjustment will be made.

Any methodology selected will be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in the City's market.

In establishing the overall goal, Bis-Man Transit will provide for consultation and publication. This includes consultation with minority, women's and general contractor groups, community organizations, such as the Bismarck Mandan Chamber of Commerce, North Dakota Women's Network, North Dakota Small Business Development Centers, and the North Dakota Women's Business Center. This may include other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and the efforts by the City and Bis-Man Transit to establish a level playing field for the participation of DBEs. The consultation will occur before the City is required to submit the goal methodology to the operating administration for review pursuant to §26.45(f). The goal submission will document the consultation process in which Bis-Man Transit engaged. Notwithstanding §26.45(f)(4), the proposed goal will not be implemented until this requirement is met.

In addition to the consultation described above, the City will publish a notice announcing the proposed overall goal before submission to FTA on August 1st. The notice will be posted on the City's and Bis-Man Transit's official internet web site. If the proposed goal changes following review by FTA, the revised goal will be posted on the official internet web site.

The City will begin using the overall goal, which corresponds to the grant funding from the FTA, on October 1 of the relevant period, unless other instructions from FTA have been received.

Prior Operating Administration Concurrence

The City understands that prior FTA concurrence with the overall goal is not required. However, if FTA's review suggests that the overall goal has not been correctly calculated or that the method employed by Bis-Man Transit for calculating goals is inadequate, FTA may, after consulting with the City, adjust the overall goal or require that the goal be adjusted by Bis-Man Transit. The adjusted overall goal is binding.

A description of the methodology to calculate the overall goal and the goal calculations can be found in Attachment C to this program.

Section 26.47 Failure to Meet Overall Goals

The City cannot be penalized, or treated by DOT as being in noncompliance with Part 26, because DBE participation falls short of an overall goal, unless the City and Bis-Man Transit fail to administer its DBE program in good faith.

The City understands that to be considered to be in compliance with Part 26, an approved DBE Program and overall DBE goal, if applicable, must be maintained, and this DBE Program must be administered in good faith.

The City understands that if the awards and commitments shown on the Uniform Report of Awards or Commitments and Payments at the end of any fiscal year are less than the overall goal applicable to that fiscal year, the following actions must be taken in order to be regarded by DOT as implementing this DBE Program in good faith:

1. Analyze in detail the reasons for the difference between the overall goal and the awards and commitments in that fiscal year;
2. Establish specific steps and milestones to correct the problems identified in the analysis to enable the goal for the new fiscal year to be fully met;
3. Bis-Man Transit will prepare, within 90 days of the end of the fiscal year, the analysis and corrective actions developed under paragraph (c)(1) and (2) of 49 CFR §26.47. The City and Bis-Man Transit will retain copy of analysis and corrective actions in records for a minimum of three years, and will make it available to FTA upon request.

Section 26.49 Awards to Transit Vehicle Manufacturers (TVMs)

Awards to transit vehicle manufacturers (TVMs) will not be included in the City's overall goal calculation.

The City will require TVMs, as a condition of being authorized to bid or propose on any FTA-assisted transit vehicle procurements, to certify that they have complied with the requirements of §26.49.

1. The City affirms that only those TVMs listed on FTA's certified list of Transit Vehicle Manufacturers, or that have submitted a goal methodology to FTA that has been approved or has not been disapproved, at the time of solicitation are eligible to bid.
2. A TVM's failure to implement the DBE Program in the manner as prescribed in 49 CFR §26.49 and throughout Part 26 will be deemed as noncompliance, which will result in removal from FTA's certified TVMs list, resulting in that TVM becoming ineligible to bid.
3. The City is aware that failure to comply with the requirements set forth in 49 CFR §26.49(a) may result in formal enforcement action or appropriate sanction as determined by FTA (e.g., FTA declining to participate in the vehicle procurement).

4. Bis-Man Transit will submit to NDDOT, within 30 days of making an award, the name of the successful bidder and the total dollar value of the contract in the manner prescribed in the grant agreement.

The City may, with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of complying through the procedures of 49 CFR §26.49.

Section 26.51 Means Used to Meet Overall Goals

Breakout of Estimated Race-Neutral & Race-Conscious Participation

Bis-Man Transit on behalf of the City, will meet the maximum feasible portion of its overall goal by using race-neutral means of facilitating race-neutral DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures or is awarded a subcontract on a prime contract that does not carry a DBE contract goal.

