APPENDIX A
Senate Resolution No. 102

STATE OF ILLINOIS
NINETY-FOURTH GENERAL ASSEMBLY
SENATE

Senate Resolution No. 102

Offered by Senators del Valle and Hendon

WHEREAS, It is the public policy of the State to promote and encourage the continuing economic development of minority- and female-owned and -operated businesses and that minority- and female-owned and -operated businesses participate in the State's procurement process as both prime contractors and subcontractors; and

WHEREAS, It is mandated by the U.S. Department of Transportation, 49 CFR Pt. 26, to ensure nondiscrimination in the award and administration of Illinois Department of Transportation (IDOT)-assisted contracts in IDOT's highway, transit, and airport financial assistance programs by ensuring that only firms owned and controlled by socially and economically disadvantaged individuals are permitted to participate as DBEs; and

WHEREAS, It is the public policy of this State to promote and encourage the continuous economic development of businesses owned by persons with disabilities; and

WHEREAS, It is mandated by the U.S. Department of Transportation to help create a level playing field for firms owned and controlled by socially and economically disadvantaged individuals in IDOT-assisted contracts; and

WHEREAS, The enactment of the Business Enterprise for Minorities, Females, and Persons with Disabilities Act (the Act) serves the State's continuing interest in promoting open access in the awarding of State contracts to disadvantaged small business enterprises victimized by discriminatory practices; and

WHEREAS, It is mandated by the U.S. Department of Transportation to help remove barriers to firms owned and

controlled by socially and economically disadvantaged individuals in IDOT-assisted contracts; and

WHEREAS, The Act establishes goals for awarding State contracts to businesses owned and controlled by minorities, females, and persons with disabilities; and

WHEREAS, It is mandated by the U.S. Department of Transportation that recipients must set an overall goal for DBE participation in IDOT-assisted contracts; and

WHEREAS, The State of Illinois has observed that the goals established in the Act have served to increase the participation of minority and female businesses in contracts awarded by the State; and

WHEREAS, It is mandated by the U.S. Department of Transportation that the overall goal must be based on demonstrable evidence of the availability of ready, willing, and able DBEs; and

WHEREAS, The Act creates the Business Enterprise Council (the Council) to help implement, monitor, and enforce the Act's goals through the State's Business Enterprise Program; and

WHEREAS, It is mandated by the U.S. Department of Transportation that IDOT must have a DBE Liaison Officer who shall be responsible for implementing all aspects of the DBE program; and

WHEREAS, The Business Enterprise Council is charged by statute with devising a certification procedure to assure that businesses taking advantage of the Act are legitimately classified as businesses owned and controlled by minorities, females, or persons with disabilities; and

WHEREAS, The U.S. Department of Transportation requires a certification procedure to ensure that only firms meeting the minimum eligibility requirements are eligible to be certified as DBEs; and

WHEREAS, The Business Enterprise Council is assisted in administering the Business Enterprise Program by a Secretary and the Department of Central Management Services; and

WHEREAS, IDOT implements the requirements of the Federal DBE program through the Illinois Unified Certification Program (ILUCP); and

WHEREAS, Recent media attention has identified businesses circumventing similar programs in Illinois municipalities by using straw men or women (known as front corporations and pass throughs) for the purpose of receiving contracts reserved for businesses certified as minority, female, or disabled owned and controlled; therefore, be it

RESOLVED, BY THE SENATE OF THE NINETY-FOURTH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, that the Auditor General shall conduct a management audit of the State's Business Enterprise Program and the Illinois Department of Transportation's certification of businesses as DBEs through the ILUCP; and be it further

RESOLVED, That the audit include, but not be limited to, the following determinations:

(1) Whether certification and recertification procedures are adequate to assure that businesses participating in the Business Enterprise Program and businesses certified by IDOT in the ILUCP are legitimately classified as businesses owned and controlled by minorities, females, or persons with disabilities;

(2) Whether the established procedures and processes that govern certification of businesses owned and controlled by minorities, females, or persons with disabilities are being followed;

(3) Whether staff responsible for certification of these businesses have received adequate training;

(4) What steps are followed to verify information provided by businesses participating in the Business Enterprise Program and businesses certified by IDOT in the ILUCP, such as review of pertinent documentation, interviews, and on-site visits;

(5) Whether the certifications are periodically reviewed to ensure that businesses in the programs continue to be qualified for participation; and

(6) Whether procedures for enforcing compliance with the Act and federal regulations, including contract termination and contractor suspension, are adequate and uniformly enforced; and be it further

RESOLVED, That the Business Enterprise Council, the Department of Central Management Services, the Illinois Department of Transportation, businesses participating in the State's Business Enterprise Program and IDOT's ILUCP, and any other entity that may have relevant information pertaining to this audit cooperate fully and promptly with the Auditor General's Office in the conduct of this audit; and be it further

RESOLVED, That the Auditor General commence this audit as soon as possible and report his findings and recommendations upon completion in accordance with Section 3-14 of the Illinois State Auditing Act; and be it further

RESOLVED, That a copy of this resolution be transmitted to the Auditor General.

Adopted by the Senate, April 21, 2005.

President of the Senate

Secretary of the Senate

APPENDIX B
Audit Methodology

Appendix B

AUDIT METHODOLOGY

This audit was conducted in accordance with generally accepted government auditing standards and with the audit standards promulgated by the Office of the Auditor General at 74 Ill. Adm. Code 420.310. The audit's objectives are contained in Senate Resolution 102 (see Appendix A), which asks that the Auditor General conduct a management audit of the State's Business Enterprise Program and the Illinois Department of Transportation's certification of businesses as DBEs through the IL UCP. The following is an overview of the methodology used in the audit.

We reviewed applicable statutes and policies and procedures at CMS and IDOT. We also assessed management controls related to the audit's objectives and conducted a risk assessment to identify areas that needed closer examination. Any significant weaknesses in those controls are included in this report.

We met with officials from the Central Management Services (CMS), the Illinois Department of Transportation (IDOT), and the Federal Highway Administration (FHWA). We also examined personnel files for individuals with each program that are involved with certification. We reviewed the files to determine if staff responsible for program certification has received adequate training, as is required by the Resolution.

File Sampling

We selected 50 certification files to review at both IDOT and CMS in order to assess whether the certification and recertification procedures were being followed, whether required documentation is being collected, whether there is evidence that information is being verified, and whether there have been any enforcement actions taken against the firms. The 50 vendor files were judgmentally selected by blocking certain characteristics in order to isolate populations and risks. By dividing the population into blocks we attempt to control for several factors including: whether the vendor is actively contracting with the State and the amount of activity (dollars and contracts), the type of certification the vendor received (Minority, Female, or Persons With Disabilities), and the type of work the vendor is involved in (e.g., trucking).

CMS's BEP Certification File Sampling Methodology

We selected 50 BEP files for vendors awarded prime contract dollars for the period July 1, 2004 through January 31, 2006. CMS was only able to provide information regarding prime contract dollars paid by State agencies to a BEP certified vendor. CMS was unable to provide the dollar amount received by BEP vendors acting in a subcontractor capacity.

Ten of the 50 files we sampled were vendors that received contract dollars from State agencies that were certified by two private associations in the State. CMS accepts certifications from private associations in which the vendors pay a fee to become certified. These vendors accounted for over $58 million, or 33.6 percent, of total prime contractor dollars for the period

we reviewed. Testing for these cases was effected by the fact that CMS maintains a limited file for each of these vendors.

We did not sample not-for-profits or workshops for the disabled (State Use Program) because these vendors are not certified using process as other BEP vendors. These vendors are certified through the State Use Program (30 ILCS 500 sec. 45-35).

IDOT's DBE Certification File Sampling Methodology

We selected 50 IDOT certified DBE vendors awarded IDOT prime and subcontractor contract dollars during the period of July 1, 2004 through January 31, 2006. We did not sample vendors certified by other IL UCP members due to the fact that the files of DBEs certified by other IL UCP members are located at the offices of the other certifying members (not at IDOT). These vendors account for approximately 10 percent of IDOT DBE contract dollars.

Other States Comparisons

We surveyed other states to review their program requirements and results. We contacted states that were contiguous to Illinois. States contacted included Missouri, Iowa, Wisconsin, Indiana, and Kentucky.

APPENDIX C

IDOT's Bureau of Accounting and Auditing Audit of the Bureau of Small Business Enterprises' DBE Certification Program Recommendations and Status

SUMMARY OF IDOT's BUREAU OF ACCOUNTING AND AUDITING AUDIT OF THE BUREAU OF SMALL BUSINESS ENTERPRISES' DBE CERTIFICATION PROGRAM RECOMMENDATIONS, RESPONSES, AND STATUS			
RECOMMENDATION		**IDOT SMALL BUSINESS ENTERPRISES' RESPONSE**	**Status (as of March 2006)**
1	The certification analysts should be provided with adequate training.	**Agreed**. Have had training through the FHWA in the past and are working on expanding training modules to include investigative and financial review	According to IDOT officials, DBE certification staff have received training from the FHWA. However, IDOT could not provide documentation of training such as sign-in sheets. In addition, we did not find evidence of training in the personnel files.
2	The Bureau of Small Business Enterprises must implement a system of quality assurance and control that assures documentation of proper supervisory review.	**Agreed**. Their current procedures include supervisory review but they will re-evaluate their processes to ensure compliance.	The Bureau is still using the same process. The supervisory review process has not changed with the exception of an audit comment sheet.
3	The Bureau should develop work papers that clearly document that the analysis was performed to the standards set forth in the regulations.	**Agreed**. They will develop appropriate worksheets in order to provide proper documentation that a thorough, detailed, and complete review was conducted.	An audit comments page has been developed, however, no new worksheets have been developed.
4	Incorporate a Procedures Program into the certification process that includes a checklist of tasks for the analyst to complete.	**Disagreed**. No such finding in the FHWA review. They will consider using DBE Certification Procedures Review forms.	N/A, Disagreed.
5	Certification documentation should be separated and indexed by type and category. No Change Affidavit information should be separated by year.	**Agreed**. They will develop policies and procedures to address the concerns about file maintenance issues.	An ex-IDOT employee that was with the Bureau prior to the July 1, 2004 reorganization was rehired. She is working to update the policies and procedures. In February 2006, Bureau of Small Business Enterprise officials provided us with certification procedures dated 2003 on the cover page. However, it is not clear whether these procedures were finalized or adopted.
6	The Bureau should develop up to date policies and procedures in order to comply with IL UCP and federal guidelines.	**Agreed**. They will compile all IL UCP and CFRs documentation and incorporate it into the current SBE Policy/Procedure Manual.	See #5 above for status.

7	The Bureau should perform new certifications on all DBE firms certified by IDOT in order to ensure the integrity of the DBE certification process.	**Disagreed**. The integrity of the certification process has been thoroughly maintained. It would prove to be inefficient and cumbersome to the SBE process to initiate an across the board certification process for all firms and would place an undue hardship and burden on the DBE firms within our program.	N/A, Disagreed.
8	The Bureau should obtain the critical information that is missing from the files.	**Agreed**. The Bureau's immediate attention will go toward securing the required documents.	We found that files are still missing critical information.
9	The Bureau should incorporate a list of certification programs and worksheets into the certification process.	**Agreed**. They will consider implementing documents into the certification process.	An audit comments page has been developed, however, no new worksheets have been developed. According to IDOT, IL UCP participant agencies reviewed the new programs and worksheets and concluded the forms were not necessary.
Source: IDOT August 2005 Bureau of Accounting and Auditing, Audit of DBE Certification Program and OAG follow-up.			

APPENDIX D

Department of Central Management Services' Response

CMS
ILLINOIS Rod R. Blagojevich, Governor
DEPARTMENT OF CENTRAL MANAGEMENT SERVICES
Paul J. Campbell, Director

MEMORANDUM

TO: Mike Paoni

FROM: Shelly Martin

DATE: June 21, 2006

SUBJECT: BEP Responses to Management Audit of Department of Central Management Services' Business Enterprise Program

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Please find enclosed the Department's responses to the Management Audit of Department of Central Management Services' Business Enterprise Program pursuant to Senate Resolution Number 102.

Please feel free to contact me or Natalie Pedraza if you have any questions or wish to discuss our responses. Thank you in advance for your continued assistance.

405 Stratton Office Building, 401 South Spring Street, Springfield, IL 62706

BEP Audit Recommendations

Recommendation #1
The Department of Central Management Services should ensure that the Business Enterprise Council has adequate membership and that meetings are held on a regular basis.

The Department agrees with the recommendation. The Department has been working diligently to complete the membership of the Business Enterprise Council. The Governor's Office has issued the invite letters to the Council members and appointments are imminent. The Department plans to hold a Business Enterprise Council meeting in July and on a regular basis thereafter.

Recommendation #2
CMS should develop and adopt a policies and procedures manual for the Business Enterprise Program including specific certification procedures.

The Department agrees with the recommendation and has developed a policies and procedures manual, which includes codified BEP certification procedures.

Recommendation #3
CMS should establish minimum training requirements for certification staff and ensure that the required training is received. CMS should also track the training received by certification staff.

The Department agrees with the recommendation. The Department has established minimum training requirements, which include providing formal training for BEP staff. As part of these requirements, BEP staff will be attending certification training workshops held by the Chicago Minority Business Development Center and the American Contract Compliance Association.

Recommendation #4
CMS should develop written agreements with those entities that it accepts certifications from to ensure that those entities' requirements and procedures equal or exceed those in the Act and to ensure that vendors are eligible. Agreements should include requirements, procedures, and notifications of certification or denial or changes in requirements. The Business Enterprise Council should also approve all agreements.

The Department agrees with the recommendation and is currently reviewing our arrangement with the entities from which we accept reciprocity, such as CMBDC, Women's Business Development Center, and Illinois Department of Transportation. Once this review is completed, written agreements will be developed.

Recommendation #5
CMS should make the list of BEP certified forms available on its website.

The Department agrees with the recommendation. The current rules require that BEP charges a fee to provide written lists. The Department has filed rules with the Joint Committee on Administrative Rules to change the requirement to enable us to waive the fee and also to provide the list on our website.

Recommendation #6
The Department of Central Management Services should consider conducting site visits of all applicants.

The Department agrees with the recommendation to conduct site visits. The Department currently conducts site visits when determined necessary. The BEP policies and procedures manual will provide guidelines regarding site visits.

Recommendation #7
The Department of Central Management Services should ensure that all applicants for certification or recertification are processed within the required 60 days.

The Department agrees with the recommendation. The Department has implemented procedures and holds weekly update meetings to determine the status of each pending certification file.

Recommendation #8
The Department of Central Management Services should ensure that they receive all required documentation prior to certifying or recertifying vendors.

The Department agrees with the recommendation. In August 2005 the Department implemented a checklist to ensure that all required documents for certification and recertification are received and included in the certification file.

Recommendation #9
The Department of Central Management Services should consider requiring vendors to submit a no change affidavit in years when they are not going through the certification process.

The Department agrees with the recommendation. The Department has submitted rule changes to the Joint Committee on Administrative Rules to remove the current 2-year recertification process, and replace it with a requirement that vendors file an annual no change affidavit and to institute a procedure under which all BEP-certified firms would be required to complete the entire certification process every three years.

Recommendation #10
The Department of Central Management Services should ensure that all worksheets and checklists are adequately completed. Furthermore CMS should ensure that the supervisory review is documented.

The Department agrees with the recommendation. The Department has provided training and counseling to BEP staff to ensure that every certification worksheet and checklist are adequately completed, reviewed by the analyst and approved by the manager. This requirement will be incorporated into the BEP policies and procedures manual.

Recommendation #11

The Department of Central Management Services should consider establishing a central and easily accessible location for all certification files and institute a file tracking system.

The Department agrees with the recommendation and has set up both a file-tracking system for current records (up to 3 years) and an archiving system for older files. The Department has submitted a change to the Records Commission to update the records retention policy.

Recommendation #12

The Department of Central Management Services should:

- *Require all applicants to disclose all companies in which an eligible group member(s) owns more than 5 percent interest; and*
- *Prepare a written summary of information for each certification, including any concerns regarding ownership, control, or eligibility issues in order to show the basis for the certification decision.*

The Department agrees with the recommendation and has taken steps to improve the certification process.

- Since June 2006, we require tax records and a written affidavit from applicants regarding ownership interest in any other companies.
- Since May 2006, we record on the status sheet a detailed description from the analyst and approved by the manager, which provides rationale for the basis of the certification decision.

Recommendation #13

The Department of Central Management Services should track vendors to determine whether recertification documents are submitted in a timely manner and use the enforcement actions that are available to them to decertify any vendors that do not submit for recertification in a timely manner.

CMS should also monitor vendors that have been debarred by other entities and determine whether these vendors are still eligible to participate in the State's Business Enterprise Program.

The Department agrees with the recommendation. The Department decertifies vendors in the system when recertification documentation is not submitted timely; these vendors are listed on a decertified vendor list. The Department also monitors vendors debarred by other entities through email notification from the entities debarring the vendor. When the Department receives the notification, appropriate action is taken which can include

decertification if warranted. The Department will document these procedures in the BEP policies and procedures manual.

Recommendation #14
The Department of Central Management Services should track and investigate complaints file against BEP vendors.

The Department agrees with the recommendation. The Department has established a formal process to track complaints and will maintain a written log of related investigations and resolution of complaints. The Department will also incorporate this recommendation into the BEP policies and procedures manual and train staff appropriately.

Recommendation #15
The Department of Central Management Services should monitor contracts for compliance with required goals and to determine whether BEP firms are performing the work. CMS should also track dollars BEP vendors receive as subcontractors.

The Department agrees with the recommendation. In November 2005, CMS began requiring that prime vendors on certain contracts subcontract with BEP-certified businesses. Subsequently the Department has implemented a procedure under which the Department requires that prime contractors regularly report their spending with BEP subcontractors. The Department then verifies that information directly with the subcontractor.

APPENDIX E
Illinois Department of Transportation's Response

Note: This Appendix contains the complete written responses of the Illinois Department of Transportation. The Appendix contains Auditor Comments to portions of the Department's response. When Auditor Comments are included, the Department's responses appear on the left-hand pages and the Auditor Comments appear on the right-hand pages.

Illinois Department of Transportation

Office of the Secretary
2300 South Dirksen Parkway / Springfield, Illinois / 62764
Telephone 217/782-5597

June 16, 2006

MEMORANDUM TO WILLIAM G. HOLLAND, AUDITOR GENERAL
STATE OF ILLINOIS

SUBJECT: The Illinois Department of Transportation's Responses to the Management Audit Report on the Department of Transportation's Disadvantaged Business Enterprise Program

On April 21, 2005, the Illinois Senate adopted Senate Resolution Number 102 directing the Office of the Auditor General (OAG) to conduct a management audit of the Department of Central Management Services' (CMS) Business Enterprise Program and the Illinois Department of Transportation's (IDOT) certification of businesses as Disadvantaged Business Enterprises (DBEs) through the Illinois Unified Certification Program (IL UCP).

This audit report serves as a positive illustration of the proactive efforts our Department has taken to promote accountability and compliance with federal DBE regulations not only by IDOT but by other members of the IL UCP. As your audit team is aware, at least three of the six findings noted by the OAG were originally cited in IDOT's own audit of its DBE certification program performed by IDOT staff.

On January 6, 2005, four months prior to the adoption of the Senate Resolution to audit IDOT's DBE certification program and six months prior to the OAG beginning their audit of the IDOT DBE certification program, I met with our Chief of Audits and directed him to perform a management audit of both the city of Chicago's and IDOT's DBE certification programs. As part of IDOT's monitoring responsibilities with the Federal Highway Administration, we are required to monitor the city of Chicago's DBE certification program. In order to ensure compliance and accountability by the city of Chicago, as well as IDOT, the same tough audit standards were applied to both reviews.

Our Audit Section began their management audit of IDOT's DBE certification program on March 15, 2005, and substantially completed the audit and developed the findings prior to the adoption of Senate Resolution 102. Since the August 2005 issuance of our audit report on our DBE certification program, IDOT has been working to implement the recommendations noted in the report.

In order to promote accountability, transparency in government and greater compliance with federal DBE regulations by all members of the IL UCP, the

No Auditor Comments have been included for this page.

Department has shared the findings from its own management audit of our DBE program with the members of the IL UCP. Department staff has been coordinating our corrective action plans for those recommendations with the IL UCP as a means to develop best practices and uniformity in the operations of the DBE certification program by all members of the IL UCP.

We agree in principle with the recommendations provided in your report. In fact, many of the protocols and systems which have been developed or are in development as a result of our own internal management review of our DBE certification program have addressed, are addressing or will address the issues noted in the recommendations made in your report. We have included our anticipated implementation schedule for each finding.

We appreciate the understanding that your audit team has developed regarding the Northern Contracting case that Federal Judge Pallmeyer issued an opinion on September 8, 2005, upholding the IDOT DBE Program in its entirety (attached as Exhibit A). In addition, prior to the trial, IDOT had revised its goals upward, and this process and its results were also made aware to the court at that time and were upheld. In discussions with the audit team, there were concerns that the FHWA had questioned IDOT's process for goal setting. It should be noted that upon review of the documentation, no changes were made to the individual projects, and there was no delay in the procurement process. The FHWA approved the new IDOT methodology in a letter dated June 10, 2005 (attached as Exhibit B).

Compliance and accountability is a critical priority at IDOT. We recognize the challenges involved in promoting and growing the DBE program and expanding opportunities for participation by DBE firms in state and federally-sponsored projects. We welcome your input and recommendations as we move forward to continually improve our DBE certification program.

Attached for your use are this Department's responses to the recommendations relating to IDOT's DBE program which were included in your Office's management audit report on CMS' Business Enterprise Program and IDOT's DBE program. We have also included additional commentary concerning statements presented in the report concerning our DBE certification program, as well as proof of IDOT's suspension of certifications of firms where questions have been raised.

If you have any questions regarding these responses, please contact me.

Timothy W. Martin
Secretary

Attachments

#1

Auditor Comment 1: Auditors gained an understanding of the Northern Contracting case as part of the historic context of the DBE program in Illinois. The auditors **did not** question the DBE program, its goals, or methodology. Discussions with IDOT officials focused on the FHWA's approval of the goal setting methodology and the FHWA's concerns regarding IDOT's August 2005 letting.

Illinois Department of Transportation's Responses to the Office of the Auditor General's Management Audit Report on the Department of Transportation's Disadvantaged Business Enterprise (DBE) Program.

Note: Recommendations relating to IDOT's DBE certification program are included on Recommendations 16 through 21. Following our responses to the recommendations is additional commentary concerning statements and issues presented in the report.

Recommendation Number 16:

IDOT should formally adopt an up to date policies and procedures manual for DBE certifications and distribute it to all DBE staff.

Response:

The Department agrees with this recommendation. This finding was originally developed and cited by IDOT auditors in our management audit of the Department's DBE certification program.

With respect to our current Policy and Procedure Manual, the Department's Bureau of Small Business Enterprises' (SBE) Certification Section and Compliance Section had received and implemented the sections of the 2003 Policy & Procedures Manual pertinent to their respective functions. Although the complete Manual had not been formally adopted, all policies and procedures were current with exception to inclusion of the IL UCP certification procedures.

