

FTA

FEDERAL TRANSIT ADMINISTRATION

Massachusetts Unified Certification Program DBE Compliance Review Final Report

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PREPARED BY
Milligan & Company, LLC



U.S. Department of Transportation
Federal Transit Administration

FINAL COMPLIANCE REVIEW REPORT
OF THE
MASSACHUSETTS
UNIFIED CERTIFICATION PROGRAM

April 2012

**Prepared for the
Federal Transit Administration
Office of Civil Rights**

by

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SECTION 1 - GENERAL INFORMATION

Hosting Grant Recipient: Massachusetts Department of Transportation
1 Ashburton Place.

City/State: Boston, MA 02108-1552

Executive Official: Jeffrey B. Mullan
Secretary of Transportation

On Site Liaison: Reginald Nunnally
Executive Director, Supplier Diversity Office
617-502-8806

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SECTION 2 - JURISDICTION AND AUTHORITIES

The Federal Transit Administration (FTA) Office of Civil Rights is authorized by the Secretary of Transportation to conduct civil rights compliance reviews. The reviews are undertaken to ensure compliance of applicants, recipients, and subrecipients with Section 12 of the Master Agreement, Federal Transit Administration M.A., (17), October 1, 2010 and 49 CFR Part 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation (DOT) Programs."

The Federal Transit Administration (FTA) of the U.S. Department of Transportation (DOT) provides financial assistance to transit agencies, Metropolitan Planning Organizations (MPOs) and State Departments of Transportation (State DOTs). These recipients are required to comply with Federal civil rights provisions. The FTA Office of Civil Rights (TCR) oversees grantee compliance with these provisions through compliance reviews, which are conducted at TCR's discretion.

The Massachusetts Unified Certification Program (Mass UCP) members, which are direct or indirect recipients of FTA funding assistance, are subject to the Disadvantaged Business Enterprise (DBE) compliance conditions associated with the use of these funds pursuant to 49 CFR Part 26. These regulations define the components that must be addressed and incorporated in Mass UCP's agreement and were the basis for the selection of compliance elements that were reviewed.

SECTION 3 – PURPOSE AND OBJECTIVES

PURPOSE

The FTA Office of Civil Rights periodically conducts discretionary reviews of grant recipients and subrecipients to determine whether they are honoring their commitment, as represented by certification to FTA, to comply with their responsibilities under 49 CFR Part 26. In keeping with its regulations and guidelines, FTA has determined that a compliance review of the Massachusetts Unified Certification Program (Mass UCP) is necessary.

The primary purpose of the compliance review is to determine the extent to which the Massachusetts Unified Certification Program (Mass UCP) has met its DBE certification program goals and objectives, as represented to DOT in its Unified Certification Program agreement. This compliance review is intended to be a fact-finding process to: (1) examine the Massachusetts Unified Certification Program and its implementation, (2) make recommendations regarding corrective actions deemed necessary and appropriate, and (3) provide technical assistance.

This compliance review is not to directly investigate whether there has been discrimination against disadvantaged businesses by the grant recipient or its subrecipients, nor to adjudicate these issues in behalf of any party.

OBJECTIVES

The objectives of Unified Certification Programs, as specified in 49 CFR Part 26, are to:

- follow the certification procedures and standards and the non-discrimination requirements of 49 CFR Parts 26 and 23;
- cooperate fully with all oversight, review and monitoring activities of the United States Department of Transportation (USDOT) and its operating administrations;
- implement USDOT directives and guidance on DBE certification matters;
- make all certification and decertification decisions on behalf of all UCP members with respect to participation in the USDOT DBE Program. Certification decisions by the UCP shall be binding on all UCP members. Certification decision must be made final before the due date for bids or offers on a contract on which a firm seeks to participate as a DBE;
- provide a single DBE certification that will be honored by all UCP members;
- maintain a unified DBE directory containing at least the following information for each firm listed: address, phone number, and the types of work the firm has been certified to perform. The UCP shall make the directory available to the public electronically, on the internet, as well as in print. The UCP shall update the electronic version of the directory by including additions, deletions, and other changes as soon as they are made; and
- ensure the UCP agreement shall commit recipients to ensuring that the UCP has sufficient resources and expertise to carry out the requirements of 49 CFR Part 26 and 23.