Race-neutral means include, but are not limited to, the following:

1. Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses, by means such as those provided under §26.39.
2. Providing technical assistance and other services; such as directing certified or potential DBE's to NDDOT for additional assistance and questions
3. Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; provision of information in languages other than English, where appropriate);
4. Ensuring distribution of the DBE directory, via the Bis-Man Transit website, to the widest feasible universe of potential prime contractors; and

The breakout of estimated race-neutral and race-conscious participation can be found in Attachment C to this program.

Contract Goals

Contract goals are currently the only race conscious effort for the City and Bis-Man Transit. Bis-Man Transit will arrange solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by

DBEs and other small businesses and by making contracts more accessible to small businesses, by means such as those provided under §26.39.

If the approved projection under §26.51(c) estimates that the entire overall goal for a given annual period can be met through race-neutral means, contract goals will not be set during that year, unless the use of contract goals becomes necessary in order to meet the overall goal.

Contract goals will be established only on those DOT-assisted contracts that have subcontracting possibilities. A contract goal need not be established on every such contract, and the size of contract goals will be adapted to the circumstances of each such contract (e.g., type and location of work, availability of DBEs to perform the particular type of work).

Contract goals, if used, will be expressed as a percentage of the total amount of a DOT-assisted contract.

Section 26.53 Good Faith Efforts Procedures in Situations where there are Contract Goals

Demonstration of Good Faith Efforts (Pre-award)

The obligation of the bidder/offeror is to make good faith efforts. The bidder/offeror can demonstrate that it has made good faith efforts by either meeting the contract goal or documenting that it has made adequate good faith efforts to do so. Examples of good faith efforts are found in Appendix A to Part 26.

Bis-Man Transit is responsible for determining whether a bidder/offeror who has not met the contract goal has documented sufficient good faith efforts to be regarded as Responsive.

Bis-Man Transit will ensure that all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before committing to the performance of the contract by the bidder/offeror.

In all solicitations for DOT-assisted contracts for which a contract goal has been established, the following information will be required of every bidder/offeror:

Bis-Man Transit treats bidder/offerors compliance with good faith efforts' requirements as a matter of responsiveness.

Each solicitation for which a contract goal has been established will require the bidders/offerors to submit the following information:

1. Award of the contract will be conditioned on meeting the requirements of 49 CFR §26.53;
2. All bidders or offerors will be required to submit the following information to Bis-Man Transit, at the time provided in paragraph (3) of this section:
 - i. The names and addresses of DBE firms that will participate in the contract;
 - ii. A description of the work that each DBE will perform;
 - iii. The dollar amount of the participation of each DBE firm participating;
 - iv. Written and signed documentation of the commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;
 - v. Written and signed confirmation from each listed DBE firm that it is participating in the contract as provided in the prime contractor's commitment; and
 - vi. If the contract goal is not met, evidence of good faith efforts (as elaborated in Appendix A of Part 26). The documentation of good faith efforts must include copies of each DBE and non-DBE subcontractor quote submitted to the bidder when a non-DBE subcontractor was selected over a DBE for work on the contract.
3. The bidder/offeror will be required to present the information stipulated in paragraph two (2) of this section:
 - i. No later than 5 days after bid opening as a matter of **responsibility**.
 - ii. Provided that, in a negotiated procurement, including a design-build procurement, the bidder/offeror may make a contractually binding commitment to meet the goal at the time of bid submission or the presentation of initial proposals but provide the information required by paragraph two (2) of this section before the final selection for the contract is made by the recipient.

Administrative Reconsideration

Within seven (7) working days of being informed by Bis-Man Transit on behalf of the City that it is not responsive because it has not documented sufficient good faith efforts, a bidder/offeror may request administrative reconsideration. Bidder/offerors should make this request in writing to the following Reconsideration Official:

Bis-Man Transit Board President
3750 East Rosser Ave,
Bismarck, ND 58501
Telephone: 701.258.6817

The Reconsideration Official will not have played any role in the original determination that the bidder/offeror did not document sufficient good faith efforts.

As part of this reconsideration, the bidder/offeror will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The bidder/offeror will have the opportunity to meet in person or virtually with the Reconsideration Official to discuss the issue of whether the goal was met or the bidder/offeror made adequate good faith efforts to do. We will send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so. The result of the reconsideration process is not administratively appealable to the Department of Transportation.

The Board President may choose to bring the reconsideration before the full Bis-Man Transit Board or relevant committee for final approval.