With USDOT's December 2002 approval of the IL UCP procedures, these became the operating authority for the certification procedures. The IL UCP procedures were not implemented until the first day of operation under the IL UCP agreement, which began in September 1, 2003. The IL UCP certification procedures have been provided to the OAG.

Corrective Action:

The Department's SBE will merge and formally adopt the IL UCP certification procedures into its Policy and Procedures Manual and ensure that contract compliance policies and procedures are updated at least every two years at a minimum and as necessary. It should be noted that federal regulations do not specify a required time period with regard to the update of policy and procedure manuals.

Expected Date of Completion:

December 2006.

No Auditor Comments have been included for this page.

Recommendation Number 17:

IDOT should ensure that adequate training is provided to certification staff regarding certification requirements and procedures. IDOT should also document any training received by certification staff.

Response:

The Department agrees with this finding. This finding was originally developed and cited by IDOT auditors in our management audit of the Department's DBE certification program.

Corrective Action:

The Department has already scheduled training for DBE certification staff. Future training events will include a USDOT DBE certification training class to be conducted June 22, 2006, and an American Contract Compliance Association training initiative that will be held August 29, 2006, through September 3, 2006, in Chicago. The Department will continue to provide on-going, in-house training to all DBE certification staff relative to program and regulatory updates.

With all future training, IDOT will maintain a log that will track staff participation in all training sessions, i.e., sign-in sheets, agenda and material covered to document the training.

Expected Date of Completion:

Staff training programs will be implemented immediately and will be on-going for all DBE certification staff.

No Auditor Comments have been included for this page.

Recommendation Number 18:

IDOT should take the steps necessary to complete certifications within required timeframes. Furthermore, controls should be implemented so that officials can effectively monitor the timeliness of certifications and the certifications analysis assigned.

Response:

The Department agrees with the recommendation.

Corrective Action:

The Department will work with its Bureau of Information Processing to institute tighter management controls by updating and revising the current computer tracking system to alert DBE certification analysts and managers of needed follow-ups, documentation and action deadlines for pending files.

Expected Date of Completion:

December 2006

Additional IDOT and IL UCP Initiatives:

The Department has been working with the IL UCP to promote greater accountability and compliance through joint efforts to develop new technology which will promote certification timeliness by all members of the IL UCP. The IL UCP portal, when complete, will provide newer technology programming that will help to eliminate any timeliness issues, i.e., the system will automatically generate correspondence based on tickler dates such as certification anniversary dates, No Change Affidavits, renewals, etc.

The IL UCP portal is a database that will be a shared information site for the IL UCP participant agencies. IDOT's Bureau of Information Processing is working closely with each of the participant agencies' Information Technology staff in the technical requirements phase to develop a Request for Proposal (RFP) to select a consultant to modify and enhance IDOT's current database. Each IL UCP participant, as well as the Regional Transit Administration, has committed $50,000 for the RFP.

Expected Date of Completion: December 2007

No Auditor Comments have been included for this page.

Recommendation Number 19:

IDOT should ensure that complete and current documentation is obtained from applicants during the certification process and included in case files. IDOT should also consider revisions to its record keeping process in order to make files more manageable.

Response:

The Department agrees with this recommendation. This finding was originally developed and cited by IDOT auditors in our management audit of the Department's DBE certification program. The Department will continue to ensure that complete and current documentation is obtained from applicants during the certification process.

IDOT does not concur with the missing documentation findings which were commented on in the report. With regard to the missing documentation findings, cited examples include:

* **Only one form of proof of ethnicity.** As discussed in our initial response to OAG, the African American owner of a construction company was born in rural Mississippi over 50 years ago. Per a letter from the firm, they were awaiting a copy of the birth certificate. Although a birth certificate was never provided, the owner's ethnicity was documented with a photo and verified through the onsite interview. In addition, this individual is recognized by the community as an African American, and this is how he has held himself out. As in the case of the second example, the owner's ethnicity was verified during the onsite interview and supported by his father's birth certificate. It should be noted that the father was a previously certified DBE. In the third example, for proof of gender, the female owner of the construction company submitted a copy of her birth certificate which identified her as a Caucasian Female. Since women are presumed socially and economically disadvantaged, only one form of documentation of gender is requested rather than two forms. IDOT and the IL UCP participant agencies have determined that one form of documentation is sufficient to support an individual's claimed ethnicity/gender in most cases, and the practice is to request only one form rather than two, except when there are questions regarding ethnicity. The federal regulations that govern group membership determinations state that *in making such a determination, you must consider whether the person has held himself out to be a member of the group over a long period of time prior to application for certification and whether the person is regarded as a member of the group by the relevant community. You may require the applicant to produce appropriate documentation of group membership.*

* **Personal Net Worth (PNW) statements missing.** As discussed in our initial response to the OAG, IDOT did not require PNWs to be submitted with No Change Affidavits until late 2003 with the implementation of the IL UCP. As a rule, PNW statements are completed on an annual/fiscal basis. IDOT and the IL UCP accept a firm's most current PNW statement, as of the date of the filed No Change Affidavit. Note: The federal regulations governing No Change Affidavit submittals do not require PNWs or tax returns to be submitted on an annual basis with the Affidavit.

Auditor Comment 2: This finding **was not** developed by IDOT auditors. This finding was developed by OAG auditors upon their review of 50 IDOT DBE certification files.

Auditor Comment 3: While the Department does not concur with the OAG's missing documentation finding in this report, the Department **did** concur with a **similar** finding in IDOT's August 2005 audit of its DBE certification process. That audit similarly concluded that ". . . *certification files were absent critical information necessary for the certification process.*" The IDOT audit report then goes on to list the "missing Required Eligibility Decision Documentation" for 24 cases. Documentation cited as missing included items similar to those identified as missing by OAG auditors, such as tax returns, financial statements, and bank resolutions. IDOT agreed with the IDOT auditors' recommendation to improve certification file documentation noting that it "will focus its immediate attention on securing the required documents cited prior to performing any new certification renewals on the identified firms . . . ."

#2

#3

Auditor Comment 4: The exceptions developed by OAG auditors were based on testing compliance with policies and application documentation requirements established by IDOT. Regarding ethnicity, certification procedures state:

> *"Ethnicity should be resolved early. In cases where the ethnicity status cannot be determined, additional documentation is required. Copies of **two or more** documents evidencing ethnicity are necessary. . . ." (emphasis added)*

In one of the cases cited by IDOT, the only documentary evidence in the case file of the applicant's ethnicity was a picture of an individual standing by a truck, with his name typed below the picture. The auditors questioned whether the picture provided sufficient evidence (such as whether the person in the picture was actually the person making the application), and, therefore, concluded that pursuant to IDOT requirements, additional evidence should have been obtained.

#4

In another case, the only evidence of ethnicity was a birth certificate – not of the applicant, but of the applicant's father. No other documentation, such as a driver's license, baptismal certificate, etc. for the applicant was found in the file. Again, the auditors questioned whether this provided sufficient evidence (the applicant could be adopted, could be from a prior marriage, etc.) and concluded that pursuant to IDOT requirements, additional evidence should have been obtained.

The auditors do not dispute that on-site interviews, or site visits, are an effective certification tool. However, IDOT certification requirements specify that applicants are required to submit adequate documentary evidence of ethnicity, and in the cases cited, such documents were not submitted.

Auditor Comment 5: The OAG **did not** include missing PNWs as an exception if the No Change Affidavit preceded late 2003.

#5

*** Tax information missing.** As discussed with OAG, an example was provided for an applicant who applies for DBE certification in late 2005, using 2004 tax information. The eligibility decision for the firm was rendered in February 2006. While the file was processed without 2005 tax information, the review relied upon the most current information available at the time the decision was rendered--three years of filed tax returns (2004, 2003 & 2002). A No Change Affidavit and 2005 tax information will then be due upon the firm's next anniversary date in February 2007.

Although the file does not contain 2005 information, it would not be considered "missing" by IDOT or the IL UCP participant agencies, as the most current information available was used at the time the eligibility decision was rendered. Note: Robert Ashby, USDOT Deputy Counsel, agreed with this example in a May 2006 teleconference call, and IDOT has requested his written concurrence.

*** Bank signature card missing.** In instances when the bank signature card was not in the file, a bank resolution was generally on file. While the bank signature card identifies the individuals who can sign checks on behalf of the firm, a bank resolution also identifies those individuals who can financially obligate the firm through loans, lines of credit, etc., thus making the bank resolution more pertinent in the review process. The resolution also identifies officers of the firm with authority to effect all transactions for the firm. In addition, in the majority of the cases cited, the firms are *solely* owned by a socially and economically disadvantaged individual and as such, this is the only person who can financially obligate or conduct business on behalf of the firm.

Corrective Action: IDOT will maintain the process of ensuring that the most current year of corporate/individual tax returns and a PNW statement is received with each annual No Change Affidavit submitted. With this practice, IDOT will always have the most recent three years of corporate/individual tax returns and PNW statements in file. In addition, IDOT will contact firms and make every effort to acquire any missing file information. We expect to accomplish this by September 1, 2006.

IDOT, in order to make files more manageable, will maintain the original filed certification application and supporting documentation and consolidate the last three years of No Change Affidavits with financials. Documentation of filed No Change Affidavits between these periods will be stored apart from these files.

Expected Date of Completion: July 2007

Auditor Comments

Auditor Comment 6: The example cited by IDOT is a **fictional** example, and is not an exception cited in the audit report. The example cited by IDOT **would not** have been counted as an exception by the auditors. As an example of one of the exceptions cited by OAG auditors, the eligibility decision was rendered by IDOT on May 11, 2004; the most recent corporate tax information in the file at that time was from 2001. Tax information from at least 2002, and possibly 2003, should have been available to the Department at the time the eligibility decision was made.

#7

Auditor Comment 7: Per IL UCP Certification Procedures and IDOT's 2003 policies and procedures both bank signature cards and bank resolutions are required for corporations.

Recommendation Number 20:

IDOT should keep a log of complaints received as a control to ensure that complaints are adequately investigated and resolved.

Response:

The Department agrees with the recommendation. A complaint log will assist with managing the complaint process.

Corrective Action:

A log will be maintained as a control to ensure that complaints are investigated and resolved. In addition to IDOT's current process of a firm's individual file containing documentation and related follow-up activities, IDOT's log will record and date all investigations and resolutions.

Expected Date of Completion:

July 2006

No Auditor Comments have been included for this page.

Recommendation Number 21:

IDOT should more closely track when no change affidavits and recertifications are due and decertify vendors that do not file the required applications and affidavits in a timely manner.

Response:

The Department agrees with the recommendation. We will work to more closely monitor and track the timeliness of submittals relative to annual No Change Affidavits and supporting documentation.

As the DBE program is one of inclusions, IDOT attempts to work closely with certified firms through Requests for Information letters, follow-up calls by analysts and supportive services consultant assistance to assist firms in maintaining their eligibility. IDOT does not start a decertification (due process) proceeding based on technical deficiency (versus one for cause) until all avenues to acquire information have been exhausted for firms who are certified. In effect, the federal regulations state that an already certified DBE no longer has to "reprove" its eligibility. See attached USDOT METRA appeal decision.

Corrective Action:

IDOT will be better able to more closely track when No Change Affidavits and Affidavits of Continued Eligibility are due and decertify firms that do not file the required documentation in a timely manner with the implementation of the IL UCP portal. The portal, when complete, will provide newer technology programming that will help to eliminate any timeliness issues, i.e., the system will automatically generate correspondence based on tickler dates such as certification anniversary dates, No Change Affidavits, renewals, etc.

Expected Date of Completion: December 2007.

In the interim, IDOT will generate No Change Affidavits and Affidavits of Continued Eligibility reports monthly. In addition, the Department's Bureau of Information Processing will work to enhance the current database to assist with monitoring and tracking until completion of IL UCP portal project.

Expected Date of Completion: December 2006.

No Auditor Comments have been included for this page.

Additional IDOT Responses to Comments Made in the OAG's Audit Report:

Confidentiality of DBE Applicant Information:

In accordance with federal and state law, the Department remains vigilant in its efforts to keep all DBE applicant information confidential and private.

Federal regulations direct recipients of DBE applicant information to safeguard from disclosure to unauthorized persons information that may reasonably be considered to be confidential business information, consistent with federal, state and local law. 49 CFR part 26.109((a)(2)) specifically states, "Notwithstanding any provision of Federal or state law, you must not release information that may 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."

The State of Illinois' Freedom of Information Act, (5 ILCS 140/7), states that the following shall be exempt from inspection and copying:

(a) Information specifically prohibited from disclosure by federal or State law or rules and regulations adopted under federal or state law.

(b) Information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information . . . . Information included under this subsection (b) shall include but is not limited to:

(iii) files and personal information maintained with respect to any applicant, registrant, or licensee by any public body cooperating with or engaged in professional or occupational registration, licensure or discipline;

(g) Trade secrets and commercial or financial information obtained from a person or business where the trade secrets or information are proprietary, privileged or confidential, or where disclosure of the trade secrets or information may cause competitive harm.

The OAG audit report questions the eligibility of a number of DBE certified firms. The Department is reviewing the auditor's comments and will act, where appropriate, to challenge the eligibility if a firm should not be certified based on cause. When a DBE firm's eligibility is challenged, the IL UCP makes any final decisions regarding its status and not IDOT. When a DBE's eligibility is being challenged, they are entitled to due process to respond to any allegations made. If, subsequent to the release of this report any of the DBE firms' names or confidential information is made public, the DBE firm's reputation would be irreparably harmed and this would violate their rights to due process to defend their reputations.

The Department trusts that any and all confidential information including the names of

Auditor Comment 8: As stated in the audit report, the auditors initially identified items that raised questions concerning the eligibility in cases reviewed **based on documentation in IDOT's certification files.**

Auditor Comment 9: IDOT may not remove a DBE's eligibility without following the procedures set forth in federal regulations (see 49 CFR 26.87). These procedures are designed to ensure that currently-certified firms are given written notice of IDOT's determination that there is reasonable cause to believe a firm is not eligible to participate in the DBE program, along with IDOT's evidence supporting that determination. No such determination may be made by IDOT without giving the firm an opportunity for hearing and a chance to respond.

#8

#9

#10

Auditor Comment 10: Throughout this engagement, the auditors cautioned IDOT of its responsibility to identify for the auditors any and all confidential information so that it could be handled appropriately. We do not agree with IDOT that the names of DBE firms are confidential; to the contrary, federal regulations require IDOT to "make available to interested persons a directory identifying all firms eligible to participate as DBEs. . ." 49 CFR 26.31. However, the auditors do agree with IDOT that the name of a DBE, in conjunction with information obtained by the auditors from the applicant's certification file, would be confidential and we have taken appropriate steps to maintain such information in a confidential manner. Further, we have removed such confidential information from the response submitted by IDOT for publication in this audit report.

any and all DBE certified firms subject to the OAG's audit testing will be held to the highest levels of confidentiality by the OAG both prior to and subsequent to the release of this report. As noted, the IDOT remains vigilant in its efforts to keep all DBE applicant information confidential and private.

General Comments:

* (page 58) a significant portion of the DBE firms, hosted by the city of Chicago were certified by IDOT and/or other IL UCP participant agencies; however, due to the IL UCP "one-stop shop" mandate, the City of Chicago became the firm's designated host (grandfathering process). Prior to implementation of the IL UCP, IDOT had over 650 firms certified.

* IDOT's DBE Program-inaccurate information regarding Persons with Disabilities are not automatically eligible for DBE program. Applicants must make an individual (case-by case) showing of how disability caused social and economic disadvantage.

* While OAG raised questions concerning the decision to certify firms in ten of the files reviewed, IDOT determined these firms met the minimum eligibility criteria for program participation. IDOT's application review process included a complete analysis and review of submitted documentation, request(s) for additional information, an on-site interview with the firm's eligible owner(s), and when the Administrative Review Panel (ARP) still has concerns regarding eligibility issues, the firm's eligible owner is requested to attend an informal meeting to respond to outstanding issues/concerns before the eligibility decision is made.

When a firm meets minimum eligibility criteria for DBE program participation, it is certified. IDOT will alert Compliance staff to possible problems, and the firm's performance on contracts is monitored.

* In one particular case the OAG cites, the eligible (owner) leased a tractor and trailer and various buildings for office use from her ineligible spouse and they both had signature rights on bank cards.

This firm has been certified since 1985. The eligible owner of this firm has served as CEO and President since 1982. The firm was denied in 1984, however, they addressed the deficiencies identified in the letter of denial and reapplied after passage of the required waiting period and were subsequently certified in 1985. (The building the firm leases is owned by both individuals and leased to the firm. Two of the ten pieces of leased equipment were owned by the spouse, the rest is owned by both. The bank signature card does not grant the ineligible spouse check signature authority.) There are also subsequent memos of monitoring the firm's performance, audits/summary reports and on sites which supports that the eligible owner has the experience/expertise to independently control the firm's daily activities.

Additional IDOT DBE Certification Enforcement Efforts

Pursuant to 49 CFR 26.107/29 et seq., a firm may be suspended/debarred for false or fraudulent acts. Additionally, Title 44 Ill. Adm. Code 660.480 et seq. provides the IDOT mechanism for such proceedings. In relation to the IDOT DBE program, suspension

#11

Auditor Comments

Auditor Comment 11: We appreciate the Department's trust of our process which, in over 30 years of operation, has never resulted in the release by our Office of information that is confidential by or pursuant to law.

#12

Auditor Comment 12: The auditors removed confidential information from the response submitted by IDOT for publication in this audit report.

#13

Auditor Comment 13: The text cited by IDOT in its response was revised subsequent to our exit conference. A revised draft was provide to the Department prior to its submission of its formal responses.

#14

Auditor Comment 14: The report acknowledges that IDOT had followed up on eligibility issues in most cases.

#15

Auditor Comment 15: Auditors initially raised questions concerning this case. However, auditors concluded that IDOT was diligent in following up on ownership and controls issues.

and/or debarment also results in removal of the offending entity from the ability to participate in any way on IDOT projects and referral to the USDOT Office of Inspector General (OIG).

Beginning in November 2004, IDOT Office of Chief Counsel suspended 23 DBE IL UCP companies and referred 2 of those to the USDOT OIG for investigation and prosecution. Subsequent to the suspensions, one DBE was reinstated after concurrence with prosecutors, and one DBE was partially reinstated by a circuit court after posting a $750,000 bond to ensure honest performance in contracting. Eighteen of the twenty-three are currently permanently suspended and three are seeking administrative appeal.

No Auditor Comments have been included for this page.

Status Update for Bureau of Accounting and Auditing Review (page 89)

The final report for the 2005 audit conducted by IDOT's Bureau of Accounting and Auditing was completed in August 2005. The OAG's Audit began in August 2005. Although the Office of Business and Workforce Diversity had completed its response to the Bureau of Accounting and Auditing, we had not begun implementation of the corrective action noted. This was due to the fact that Department staff has been coordinating our corrective action plans for those recommendations with the IL UCP as a means to develop best practices and uniformity in the operations of the DBE certification program by all members of the IL UCP. With the commencement of the OAG audit on our DBE certification program, additional efforts to implement corrective action have been delayed awaiting the final recommendations from the OAG.

Status Update on Recommendations Made in IDOT-performed Audit of our DBE Certification Program:

1) DBE certification training (by USDOT) is scheduled for June 22, 2006.
2) Re-evaluation of current procedure completed. Determined adequate by IDOT. IL UCP participant agencies concurred. No further action required.
3) Review of current work papers concluded. Determined adequate by IDOT. IL UCP participants concurred. No further action required.
4) No further action required.
5) No Change Affidavit information being maintained in separate file from original application.
6) IDOT procedures not formally adopted. Superseded by IL UCP procedures. In process of incorporating with IDOT. (See attached work flow document).
7) No further action required.
8) With regard to files missing documentation – cited examples include: only one form of proof of ethnicity for an African American male. A driver's license with photo was determined sufficient support documentation of individual's claimed ethnicity. Therefore, only one, rather than two forms were sought. Similarly, since females are presumed socially and economically disadvantaged, only one form of documentation of gender is requested rather than two forms. However, when there are questions regarding ethnicity, more than one form of documentation is requested. IDOT does not agree with OAG finding regarding tax information and PNW. When an applicant applies for DBE certification in late 2005 (using 2004 tax information) and the eligibility decision for the firm is rendered in 2006, while the file will not have 2005 information, a No Change Affidavit and supporting information is not due until the firm's anniversary date in 2007 (Robert Ashby, USDOT agreed via teleconference, and IDOT has requested their written concurrence).
9) Consideration given to incorporating the Bureau of Auditing and Accounting worksheets and programs into the certification process. IL UCP participants concluded not necessary. No further action required.

No Auditor Comments have been included for this page.

H

Only the Westlaw citation is currently available.

United States District Court,N.D. Illinois, Eastern Division.

NORTHERN CONTRACTING, INC., an Illinois Corporation, Plaintiff,

v.

THE STATE OF ILLINOIS, Illinois Department of Transportation, Kirk Brown, in his capacity as the Illinois Secretary of Transportation, and Gordon Smith, in his capacity as the Bureau Chief of the Bureau of Small Business Enterprises, Defendants.

No. 00 C 4515.

Sept. 8, 2005.

Thomas R. Olson, Kimberly Price Anderson, Thomas R. Olson & Associates, St. Paul, MN, Mark Andrew Lies, II, Nicole M. Slack, Seyfarth Shaw, Chicago, IL, for Plaintiff.

Kevin Joseph Burke, Robert Thomas Shannon, J. William Roberts, Peter Herbert Carlson, Hinshaw & Culbertson, Melvin Michael Wright, Jr., Sonnenschein, Nath & Rosenthal, LLP, Michael Keith Fridkin, Office of the Attorney General of Illinois, Special Litigation Bureau, Patricia Mendoza, Mexican American Legal Defense & Educational Fund, Timothy Ray, Neal, Gerber & Eisenberg, Chaka M. Patterson, Illinois Attorney General, Chicago, IL, Lisa J. D'Souza, Charles E. Leggott, Richard S. Ugelow, Tamara R. Alexander, U.S. Department of Justice, Washington, DC, for Defendants.

MEMORANDUM OPINION AND ORDER

PALLMEYER, J.

*1 Plaintiff, Northern Contracting, Inc. ("Northern"), an Illinois highway contractor, challenges the constitutionality of state law provisions designed to guarantee the award of a portion of highway subcontracts to disadvantaged business enterprises ("DBEs"). Northern brought this action against the State of Illinois, the Illinois Department of Transportation ("IDOT"), the United States Department of Transportation ("USDOT"), and federal and state officials, seeking a declaration that the federal statutory provisions, federal implementing regulations, and state statute authorizing the Illinois DBE program, as well as the Illinois DBE program itself, are unlawful and unconstitutional. In an earlier order, the court granted summary judgment in favor of the Federal Defendants, but found that there was a material issue of fact regarding whether the Illinois DBE program is narrowly tailored to achieve the federal government's compelling interest. Following the issuance of the court's opinion, IDOT issued its fiscal year 2005 DBE program, which differed substantially from its earlier DBE programs. The court subsequently presided over a two-week bench trial in October 2004, focusing on this 2005 program. For the reasons set forth below, the court finds in favor of Defendants.