The objectives of this compliance review are to:

- determine whether the Mass UCP is honoring the Unified Certification Program agreement submitted to the Secretary of Transportation;
- examine the required certification procedures and standards of the Mass UCP against the Disadvantaged Business Enterprise program compliance standards set forth in the regulations and to document the compliance status of each component; and
- gather information and data regarding the operation of the Mass UCP from certifying members through interviews and certification file review.

SECTION 4 – BACKGROUND INFORMATION

Prior to the 1999 DBE Final Rule 49 CFR Part 26, applicants seeking participation on DOT assisted projects as a Disadvantaged Business Enterprise (DBE) could be required to be certified by multiple DOT recipients in a state. Subpart E, of 49 CFR Part 26.81 now requires DOT recipients to participate in a Unified Certification Program (UCP) that shall provide one-stop shopping to applicants for DBE certification. An applicant is required to apply only once for a DBE certification that will be honored by all recipients in the state.

An agreement establishing the UCP for the state was to be submitted to the Secretary of Transportation within three years of March 4, 1999. The agreement was to provide for the establishment of a UCP meeting all the requirements of this section. The agreement must specify the UCP will follow all certification procedures and standards of part 26, on the same basis as recipients. The UCP is also required to cooperate fully with oversight, review, and monitoring activities of DOT and its operating administration.

Massachusetts Unified Certification Program

In 1994, the Commonwealth of Massachusetts, through the Executive Office of Transportation and Construction, initiated the creation of a DBE transportation certification unit at the Supplier Diversity Office (SDO) (Formerly State Office of Minority and Women Business Assistance (SOMWBA)). Under this program, the state's major transportation agencies and authorities dedicated funding to institute efficient certification services needed by DBE firms operating in the transportation industry and in other related industries. Under contract with the state's major transportation agencies and authorities, SDO provided certification services required by federal regulation and state executive orders. SDO is a state regulatory agency within the Department of Economic Development that certifies and promotes businesses for state funded M/WBE programs. A committee of agency representatives was established to monitor operations, refine procedures, address various issues, make adjustments to practices, and provide oversight and other assistance. The steps taken by the Commonwealth of Massachusetts toward development of a unified certification program, specifically the integration of a transportation certification unit within a state agency, was recognized by the Federal Highway Administration in 1999 as a best practice worthy of sharing with other states.

Task Force Development and Planning Process

The Disadvantaged Business Enterprise (DBE) requirements contained in 49 CFR Part 26 require that all DOT recipients in Massachusetts participate in a Unified Certification Program (UCP). Subject to approval by the Secretary, the UCP can take any form acceptable to the recipients in that state. All recipients must sign an agreement establishing the UCP and submit the agreement to the Secretary for approval.

In the summer of 2001, the Executive Office of Transportation and Construction invited the Massachusetts Highway Department, the Massachusetts Bay Transportation Authority, the Massachusetts Port Authority, the Massachusetts Aeronautics Commission, the Massachusetts Turnpike Authority, the Supplier Diversity Office, and local Federal USDOT agencies to an initial meeting to discuss UCP requirements.

The meeting was designed to review what additional activities and changes needed to be instituted at SOMWBA's existing transportation certification unit, so that it fully complied with

49 CFR Part 26, and to refine the program where necessary. The meeting provided an opportunity for agencies to identify major concerns and issues that Massachusetts recipients must address and to develop a strategy and timeline of activity to meet the goal of establishing a Massachusetts UCP and a statewide agreement on the UCP by March, 2002.