Good Faith Efforts Procedural Requirements (Post-solicitation)

The City will require the awarded contractor to make good faith efforts to replace a DBE that is terminated or has otherwise failed to complete its work on a contract with another certified DBE, to the extent needed to meet the contract goal. We will require the prime contractor to notify the Bis-Man Transit Executive Director immediately of the DBE's inability or unwillingness to perform and provide reasonable documentation. The Bis-Man Transit Executive Director will notify the DBELO of the contract change as soon as possible. In this situation, we will require the prime contractor to obtain our prior approval by the Bis-Man Transit Board of the substitute DBE and to provide copies of new or amended subcontracts, or documentation of good faith efforts.

We will provide such written consent only if we agree, for reasons stated in our concurrence document, that the prime contractor has good cause to terminate the DBE firm. For purposes of this paragraph, good cause includes the following circumstances:

- i. The listed DBE subcontractor fails or refuses to execute a written contract;
- ii. The listed DBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided however, that good cause does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor;
- iii. The listed DBE subcontractor fails or refuses to meet the prime contractor's reasonable, non-discriminatory bond requirements.

- iv. The listed DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;
- v. The listed DBE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant to 2 CFR Parts 180, 215 and 1,200 or applicable state law;
- vi. The City determined that the listed DBE subcontractor is not a responsible contractor;
- vii. The listed DBE subcontractor voluntarily withdraws from the project and provides the City written notice of its withdrawal;
- viii. The listed DBE is ineligible to receive DBE credit for the type of work required;
- ix. A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract;
- x. Other documented good cause that the City has determined compels the termination of the DBE subcontractor. Provided, that good cause does not exist if the prime contractor seeks to terminate a DBE it relied upon to obtain the contract so that the prime contractor can self-perform the work for which the DBE contractor was engaged or so that the prime contractor can substitute another DBE or non-DBE contractor after contract award.

Before transmitting to Bis-Man Transit a request to terminate and/or substitute a DBE subcontractor, the prime contractor must give notice in writing to the DBE subcontractor, with a copy to Bis-Man Transit, of its intent to request to terminate and/or substitute the DBE, and the reason(s) for the request.

The prime contractor must allow the DBE five days to respond to the prime contractor's notice and advise the City and the prime contractor of the reasons, if any, why the DBE objects to the proposed termination of its subcontract and why the prime contractor's action should not be approved. If required in a particular case as a matter of public necessity (e.g., safety), a response period shorter than five days may be provided.

In addition to post-award terminations, the provisions of this section apply to pre-award deletions of or substitutions for DBE firms put forward by offerors in negotiated procurements.

Bis-Man Transit will require a contractor to make good faith efforts to replace a DBE that is terminated or has otherwise failed to complete its work on a contract with another certified DBE. These good faith efforts must 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 that was established for the procurement. The good faith efforts must be documented by the contractor.

If Bis-Man Transit requests documentation from the contractor under this provision, the contractor must submit the documentation within 7 days, unless the contractor requests an extension, which may be granted for no more than an additional 7 days if necessary. Bis-Man Transit will provide a written determination to the contractor stating whether or not good faith efforts have been demonstrated.

If the contractor fails or refuses to comply in the time specified, Bis-Man Transit may issue an order stopping all or part of payment/work until satisfactory action has been taken. If the contractor still fails to comply, the contracting officer may issue a termination for default proceeding.

Sample Bid Specification

Each prime contract will include a provision such as the one below:

The requirements of 49 CFR Part 26, Regulations of the U.S. Department of Transportation, apply to this contract. It is the policy of the Bis-Man Transit to practice nondiscrimination based on race, color, sex, or national origin in the award or performance of this contract. All firms qualifying under this solicitation are encouraged to submit bids/proposals. Award of this contract, will be conditioned upon satisfying the requirements of this bid specification. These requirements apply to all bidders/offerors, including those who qualify as a DBE. A DBE contract goal of percent [as determined in the goal calculation Attachment C] has been established for this contract.

The bidder/offeror shall make good faith efforts, as defined in Appendix A, 49 CFR Part 26 (Attachment 1), to meet the contract goal for DBE participation in the performance of this contract. The bidder/offeror will be required to submit the following information: (1) the names and addresses of DBE firms that will participate in the contract; (2) a description of the work that each DBE firm will perform; (3) the dollar amount of the participation of each DBE firm participating; (4) Written documentation of the bidder/offeror commitment to use a DBE subcontractor whose participation it submits to meet the contract goal; (5) Written confirmation from the DBE that it is participating in the contract as provided in the commitment made under (4); and (6) if the contract goal is not met, evidence of good faith efforts.