FACTUAL BACKGROUND

I. Parties

Defendant IDOT is the Illinois state agency responsible for planning, construction, and maintenance of Illinois's transportation network, including highways and bridges, airports, public transit, rail freight, and rail passenger systems. With an annual budget of approximately $5 billion, IDOT administers all state-funded and federal-aid highway construction projects in the State of Illinois, subject to USDOT Regulations and the state's own Business Enterprise for Minorities, Females and Persons with Disabilities Act, 30 ILCS 575/1, *et seq.* (West 1996) (hereinafter, the "Business Act").

The individual Defendants include Kirk Brown, the Illinois Secretary of Transportation until December 2002; Timothy Martin, the current Secretary; Gordon Smith, Chief of the Bureau of Small Business Enterprises and the Liaison Officer for the IDOT DBE program from June 16, 2002 until April 30, 2003; and Carol Lyle, who holds that position today and is therefore responsible for developing and implementing all aspects of IDOT's DBE program and for promoting the utilization of women and minorities consistent with federal regulations. Plaintiff Northern Contracting, Inc. is a highway contractor specializing in guardrail and fencing work. Northern bids on both state and local government work, as well as commercial work, generally as a subcontractor. On average, Northern bids as a subcontractor on approximately 200 to 250 IDOT and county projects each year. In doing so, it competes

against a number of minority contractors, though, as discussed in this court's summary judgment opinion, Plaintiff has presented little evidence that is has suffered anything more than minimal revenue losses due to the program. *See* Northern Contracting, Inc. v. State of Illinois, No. 00 C 4515, 2004 WL 422704, *24 (N.D.Ill. Mar.3, 2004).

II. Relevant Statutes

A. TEA-21 and Federal Implementing Regulations

*2 Since 1982, federal highway statutes have required that ten percent of federal highway construction funds be paid to small businesses owned and controlled by "socially and economically disadvantaged individuals," as that term is defined in the Small Business Act. *See* Surface Transportation Assistance Act of 1982, Pub.L. No. 97-424 § 105(f), 96 Stat.2097, 2100. In 1998, Congress passed the Transportation Equity Act for the 21st Century ("TEA-21"), which authorized USDOT to expend funds for federal surface transportation programs during fiscal years 1998-2003. Pub.L. No. 105-178, § 1101(b)(1), 112 Stat. 107, 113. Prior to the expiration of TEA-21, the President signed into law the Surface Transportation Extension Act of 2003, Pub.L. No. 108-88, 117 Stat. 1110, which extended the provisions of TEA-21 for an additional five months, through February 29, 2004. Two years later, Congress further extended the Act through passage of the Surface Transportation Extension Act of 2005, Pub.L. No. 109-14, 119 Stat. 324 (May 31, 2005).

Pursuant to these statutes, USDOT issued implementing regulations entitled "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs." 64 Fed.Reg. 5096 (Feb. 2, 1999) (codified in 49 C.F.R. Pt. 26) (the "Regulations"). The Regulations apply to all "Recipients" of federal highway funds, defined as "any entity, public or private, to which DOT financial assistance is extended, whether directly or through another Recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance." 49 C.F.R. § 26.5. The parties agree that the State of Illinois and IDOT are Recipients within this definition. As a condition of receiving federal highway funds, Recipients must establish a DBE program to increase the participation of disadvantaged business enterprises in the construction industry, and must set an overall goal for DBE participation in USDOT-assisted contracts. 49 C.F.R. § § 26.21; 26.45(a). The Regulations direct that at least ten percent of federal highway construction funds be paid to DBEs, though this provision represents "an aspirational goal at the national level." 49 C.F.R. § 26.41(b). This goal "does not authorize or require Recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent." 49 C.F.R. § 26.41(c). Moreover, USDOT may grant an exemption or waiver from nearly all aspects of the program, including any provision related to administrative requirements, overall goals, contract goals, or good faith efforts. 49 C.F.R. § 26.15(b).

1. The Goal-Setting Process

The Regulations outline the process for setting the Recipient's overall DBE participation goal. Under the Regulations, the goal "must be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all business ready, willing and able to participate" on its USDOT-assisted contracts (hereinafter, the "relative availability of DBEs"). 49 C.F.R. § 26.45(b). The goal must also reflect the Recipient's determination of the level of DBE participation it "would expect absent the effects of discrimination." *Id.* This determination is the result of a two-step process set forth in the Regulations. The first step directs the Recipient to determine "a base figure for the relative availability of DBEs." 49 C.F.R. § 26.45(c). The Regulations present a number of examples of approaches a Recipient may employ in determining a base figure, including: (1) use of DBE directories and census data; (2) use of a bidders list; (3) use of data from a disparity study; (4) use of the goal of another Recipient in the same, or a substantially similar, market, adjusted for differences in the Recipient's market and contracting program, as a base figure of the Recipient's goal; or (5) other methods to determine a base figure, as long as such methods are based on demonstrable evidence of local market conditions and are designed ultimately to attain a goal that is rationally related to the relative availability of DBEs in the relevant market. *Id.*

*3 Once the Recipient has identified its base figure, the second step of the goal-setting process requires the Recipient to examine all available evidence in the jurisdiction and adjust the base figure accordingly to arrive at the overall goal. 49 C.F.R. § 26.45(d). The

Regulations mandate that "many types of evidence" be considered, including: (1) the current capacity of DBEs to perform work in the Recipient's contracting program, as measured by the volume of work performed in recent years, and (2) evidence from disparity studies within the jurisdiction, to the extent such evidence is not already accounted for in the base figure. *Id.* In addition, if available, the Recipient must consider evidence from related fields that affect the opportunities for DBEs to form, grow, and compete, including (1) statistical disparities in the ability of DBEs to obtain the financing, bonding, and insurance required to perform the work in the program, and (2) data on employment, self-employment, education, training, and union apprenticeship programs, to the extent they relate to the opportunities for DBEs to participate in the Recipient's programs. *Id.* If the Recipient attempts to make an adjustment to the base figure "to account for the continuing effects of past discrimination (often called the 'but for factor') or the effects of an ongoing DBE program, the adjustment must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought." *Id.* In setting the overall goal, the Recipient must provide for public participation, including consultation with minority, women's, and general contractor groups and community 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 Recipient's] efforts to establish a level playing field for the participation of DBEs." 49 C.F.R. § 26.45(g)(1). If a Recipient does not have an approved DBE program or overall goal, or if it fails to implement its program in good faith, it is "in noncompliance with" the Regulations. 49 C.F.R. § 26.47(b). A Recipient cannot, however, be penalized, or treated by USDOT as being in noncompliance with the Regulations, merely because its DBE participation falls short of its overall goal, unless it has failed to administer its program in good faith. 49 C.F.R. § 26.47(a).

When submitting its DBE goal to USDOT, a Recipient must include a description of the methodology used to establish the goal, including the base figure and the evidence with which it was calculated, as well as the adjustments made to the base figure and the evidence relied on for such adjustments. 49 C.F.R. § 26.45(f)(3). The Regulations also recommend the inclusion of a summary listing of the relevant available evidence in the jurisdiction and, where applicable, an explanation of why the Recipient did not use that evidence to adjust the base figure. *Id.* Further, the Recipient must include its projection of the portions of the overall goal it expects to meet through race-neutral and race-conscious measures. 49 C.F.R. § § 26.45(f)(3); 26.51(c).

2. Preferences for Race-Neutral Measures

***4** Under the Regulations, a recipient must meet the "maximum feasible portion" of its overall goal through race-neutral means. [FN1] 49 C.F.R. § 26.51(a). Race-neutral means include providing assistance in overcoming limitations such as inability to obtain bonding or financing by simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs and other small businesses obtain bonding and financing. 49 C.F.R. § 26.51(b).

> FN1. The terms "race-neutral" and "race-conscious" are to be interpreted as referring as well to gender-neutrality and gender-consciousness for purposes of 49 C.F.R. § 26.51. 64 FED.REG. at 5112.

If a Recipient projects it will not be able to meet its overall goal through solely race-neutral means, it must establish contract goals to the extent necessary to achieve the overall goal. 49 C.F.R. § 26.51(d). Contract goals may be used only on those USDOT-assisted contracts that have subcontracting possibilities. 49 C.F.R. § 26.51(e)(1). Further, a Recipient must adjust its use of race-neutral and/or race-conscious measures if it determines during the course of the year that it will exceed or fall short of its overall goal. 49 C.F.R. § 26.51(f)(2). If a Recipient has succeeded in meeting or exceeding its overall goals through solely race-neutral means for two consecutive years, it need not make a projection of the amount of its goal it can meet using race-neutral means in the next year. 49 C.F.R. § 26.51(f)(3). If the Recipient obtains DBE participation that exceeds its overall goal in two consecutive years through the use of contract goals, it must reduce its use of contract goals proportionately in the following year. 49 C.F.R. § 26.51(f)(4). The Regulations provide, further, that a Recipient may not use quotas for DBEs on USDOT-assisted contracts and may not set aside contracts for DBEs on USDOT-assisted contracts except in limited circumstances "when no other method could be reasonably expected to redress egregious instances of discrimination." 49 C.F.R. § 26.43.

Once a DBE goal has been set, a Recipient may only award a prime contract to a bidder/offeror that documents that it has either (1) obtained enough DBE participation to meet the goal, or (2) made adequate good faith efforts to meet that goal, even if it did not succeed in obtaining enough DBE participation to do so. 49 C.F.R. § 26.53(a). Examples of the types of actions a Recipient should consider as part of the bidder's good faith efforts to obtain DBE participation include soliciting interest of DBEs at pre-bid meetings; advertising and/or written notices; breaking out contract work items into economically feasible units to facilitate DBE participation, even where the prime contractor might otherwise prefer to perform these work items with its own forces; providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract; negotiating in good faith with interested DBEs; declining to reject DBEs as unqualified without sound reasons based on a thorough investigation of their capabilities; making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the Recipient or contractor; making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services; and effectively using the services of available minority/women community organizations, contractors' groups, and government business assistance offices. 49 C.F.R. pt. 26, Appendix A § IV. A higher bid from a DBE than from a non-DBE is not a sufficient reason for a prime contractor's failure to meet the DBE goal on a contract, unless the difference is "excessive or unreasonable." 49 C.F.R. pt. 26, Appendix A § IV(D)(2). DBEs who make bids on prime contracts are also bound by these requirements. 49 C.F.R. § 26.53(g). In determining whether a prime contractor has met a contract goal, the Recipient is directed to "count the work the DBE has committed to performing with its own forces [that is, the amount of work that the prime contractor is not subcontracting out to other firms] as well as the work that it has committed to be performed by DBE subcontractor and DBE suppliers." *Id.*

3. Qualifications for DBE Status

***5** To qualify as a DBE, a contractor must be independently owned and operated, not dominant in its field of operation, and at least 51 percent owned and controlled by one or more socially and economically disadvantaged individuals. TEA-21 § 1101(b)(2); 15 U.S.C. § § 632(a)(1); 637(a)(6)(A); 637(d). "Socially disadvantaged individuals" are "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5). "Economically disadvantaged individuals" are "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capacity and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. § 637(a)(6)(A). Recipients "must rebuttably presume" that women and members of certain racial minority groups are socially and economically disadvantaged individuals and must require each presumptively disadvantaged business owner to submit a signed, notarized certification that he or she is, in fact, socially and economically disadvantaged. 49 C.F.R. § 26.67(a)(1). A firm does not qualify for DBE status, however, if its average annual gross receipts over the preceding three fiscal years exceed $16.6 million, as adjusted by USDOT for inflation. TEA-21 § 1101(b)(2)(A). Further, any individual whose personal net worth exceeds $750,000 is not economically disadvantaged. 49 C.F.R. § 26.67(b)(1). Nevertheless, a firm owned by an individual who is not presumptively disadvantaged may qualify as a DBE if it can demonstrate that "the individuals who own and control" the firm are in fact socially and economically disadvantaged. 49 C.F.R. § 26.67(d).

Recipients have the responsibility to ensure that DBEs attest to the accuracy of the information provided to the Recipient and continue to meet the requirements for that status. 49 C.F.R. § 26.83(c)(7)(ii). Recipients must require each individual owner of a firm applying to participate as a DBE to certify that he or she has a personal net worth that does not exceed $750,000. 49 C.F.R. § 26.67(a)(2). Any person may file with the Recipient a written complaint alleging that a DBE-certified firm is ineligible for specific reasons. 49 C.F.R. § 26.87(a). When such a complaint is made, the Recipient must review all available information concerning the firm and, if it determines that there is reasonable cause to believe the firm is ineligible, provide written notice to that firm setting forth the reasons for the proposed determination and give the firm an opportunity for an informal hearing on the matter. 49 C.F.R. § 26.87(a), (d)-(k).

B. Illinois DBE Program

Pursuant to these Regulations, IDOT is, as a recipient of federal highway funds, required to file an annual DBE goal and methodology with the Federal Highway Administration. The court's memorandum order and opinion on the parties' cross motions for summary judgment examined IDOT's DBE plans for fiscal years 2000, 2002, and 2003. [FN2] Since the issuance of that opinion on March 3, 2004, IDOT has completed and issued its fiscal year 2005 DBE plan. In light of the fact that Plaintiff is seeking prospective relief, and not specific damages for, say, loss of a contract in 2002, the court will focus on IDOT's fiscal year 2005 plan and consider whether there is a compelling need for such a program going forward, and whether the plan is a narrowly-tailored remedy for discrimination. *See Builders Ass'n of Greater Chicago v. City of Chicago*, 298 F.Supp.2d 725, 732 (N.D.Ill.2003) (where plaintiff association sought to enjoin City's minority set-aside program, court focused on "whether there is sufficient evidence [at present] of a continuing need, and of narrow-tailoring, so as to cause the program to pass constitutional muster.").

FN2. With the approval of USDOT, IDOT did not submit a proposed DBE goal for fiscal year 2001 but continued to use the fiscal year 2000 goal and race-neutral component in fiscal year 2001. *Northern Contracting*, 2004 WL 422704, *19.

1. Fiscal Year 2005 DBE Plan

***6** In June 2004, IDOT retained Colette Holt as a consultant to assist with the formulation of its fiscal year 2005 DBE plan ("FY2005 Plan"). (Trial Transcript, hereinafter "T.T.," at 26.) Ms. Holt served as the principal drafter of IDOT's FY2005 Plan, and outlined the drafting process in her testimony before the court. [FN3] (*Id.* at 27.) In setting its overall goal for the FY2005 Plan, IDOT followed the two-step process set forth in 39 C.F.R. pt. 26:(1) calculation of a base figure for the relative availability of DBEs and (2) consideration of a possible adjustment to the base figure to reflect the effects of the DBE program and the level of participation that would be expected but for the effects of past and present discrimination. (IDOT's FY2005 Overall DBE Goal Submission, Defendant's Trial Ex. 28, hereinafter "FY2005 Submission," at 1; 49 C.F.R. § 26.45.)

FN3. In addition to Ms. Holt, Carol Lyle, the Bureau Chief of Small Businesses at IDOT, also testified regarding the development of the FY2005 Plan. (*See* T.T. at 425.)

a. Step 1: Calculation of Base Figure

In order to calculate the overall availability of DBEs for the FY2005 Plan, Holt and IDOT retained National Economic Research Associates, Inc. ("NERA"), a Chicago-based consulting firm. (T.T. at 37.) As explained above, 49 C.F.R. § 26.45(c), a Recipient may calculate its base estimate of DBE availability using one of five methods. In prior plans, IDOT had utilized a bidders list to calculate the relative availability of DBEs, pursuant to 49 C.F.R. § 26.45(c)(2). Under that approach, which IDOT believed to be the best available at the time, IDOT determined the relative availability of DBEs by reference to its existing list of pre-qualified and pre-registered [FN4] construction and professional consulting firms. [FN5] When determining the relative availability of DBEs for the FY2005 Plan, however, IDOT commissioned NERA to conduct a custom census to determine whether a more accurate means of determining the relative availability of DBEs might be available. Dr. Jon Wainwright, the economist who conducted the NERA study, testified that he did not believe that the "bidders list" approach was appropriate for measuring the availability of DBEs "because it imports potential bias on the part of recipients directly into the measure." (T.T. at 732.) Thus, if the recipient agency itself had discriminated against DBEs, their availability, as reflected in the bidders list, may be lower than their actual availability in the marketplace. (*Id.*)

FN4. Under Illinois law, only firms registered and pre-qualified are eligible to participate in IDOT contracts, whether as a prime or subcontractor. 44 ILL. ADMIN. CODE tit. 44, § § 650.10; 625.40. In order to become pre-qualified, a firm must submit an application including a "Statement of Experience and Financial Condition," detailing the firm's work history and financial status. *Id.* § § 650.40.

FN5. For an overview of IDOT's pre-2005 DBE plans, see *Northern Contracting v. State of Illinois*, No. 00 C 4515, 2004 WL 422704, ----8-11.

In developing its own methodology, NERA relied on 49 C.F.R. § 26.45(c)(5), which authorizes a Recipient to utilize alternative methods (beyond

those specifically identified in the Regulations) to determined the relative availability of DBEs, so long as the alternative methodology is "based on demonstrable evidence of local market conditions and ... designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in [the Recipient's] market." 49 C.F.R. § 26.45(c)(5). Pursuant to these instructions, NERA conducted a "custom census," in which it employed a six-step analysis to determine the baseline level of DBE availability. (T.T. at 731.) In the first step, NERA identified the appropriate and relevant geographic market for IDOT's contracting activity and its prime contractors as the State of Illinois. (T.T. at 731, 737-38; NERA Disadvantaged Business Enterprise Availability Study, Defendant's Ex. 27, hereinafter "NERA Study," at 8.) Second, NERA identified the relevant product markets in which IDOT and its prime contractors contract (i.e., concrete work or transportation). In so doing, NERA identified the specific industries from which IDOT draws its contractors-highway, engineering consulting, and aviation-as well as the relative amount of money spent in each of these industries. (T.T. at 739-40.) To do this, NERA worked with IDOT officials to assign one or more Standard Industrial Classification System Codes ("SIC Codes") to every contractor and subcontractor that had successfully completed work for IDOT or its prime contractors in the previous five years. (*Id.* at 741.) SIC Codes are the government's means of categorizing firms by their specific industry. (*Id.*) [FN6] NERA then estimated the relative amount of dollars flowing into each industry category. (*Id.* at 740.) NERA also worked with IDOT officials to assign SIC Codes to specific pay items within all IDOT contracts over the five years leading up to the study. (*Id.* at 741.) NERA used these figures to determine the relative amount of contracting dollars spent in each industry, and thus the relative weight/importance of each industry in which IDOT contracts. (*Id.* at 738-40.)

FN6. Some relevant example codes include: SIC 1442 (construction sand and gravel); SIC 1794 (excavation); SIC 1731 (electrical contractors). (NERA Report, at 10 n. 15.)

*7 In step three, NERA sought to identify all available contractors and subcontractors in the relevant industries within the State of Illinois using Dun & Bradstreet's *Marketplace,* which Mr. Wainwright described as "one of, if not the most comprehensive microbusiness establishment lists available." [FN7] (T.T. at 747-48.) The *Marketplace* list identified minority- and women-owned businesses. (*Id.* at 751-52.) These businesses were classified according to the SIC Codes, as listed above. (*Id.*) Using this information, NERA determined the total number of businesses operating in the relevant geographic and product markets. (NERA Study, at 16.) NERA then identified the number of DBE businesses within the relevant geographic and product markets. In doing so, NERA felt it necessary to go beyond a mere reliance on DBE businesses listed in *Marketplace* because, in NERA's experience, the *Marketplace* "does not adequately identify businesses owned by minorities or women." (NERA Study, at 21.) NERA therefore also collected lists of DBEs from IDOT as well as approximately twenty other public and private agencies in and around Illinois, including the Indiana, Wisconsin, Iowa, and Missouri Departments of Transportation, as well as a number of other state and local agencies. (*Id.;* T.T. at 751-52.) From these sources, NERA compiled a list of Illinois-based DBEs, classified based on SIC Codes. (NERA Study, at 22-25.)

FN7. *Marketplace* contains not only the name, address, and telephone number of relevant contractors, but also executive names and titles and their primary and secondary areas of business, reflected by SIC Codes. (T.T. at 747-48.) This information is updated quarterly. (*Id.* at 748.)

In the final two steps, NERA attempted to correct for what it considered to be two common biases in DBE lists: (1) the possibility that certain businesses listed as DBEs no longer qualify for that status, due to ownership change, recording errors, or misrepresentation, or, on the other hand, that certain businesses are not listed as DBEs, but qualify as such under the federal Regulations, and (2) the possibility that not all DBE businesses are listed in the various directories. (NERA Study, at 30; T.T. at 754-55.) To correct for these biases, NERA employed standard statistical sampling procedures. (NERA Study, at 30.) With regard to the possibility that a business is incorrectly classified as a DBE or non-DBE, NERA surveyed a large random sample of relevant businesses to measure how often they were misclassified. (*Id.*) Overall, NERA found that 22.8 percent of listed DBE businesses were actually owned by white males. (*Id.* at 31.) Finally, NERA attempted to determine the ownership of unclassified firms (those not listed in any of the consulted

directories) by polling a random sample of such businesses. (*Id.* at 37.) The result of this random sample revealed that the vast majority-85 percent-were owned by white men. (*Id.* at 39.) Separate DBE availability calculations (on a percentage basis) were then made by SIC Code grouping and by race and gender. (*Id.* at 41.)

Combining the information and weighted averages obtained in each of these six steps, NERA estimated an overall weighted average DBE availability of 22.7 percent. (T.T. at 762; NERA Study, at 45.) This weighted average adjusted the DBE availability for the relative amount of IDOT funds spent in each industry and each county. (T.T. at 766-67.) Thus, the average DBE availability figure gave proportionately higher weight to those industries and counties where IDOT spends a higher proportion of its total contract dollars and proportionately lower weight to those industries and counties where IDOT spends fewer dollars. (*Id.* at 767.)

b. Step Two: Adjustment Based on Past Discrimination

*8 Once it had identified an overall weighted average of DBE availability, IDOT next turned to the second step in the goal-setting process under 49 C.F.R. § 26.45: examining all available evidence within the jurisdiction to determine what adjustment, if any, is needed to the base figure to meet the overall goal. (FY2005 Submission, at 1; T.T. at 42-43.) Under this prong, the Regulations required IDOT, as a Recipient, to determine whether the DBE availability figures are artificially low due to the effects of past discrimination, or, in other words, whether DBE availability would be higher "but for" past discrimination. (T.T. at 43.) In determining whether DBE availability would be higher in a discrimination-free marketplace, IDOT relied on a number of sources, including the second portion of the NERA Study, as well as prior studies completed in conjunction with other legal cases. (T.T. at 44-46.)

The first study examined by Ms. Holt (on behalf of IDOT) was the second half of the NERA Study, which considered whether the DBE level should be adjusted to reflected the approximate availability level "but for" past discrimination. (T.T. at 768; NERA Study, at 46.) In other words, the study considered whether DBE availability figures are artificially low due to the effects of past discrimination; for example, discrimination may have rendered minorities and women less likely to start businesses or make such businesses less profitable and hence more likely to fail. (NERA Study, at 46.) To discern such effects, the study examined disparities in the earnings of minority and female business owners compared to their similarly-situated white male counterparts. (T.T. at 769.) In addition, NERA looked at differences in the business formation rates between women and minorities and similarly-situated white males. (*Id.*) Running a regression analysis on this data, NERA concluded that in a discrimination-free marketplace, DBE availability would be approximately 20.8 percent higher, resulting in an overall corrected weighted average DBE availability of 27.51. (NERA Study, at 63-64; T.T. at 768-70.)