Participants of the meeting included representatives from the Federal Aviation Administration, the Federal Highway Administration, and the Federal Transit Administration. USDOT recipient representatives included the Executive Office of Transportation and Construction (EOTC), the Massachusetts Highway Department (MHD), the Massachusetts Bay Transportation Authority (MBTA), the Massachusetts Port Authority (MPA), and the Massachusetts Aeronautics Commission (MAC). Other agencies included the Massachusetts Turnpike Authority, as the agency managing construction of the federally funded Central Artery Tunnel (CAT) Project, and the Supplier Diversity Office (SDO).

Following the initial meeting a UCP committee and task force was established. The role of the task force was to draft the UCP proposal and agreement and work plan for distribution and approval by the Committee.

Following a number of meetings with the direct USDOT recipients, it was agreed that assistance in coordinating activity was needed in the planning and development process. It was also decided that a coordinator was needed for data collection, information coordination and to keep the project on schedule. The Massachusetts Alliance for Small Contractors was contracted for that role.

The task force participants held a number of meetings to discuss the requirements of the unified certification program. They discussed how the present DBE transportation certification program at SDO could be changed to meet the new federal requirements for a UCP. The current program at SDO was the Massachusetts preliminary UCP. A decision was made to continue with SDO as the certifying agent. The certification for concessionaires would remain with MPA and the DBE firms would be listed in the DBE Directory. The strategy was to convert the present transportation DBE certification process into a UCP. A draft work plan and schedule was developed for distribution to the Committee. Throughout the planning process Committee participants shared information obtained from workshops held at transportation conferences and from USDOT recipients in other states.

Additional meetings were held with USDOT representatives, the direct recipients, large subrecipients, SOMWBA, and MTA to discuss the strategy, the draft work plan and schedule and request input and solicit more members to participate on the task force. The USDOT representatives provided updates on issues and concerns raised on a national level. They also suggested specific areas that required close attention as the program was developed, including separation of functions, resource commitments, and the "one stop service goal." All USDOT recipients regardless of funding were invited to participate in the development process. The work plan and schedule was distributed to all recipients and efforts were initiated to develop this program submission to the United States Department of Transportation. A listing of Task Force members, all USDOT recipients in Massachusetts, and the timeline and schedule was attached to the UCP submission.

Membership and Organization

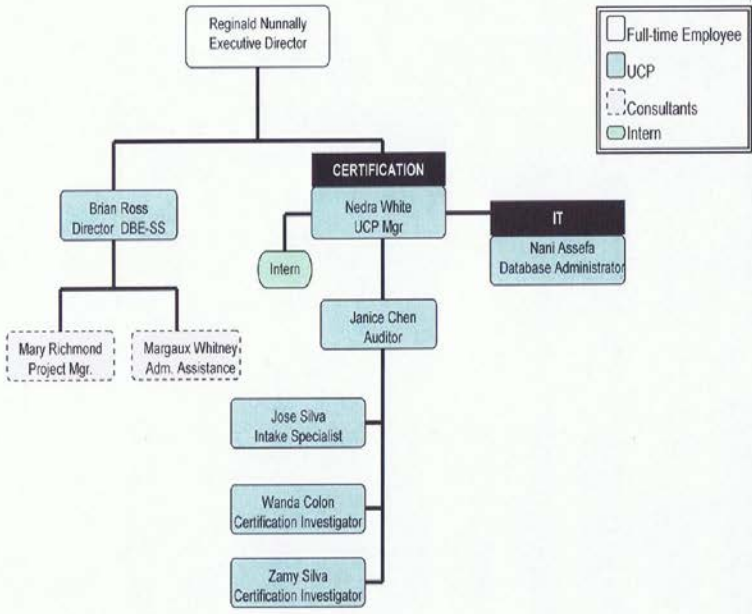
The Supplier Diversity Office (SDO) has contracted the public agencies and authorities, known as the UCP Development Committee, representing all recipients of US DOT funding in the

Commonwealth, to provide DBE certification services required by federal regulation for appropriate costs, within agency- specific restrictions.