[Note: The provisions of the foregoing section apply only when a contract goal is established.]

Section 26.55 Counting DBE Participation

DBE participation will be counted toward overall and contract goals as provided in §26.55. The participation of a DBE subcontractor will not be counted toward a contractor's final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE.

In the case of post-award substitutions or additions, if a firm is not currently certified as a DBE in accordance with the standards of Subpart D of Part 26 at the time of the execution of the contract, the firm's participation will not be counted toward any DBE goals, except as provided for in §26.87(j).

SUBPART D – CERTIFICATION STANDARDS

Sections 26.61 – 26.73 Certification Process

The City and Bis-Man Transit will utilize the DBE firms listed in the North Dakota Department of Transportation statewide DBE Directory and will not certify DBE firms directly.

Certification Application form is available to view and download through NDDOT at <http://dotnd.diversitycompliance.com>.

For information about the certification process or to apply for certification, firms should contact:

North Dakota Department of Transportation Civil Rights Office
Phone: 701.328.3116
civilrights@nd.gov

The Uniform Certification Application form and documentation requirements are found at <https://www.dot.nd.gov/divisions/civilrights/dbeprogram.htm>.

[The Uniform Certification Form contained in the Final Rule, 49 CFR Part 26, can be found in Attachment D; see §26.83(c)(2).]

SUBPART E – CERTIFICATION PROCEDURES

Section 26.81 Unified Certification Programs

The City is a non-certifying member of the North Dakota Unified Certification Program (UCP). The UCP maintains a directory identifying all firms eligible to participate as DBEs, which contains all the elements required by §26.31. *A copy of the signed agreement between the City and NDDOT* can be found in Attachment B.

SUBPART F – COMPLIANCE AND ENFORCEMENT

Section 26.101 Compliance Procedures Applicable to the City and Bis-Man Transit

The City of Bismarck has a path through relationship with Bis-Man Transit. Funds received from the Federal Transit Administration are contracted out to Bis-Man Transit. The City passes on the responsibility of the DBE Goal to Bis-Man Transit and monitors accordingly. The DBE Program Plan is based on the operations performed by Bis-Man Transit and overseen by the City.

Monitoring and oversight activities include quarterly procurement compliance monitoring, annual facility inspection, annual vehicle and warranty review. An annual review of Bis-Man Transit Title VI, ADA, and DBE compliance and an annual review of the City's Title VI, ADA, and DBE compliance will be performed and documented accordingly.

The City understands that if it fails to comply with any requirement of Part 26, The City may be subject to formal enforcement action under §26.103 or §26.105 or appropriate program sanctions by the concerned operating administration, such as the suspension or termination of Federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied. Program sanctions may include, in the case of the FTA program, any actions permitted under 49 U.S.C. chapter 53 or applicable FTA program requirements.

Section 26.109 Information, Confidentiality, Cooperation, and Intimidation or Retaliation

Information that may reasonably be regarded as confidential business information, consistent with Federal, state, and local law will be safeguarded from disclosure to third parties.

Notwithstanding any provision of Federal or state law, information that may reasonably be construed as confidential business information will not be released to any third party without the written consent of the firm that submitted the information, including applications for DBE certification and supporting information. However, this information will be transmitted to DOT in any certification appeal proceeding under §26.89 or to any other state to which the individual's firm has applied for certification under §26.85.

All participants in DOT'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).

The City, contractor, or any other participant in the program will not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by Part 26 or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Part 26. The City understands that it is in noncompliance with Part 26 if it violates this prohibition.

Notwithstanding any contrary provisions of Federal, State or Local law, we will not release personal financial information submitted in response to the personal net worth requirement to a third, other than DOT, without the written consent of the firm that submitted the information.

1) Monitoring Payments to DBEs

The City will require prime contractors to maintain records and documents of payments to DBEs for three years following the performance of the contract. These records will be made available for inspection upon request by any authorized representative of the City or DOT. This reporting requirement also extends to any certified DBE subcontractor. We will perform interim audits of contract payments to DBEs. The audit will review payments to DBE subcontractors to ensure that the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts stated in the schedule of DBE participation.

ATTACHMENTS
(intentionally blank)