In addition to this NERA estimate, IDOT also considered a separate NERA DBE study commissioned by the Northeast Illinois Regional Commuter Railroad Corporation, better known as Metra. [FN8] (T.T. at 55; DBE Availability Study, March 28, 2000, Defendant's Ex. 19, hereinafter "Metra Study.") The Metra Study included a 1999 survey in which 50.6 percent of minority- or women-owned construction firms reported that firms that use or solicit their services on contracts with race or gender participation goals rarely or never solicit or subcontract with their firm on non-goals projects. (T.T. at 59; Metra Study, at 21.) Similarly, 54.1 percent of minority- or women-owned professional service firms [FN9] reported that they were seldom or never solicited to bid for non-goals projects. (T.T. at 62-63; Metra Study, at 28.) IDOT concluded that race-neutral methods are unlikely to achieve IDOT's baseline estimate of 22.77 percent DBE availability if DBEs are often not solicited in the absence of goals. (T.T. at 59-60.) In addition, the Metra Study found that DBEs suffered discrimination in capital markets. Specifically, the Study found that, controlling for creditworthiness, DBEs were more likely to have loan applications denied, and, when such loans are approved, more likely to pay higher rates of interest. (T.T. at 63-64; Metra Study, at 73-74.) Finally, the Metra Study found disparities in the earnings and business formation rates of minorities and women similar to those found in the study conducted on behalf of IDOT. (T.T. at 67-68; *supra* at 16.)

FN8. The Metra Study was commissioned by Metra in order to fulfill its responsibilities under 49 C.F.R. § 26.45 as a recipient of federal highway funds. (T.T. at 56.) The Study was conducted within IDOT's jurisdiction. (T.T. at 66.)

FN9. In the Study, professional service firms included architects, engineers, surveyors, and other professionally licensed fields within the construction industry. (T.T. at 61-62.)

*9 In addition, IDOT considered reports prepared by three expert witnesses retained by the City of Chicago in a lawsuit challenging its minority set-aside program. *See* *Builders Ass'n of Greater Chicago v. City of Chicago*, 298 F.Supp.2d 725 (N.D.Ill.2003). Dr. Elisabeth Landes, a consultant who holds a Ph.D in economics from Columbia University, completed the first of these reports, which examined whether minority- and women-owned firms in the Chicago-area are underutilized relative to their availability, i.e. whether such firms attract less business and earn lower revenues than similarly situated white male-owned businesses. (T.T. at 72; Report of Dr. Elisabeth M. Landes, Defendant's Ex. 31, hereinafter "Landes Report," at 2.) [FN10] After having analyzed a number of statistical studies, Dr. Landes concluded that minority-and women-owned businesses in the Chicago area are underutilized relative to their capacity, and that this underutilization was a result of discrimination. (Landes Report, at 11-12.) Moreover, Dr. Landes concluded that this underutilization had the effect of substantially diminishing the overall earning capacity of minority-and women-owned businesses. (*Id.*)

FN10. Dr. Landes's report is undated, however, it appears to have been completed in either 2001 or 2002.

The second report was completed by Dr. David Branchflower, a professor of economics at Dartmouth University on April 28, 2004. (T.T. at 73.) Dr. Branchflower examined and compared the rates of business formation for minorities and women with those of white males within the City of Chicago. (*Id.* at 75; Report of Dr. David Branchflower, Defendant's Exhibit 18, hereinafter "Branchflower Report," at 5.) Using 2000 data, Dr. Branchflower concluded that, after controlling for relevant variables such as credit worthiness, [FN11] minorities and women are less likely to form businesses, and that when they do form businesses, those businesses achieve lower earnings than did businesses owned by white males. (T.T. at 76; Branchflower Report, at 14-15, 18.)

FN11. Dr. Branchflower's Report does not identify all relevant variables for which he controlled in his analysis, instead stating that he had held constant "a whole array of characteristics, including creditworthiness." (Branchflower Report, at 12.)

Dr. Timothy Bates, a professor of economics at Wayne State University, completed the third study, dated April 20, 2004. Dr. Bates's study, again controlling for relevant variables, [FN12] concluded that minority- and female-owned businesses formation rates are lower than those of their white male counterparts. (T.T. at 78.) Dr. Bates's study found, further, that such businesses engage in a disproportionate amount of government work and contracts as a result of their inability to obtain private sector work. (*Id.* at 78-79.)

FN12. Specifically, Dr. Bates's study controlled for education, age, marital status, industry, and wealth. (Report of Dr. Timothy Bates, Defendant's Ex. 17, at 38.)

In addition to this material, IDOT also conducted a series of public hearings during June and July 2004 in an effort to obtain further information regarding discrimination in the construction industry. These hearings were conducted pursuant to 49 C.F.R. § 26.45(g), which requires a Recipient to provide for public participation in the goal-setting process. (T.T. at 83; 49 C.F.R. § 26.45(g).) IDOT invited participating firms as well as the general public to participate in the meetings, which were held in Peoria, East St. Louis, and Chicago. (T.T. at 83; FY2005 Submission, at 2.) In total, 187 people attended the three meetings, 57 witnesses testified, and an additional 10 people submitted written statements. (FY2005 Submission, at 2.) During these hearings, a large number of DBE owners testified that they were rarely, if ever, solicited to bid on projects not subject to disadvantaged-firm hiring goals ("non-goals projects"). (T.T. at 85.) [FN13] A number of the DBE witnesses identified prime contractors who rarely or never solicited bids on non-goals projects, despite the fact that, in some instances, the witness' own firms had satisfactorily completed work for the contractors on goals projects. (T.T. at 8-87.) In total, twenty such prime contractors were identified in IDOT District 1 alone. [FN14] Further research revealed that IDOT had entered into contacts totaling $772,315,498.98 with those twenty firms from July 2, 2000 through June 30, 2004. (T.T. at 89-91; Defendant's Ex. 38.) This total represents more than 34 percent of IDOT expenditures within District 1

during the four-year period. (T.T. at 93-95; Defendant's Ex. 38.) On August 13, 2004, Frank McNeil of IDOT wrote letters to the twenty firms, requesting documents concerning their use and solicitation of DBEs on non-goal projects. (Defendant's Ex. 23.) Not one of the firms responded to the letters. (T.T. at 96-97.) IDOT took no action to pursue the matter, but concluded from the firms' silence that the witnesses' allegations had merit. (T.T. at 971-73.)

FN13. Defendant's Exhibit 20 contains a transcript of these proceedings.

FN14. IDOT divides the state into nine districts. (T.T. at 92; Defendant's Ex. 2 at 1.) District 1, an area encompassing Cook, Lake, McHenry, Kane, Dupage and Will Counties (as well as the City of Chicago), is the largest of the nine districts in terms of volume of expenditures. (T.T. at 94-95.)

***10** The final consideration in IDOT's "step two" discrimination analysis consisted of a review of "unremediated market data." Unremediated market data consists of DBE participation rates in markets that do not have race- or genderconscious subcontracting goals in place to remedy discrimination. (T.T. at 120.) IDOT considered such data as evidence of what IDOT market conditions would look like in the absence of DBE goals. [FN15] (*Id.* at 120-21.) Specifically, IDOT examined data from four unremediated markets: the Illinois State Toll Highway Authority, the Missouri Department of Transportation, Cook County road construction activities, and a "non-goals" experiment conducted by IDOT itself from 2001 to 2002. The Illinois State Toll Highway Authority (the "Tollway") is involved in road construction in the northern part of Illinois, including Chicago and the surrounding region. (T.T. at 122-23.) Although involved in the same type of construction as IDOT, the Tollway does not received federal funding and thus is not bound by the Regulations at issue in this case. (*Id.*) The Tollway has adopted a voluntary 15 percent DBE subcontracting goal, though it does not conduct any monitoring of contractors' efforts to reach the goal nor impose any sanctions upon those that fail to do so. (*Id.*) An analysis of DBE utilization rates on Tollway subcontracts revealed that DBE utilization in fiscal year 2002 on Tollway projects was just 1.3 percent. (*Id.* at 130; Illinois State Tollway Highway Authority 2002 Contracts, Defendant's Ex. 8, at 6.) Further analysis revealed the DBE utilization rate in fiscal year 2003 to be 0.9 percent. (T.T. at 131; Illinois State Tollway Highway Authority 2003 Contracts, Defendant's Ex. 10, at 6.) A cross-check (by Ms. Holt) of Tollway's DBE designations against a larger DBE directory revealed that Tollway had understated DBE utilization; after adjusting for this, IDOT found that the Tollway's DBE utilization was still only 1.5 and 1.7 percent for fiscal years 2002 and 2003. (T.T. at 133-34.)

FN15. IDOT considered this data pursuant to 49 C.F.R. § 26.45(d)(1)(ii), which directs Recipients to consider "[e]vidence from disparity studies conducted anywhere within [their] jurisdiction."

The second unremediated market examined by IDOT was the Missouri Department of Transportation ("MoDOT"), which has a goals program in place on its federally funded projects, but not on its state-funded highway projects. (T.T. at 135.) Although MoDOT's contracting is outside of IDOT's jurisdiction, IDOT believed MoDOT's DBE utilization rates are relevant because many firms seek work from both IDOT and MoDOT. (*Id.* at 134-36.) An analysis of the MoDOT data revealed that DBEs received 9.04 percent of contracting dollars on federally-assisted projects with goals, but only 3.36 percent of contract dollars on state-funded projects, which did not have goals. (T.T. at 138.)

IDOT also examined Cook County's public contracting program. In 2000, Cook County's goals program was enjoined by a federal court due to the County's failure to establish a compelling interest furthered by the race- and gender-conscious aspects of the program. *See* *Builders Ass'n of Greater Chicago v. County of Cook*, 123 F.Supp.2d 1087 (N.D.Ill.2000), *aff'd* 256 F.3d 642 (7th Cir.2001). Data obtained from the County revealed that during the period December 1, 2002 through December 1, 2003, approximately 5 percent of contracting dollars in the construction context were awarded to DBEs. (T.T. at 145-46; Memorandum from Betty Perry, Defendant's Ex. 22.) This figure was substantially less than the overall availability of the marketplace at the time; in its fiscal year 2002 plan, IDOT estimated DBE availability as 12.29 percent of the marketplace. [FN16] (T.T. at 146; *Northern Contracting*, 2004 WL 422704, ----10-11.)

FN16. Ms. Holt, the author of IDOT's FY2005 plan, also testified that IDOT

considered data collected by the Minnesota Department of Transportation ("MnDOT") during a two-year period in which it operated without a DBE goals program following a federal court's injunction barring enforcement of that state's DBE program in 1998. *In re Sherbrooke Sodding Co.*, 17 F.Supp.2d 1026 (D.Minn.1998). The report itself was not entered into evidence, however, and the court will not consider it.

***11** In addition, IDOT considered its own "Zero Goals" experiment. During 2001 and 2002, IDOT reserved a portion of its highway construction contracts without race- or gender-conscious goals. (Stipulation ¶ 3(a); Am. Stipulation ¶ 7(a).) During this period, DBEs received approximately 1.5 percent of the total dollar value of all those contracts, as compared with approximately 17 percent of the total dollar value of all subcontracts awarded. (*Id.*)

Finally, as directed by 49 C.F.R. § 26.45(d), IDOT considered evidence of past utilization of DBEs on IDOT projects. [FN17] (T.T. at 151.) IDOT records revealed that during fiscal years 2001 through 2003, IDOT's utilization of DBEs, as a percentage of total contract dollar awards, was 12.4 percent. (T.T. at 152-53; FY2005 Submission, at 3.) Between April 2003 and March 2004, DBEs received 17.54 percent of the total contract dollars awarded by IDOT. (*Id.*) These figures measure the utilization of all DBE contractors, not merely subcontractors. (T.T. at 152-53.) During her testimony, Ms. Holt explained that the study included all DBE contractors, and not merely subcontractors, in accordance with the Regulations, which do not limit the inquiry to the utilization of subcontractors alone. (*Id.* at 153.) The disparity between these overall utilization rates, and the previously measured DBE availability rate of 22.77 percent during the period from April 2003 through March 2004, was consistent, in Ms. Holt's view, with the anecdotal evidence of discrimination against DBEs in the highway construction industry. (*Id.* at 153-54.)

FN17. The Regulations require Recipients to consider the "current capacity of DBEs to perform work in [the Recipient's] DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years," when considering adjustments to the base figure under step two. 49 C.F.R. § 26.45(d)(1)(i).

After analyzing the above data sources as part of the "step two" analysis under the Regulations, NERA concluded that DBE availability would be 27.51 percent absent the effects of discrimination on the market. (T.T. at 154-55; NERA Study, at 63-64.) NERA thus recommended that IDOT upwardly adjust its DBE goal from 22.77 percent to 27.51 percent. Nevertheless, IDOT wished to adopt as its 2005 goal a "plausible lower bound estimate" of DBE availability, and thus chose to set its goal at 22.77 percent, rather than accepting NERA's proposed upward adjustment. (T.T. at 155; FY2005 Submission, at 7.)

2. Administration of the DBE Program

Ms. Holt testified that IDOT administers its DBE program on a contract-by-contract basis; that is, it examines each contract individually to decide whether a goal is appropriate on that particular project. (T.T. at 156-57.) In doing so, IDOT considers factors such as the size of the project, the anticipated amount of subcontracting, the location of the project, and the availability of DBEs to perform the specific type of work involved. (*Id.*) This approach was adopted to comport with the requirements of 49 C.F.R. § 26.51(e), which states that a Recipient need not set a DBE goal on each contract, but rather that the goal on an individual contract, if any, should be narrowly tailored to the specifics of the contract, provided that over the period covered by the overall goal, the contract goals are set "so that they will cumulatively result in meeting any portion of your overall goal you do not project being able to meet through the use of race-neutral means." (T.T. at 156-57; 49 C.F.R. § 26.51(d)(2).) Ms. Holt testified that this provision ensures that IDOT retains flexibility on each project and that contractors are not burdened with unrealistic goals on, for example, projects where DBE availability is low. (T.T. at 157-58.) In any event, DBE goals have no effect on the award of prime contracts; pursuant to § 26.43(b), IDOT awards such contracts exclusively to the "lowest responsible bidder." [FN18] (*Id.* at 159-60.)

FN18. 49 C.F.R. § 26.43(b) provides: "[A Recipient] may not set-aside contracts for DBEs on DOT-assisted contracts subject to [TEA-21], except that, in limited and extreme circumstances, you may use set-asides when no other method could be reasonably expected to redress egregious

instances of discrimination."

a. Waivers

*12 In order to retain flexibility in the program and avoid imposing unreasonable burdens on contractors, IDOT also allows contractors to petition for waiver of individual contract goals in certain situations, such as where the contractor has been unable to meet the goal despite having made reasonable good faith efforts to do so. [FN19] (*Id.* at 160-61.) Between January 2001 and August 2004, IDOT received waiver requests on just 8.53 percent of contracts and granted almost 3 out of every 4 of these requests. (T.T. at 161, 440; Report on Pre-Award Modifications and Waivers, Defendant's Ex. 4.) Moreover, when a waiver request is denied, the contractor may appeal that decision to a reconsideration officer. [FN20] (T.T. at 442.)

FN19. This standard is derived from the federal regulations, which state: "When you have established a DBE contract goal, you must award the contract only to a bidder/offeror who makes good faith efforts to meet it." 49 C.F.R. § 26.53.

FN20. According to Ms. Holt, such appeals are brought "not very often." (T.T. at 442.)

b. Race- and Gender-Neutral Measures

IDOT's fiscal year 2005 plan contains a number of race- and gender-neutral measures designed to achieve the maximum feasible portion of its overall DBE utilization goal without resort to race- or gender-conscious measures. (T.T. at 163; FY2005 Submission, at 7-8.) These race- and gender-neutral encourage participation in IDOT-contracted work on the part of small businesses, whether or not they qualify as DBEs. (T.T. at 163-64.) IDOT has, for example, a "prompt payment" provision in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments. (FY2005 Submission, at 8; T.T. at 170.) In addition, IDOT has implemented an extensive outreach program seeking to attract and assist DBE and other small firms enter and achieve success in the industry. (FY2005 Submission, at 8.) In support of this goal, IDOT retains a network of consultants to provide management, technical, and financial assistance to small businesses. (*Id.*) Similarly, IDOT sponsors networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects. (*Id.*)

In addition to these continuing initiatives, IDOT has also instituted a number of race- and gender-neutral initiatives in response to this court's earlier summary judgment order. Since that time, IDOT has, for example, developed a number of initiatives to increase opportunities for new and smaller firms, and reduce barriers to participation of emerging contractors as prime contractors. (FY2005 Submission, at 7.) These initiatives include: reviewing the criteria for prequalification to reduce any unnecessary burdens; "unbundling" large contracts-that is, breaking a large project into smaller, discrete work assignments which can more easily be performed by smaller firms; and allocating some contracts for bidding only by firms meeting the Small Business Administration's definition of small businesses. (*Id.*) In addition, IDOT is in the process of adopting bonding and financing initiatives to assist emerging contractors obtain bonding and lines of credit. (*Id.*) These programs would provide graduates with guaranteed bonding and lines of credit, thereby addressing one of the major hurdles facing emerging firms in the construction industry. (*Id.*) Finally, IDOT is also in the process of developing an effective mentor-protégé program, through which established contractors would teach smaller firms about management skills, business development, banking and bonding relationships, and other relevant aspects of the industry. (FY2005 Submission, at 7; T.T. at 166.)

c. Estimate of Race- and Gender-neutral and Race- and Gender-conscious Portions of Overall Goal

*13 In accordance with the Regulations, IDOT sought to achieve the maximum feasible portion of its overall DBE goal through race- and gender-neutral measures. (FY2005 Submission, at 9; 49 C.F.R. § 26.51(a).) Under § 26.51(a), race- and gender-neutral participation includes situations in which: (1) a DBE wins a prime contract through the competitive bidding process; (2) a DBE is awarded a subcontract on a non-goals project; or (3) a DBE is awarded a subcontract on a goals project where the contractor did not consider its DBE status in awarding the contract. 49 C.F.R. § 26.51(a). IDOT determined that race- and gender-neutral means resulted in a DBE utilization rate of 6.43 percent in fiscal year 2003. (FY2005 Submission, at 9.) According to Ms. Holt, this rate was a historic high for IDOT; prior to

2003, race- and gender-neutral measures had been responsible for a DBE utilization rate of approximately 2 or 2.5 percent. (T.T. at 176-77.) Nevertheless, IDOT believes it can maintain a DBE participation rate of 6.43 percent on the basis of race- and gender-neutral measures alone due to the implementation of the initiatives discussed above. (T.T. at 177.) As a result, IDOT projects the need to achieve the remaining 16.34 percent of its overall goal through race- and gender-conscious contract goals. (FY2005 Submission, at 9; T.T. at 177.) Thus, approximately 84 percent of IDOT expenditures are unaffected by race- or gender-conscious contracting goals. (T.T. at 178.) Of the firms competing in this market, 77 percent constitute non-DBEs. (T.T. at 179.)

d. Testimony of DBE Owners

In support of IDOT's DBE program, a number of DBE owners testified regarding the difficulties they face and described instances in which they believed they were discriminated against based on their race or gender. [FN21] The DBE witnesses testified regarding their struggle to obtain work in the private sector, which operates without DBE goals. The witnesses unanimously reported that they were rarely invited to bid on such contracts. They explained, further, their reluctance to submit unsolicited bids, due to the expense involved as well as the fact that such bids are rarely successful. A number of DBE witnesses identified specific firms for which they had successfully completed subcontracting work on goals projects, but who nevertheless rarely solicited their firms to submit bids for subcontracts on non-goals projects. Ernest Wong, for example, identified seven firms that regularly solicited proposals from his firms on projects with DBE goals, but rarely, or never, solicited proposals on non-goals projects. (T.T. at 477-80.) According to Mr. Wong, these failures to solicit his firm for non-goals work continued even after he expressly asked these firms to contact his firm regarding such projects. (*Id.* at 477-78.)

> FN21. The following witnesses testified on behalf of IDOT: (1) Ernest Wong, president and owner of Site Design Group, Ltd., a landscape architectural firm; (2) Elizabeth Perino, President, CEO, and owner of Perdel Contracting, a general contracting firm specializing in carpentry and concrete work, and Accurate Steel Installers, a subcontractor specializing in the installation of concrete reinforcing bars; (3) Harendra Mangrola, Vice President and Controller of Summit Construction Company, a general contractor engaged in concrete, sewer, bridge, and road repair work; (4) William Clark, owner of Clark Trucking; and (5) Deborah Sawyer, President and CEO of Environmental Design International, a civil engineering firm.

A number of IDOT's witnesses also discussed incidents of direct discrimination in the industry. Elizabeth Perino, for example, related incidents in which contractors or engineers in the field had asked if they could speak with a man when problems arose on a job site. (T.T. at 509-10.) Ms. Perino also testified that she had attended bid openings and been asked "whose secretary are you?" (*Id.* at 509.) More significantly, Ms. Perino discussed an occasion in which her firm had been the low bidder at a public bid opening. Despite the fact that she met all the qualifications and requirements for bidding the contract as a prime contractor, the architect later informed her that the owner wanted to rebid the job. (*Id.* at 509-10.) Ms. Perino's firm, Perdel Contracting, rebid the job at the same price (which had been publicly announced at the first bid opening), only to be underbid by $1000 (on a $30,000 contract) by a local contractor who had not submitted a bid initially. (*Id.*) William Clark, who owns and operates a trucking and excavation firm, testified more generally that, in his experience, DBEs are often assigned the "hardest" work, which causes the most wear and tear on their equipment. (*Id.* at 663.)

***14** IDOT's witnesses also discussed discrimination in the financing and insurance markets. According to Ms. Perino, her applications for a line of credit were turned down by countless banks, many of which requested that a man co-sign the loan application. (T.T. at 508.) Other banks required her to post " 'three-for-one' collateral" in order to establish a line of credit. [FN22] (*Id.*) Deborah Sawyer, similarly, reported being asked for a male co-signor on her loan applications. (*Id.* at 682.) A number of witnesses also testified that they had experienced difficulties in obtaining insurance, and that their rates were ultimately higher than those of similarly-situated non-DBEs. Mr. Clark, for example, testified that insurance rates tend to be higher for DBEs in the trucking industry, regardless of their record of accidents and violations. [FN23] (*Id.* at 632.) Similarly, Ms. Sawyer testified that insurance rates are very high and burdensome in the industry; the Chicago Public Schools, for example, has a $10 million

insurance requirement. (*Id.* at 684-85.) Ms. Sawyer acknowledged that these insurance requirements are burdensome for all firms, but she believes they are especially so for DBEs, which frequently are forced to pay higher insurance rates due to racial and gender discrimination. [FN24] (*Id.* at 680-81, 684-85.)