Two of those agencies are direct recipients: the Massachusetts Highway Department, and the Massachusetts Bay Transportation Authority. A third recipient, the Massachusetts Port Authority, is a member of the UCP but conducts its own concession certifications, consistent with the certification standards and procedures of the federal regulation. Certification of potential concessionaires at the regional airports and the MBTA will be evaluated during the implementation period. The Executive Office of Transportation and Public Works is also a direct recipient, and also has limited responsibility for the state's regional transit authorities. EOTC continues to coordinate and facilitate meetings among member agencies, SDO, and federal administrations. The Massachusetts Aeronautics Commission (MAC) is also a direct recipient, and has limited responsibility for the state's regional airports. In addition, the UCP Development Committee will include one representative from the Regional Transit Authorities.

SDO will continue to implement and manage the Unified Certification for these entities, and will follow all of the certification procedures and standards outlined in 49 CFR Part 26. The UCP Development Committee meets quarterly with SDO's Executive Director over the course of the implementation period to review monthly reports, discuss matters of concern and to identify solutions to any problems which arise in the operation of the UCP. USDOT representatives are invited to participate in these meetings of the UCP to provide information and guidance, to ensure compliance with all applicable federal requirements, and/or to initiate program reviews of the UCP.

Supplier Diversity Office (SDO)



SECTION 5 – SCOPE AND METHODOLOGY

Scope

Implementation of the following twelve required DBE UCP program components specified by the FTA are reviewed in this report.

1. You must rebuttably presume that members of the designated groups identified in 26.67 are socially and economically disadvantaged [49 CFR 26.61].
2. If you have a well founded reason to question the individual's claim of membership in that group, you must require the individual to present additional evidence that he or she is a member of the group [49 CFR 26.63].
3. You must apply current Small Business Administration (SBA) business size standards found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts [49 CFR 26.65].
4. You must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged [49 CFR 26.67].
5. In determining whether the socially and economically disadvantaged participants in a firm own the firm, you must consider all the facts in the record, viewed as a whole [49 CFR 26.69].
6. In determining whether socially and economically disadvantaged owners control a firm, you must consider all the facts in the record, viewed as a whole [49 CFR 26.71].
7. Other rules affecting certification include not considering commercially useful function issues, evaluating the eligibility of a firm on the basis of present circumstances, and making sure only firms organized for profit may be eligible DBEs [49 CFR 26.73].
8. You and all other DOT recipients in your state must participate in a Unified Certification Program (UCP). You must maintain and make available to interested persons a directory identifying all firms eligible to participate as DBEs in your program [49 CFR 26.81 and 26.31].
9. You must ensure that only firms certified as eligible DBEs under this section participate as DBEs in your program [49 CFR 26.83].
10. When you deny a request by a firm to be certified as a DBE, you must provide the firm a written explanation of the reasons for the denial [49 CFR 26.86 – 26.89].
11. If you fail to comply with any requirement of this part, you may be subject to formal enforcement action under program sanctions by the concerned operating administration, such as the suspension or termination of Federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied [49 CFR 26.101 – 26.109].

Methodology

The initial step in the scope of this Compliance Review consisted of consultation with the FTA Office of Civil Rights and a review of available information from the Unified Certification Program websites and other sources. Subsequent to this review, potential dates for the site visit were coordinated.

An agenda letter was then compiled and sent to the Massachusetts UCP by FTA's Office of Civil Rights. The agenda letter notified the Massachusetts UCP of the planned site visit, requested preliminary documents, and informed the Massachusetts UCP of additional documents needed and areas that would be covered during the on-site portion of the review.

The documents received prior to the on-site portion of the review were examined and an itinerary for the site visit was developed.

An entrance conference was conducted at the beginning of the Compliance Review with the Mass UCP Certifying Members and the review team. Subsequent to the entrance conference, a review was conducted of the Mass UCP agreement and other documents submitted to the review team by the Mass UCP representative. Interviews were then conducted with selected Mass UCP Certifying Members regarding DBE program certification standards and certification procedures. These interviews included members with the responsibility of certifying on behalf of all the members.

A sample of certification files (see table on next page) were then selected and reviewed for the DBE required elements.