FN22. Ms. Perino did not define her meaning by "three-for-one" collateral; the court presumes that this means that the bank required her to post collateral of three times the value of the line of credit.

FN23. It appears to the court that the source for Mr. Clark's testimony that DBEs pay higher insurance premiums than non-DBEs could only be hearsay. Nevertheless, in the absence of an objection by Plaintiff, the information was admitted.

FN24. Again, this testimony was admitted in the absence of a hearsay objection.

Finally, the DBE witnesses reported that they encountered difficulties in obtaining prompt payment for their work, leading to serious cash-flow problems and jeopardizing their business success. According to Harendra Mangrola, his firm has had problems obtaining prompt payments on approximately 50 percent of its projects historically. (T.T. at 576.) Such delays hamper the growth of his firm and compromise his firm's ability to bid on new and larger projects. (*Id.*) Noting that it is public agencies that are most likely to delay payment, Mr. Wong expressed his desire for more non-goals work in the private sector, where he can expect prompt payment for those services. (*Id.* at 480-81.)

e. Testimony of non-DBE Owners

In response to the testimony of DBE owners, Plaintiff called a number of non-DBE business owners as witnesses. [FN25] These witnesses were unanimous in declaring that they solicit DBEs and non-DBEs equally on non-goals jobs. Generally, such solicitations are made from a subcontractor list compiled and maintained by each firm, according to the type of work being solicited. Most witnesses reported that their lists contain all known subcontractors in a given field, and that any firm may ask to be added to their list. Upon receiving bids, the witnesses reported that they award subcontracts based on three factors: (1) price; (2) the ability of the subcontractor to complete the work; and (3) whether the project has a DBE goal. As to this final consideration, a number of witnesses explained that their firms will occasionally solicit bids from subcontractors for certain work on goals projects that the firm would otherwise have completed itself in the absence of goals, solely in order to meet the specified DBE goal. In addition, a number of witnesses testified that their firms occasionally award work to a DBE that was not the low bidder in order to avoid scrutiny from IDOT, though other witnesses reported that their firms have no such policy.

FN25. The following business owners/representatives testified on behalf of Plaintiff: (1) Bob Fulton, Vice President of Gunther Construction Company; (2) Eugene Keeley, President of Keeley & Sons Construction Company; (3) James Brunner, President and CEO of United Contractors Midwest; (4) Art Baker, President of Peter Baker & Sons Co.; (5) Donald Schultz, President of Herlihy Mid-Continent Construction; (6) Richard Weber, Chief Estimator for Plate Construction, Inc.; Charles Gallagher, President of Gallagher Asphalt Corp.; (7) Alex Apes, estimator and project manager for Greco Construction; (8) Kenneth Aldridge, CEO of Aldridge Electric; (9) Dennis DeVitto, Vice President of K-Five Construction Corp; (10) David Lorig, President of Lorig Construction; and (11) Diane Forbus, Chief Estimator at Central Blacktop.

***15** Representatives from a number of firms accused of failing to solicit DBEs on non-goals projects testified. Responding to allegations that his firm solicited Perdel Contracting (Elizabeth Perino's firm) only on non-goals projects, Richard Weber, the chief estimator for Plate Construction, identified a number of non-goals projects on which his firm had in fact solicited bids from Perdel. (T.T. at 1121-22.) He explained that his firm maintains an automated subcontractor list, from which bid solicitations are faxed out automatically to qualified subcontractors. (*Id.* at 1020-22.) Similarly, Alex Apes, an estimator and project manager for Greco Construction, denied allegations that his firm solicits Summit Construction (Harendra Mangrola's firm) only on goals projects. (*Id.* at 1228-29.) To the contrary, Mr. Apes explained that his firm has a close relationship with Summit, even leasing Summit space on Greco's property. (*Id.*) He testified, further, that the only time his firm does

not solicit Summit's service on relevant subcontracts is on those projects where Summit is also bidding as a prime contractor. (*Id.*)

Kenneth Aldridge, CEO of Aldridge Electric, also responded to Summit's allegations against his firm. Mr. Aldridge described a bad experience his firm had with Summit, in which Summit refused to honor its bid, leading to a lawsuit. (*Id.* at 1241-42.) Given this history, Aldridge stated that the did not believe his firm should continue to do business with Summit. (*Id.*) He denied, however, that this refusal was in any way related to Summit's status as a DBE. To the contrary, Mr. Adridge testified that his firm goes out of its way to mentor minority and other new small businesses by, for example, giving them smaller projects and introducing them to his bonding insurance agents and bankers. (*Id.* at 1239-40.) According to Mr. Aldridge, such mentoring is in his own firm's best interest, by helping it create long-term relationships with reputable subcontractors. (*Id.*)

DISCUSSION

Plaintiff argues that the IDOT DBE program violates the Equal Protection Clause of the Fourteenth Amendment which provides that "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The use of racial preferences is a "highly suspect tool," subject to strict judicial scrutiny. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion). Thus, racial classifications created or imposed by federal, state, or local law must serve a compelling governmental interest and must be narrowly tailored to serve that interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (*"Adarand III"*); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion). The Supreme Court has observed that although strict scrutiny is rigorous, it is not always "fatal in fact." *Adarand III*, 515 U.S. at 237.

***16** To the extent that IDOT's DBE program is rooted in gender-conscious classifications, [FN26] the program is subject to intermediate scrutiny. In general, a government entity must set forth an "exceedingly persuasive justification" for gender classifications. *Builders Ass'n of Greater Chicago v. County of Cook*, 256 F.3d 642, 644 (7th Cir.2001), *citing United States v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996). The Supreme Court has not, however, developed a framework for analyzing equal protection challenges to gender-based remedial measures, nor have the courts resolved the issue of whether gender preferences are entitled to a different, more permissive, standard than those based on race. *Builders Ass'n*, 256 F.3d at 644, *citing Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 422 (7th Cir.1991). In any event, since IDOT has not argued for application of a different standard for the race and gender aspects of the DBE program, the court will apply strict scrutiny to the program as a whole, and will not attempt to carve out and apply a more permissive standard to the gender-based aspects of the program.

> FN26. As discussed, the federal Regulations upon which IDOT's DBE program is rooted contains a rebuttable presumption that women (and members of certain racial minority groups) are socially and economically disadvantaged individuals. 49 C.F.R. § 26.67(a)(1).

I. Strict Scrutiny Review

In order to survive strict scrutiny, the government must first articulate a compelling government interest served by the legislative enactment. To do so, the government must make two showings:
First, the discrimination must be "identified discrimination." "While the states and their subdivisions may take remedial action when they possess evidence" of past or present discrimination, "they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief." A generalized assertion of past discrimination in a particular industry or region is not adequate because it "provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." Accordingly, an effort to alleviate the effects of societal discrimination is not a compelling interest. Second, the institution that makes the racial distinction must have had "a strong basis in evidence" to conclude that remedial action was necessary, *before* it embarks on an affirmative action program.

Shaw v. Hunt, 517 U.S. 899, 909-10, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (emphasis in original) (internal citations omitted); *cf. Croson*, 488 U.S. at 500 ("Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice.") (citation omitted); *Majeske v. City of Chicago*, 218 F.3d 816, 820 (7th Cir.2000)

("[T]he government must show real evidence of past discrimination and cannot rely on conjecture."). If the government makes such a showing, the party challenging the affirmative action plan bears the "ultimate burden" of demonstrating that unconstitutionality of the program. *Wygant*, 476 U.S. at 277-78.

II. Compelling Interest

In its earlier opinion, this court granted summary judgment in favor of the federal Defendants, holding that the federal DBE statute (TEA-21) was narrowly tailored to further a compelling government interest. *Northern Contracting, Inc. v. State of Illinois*, No. 00 C 4515, 2004 WL 422704, *39-40 (N.D.Ill. Mar.3, 2004). Specifically, the court held that the federal DBE program was narrowly tailored to further the government's compelling interest in redressing private discrimination in federally-assisted highway subcontracting. *Id.* at *34. In enacting its own DBE program, IDOT was complying with federal law, specifically TEA-21. Therefore, the court, citing a similar Eighth Circuit case, held that IDOT need not establish a distinct compelling interest before implementing the federal DBE program, *Northern Contracting, Inc.*, 2004 WL 422704, *40, *citing Sherbrooke Turf, Inc. v. Minnesota Dept. of Transp.*, 345 F.3d 964, 970 (8th Cir.2003), *cert. denied*, 541 U.S. 1041 (2004). IDOT is, however, required to demonstrate that its implementation of the federal DBE program is narrowly tailored to serve the federal program's compelling interest. *Sherbrooke Turf*, 345 F.3d at 971. Specifically, to be narrowly tailored, "a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed." *Id.* The federal DBE program delegates this tailoring function to the state; thus, IDOT must demonstrate, as part of the narrowly tailored prong, that there is a demonstrable need for the implementation of the federal DBE program within its jurisdiction.

III. Narrowly Tailored

***17** Once a government entity has identified and established that a race-conscious program serves a compelling government interest, it must next show the program is narrowly tailored to serve that interest. *Adarand III*, 515 U.S. at 235. This analysis considers several factors, "including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties." *United States v. Paradise*, 480 U.S. 149, 171, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987) (plurality). An affirmative action plan is narrowly tailored if "it discriminates against whites as little as possible consistent with effective remediation." *Majeske*, 218 F.3d at 820, *quoting McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir.1998). Thus, courts look to "whether the racially preferenced measure is 'a plausible lower-bound estimate of a shortfall in minority representation' that is caused by past discrimination." *Majeske*, 218 F.3d at 823, *quoting McNamara*, 138 F.3d at 1224.

Once the government entity has both demonstrated a compelling interest in remedying past discrimination and shown that its plan is narrowly tailored to achieve that goal, the party challenging that program bears the "ultimate burden" of proving that the plan is unconstitutional. *Majeske*, 218 F.3d at 820, *citing Aiken v. City of Memphis*, 37 F.3d 1155, 1162 (6th Cir.1994); *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1521 (10th Cir.1994); *see also Wygant*, 476 U.S. at 277-78 ("The ultimate burden remains with the [plaintiff] to demonstrate the unconstitutionality of an affirmative-action program."). This burden can be met only by presenting credible evidence to rebut the government's proffered data.

A. Is IDOT's FY2005 DBE Goal a "Plausible Lower-bound Estimate"?

The court need not conduct a step-by-step analysis of the statistical data underlying IDOT's FY2005 DBE plan. IDOT has presented an abundance of such data documenting usage disparities between DBEs and non-DBEs in the construction industry. The methodology employed in the NERA Report has been upheld on a number of other occasions, *see Sherbrooke Turf*, 345 F.3d 964 (8th Cir.2003); *Concrete Works of Colo., Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir.2003), *cert. denied*, 540 U.S. 1027, 124 S.Ct. 556, 157 L.Ed.2d 449 (2003), and this court agrees that the methodology utilized here is generally consistent with the dictates of the federal Regulations. Nevertheless, Plaintiff has raised a couple of specific issues regarding the methodology of the NERA Study that the court must address. First, Plaintiff argues that the custom census methodology was erroneous because it failed to limit its DBE availability figures to those firms that are

registered and pre-qualified with IDOT, as required by state law. Plaintiff also maintains that the NERA study erred in its calculations of the DBE utilization rate because it considered data relating to IDOT subcontracts as well as prime contracts, despite the fact that the latter are awarded, as a matter of law, to the lowest bidder. According to Plaintiff, limiting the analysis of DBE utilization to IDOT subcontracts alone reveals such firms are actually overutilized. As a result of these errors, Plaintiff argues that IDOT's fiscal year 2005 DBE goal does not represent a "plausible lower-bound estimate" of DBE participation in the absence of discrimination. The court will address these contentions in turn.

1. Calculation of DBE Availability

***18** Under 49 C.F.R. § 26.45(c), a Recipient may calculate its base estimate of DBE availability under one of five methods: (1) use of DBE directories and Census Bureau data; (2) use of a previous year's bidders list; (3) use of data from a disparity study; (4) use of a goal of another DOT recipient in the same, or substantially similar, market; or (5) use of alternative methods "based on demonstrable evidence of local market conditions." 49 C.F.R. § 26.45(c)(1)-(5). Prior to fiscal year 2005, IDOT calculated its DBE availability figures based on its existing list of pre-qualified and pre-registered DBE firms. In developing its fiscal year 2005 plan, however, IDOT commissioned NERA to conduct a "custom census" to provide a more accurate estimate of DBE availability, pursuant to § 26.45(c)(5). As part of this custom census, NERA identified all available DBE contractors and subcontractors in the relevant industries within the State of Illinois using Dun & Bradstreet's *Marketplace* directory, as well as approximately twenty additional DBE lists from various public and private entities within Illinois and the surrounding states. [FN27] This resulted in the calculation of a higher DBE availability figure than would have been reached by focusing solely on the list of registered and pre-qualified bidders lists. Specifically, use of the bidders list would have resulted in a DBE availability figure of 13.34 percent, [FN28] as opposed to the 22.77 percent availability figure found in the NERA Study.

FN27. As discussed above, NERA cross-checked these lists to eliminate duplicates and randomly sampled the firms to verify DBE status. The Study also attempted to weight firms, and various industries, based on their relative amount of IDOT contracting dollars. *See supra* at 15.

FN28. This 13.34 percent figure is based on the following figures: 794 pre-qualified prime contractors, of which 57 are DBEs; 1381 registered subcontractors, of which 197 are DBEs; and 381 pre-qualified consultants, of which 87 are DBEs. (Am. Stipulation, ¶ 5; Ex. A.)

Plaintiff argues that IDOT is required to calculate DBE availability based solely on the bidders list of registered and pre-qualified subcontracts. Under Illinois law, only firms registered and pre-qualified are eligible to participate in IDOT contracts, whether as a prime or subcontractor. 44 ILL. ADMIN. CODE tit. 44, § § 650.380; 625.40. Plaintiff argues that including DBEs that are not registered and pre-qualified violates § 26.45(b), which requires that a Recipient's overall goal to be "based on demonstrable evidence of the availability of *ready, willing and able* DBEs relative to all business ready, willing and able to participate on your DOT-assisted contracts." 49 C.F.R. § 26.45(b) (emphasis added). Unregistered firms are not "ready, willing and able" to participate in IDOT contracts, Plaintiff urges, and thus IDOT's inclusion of such firms within its DBE availability calculation contravenes the federal Regulations. Plaintiff also cites language in prior IDOT DBE plans reflecting IDOTs reliance prior to 2005 on the bidders list as the most accurate estimate of DBE availability. (Plaintiff's Post-Trial Memorandum, at 13-14.)

In response, IDOT notes that NERA's custom census approach has been employed, without successful challenge, by the Minnesota Department of Transportation, Chicago's Metra commuter railway agency, and the Maryland Department of Transportation. (Defendant's Post-Trial Memorandum, at 5, citing T.T. at 361-62.) The Eight Circuit recently upheld the Minnesota Department of Transportation's use of a custom census conducted by NERA. *Sherbrooke Turf*, 345 F.3d at 973-74. Significantly, *Sherbrooke Turf* involved an agency that, like IDOT, requires firms to be pre-qualified before being placed on a bidder's list of eligible firms. (T.T. at 370-73.) Despite this requirement, the Eighth Circuit (albeit without expressly addressing the matter) upheld the use of a custom census that looked beyond the list of pre-qualified firms when measuring DBE availability.

***19** In addition to these precedents, IDOT urges that

more general policy concerns support the use of the custom census measure. Specifically, IDOT suggests, and the court agrees, that the remedial nature of the federal statute counsels for the casting of a broader net when measuring DBE availability. IDOT cites, for example, language from a website run by the U.S. DOT's Office of Small and Disadvantaged Business Utilization, which explicitly encourages Recipients to consider sources beyond certified DBE lists when calculating DBE availability:

[I]f you have data about the number of minority and women-owned businesses (regardless of whether they are certified as DBEs) in your market area, or DBEs in your market area that are in other recipients' Directories but not yours, you can supplement your Directory data with this information. Doing so may provide a more complete picture of availability of firms to work on your contracts than the data in your Directory alone.

(Def.'s Post-Trial Brief, at 5-6, citing http://osdbu.dot.gov/business/dbe/hottips.cfm.) Moreover, the author of the NERA Study, Dr. Wainwright, discussed during his testimony his concern that a registration list such as the one maintained by IDOT may reflect lower levels of DBE availability due to the indirect effects of discrimination. (T.T. at 732-34.) Dr. Wainwright explained, for example, that discrimination in the credit and bonding markets may artificially reduce the number of registered and pre-qualified DBEs, relative to the number of such firms within the marketplace as a whole. (*Id.*) As discussed below, IDOT presented uncontradicted evidence that DBEs face significantly higher burdens within the credit and bonding markets than non-DBE small firms. In light of the established use of the custom census approach, as well as the legitimate policy considerations in favor of a broader and more flexible inquiry into DBE availability, the court overrules Plaintiff's objections to the custom census. [FN29]

FN29. As for Plaintiff's suggestion that IDOT is bound by its prior statements indicating its belief that the bidder's list produced the most accurate estimate of DBE availability, the court finds nothing in the Regulations indicating that a Recipient is required to utilize the same approach in each of its annual DBE plans. To the contrary, the Regulations invite Recipients to use whichever of the five alternative approaches they deem likely to produce the most accurate estimate of DBE availability. Indeed, the Regulations provide not only that the five examples "are not intended to be an exhaustive list," but explain that "[a]ny percentage figure derived from one of these examples should be considered a basis from which you begin when examining all evidence available in your jurisdiction." 49 C.F.R. § 26.45(c)(1). In the face of such regulatory flexibility, any assertion that a Recipient is bound to employ the same method of estimating DBE availability in each of its annual DBE plans is frivolous.

2. Calculation of DBE Utilization

Plaintiff urges that the DBE utilization rate presented in the NERA study is erroneous because it considered data relating to IDOT subcontracts as well as prime contracts, despite the fact that the latter are awarded, as a matter of law, to the lowest bidder. According to Plaintiff, calculation of DBE utilization rate based on percentage of subcontracting dollars alone would have revealed that DBEs are actually overutilized on both goals and non-goals projects. As shown in the chart below, DBE utilization on subcontracts has exceeded availability each year for which data is available since 2001, on both goals and non-goals projects:

Year	Methodology Used	Baseline DBE availability	DBE % of Total $ value of non-goals Ks	DBE % of total $ value of non-goals sub-Ks	DBE % of total $ value of goals contracts	DBE % of total $ value of goals subcontracts
2001	Bidders list 26.45(c)(2)	14.76%	1.5%	17%	Not available	Not available
2002	26.45(c)(2)	11.74%	1.5%	17%	Not available	Not available
2003	26.45(c)(2)	11.01%	2%	19%	15.19%	47.72%
2004	26.45(c)(2)	13.79%	2%	17%	18.05%	49.85%

2005 (Jan.-Apr. 2004)	Custom Census 26.45(c)(5)	22.77%	2%	17%	N/A	N/A

*20 (Adapted from Exs. A, B, and C to Am. Stipulation.) In 2004, for example, IDOT calculated DBE availability, using its bidders list of registered and pre-qualified firms, to be 13.79 percent of the total marketplace. During that year, DBEs received 17 percent of the total value of the subcontracted portion of non-goals contracts and 48.85 percent of the total value of the subcontracted portion of contracts with goals, both totals significantly in excess of DBE availability. Plaintiff argues that since DBE utilization on the subcontracted portion of both goals and non-goals contracts exceeded their overall availability in the marketplace, DBEs are not only fully utilized, but overutilized as compared with their utilization in a race-neutral market. (Pl.'s Post-Trial Brief, at 5.) In light of this full utilization of DBEs, Plaintiff contends, IDOT has no basis on which to employ any race-conscious requirement in the selection of subcontractors. (*Id.*)

IDOT responds that if one considers DBE utilization in terms of the total value of all IDOT contracts, as the Regulations require, DBE usage plummets to 2 percent of the total value of non-goals contracts and 18.05 percent of the total value of goals contracts. IDOT urges that this 2 percent figure represents a more accurate estimation of likely DBE utilization in a market without any race-conscious goals. Moreover, IDOT contends that the Regulations require Recipients to consider DBE participation rates in terms of the total value of all federally funded contracts, not merely the portion of those contracts awarded to subcontractors. Under the Regulations, a Recipient must set an overall goal for DBE participation in your DOT-assisted contracts." 49 C.F.R. § 26.45(a)(1). At no point do the Regulations limit the application of DBE goals to the subcontracted portion of contracts. To the contrary, the Regulations expressly provide that the goals requirements are imposed on prime contractors:

You must apply the requirements of this section to DBE bidders/offerors for prime contracts. In determining whether a DBE bidder/offeror for a prime contract has met a contract goal, you count the work the DBE has committed to performing with its own forces as well as the work that it has committed to be performed by DBE subcontractors and DBE suppliers.

49 C.F.R. § 26.53(g).

This requirement that goals be applied to the value of the entire contract, not merely the subcontracted portion(s), is not altered by the fact that prime contracts are, by law, awarded to the lowest bidder. While it is true that prime contracts are awarded in a race- and gender-neutral manner, the Regulations nevertheless mandate application of goals based on the value of the entire contract. Strong policy reasons support this approach. Although laws mandating award of prime contracts to the lowest bidder remove concerns regarding direct discrimination at the level of prime contracts, [FN30] the indirect effects of discrimination may linger. The ability of DBEs to compete successfully for prime contracts may be indirectly affected by discrimination in the subcontracting market, or in the bonding and financing markets. Such discrimination is particularly burdensome in the construction industry, a highly competitive industry with tight profit margins, considerable hazards, and strict bonding and insurance requirements. *See Builders Ass'n of Greater Chicago*, 298 F.Supp.2d at 730-31 (discussing the hurdles facing small firms in the construction industry). Due to these requirements, smaller firms are generally unable to bid on large, prime contracts, and indeed often focus on subcontracts in a particular trade. *Id.* at 731 ("Smaller firms are not, therefore, bidders on large prime contracts and generally focus on subcontracts in a particular trade.").

> FN30. In light of laws requiring the award of prime contracts on the basis of low bid, any direct racial or gender discrimination at this level could presumably occur only in the form of overt bid-rigging.

*21 IDOT presented an array of statistical studies concluding that DBEs face disproportionate hurdles in the credit, insurance, and bonding markets. A study conducted by NERA on behalf of Metra, for example, found that black-owned firms are twenty percent more likely to have a loan application denied than white-owned firms, even after controlling for differences in creditworthiness. (Def.'s Ex. 19, at 75.) The study also found that black-owned firms pay, on average, a one percent higher rate of interest than comparable white-owned firms. (*Id.* at 76.) In addition, IDOT cited studies concluding that minorities and women form businesses at a lower rate, and that such business, when formed, are less successful than businesses owned by white males. (Branchflower Report, at 14-15, 18.)

The results of these studies were consistent with the

testimony of DBE owners. These witnesses discussed their difficulties obtaining financing, lines of credit, and insurance, as well as their beliefs that their experiences were linked to their race or gender. Disappointingly, the two female witnesses, both successful business owners, separately reported that they had been asked to present a male co-signor when applying for lines of credit. [FN31] The DBE witnesses testified, further, that when they are able to obtain credit and insurance, their rates are higher than those applied to non-DBEs. [FN32] These accounts were not impeached during cross examination, nor did Plaintiff otherwise refute their testimony through its own witnesses (i.e. representatives from the credit or insurance industries) or statistical studies.

FN31. IDOT's DBE witnesses also discussed their belief that many prime contractors only solicited their services on projects with DBE goals. Some of this testimony, however, was effectively rebutted by the testimony of the prime contractors called to testify on behalf of Plaintiff. Plaintiff's witnesses were unanimous in maintaining that they solicit DBEs and non-DBEs equally, and in explaining that their firms look to price and ability, not race or gender, in awarding subcontracts. There was no evidence of even a single instance in which a prime contractor failed to award a job to a DBE that offered the low bid. This testimony is supported by the statistical data discussed above, which shows that at least at the level of subcontracting, DBEs are generally utilized at a rate in line with their ability.

FN32. Regrettably, IDOT did not verify the specific allegations made by these witnesses nor test these experiences against those of new businesses established by white males. At least one Court of Appeals has nevertheless honored such testimony:
There is no merit to [plaintiff's] argument that the witnesses' accounts [of discrimination] must be verified to provide support for [the government's] burden. Anecdotal evidence is nothing more than a witness' narrative of an incident told from the witness' perspective and including the witness' perceptions.... [The government] was not required to present corroborating evidence and [plaintiff] was free to present its own witnesses to either refute the incidents described by [the government's] witnesses or to relate their own perceptions on discrimination in the ... construction industry.
Concrete Works, 321 F.3d at 989.

That such discrimination indirectly affects the ability of DBEs to compete for prime contracts, despite the fact that they are awarded solely on the basis of low bid, cannot be doubted: "[E]xperience and size are not race- and gender-neutral variables ... [DBE] construction firms are generally smaller and less experienced *because* of industry discrimination. The lending discrimination and business formation studies both strongly support [the recipient's] argument that [DBEs] are smaller and less experienced because of marketplace and industry discrimination." *Concrete Works*, 321 F.3d at 981.

Nevertheless, Plaintiff urges that, regardless of the method of calculation, the data indicates that there is no underutilization of DBEs in IDOT contracts and, thus, data on the utilization of DBEs provides no support for race- or gender-based remedial measures. The parties have stipulated that DBE utilization on goals projects exceeded their overall availability in both fiscal years 2003 and 2004, even if utilization is measured as a percentage of total IDOT contract dollars. In fiscal year 2003, in which IDOT calculated DBE availability at 11.01 percent of the marketplace, DBEs were awarded 15.19 percent of the total dollar value of all IDOT goals contracts and 47.72 percent of the subcontracted dollars. (Ex. B to Am. Stipulation.) Likewise in fiscal year 2004, when DBE availability was estimated to be 13.79 percent, DBEs were awarded 18.05 percent of the total value of all IDOT goals contracts and 49.65 percent of the total value of the subcontracted portions of all goals contracts. (Ex. C to Am. Stipulation.)

*22 IDOT contends that the high utilization of DBEs on goals contracts was a product of the successful DBE program and not the absence of discrimination. It points to the sharp decline in DBE utilization on IDOT contracts without DBE goals over the same period. In fiscal year 2003, in which DBE availability was estimated to consist of 11.01 percent of the total marketplace, DBEs received 2 percent of the total dollar value of IDOT contracts without goals and 19 percent of the total value of the subcontracted portions of those contracts. (Ex. A to Am. Stipulation.) Similarly, in fiscal year 2004, when IDOT estimated DBE availability at 13.79 percent of the total market, DBEs received only 2 percent of the total dollar value of non-goals contracts but 17 percent of the total value of subcontracts awarded. (*Id.*) In addition, IDOT presented evidence regarding DBE utilization in other unremediated markets (without DBE goals), all of which showed DBE utilization to decline significantly in the absence of goals.

In light of this data, the court is convinced that the relatively high (or appropriately high) level of DBE

participation on goals contracts has resulted not from a lack of discrimination, but from the success of IDOT's DBE program. The stark disparity in DBE participation rates on goals and non-goals contracts, when combined with the statistical and anecdotal evidence of discrimination in the relevant marketplaces, indicates that IDOT's 2005 DBE goal represents a "plausible lower-bound estimate" of DBE participation in the absence of discrimination. *Majeske,* 218 F.3d at 82; *McNamara,* 138 F.3d at 1224. Now that IDOT has met this burden, Plaintiff can succeed in meeting its "ultimate burden" to show that IDOT's DBE program is not narrowly tailored only by presenting credible evidence to rebut IDOT's proffered data. *Majeske,* 218 F.3d at 820. Such "rebuttal evidence may consist of a neutral explanation for the statistical disparities" or presentation of Plaintiff's own statistical data. *Concrete Works,* 321 F.3d at 959, *quoting Coral Const. Co. v. King County,* 941 F.2d 910, 921 (9th Cir.1991). Plaintiff presented no persuasive evidence contravening the conclusions of IDOT's studies, or explaining the disparate usage of DBEs on goals and non-goals contracts.

In the absence of its own statistical evidence, Plaintiff argues that the marketplace data presented by IDOT, even if accepted at face value, cannot justify the use of race- or gender-based remedies because IDOT has not identified direct discrimination against DBEs by prime contractors. (Pl.'s Post-Trial Brief, at 22-23.) It cites language from the Seventh Circuit suggesting that in the absence of such evidence, IDOT could not constitutionally create race-conscious remedies:

> [I]f prime contractors on County projects were discriminating against minorities and this was known to the County, whose funding of the contracts thus knowingly perpetuated the discrimination, the County might be deemed sufficiently complicit (a kind of joint tortfeasor, coconspirator, or aider and abettor) to be entitled to take remedial action. But of that there is no evidence either.

*23 *Builders Ass'n of Greater Chicago,* 256 F.3d at 645 (citations omitted). Plaintiff urges that IDOT is barred from employing race-conscious remedies because it has not demonstrated, statistically or otherwise, any direct discrimination by prime contractors.

At bottom, this argument amounts to the contention that IDOT failed to identify a compelling government interest underlying its DBE program by failing to "identify [past or present] discrimination, public or private, with some specificity." *Shaw,* 517 U.S. at 909-910. The argument fails for two reasons. First, IDOT's proffered evidence of discrimination against DBEs was not limited to alleged discrimination by prime contractors in the award of subcontracts. IDOT also presented evidence that discrimination in the bonding, insurance, and financing markets erected barriers to DBE formation and prosperity. Such discrimination inhibits the ability of DBEs to bid on prime contracts, thus allowing the discrimination to indirectly seep into the award of prime contracts, which are otherwise awarded on a race- and gender-neutral basis. This indirect discrimination is sufficient to establish a compelling governmental interest in a DBE program:

> [E]vidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between [DBEs] and majority-owned construction firms shows a "strong link" between a government's "disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination." Evidence that private discrimination results in barriers to business formation is relevant because it demonstrates that [DBEs] are precluded *at the outset* from competing for public construction contracts.

Concrete Works, 321 F.3d at 977 (internal citations omitted). [FN33] Having established the existence of such discrimination, a governmental entity "has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *Croson,* 488 U.S. at 492 (O'Connor, J., joined by Rehnquist, C.J. and White, J.).

> FN33. As in this case, the defendants in *Concrete Works* presented statistical studies showing that private discrimination in the lending and credit markets was responsible for lower minority business formation rates. *Id.* at 963-66.

More importantly, Plaintiff fails to acknowledge that, in enacting its DBE program, IDOT acted not to remedy its own prior discriminatory practices, but pursuant to federal law, which both authorized and required IDOT to remediate the effects of *private* discrimination on federally funded highway contracts. This is a fundamental distinction. [FN34] As noted above, a state or local government need not independently identify a compelling interest when its actions come in the course of enforcing a federal statute, citing

> FN34. For this reason, *Builders Association of Greater Chicago v. County of Cook,* 123 F.Supp.2d 1087 (N.D.Ill.2000) *aff'd* 256 F.3d 642 (7th Cir.2001), is not directly relevant to the present case. In that case, the court held that Cook County had failed to establish a compelling interest supporting its contract set-

> aside program. In support of its program, the County had presented anecdotal evidence that prime contractors failed to solicit minority- and women-owned subcontractors at the same rate as similarly-situated firms owned by white males. *Id.* at 1113. In addition, the County had presented statistical data demonstrating that a number of firms rarely or never solicit minority- or women-owned firms for subcontract work. The court, however, held that the County had failed to show evidence of a systematic refusal to solicit such firms for subcontract work, noting that the County's statistical data was based on the practice of a mere thirteen general contractors. *Id.* The Seventh Circuit subsequently upheld this decision, adding that the program also failed the narrowly tailored prong insofar as the County failed to link its set-aside levels (30 percent to minorities and 10 percent to women) to evidence of their availability in the marketplace. *Builders Ass'n of Greater Chicago v. County of Cook*, 256 F.3d at 647.

Compelling government interest looks at a statute or government program on its face. When the program is federal, the inquiry is (at least usually) national in scope. If Congress or the federal agency acted for a proper purpose and with a strong basis in the evidence, the program has the requisite compelling government interest nationwide, even if the evidence did not come from or apply to every State or locale in the Nation. Thus, we reject appellants' contention that their facial challenges to the DBE program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting in [a given state].
***24** *Sherbrooke Turf*, 345 F.3d at 970; *see also Milwuakee County Pavers Ass'n v. Fielder*, 922 F.2d 419, 423 (7th Cir.1991) ("If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of the litigation to be constitutional, we do not see how the state can be thought to have violated the Constitution.").

A. Race-Neutral Aspects of IDOT's DBE Program

As a part of the narrow tailoring inquiry, courts examine whether there was " 'any consideration of the use of race-neutral means to increase minority business participation' in government contracting." *Adarand III*, 515 U.S. at 237-38, *quoting Croson*, 488 U.S. at 507. Such measures are important to ensure that a plan " 'discriminates against whites as little as possible consistent with effective remediation." ' *Majeske*, 218 F.3d at 820, *quoting McNamara*, 138 F.3d at 1222. Though "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," it does require "serious, good-faith consideration" of race-neutral measures. *Grutter v. Bollinger*, 539 U.S. 306, 339, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (citations omitted). This court is satisfied that IDOT has done its best to maximize the portion of its DBE goal met through methods unrelated to contracting goals.

Those measures fall into two broad categories: anti-discrimination enforcement and small business initiatives. As part of its anti-discrimination efforts, IDOT has developed an internet website where a DBE can file an administrative complaint if it believes a prime contractor is discriminating on the basis of race or gender in the award of subcontracts. (FY2005 Plan, at 8; T.T. at 1335.) Once such a complaint has been filed, IDOT will conduct a full-scale inquiry into the allegations, and, if discrimination is found, impose penalties on individual contractors. (T.T. at 1335-37.) In addition, IDOT requires contractors seeking pre-qualification to maintain and produce solicitation records on all projects, both public and private, with and without goals, as well as records of the bids received and accepted. (FY2005 Plan, at 8; T.T. at 1335-38.) Such evidence will assist IDOT in investigating and evaluating discrimination complaints. Through these measures, IDOT is able to limit its reliance on race- and gender-conscious remedies, by attempting to stem discrimination at its source.

In addition to these anti-discrimination measures, IDOT has also implemented a number of small business initiatives designed to increase DBE participation without the use of race- or gender-conscious goals. The agency has, for example, taken a number of steps to reduce barriers to participation facing new and small firms, including the "unbundling" of large contracts into smaller pieces, and the allocation of some contracts for bidding only by firms meeting the Small Business Administration's definition for small businesses. (FY2005 Plan, at 7.) IDOT is also in the process of adopting a bonding and financing assistance initiative, which will assist emerging contractors in meeting IDOT's pre-qualification requirements and increasing their capacity to handle larger projects. (*Id.*) Towards this end, IDOT has adopted "prompt pay" rules, designed to ensure prompt payment of subcontractors and to improve the cash flow of small businesses. (*Id.* at 8.) IDOT has continued to sponsor networking and informational sessions, as well as a mentor-protégé program encouraging partnerships between established firms and DBEs, and other small businesses. (*Id.*) In addition, IDOT maintains a network of consultants available to provide management, technical and financial training to DBEs and other small businesses. (*Id.*)

*25 Significantly, Plaintiff did not question the efficacy or sincerity of these race- and gender-neutral measures. For good reason. There is no basis to dispute IDOT's commitment to achieving the maximum portion of its DBE goals through race- and gender-neutral means. [FN35] The court takes special notice of the efforts to increase the ability of DBEs and other small businesses to grow in size and compete for prime contracts. These efforts are significant in light of the statistical data showing that DBE participation is especially low in the prime contracting arena. Because this data is not the result of direct discrimination, race- and gender-neutral measures are likely to be vital in increasing the ability of DBEs and other small businesses to compete for prime contracts.

FN35. This is in sharp contrast to the program in *Builders Association of Greater Chicago v. City of Chicago,* where the court found that a contractual set-aside program was not narrowly tailored to remedy past and present discrimination and thus violated equal protection. 298 F.Supp.2d at 741. In that case, the court found, initially, that evidence that business formation rates among women and minorities were depressed by discrimination in the credit market established a compelling governmental interest for the City's set-aside program. *Id.* at 739. The court held, however, that the City's program was not narrowly tailored to this interest. Specifically, the court noted that the program had no termination rate, and contained a very high "graduation" revenue amount of $27,500,000. *Id.* at 739-40. Thus, a minority- or women-owned business was treated as disadvantaged unless or until it achieved annual revenues of over $27,500,000. Furthermore, the court noted that the City "rarely or never granted" waivers on construction constructs. *Id.* at 740. Finally, the court found that the City had failed to attack direct discrimination by prime contractors and had otherwise failed to implement race-neutral measures designed to assist minority- or women-owned businesses without resort to race- or gender-conscious set-asides. *Id.* at 741.

B. Flexibility and Waivers

IDOT's DBE program also retains significant flexibility through the use of contract-by-contract goal setting and a provision for individual contract waiver. In the case of the former, IDOT individually tailors the DBE goal on an individual contract basis-in other words, IDOT does not apply a fixed DBE goal to each individual contract. (T.T. at 156-57.) Instead, IDOT sets individual contract goals only after considering the nature of the work involved, the geographic area, and the availability of DBEs in that area. (*Id.* at 157.) In addition, IDOT's DBE plan allows prime contractors to petition for waiver of individual contract goals in certain situations. (*Id.* at 160.) A contractor is entitled to a waiver when it cannot meet a goal despite having made reasonable efforts to do so. (*Id.* at 160-61.) Significantly, IDOT approves over 70 percent of waiver requests (though they are only requested on 8 percent of contracts). *Compare* *Builders Ass'n of Greater Chicago,* 298 F.Supp.2d at 740 (finding DBE plan not to be narrowly tailored where waivers were "rarely or never granted").

The individualized goal setting and waiver provisions are important aspects of IDOT's DBE program. A number of courts have stressed the importance of the flexibility in the context of narrow tailoring:
Regarding flexibility, "the availability of waiver" is of particular importance. As for numerical proportionality, *Croson* admonishes us to beware of the "completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." In that context, a "rigid numerical quota" particularly disservices the cause of narrow tailoring.

Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1177 (10th Cir.2000) (*"Adarand VII"*) (internal citations omitted) (opinion on remand from *Adarand Constructors, Inc. v. Slater,* 528 U.S. 216, 120 S.Ct. 722, 145 L.Ed.2d 650 (2000)). IDOT's DBE plan accounts for both these factors. Its plan contains a great deal of flexibility, through the employment of individualized DBE goals on a contract-by-contract basis, and through the maintenance of a waiver provision to account for those situations in which achievement of the set DBE goals is not reasonably possible.

CONCLUSION

*26 The court finds IDOT's plan narrowly tailored to the goal of remedying the effects of racial and gender discrimination within the construction industry. Judgment is entered in favor of Defendants.

N.D.Ill.,2005.
Northern Contracting, Inc. v. State of Ill.
Slip Copy, 2005 WL 2230195 (N.D.Ill.)

END OF DOCUMENT

Ellen Schanzle-Haskins

EXHIBIT B

U.S. Department of Transportation
Federal Highway Administration

Illinois Division

3250 Executive Park Drive
Springfield, Illinois 62703

June 10, 2005

HDA-IL

Mr. Timothy W. Martin, Secretary
Illinois Department of Transportation
2300 South Dirksen Parkway
Springfield, IL 62764

Subject: Fiscal Year (FY) 2005-Disadvantaged Business Enterprise (DBE) Goal Setting Methodology

Dear Secretary Martin:

In accordance with the provisions of 49 CFR § 26.45, we have reviewed the overall goal submitted by the Illinois Department of Transportation (IDOT) in connection with your FY 2005 DBE program. For the federal-aid highway program in 2005, IDOT submitted an overall goal of 22.77 percent (6.43 percent of which it projects to meet through race neutral means and 16.34 percent through race conscious means). Our review considered the overall goal as well as the description of the data and methodology used in arriving at your overall goal, including the base figure calculation and evidence supporting the calculation; adjustments, if any, made to the base figure and the evidence supporting these adjustments; a summary of the relevant evidence in your jurisdiction; the projection of the portion of your overall goal that you will meet through race neutral as opposed to race conscious means and the basis for your projections; and the evidence of public participation in establishing your overall goal.

After reviewing this information, we have determined that the goal setting methodology you have employed is consistent with the requirements of 49 CFR § 26.45, and that you have followed the requirements for public participation in establishing your overall goal as set forth in 49 CFR § 26.45(g). Further, we have also approved your projection of the portions of your overall goal that you expect to meet through race neutral and race conscious means. That projection is subject to modification during the fiscal year in accordance with 49 CFR § 26.51. The basis for our conclusions is set forth more fully in the enclosed document.

In the race-neutral discussion of your submittal, a Small Business Set-Aside Program was proposed. However, such a program has not yet been submitted to FHWA for review and approval for use on Federal-aid projects. Therefore, we have removed Small Business Set-Asides from the approval document.

As you are aware, the State still must submit a separate overall DBE goal for programs funded by the Federal Transit Administration (FTA) and the Federal Aviation Administration (FAA) based upon the goal setting approach outlined in the State's DBE program. The State should contact its regional FTA and FAA offices for further guidance and assistance on these matters.

In developing your DBE goal submission for FY 2006, you should consider the following: (1) make sure the aviation construction contractors that are included in your analysis are capable of doing work that is relevant to your highway construction program, and (2) the data relied upon to derive your race-neutral projections should include race-neutral achievements realized in excess of contract goals, since the United States Department of Transportation in its guidance considers those achievements to be properly characterized as race-neutral. Moreover, the new uniform reporting form requires the collection of that data to facilitate its use for goal setting purposes.

Feel free to contact my office if you have questions or need technical assistance.

Sincerely yours,

/s/ Norman R. Stoner

Norman R. Stoner, P.E.
Division Administrator

Enclosure
cc: Ms. Robin Black, Chief of Staff, IDOT
Ms. Ellen Schanzle-Haskins, Chief Counsel, IDOT
Mr. Paul Cerpa, Director, Office of Business & Workforce Diversity, IDOT
Ms. Carol Lyle, Chief, Bureau of Small Business Enterprise, IDOT

Explanation for Approval of Illinois
Disadvantaged Business Enterprise (DBE) Program
Goal Setting Process for Fiscal Year (FY) 2005

This document sets forth the Federal Highway Administration's (FHWA) reasons for approving the Illinois Department of Transportation's (IDOT) DBE goal methodology and the portion of the goal to be attained by race- and gender- neutral means for FY 2005.

Goal Setting Methodology Section 26.45
The DBE regulations require recipients to set overall goals based on demonstrative evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate on Department of Transportation (DOT)-assisted contracts. The IDOT contracted with the National Economics Research Associates (NERA) to conduct an availability and goal setting study. The IDOT used this study as the basis for its FY 2005 DBE goal.

A. **Step One-Base Figure Section 26.45(c)**
Under the regulations, IDOT must begin the process by determining the base figure for the relative availability of DBEs. The NERA used the following data and methodology to calculate the base figure:

1. **Method Selected -** The NERA used what it described as a "custom census" approach to determine the relative availability of DBEs in the IDOT market, which is the state of Illinois where 95 percent of the IDOT contractors are located. The regulations at 49 CFR § 26.45(c)(5) permit the use of "alternative methods" to determine the base figure as long as the method is based on evidence of local market conditions and is designed to produce a goal that is rationally related to the relative availability of DBEs in the IDOT market. The method used by NERA satisfies this requirement.

2. **Data Used -** The NERA used data from a number of sources: (1) Dun & Bradstreet's Marketplace database, an independent data source that is continually updated, was used to identify the total number of Illinois businesses in the relevant industry categories used by IDOT, (2) directories of minority- and women-owned firms were used to supplement the Marketplace data (eliminating duplicates and non-Illinois companies), and (3) IDOT contract expenditure data in each industry category and geographic area was used to weight the numbers compiled. Scientifically accepted safeguards were taken to verify listed DBEs and estimate unlisted DBEs.

3. **Estimating Baseline DBE Availability -** Based on the information from the above data sources, NERA calculated the availability of DBEs relative to all businesses in IDOT's market at 22.77 percent. The method for calculating the goal presented by NERA is logical and consistent with the regulations.

B. **Step 2 Consideration of Adjustment to the Base Figure - Section 26.45(d)**
Step 2 requires that IDOT examine all evidence in its jurisdiction to determine what adjustment, if any, is needed to the base figure to account for other conditions affecting DBEs. The NERA considered evidence from the following sources to determine whether adjustments were needed: (1) the capacity of DBEs to perform work for IDOT, (2)

disparity studies conducted within IDOT's market, (3) evidence from related fields that affect the opportunities for DBEs to form, grow, and compete, (4) anecdotal evidence of discrimination, and (5) DBE utilization in race neutral programs. The evidence in each category is summarized below.

1. **DBE Capacity** - For Federal Fiscal Years (FFYs) 2001 – 2003, DBEs received 12.24 percent of the contract commitments ($560.1M of $4,575.1M of total awards). For the period from April 2003 through March 2004, DBEs received 17.54 percent of the total awards ($136.0M of $775.3M of total awards). This suggests a downward adjustment of the base figure may be warranted.

2. **Evidence from Disparity Studies** – The NERA examined data from several disparity studies commissioned in the 1980s for the City of Chicago, the Chicago Board of Education, the Water Reclamation District of Greater Chicago, the Chicago Park District, Cook County, and the City of Evanston. These studies 'found pervasive and systemic discrimination against minorities and women that adversely affected their ability to do business on a level playing field.' However, NERA did not rely upon these studies because of their age. Instead, NERA conducted its own study of disparities in business formation and earnings which is summarized below. The IDOT considered data from more current studies conducted for the Northeast Illinois Regional Commuter Railroad Corporation d/b/a Metra and for the City of Chicago. The Metra study's findings suggest that discrimination may be impacting the ability of DBEs to compete for IDOT contracts. The expert evidence submitted in the litigation involving the City of Chicago's minority and women business program (Builders Association of Greater Chicago v. County of Cook) established that minority- and women-owned firms in the Chicago metropolitan area were being underutilized relative to their actual capacity for work, and that the most likely reason for this underutilization was discrimination.

3. **Evidence of Barriers to DBE Formation and Growth** - The NERA found large and significant disparities in Illinois in earnings and business formation rates between DBEs and non-DBEs. Similarly situated minorities and women, especially blacks, earn less than their comparable white male counterparts; and statistically significant disparities exist in the business formation rate for DBEs such that many more minority businesses would have been expected to be formed but for discrimination. Based on the data examined by NERA, DBEs would comprise 27.51 percent of IDOT's market but for discrimination. This represents an increase of 20.8 percent over the base figure of 22.77 percent, and suggests that an upward adjustment to the base figure may be warranted. The NERA concluded that the base figure is depressed because discrimination has impacted the likelihood that minorities and women will become entrepreneurs, and that when they do, those firms are likely to be less profitable and to fail more frequently.

4. **Anecdotal Evidence of Discrimination** - The IDOT considered and relied upon several sources of anecdotal evidence of discriminatory barriers to full and fair opportunities for DBEs to compete for its contracts, which included hearings held by IDOT on its program. These barriers include the pervasive pattern of general

contractors refusing to allow ready, willing, and able minority- or women-owned firms to submit bids and compete for subcontracts on the same terms as majority-owned firms; the use by contractors of racial or gender epithets in refusing to deal with minority- and women-owned subcontractors; disparate treatment of minority- and women-owned firms by unions; lack of mentoring opportunities and networking relationships to build skills and business contacts; overt harassment on the job site from white male employees and from majority-owned prime contractors; bid shopping; slow pay or no pay beyond that experienced by majority-owned firms; substitutions by prime contractors with non-DBEs post-award; higher performance standards not applied to majority-owned contractors; denial of bonding and financing or payment of higher rates than non-DBEs; and discrimination in price and delivery by suppliers, and the fact that prime contractors who regularly use DBEs on projects with goals refuse to even solicit DBEs for bids on projects without goals.

5. **DBE Utilization in Race-Neutral Programs** – The IDOT examined the contracting data from state and local government programs in Illinois (Cook County, Illinois State Toll Highway Authority, IDOT's Zero Goals experiment, and the Missouri Department of Transportation state funded program) where no goals were set, and in each instance, it found that in the absence of DBE programs, utilization of minority- and women-owned construction firms dropped dramatically below availability.

After considering all of the evidence, IDOT decided to make no adjustment to the Step 1 base figure. The IDOT determined that there is no evidence that DBEs are being over utilized relative to their availability and capacity. To the contrary, firms owned by minorities and women are available to do more, not less, work, and IDOT's utilization of DBEs has increased in recent reporting periods. Relying upon past participation, for example, to define current capacity in determining the goal for a non-discriminatory market is inappropriate for IDOT. While the statistical disparities established by NERA could serve as the basis for an upward adjustment of the base figure, for an overall goal of 27.51 percent, IDOT believes that the increase over prior years' goals to 22.77 percent represents a "plausible lower bound estimate" of DBE availability and is currently sufficient to meet the objective of further remedying discrimination against DBEs. The FHWA accepts IDOT's determination that no adjustment to the base figure is warranted.

Public Participation – Section 26.45(g)

The regulations require that the State must provide for public participation when establishing its overall goal. The following summarizes IDOT's public participation, which meets the requirements of the regulations.

A. **Consultation** - The IDOT held public meetings to solicit information from organizations, groups, or individuals which could be expected to have information concerning the availability of DBEs and non-DBEs, the effects of discrimination on opportunities for DBEs, and IDOT's efforts to establish a level playing field for the participation of DBEs. The meetings were held on June 29, 2004 in Peoria, Illinois; July 8, 2004 in East St. Louis, Illinois; and July 13, 2004 in Chicago, Illinois. A total of approximately 187 persons attended, with 57 witnesses providing oral testimony and 10 additional persons submitting written statements in advance of, or

immediately following, the hearings. In addition, IDOT has an ongoing dialogue with many individuals, minority organizations, women's groups, and contractor associations that have a stake in the operation and success of the program.

B. **Published Notice** - The proposed goal was published in the following newspapers for a 45-day comment period:

Newspaper	Date
Edwardsville Intelligencer	August 24, 25, & 28, 2004
Chicago Defender Daily Gazette	August 31, 2004
Mendota Reporter	September 1, 2004
Peoria Times-Observer	September 1, 2004
Paris Beacon News	August 30, 2004
Quincy Herald Whig	September 1, 2004
Mt. Vernon Register News	September 2, 2004
East St. Louis Monitor	September 2, 2004
Cairo Citizen	September 2, 2003

A copy of the goal document was made available for inspection at each IDOT District Office, the Bureau of Small Business Enterprises, IDOT's library, the DBE Resource Center, and IDOT's website, http://www.dot.il.gov/sbe/dbeprogram.html.

C. **Comments** - The following groups/individuals provided comments in response to the notice:

Women Construction Owners and Executives
Bigane Paving Co.
Vee See Construction Company, Inc.
Associated General Contractors of Illinois and the Illinois Road and Transportation Builders Association – Joint comments

Most of the comments supported the goal. The comments from the Associated General Contractors of Illinois and the Illinois Road and Transportation Builders Association were primarily directed at the implementation of the program and the need for more information about the availability study. They did not provide any information about the relative availability of DBE and non-DBE businesses to participate in IDOT contracts. No adjustments were made as a result of the comments received.

Race and Gender-Neutral and Conscious Measures - Section 26.51

The IDOT will meet the maximum feasible portion of its overall goal through race-neutral means. The NERA made the following calculations to determine the race-and gender-neutral and race-and gender-conscious portions of its goal (hereafter referred to as "race-neutral" and "race-conscious"):

A. **Race-Neutral and Race-Conscious Division** - To estimate the portions of the goal to be met through race-neutral and race-conscious measures, IDOT evaluated past race-neutral DBE participation as defined in 49 CFR § 26.51(a). In FY 2003, IDOT achieved 6.43 percent of its overall goal through race-neutral means. However, in

most prior years, the race-neutral participation has been approximately 2 – 2.5 percent. The IDOT expects that its current and new race-neutral initiatives will support increased participation of DBEs as prime contractors and subcontractors. Consequently, the race-neutral projection is 6.43 percent, leaving a race-conscious projection of 16.34 percent.

The findings from the aforementioned studies also support IDOT's conclusion that race-neutral measures alone would not likely achieve IDOT's baseline estimate of 22.77 percent DBE availability because DBEs are rarely solicited on projects without DBE goals.

The IDOT will monitor DBE participation throughout the year to adjust its use of contract goals to ensure that their use does not exceed the overall goal.

B. **Race-Neutral Initiatives Implemented by IDOT** - Some of the ongoing and new initiatives IDOT has developed to assist in meeting its goal include the following:

1. **Emerging Contractors Support Initiatives** - To increase competition for IDOT's prime contracts and opportunities for DBEs and newer, smaller firms, IDOT is taking several steps to reduce barriers to participation as prime contractors. These include reviewing the criteria for prequalification to reduce any unnecessary burdens and unbundling large contracts.

2. **Bonding and Financing Assistance** - The IDOT is also in the process of adopting a bonding and financing assistance initiative for DBE and other emerging contractors to meet prequalification and other requirements and to increase their current capacities to perform IDOT contracts and subcontracts. This program will provide graduates with guaranteed bonding and lines of credit, thereby addressing two elements of the market where DBEs experience disparate treatment.

3. **Complaint Procedures** - The IDOT is adopting a procedure to process complaints of discrimination in the operation of the program and against contractors receiving IDOT contracts. This will ensure prompt, uniform, and fair responses to allegations of unlawful conduct so that DBEs, non-DBEs, and interested persons can have confidence in the integrity of IDOT's operations.

4. **Outreach** - The IDOT has implemented an extensive outreach program to attract additional DBE participation and to assist those businesses to become competitive in a race-neutral environment. It is further contacting firms identified as possible program participants to encourage their applications and assist with meeting eligibility criteria.

5. **Business Development Assistance** - The IDOT retains a network of consultants to provide management, technical, technology, and financial services to DBEs and other small businesses to increase their knowledge and competitiveness. Additionally, specialized targeted assistance is being provided to DBEs in District 4/I-74 and District 8/St. Clair and Madison Counties to increase their abilities to bid competitively and perform satisfactorily on construction projects.

6. **Networking** - The IDOT sponsors networking sessions throughout the state to encourage cooperation and participation on major construction projects. It is also cooperating with a statewide network of 20 Small Business Development Centers administered by the U.S. Small Business Administration and the Illinois Department of Commerce and Economic Opportunity to provide information and training to DBEs and small businesses.

7. **Information Sharing** - The IDOT continues to develop and expand its website as a valuable source for information and communication. The Contractor's Market Place provides an electronic bulletin board where prime contractors, subcontractors, and suppliers can communicate about quotes on specific letting items and work categories. Information is organized by letting date and posted in an easy-to-read report format and updated daily.

8. **Stakeholder Inclusion** - As part of IDOT's partnering with minority and women business associations and industry associations, the Small Business Advisory Committee (SBAC) works with IDOT regarding the DBE program. Industry associations representing prime contractors and DBE interests, from both geographic and special interest perspectives, serve on the SBAC.

Changes to the Program

The DBE program was updated January 14, 2004 to reflect changes concerning retainage and the use of the uniform application form to comply with the Final Rule of June 16, 2003 in 49 CFR Part 26.

Conclusion

For the above reasons, Illinois' goal setting methodology and race-neutral/race-conscious division for FY 2005 is approved.

/s/ Norman R. Stoner

Norman R. Stoner, P.E.
Division Administrator

June 10, 2005

Date

U.S. Department of Transportation
Office of the Secretary of Transportation

400 Seventh St., S.W.
Washington, D.C. 20590

February 13, 2006

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference Number: 06–0017

Ms. Sandi Llano
DBE Director
Northeast Illinois Regional Commuter Railroad Corp.
547 W. Jackson Blvd.
Chicago, IL 60661

Dear Ms. Llano:

This is in response to an appeal of Disadvantaged Business Enterprise (DBE) certification denial concerning [redacted]. We have carefully reviewed the material submitted by the Northeast Illinois Regional Commuter Railroad Corp. ("METRA") and [redacted] and conclude that METRA failed to follow the certification procedures specified by the Regulation §26.83, and did not properly decertify the firm under §26.87. Accordingly, we reverse METRA's decision and direct METRA to certify [redacted] for the following reasons.

1. The record evidence indicates that [redacted], an Illinois firm incorporated in 1983, is certified as a DBE by METRA. The firm submitted an application for DBE certification on May 6, 2005. Following METRA's September 30, 2005, on-site interview with the firm, METRA denied [redacted] DBE application on October 13, 2005, citing the disadvantaged business owner's lack of control of the firm. Under the Regulation at §26.83(h), once recipients have certified a DBE, it shall remain certified for a period of at least three years unless and until its certification has been removed in accordance with §26.87. According to the Regulation at §26.83(h), recipients may not require DBEs to reapply for certification as a condition of continuing to participate in the program during this three-year period, unless the factual basis on which the certification was made changes. This is not the case in this situation as it appears from METRA's on-site visit report that the firm applied to METRA for renewal of its DBE certification by completing an entirely new application.

Since [redacted] was already certified, METRA should have initiated a decertification proceeding under the Regulation §26.87 rather than requiring the firm to submit a new certification application. Second, the record is void of any information indicating that METRA notified [redacted]

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that it was initiating a decertification action to remove the firm's certification as a DBE. This is a necessary step in order to remove a firm from METRA's list of certified DBE firms. In this case, the procedural protections afforded certified firms under the Regulation §26.87 were not provided. As a first step, recipients may initiate the removal of a firm's certification only after receiving information giving it reasonable cause to believe that the firm is ineligible. Under the Regulation §26.87(b), a recipient must provide the firm with written notice that it finds the firm ineligible, setting forth the specific reasons for this proposed determination and afford the firm an opportunity for an informal hearing at which time it may respond to the reasons given. In such a proceeding, the recipients bear the burden of proving by a preponderance of evidence that the firm does not meet the Regulation's certification standards. There is no indication in the record that METRA provided written notice to [redacted] informing it that METRA proposed to decertify the firm, specifying the grounds why it deemed the firm ineligible, or stating the procedures that apply in a decertification proceeding.

It is important to point out that a firm's certification does not expire. In METRA's on-site review report, an "application status" category on the form contains the following three options – initial, renewal (expiration), and reapplication after denial. The Department's guidance, which addresses this issue as well as the procedures for decertifying a firm, is as follows:

> ARE THERE ANY CIRCUMSTANCES IN WHICH A RECIPIENT MAY REMOVE THE ELIGIBILITY OF CERTIFIED DBE FIRMS WITHOUT GOING THROUGH THE PROCEDURES OF §26.87?
>
> ANSWER:
>
> There is only one situation in which a recipient may remove the eligibility of a certified DBE firm without a §26.87 decertification proceeding. That is when the DBE firm does not dispute that the personal net worth of an owner necessary to its certification exceeds $750,000.00.
>
> - In ALL other cases, without exception, a recipient is not permitted to remove the eligibility of a certified firm without a §26.87 decertification proceeding.
>
> - In particular, a recipient is not permitted to automatically remove the eligibility of a firm without a §26.87 decertification proceeding because the firm has not responded to the recipient's request for recertification information or has failed to submit an affidavit of no change in a timely manner.
>
> - In such cases, the recipient would begin a §26.87 decertification proceeding on the ground that the firm has failed to cooperate (see §26.109(c)). This could be an administrative "default judgment" process in which, if the firm also did not respond to the notice initiating the §26.87 action, the recipient could issue a notice decertifying the firm without further proceedings.

Auditor Comment 16: So as to protect applicant information, the auditors redacted the name of a DBE applicant that IDOT included in its response.

- If a recipient has mistakenly removed the eligibility of a firm without a §26.87 decertification proceeding, the recipient must immediately restore the firm to the list of certified DBEs and then, if appropriate, pursue a §26.87 proceeding. A recipient who fails to do so is in noncompliance with Part 26.

- While there are numerous reasons where a firm's certification can be lost or its DBE eligibility terminated, there is no such thing in the DBE program as the "expiration" of a certification (i.e., a "term limit" of a certain number of years on the firm's eligibility). Once certified, a firm remains certified until and unless it is decertified.

2. Under the Regulation §26.87(f), you must not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to the recipient at the time of its certification of the firm. You may base such a decision only on one or more of the following: (1) changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part; (2) information or evidence not available to you at the time the firm was certified; (3) information that was concealed or misrepresented by the firm in previous certification actions by a recipient; (4) a change in the certification standards or requirements of the Department since you certified the firm; or (5) a documented finding that your determination to certify the firm was factually erroneous.

If METRA intended to decertify [redacted] because the disadvantaged owner did not control the firm, pursuant to the Regulation §26.87, it should have determined whether (1) this was a change in [redacted] circumstances since it was first certified by METRA, thus rendering it unable to meet the eligibility standards of the Regulation, or (2) whether this information was not available to METRA at the time the firm was certified; or (3) whether this was information that was concealed or misrepresented by [redacted] in its previous certification actions by METRA, or (4) whether there was a change in the certification standards or requirements of the Department since you certified the firm; or (5) whether METRA had a documented finding that its determination to certify the firm was factually erroneous. From the Department's reading of the record, [redacted] was certified as a DBE; and it appears that there may have been changes in the firm affecting the disadvantaged business owner's control. However, because METRA did not properly initiate a decertification action, there is no supporting evidence in the record demonstrating how these changes might apply since the firm's previous certification. The Department therefore, must reverse METRA's decision.

3. METRA's request for the firm to provide a full application on the anniversary date of the firm's certification as a DBE goes beyond the intent of the Regulation. On May 18, June 15, and July 18, 2005, METRA acknowledged the receipt of [redacted] application and requested additional information including proof of the disadvantaged owner's contribution to acquire her interest in the firm, stock certificates and transfer ledger, payroll, résumés, corporate minutes and bylaws, among other items. It appears the firm submitted much of this information to METRA. Under the Regulation at §26.83(j), firms must provide to the recipient, every year on the anniversary of the date of its certification, a sworn affidavit affirming that there have been no changes in the

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firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material changes in the information provided in its application form, except for changes about which it has notified the recipient under paragraph (i) of this section. The affidavit shall specifically affirm that the firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of the firm's size and gross receipts. The Department's guidance on this subject is as follows:

> WHAT IS A "NO CHANGE" AFFIDAVIT AND WHEN SHOULD RECIPIENTS REQUIRE DBE FIRMS TO SUBMIT ONE?
>
> ANSWER:
>
> - A "no change" affidavit is an affidavit each DBE firm must provide to the recipient annually on the anniversary date of the firm's certification. The affidavit affirms that there have been no changes in the firm's circumstances affecting its ability to meet part 26 size, disadvantage, ownership, and control standards (except for changes about which the firm has submitted a "notice of change" to the recipient).
> - With a "no change" affidavit, the rule requires a firm to submit supporting documentation concerning its size and gross receipts.
> - For purposes of this notice requirement, "no change" in the firm's circumstances means, among other things, that changes in an owner's situation have not affected the firm's eligibility. For example, by submitting a "no change" affidavit, the owner of a DBE firm is affirming that his or her personal net worth does not exceed $750,000. Recipients should ensure that currently certified DBEs are aware of this obligation.

METRA's requests to the firm, in the context of the Regulation, appear to be onerous in this instance as there is no indication that METRA sought the information in the connection with any perceived change in the firm's circumstances, or that its request was prompted by the firm concealing or misrepresenting information in previous certification actions. As stated above, this exceeds the scope of the Regulation. The Department notes however, that under the Regulation §26.109(c), participants in the DBE program must comply with recipient requests during investigations, certification reviews and other requests for information. It is possible that a recipient learns of information that was not available to it when it first certified the firm, such as a change in the firm's structure that may render it unable to meet the Regulation's eligibility standards. In such an instance, a recipient can, and should seek the information it needs to make a determination as to whether the firm continues to meet the requirements of the Department's DBE Regulation.

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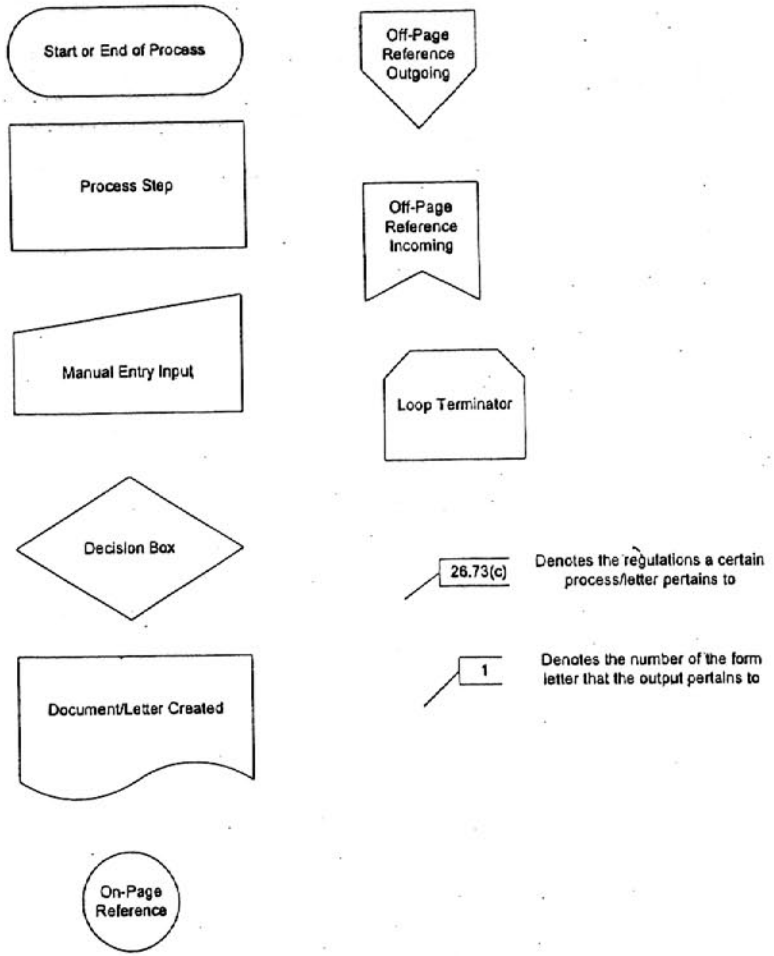
In summary, we reverse METRA's decision and direct METRA to certify [redacted] as a DBE with the Illinois Unified Certification Program. If it chooses, METRA may initiate decertification proceedings after proper notification (a detailed explanation) is given to the firm in accordance with 49 CFR Part §26.87. Thank you for your continued cooperation.

Sincerely,

Joseph E. Austin, Chief
External Policy and Program Development Division
Departmental Office of Civil Rights

cc: Jeffrey B. Rose, Esq., Tishler & Wald, Ltd.

Auditor Comment 16: So as to protect applicant information, the auditors redacted the name of a DBE applicant that IDOT included in its response.



Version 7
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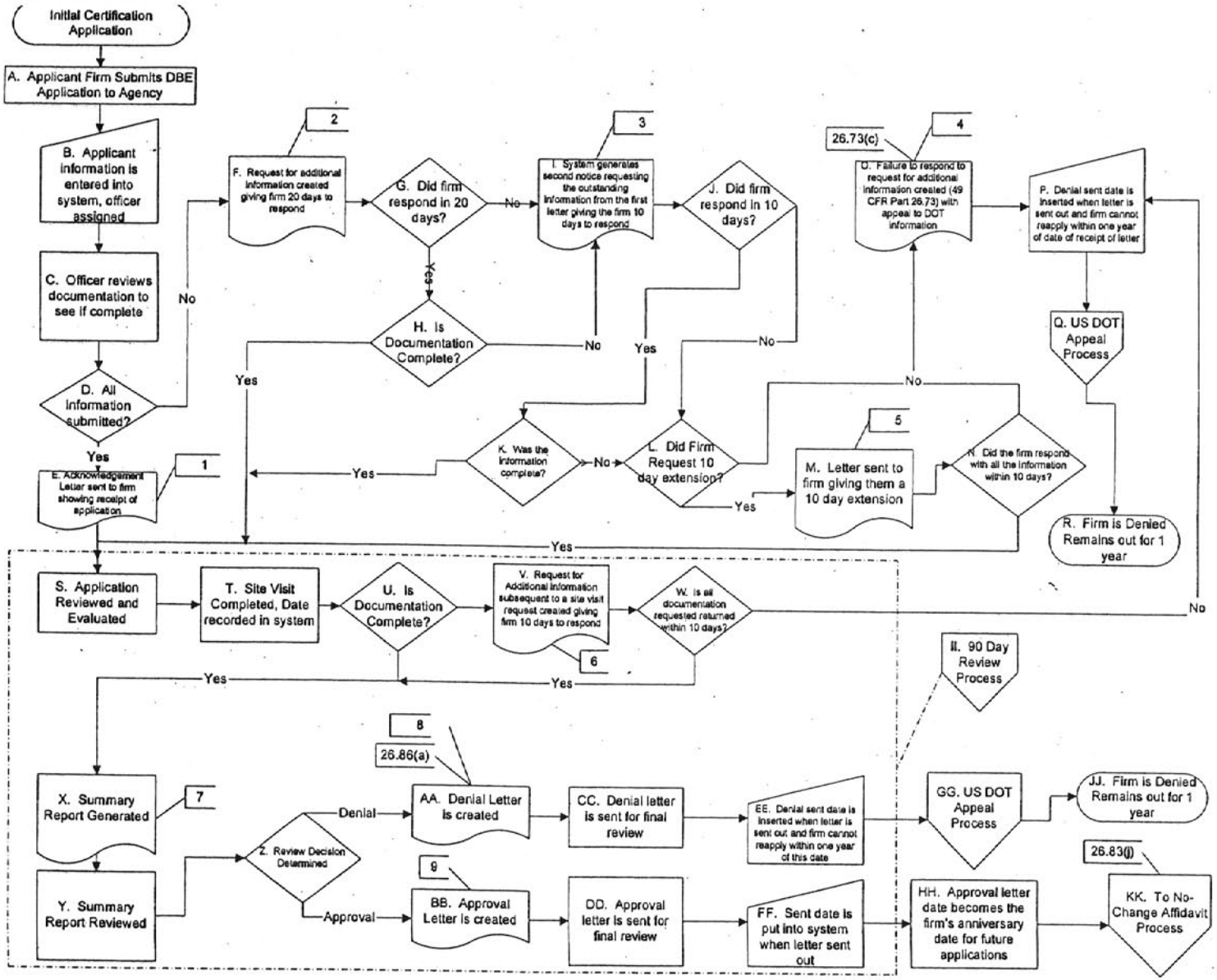
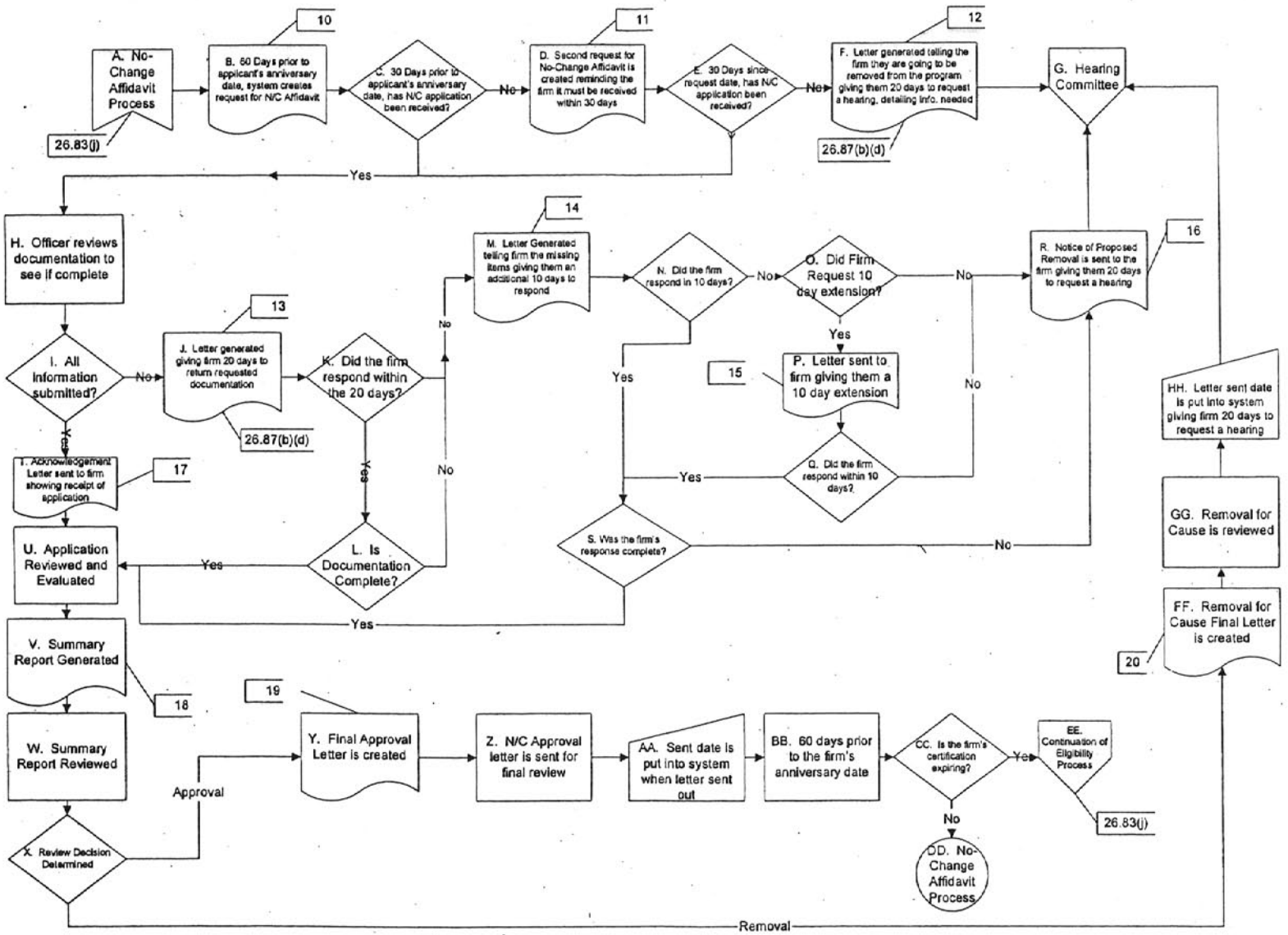
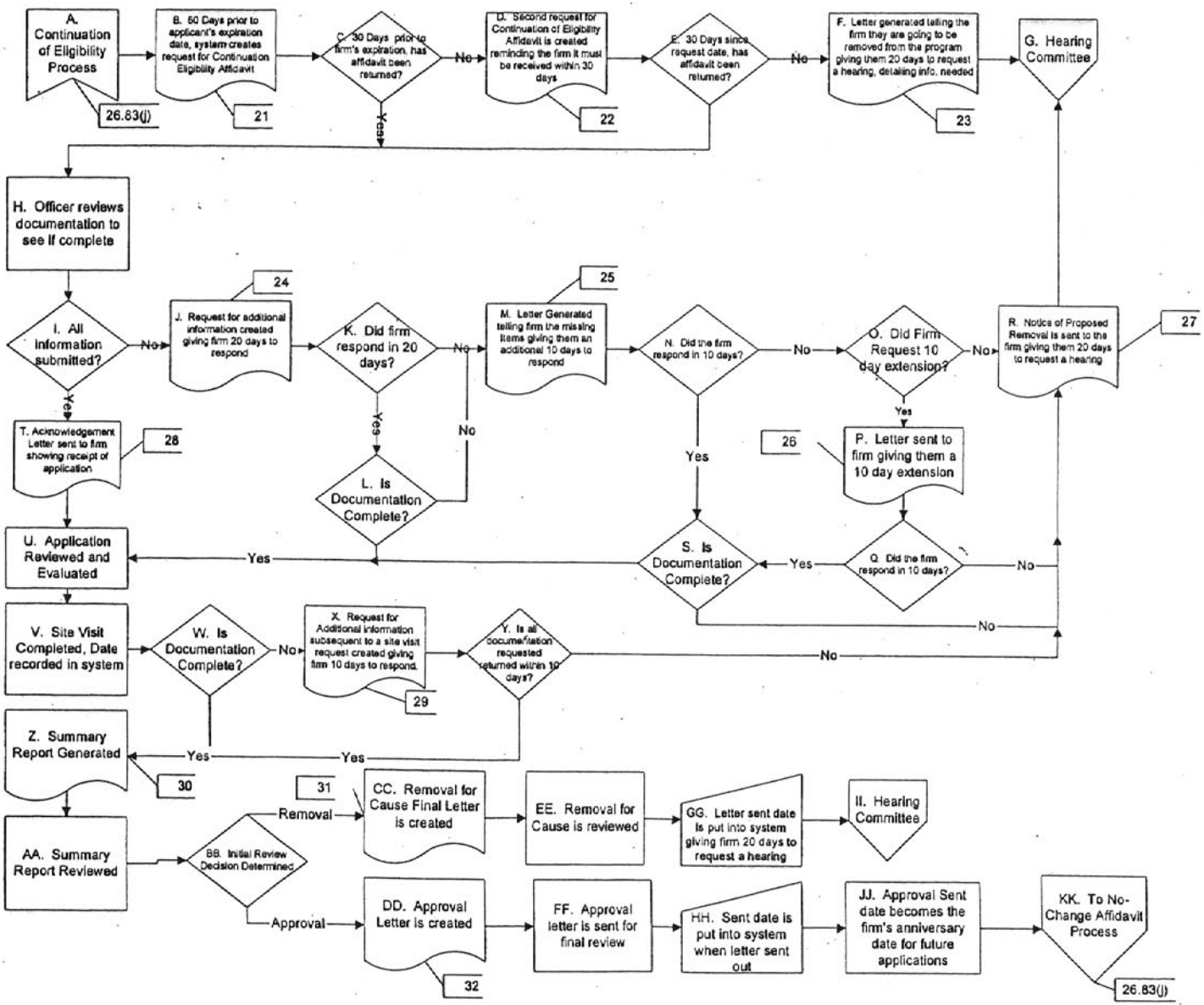
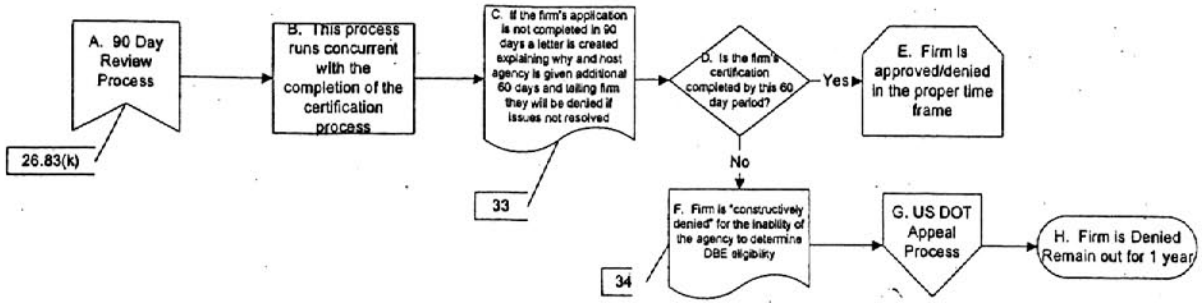
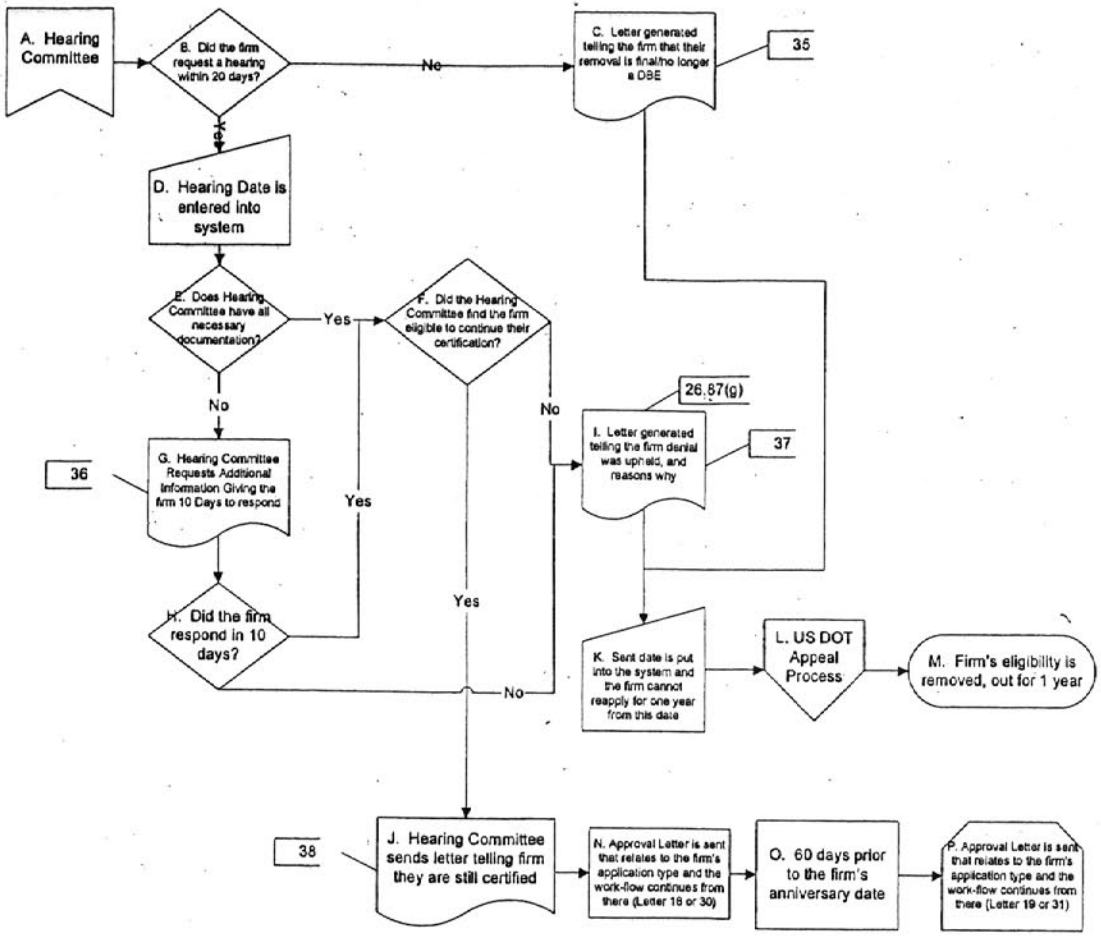
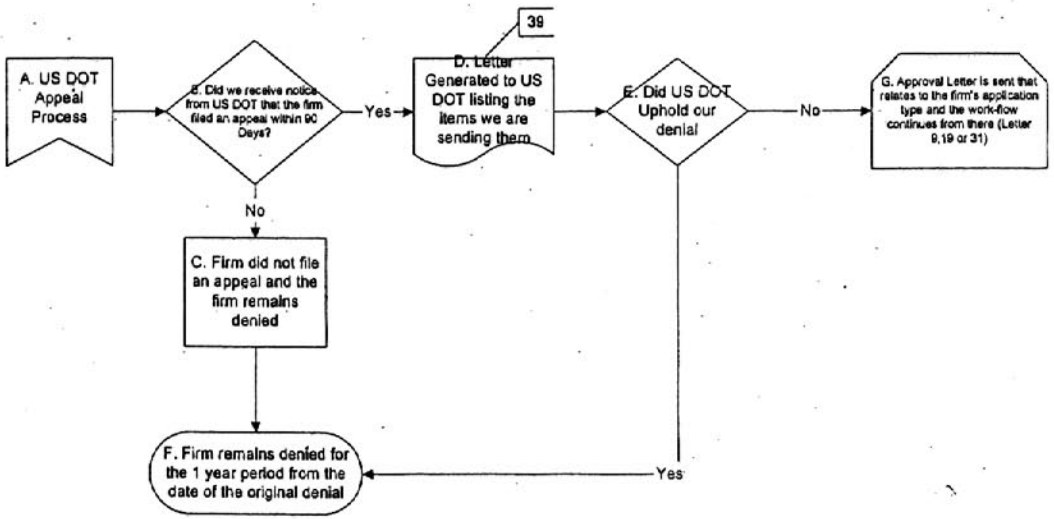

Initial Certification Application
A. Applicant Firm Submits DBE Application to Agency
B. Applicant information is entered into system, officer assigned
C. Officer reviews documentation to see if complete
D. All information submitted?
No
Yes
E. Acknowledgement Letter sent to firm showing receipt of application
1
2
F. Request for additional information created giving firm 20 days to respond
G. Did firm respond in 20 days?
No
Yes
H. Is Documentation Complete?
No
Yes
3
I. System generates second notice requesting the outstanding information from the first letter giving the firm 10 days to respond
J. Did firm respond in 10 days?
No
Yes
K. Was the information complete?
No
Yes
L. Did Firm Request 10 day extension?
No
Yes
5
M. Letter sent to firm giving them a 10 day extension
N. Did the firm respond with all the information within 10 days?
No
Yes
26.73(c)
4
O. Failure to respond to request for additional information created (49 CFR Part 26.73) with appeal to DOT information
P. Denial sent date is inserted when letter is sent out and firm cannot reapply within one year of date of receipt of letter
Q. US DOT Appeal Process
R. Firm is Denied Remains out for 1 year
S. Application Reviewed and Evaluated
T. Site Visit Completed, Date recorded in system
U. Is Documentation Complete?
No
Yes
V. Request for Additional Information subsequent to a site visit request created giving firm 10 days to respond
6
W. Is all documentation requested returned within 10 days?
No
Yes
II. 90 Day Review Process
X. Summary Report Generated
7
Y. Summary Report Reviewed
Z. Review Decision Determined
Denial
Approval
8
26.86(a)
AA. Denial Letter is created
CC. Denial letter is sent for final review
EE. Denial sent date is inserted when letter is sent out and firm cannot reapply within one year of this date
9
BB. Approval Letter is created
DD. Approval letter is sent for final review
FF. Sent date is put into system when letter sent out
GG. US DOT Appeal Process
JJ. Firm is Denied Remains out for 1 year
HH. Approval letter date becomes the firm's anniversary date for future applications
26.83(j)
KK. To No-Change Affidavit Process


A. No-Change Affidavit Process
26.83(j)
10
B. 60 Days prior to applicant's anniversary date, system creates request for N/C Affidavit
C. 30 Days prior to applicant's anniversary date, has N/C application been received?
No
11
D. Second request for No-Change Affidavit is created reminding the firm it must be received within 30 days
E. 30 Days since request date, has N/C application been received?
No
12
F. Letter generated telling the firm they are going to be removed from the program giving them 20 days to request a hearing, detailing info. needed
26.87(b)(d)
G. Hearing Committee
Yes
H. Officer reviews documentation to see if complete
I. All information submitted?
No
13
J. Letter generated giving firm 20 days to return requested documentation
26.87(b)(d)
K. Did the firm respond within the 20 days?
No
14
M. Letter Generated telling firm the missing items giving them an additional 10 days to respond
N. Did the firm respond in 10 days?
No
O. Did Firm Request 10 day extension?
No
16
R. Notice of Proposed Removal is sent to the firm giving them 20 days to request a hearing
Yes
15
P. Letter sent to firm giving them a 10 day extension
Q. Did the firm respond within 10 days?
No
Yes
Yes
I. Acknowledgement Letter sent to firm showing receipt of application
17
Yes
No
L. Is Documentation Complete?
Yes
No
S. Was the firm's response complete?
No
Yes
HH. Letter sent date is put into system giving firm 20 days to request a hearing
GG. Removal for Cause is reviewed
FF. Removal for Cause Final Letter is created
20
U. Application Reviewed and Evaluated
V. Summary Report Generated
18
19
W. Summary Report Reviewed
X. Review Decision Determined
Approval
Y. Final Approval Letter is created
Z. N/C Approval letter is sent for final review
AA. Sent date is put into system when letter sent out
BB. 60 days prior to the firm's anniversary date
CC. Is the firm's certification expiring?
Yes
EE. Continuation of Eligibility Process
26.83(j)
No
DD. No-Change Affidavit Process
Removal


A. Continuation of Eligibility Process
26.83(j)
B. 60 Days prior to applicant's expiration date, system creates request for Continuation Eligibility Affidavit
21
C. 30 Days prior to firm's expiration, has affidavit been returned?
No
Yes
D. Second request for Continuation of Eligibility Affidavit is created reminding the firm it must be received within 30 days
22
E. 30 Days since request date, has affidavit been returned?
No
F. Letter generated telling the firm they are going to be removed from the program giving them 20 days to request a hearing, detailing info. needed
23
G. Hearing Committee
H. Officer reviews documentation to see if complete
I. All information submitted?
No
Yes
24
J. Request for additional information created giving firm 20 days to respond
K. Did firm respond in 20 days?
No
Yes
25
M. Letter Generated telling firm the missing items giving them an additional 10 days to respond
N. Did the firm respond in 10 days?
No
Yes
O. Did Firm Request 10 day extension?
No
Yes
R. Notice of Proposed Removal is sent to the firm giving them 20 days to request a hearing
27
T. Acknowledgement Letter sent to firm showing receipt of application
28
L. Is Documentation Complete?
No
Yes
26
P. Letter sent to firm giving them a 10 day extension
U. Application Reviewed and Evaluated
Yes
S. Is Documentation Complete?
Yes
Q. Did the firm respond in 10 days?
No
No
V. Site Visit Completed, Date recorded in system
W. Is Documentation Complete?
No
X. Request for Additional information subsequent to a site visit request created giving firm 10 days to respond.
29
Y. Is all documentation requested returned within 10 days?
No
Z. Summary Report Generated
Yes
Yes
30
AA. Summary Report Reviewed
BB. Initial Review Decision Determined
31
Removal
CC. Removal for Cause Final Letter is created
EE. Removal for Cause is reviewed
GG. Letter sent date is put into system giving firm 20 days to request a hearing
II. Hearing Committee
Approval
DD. Approval Letter is created
32
FF. Approval letter is sent for final review
HH. Sent date is put into system when letter sent out
JJ. Approval Sent date becomes the firm's anniversary date for future applications
KK. To No-Change Affidavit Process
26.83(j)


A. 90 Day Review Process
26.83(k)
B. This process runs concurrent with the completion of the certification process
C. If the firm's application is not completed in 90 days a letter is created explaining why and host agency is given additional 60 days and telling firm they will be denied if issues not resolved
33
D. Is the firm's certification completed by this 60 day period?
Yes
E. Firm is approved/denied in the proper time frame
No
F. Firm is "constructively denied" for the inability of the agency to determine DBE eligibility
34
G. US DOT Appeal Process
H. Firm is Denied Remain out for 1 year


A. Hearing Committee
B. Did the firm request a hearing within 20 days?
No
C. Letter generated telling the firm that their removal is final/no longer a DBE
35
Yes
D. Hearing Date is entered into system
E. Does Hearing Committee have all necessary documentation?
Yes
F. Did the Hearing Committee find the firm eligible to continue their certification?
No
26.87(g)
I. Letter generated telling the firm denial was upheld, and reasons why
37
No
36
G. Hearing Committee Requests Additional Information Giving the firm 10 Days to respond
Yes
H. Did the firm respond in 10 days?
Yes
No
K. Sent date is put into the system and the firm cannot reapply for one year from this date
L. US DOT Appeal Process
M. Firm's eligibility is removed, out for 1 year
38
J. Hearing Committee sends letter telling firm they are still certified
N. Approval Letter is sent that relates to the firm's application type and the work-flow continues from there (Letter 18 or 30)
O. 60 days prior to the firm's anniversary date
P. Approval Letter is sent that relates to the firm's application type and the work-flow continues from there (Letter 19 or 31)


39
A. US DOT Appeal Process
B. Did we receive notice from US DOT that the firm filed an appeal within 90 Days?
Yes
D. Letter Generated to US DOT listing the items we are sending them
E. Did US DOT Uphold our denial
No
G. Approval Letter is sent that relates to the firm's application type and the work-flow continues from there (Letter 9,19 or 31)
No
C. Firm did not file an appeal and the firm remains denied
F. Firm remains denied for the 1 year period from the date of the original denial
Yes