At the end of the review, an exit conference was held with the Mass UCP Certifying Members and the review team. A list of participants is included at the end of this report. At the exit conference, initial findings and corrective actions were discussed with the Mass UCP Certifying Members.

Following the site visit, a draft report was compiled. MassUCP reviewed the draft report and provided responses to the report. Those responses have been compiled into this final report.

NOTE: Materials and information to address the findings and corrective actions in the report should be sent to the attention of:

Randelle Ripton
FTA Office of Civil Rights
1200 New Jersey Ave., SE, East Bldg., 5th Floor,
Washington, DC 20590
randelle.ripton@dot.gov

Supplier Diversity Office:

File Type	Firm	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Removal	[REDACTED]	Y	Y	Y	Y	Y/Y	N/A	N/A	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		Y	Y	N/A	Y	Y	Y	Y	N/A
		USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Initial Certification Denial	[REDACTED]	Y	Y	Y	N/A	Y/Y	N/A	Y	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		N	Y	N/A	Y	Y	N/A	N/A	N/A
		USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Initial Certification <1 year	[REDACTED]	Y	Y	Y	N/A	Y/Y	N/A	N/A	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		N	Y	N/A	Y	Y	N/A	N/A	N/A
		USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Removal	[REDACTED]	Y	Y	Y	Y	Y/Y	N/A	N/A	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		Y	Y	N/A	Y	Y	N	Y	N/A
		USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Initial Certification <1 year	[REDACTED]	Y	Y	Y	N/A	Y/Y	N/A	N/A	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		Y	Y	N/A	Y	Y	N/A	N/A	N/A
		USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Removal	[REDACTED]	Y	Y	Y	Y	Y/Y	N/A	N/A	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		Y	Y	N/A	Y	Y	Y	Y	N/A

		USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Existing		Y	Y	Y	Y	Y/Y	N/A	N/A	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		Y	Y	N/A	Y	Y	N/A	N/A	N/A
		USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Initial Certification Denial		Y	Y	Y	N/A	Y/Y	N/A	Y	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		N	Y	N/A	Y	Y	N/A	N/A	N/A

Massachusetts Port Authority:

File Type	Firm	USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Removal	[REDACTED],	Y	Y	Y	N	Y/Y	N/A	N/A	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		Y	N/A	N/A	Y	Y	Y	Y	N
						Concession Business	ACDBE Size Standards	PNW Exclusion	ACDBE Dir.
						Y	Y	N/A	N/A
		USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Initial Certification Denial	[REDACTED]	Y	Y	Y	N/A	Y/Y	N/A	Y	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
			N/A	N/A	N/A	Y	N/A	N/A	N/A
						Concession Business	ACDBE Size Standards	PNW Exclusion	ACDBE Dir.
						Y	Y	N/A	N/A
		USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Removal	[REDACTED]	Y	N/A	Y	N/A	Y/Y	N/A	N/A	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		N/A	N/A	N/A	Y	Y	Y	Y	N/A
						Concession Business	ACDBE Size Standards	PNW Exclusion	ACDBE Dir.
						Y	Y	N	Y
		USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Existing	[REDACTED]	Y	Y	Y	Y	Y/Y	N/A	N/A	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		N/A	N/A	N/A	N/A	Y	N/A	N/A	N/A
						Concession Business	ACDBE Size Standards	PNW Exclusion	ACDBE Dir.
						Y	Y	N/A	Y
		USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Removal	[REDACTED].	Y	Y	Y	Y	Y/Y	N/A	N/A	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		Y	N/A	N/A	Y	Y	Y	N/A	N/A
						Concession Business	ACDBE Size Standards	PNW Exclusion	ACDBE Dir.
						Y	Y	N/A	N/A

		USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Existing		Y	Y	Y	N	N/N	N/A	N/A	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		Y	N/A	N/A	Y	Y	N/A	N/A	N/A
						Concession Business	ACDBE Size Standards	PNW	ACDBE Dir.
						Y	Y	Y	
		USDOT Form	Site Visit	PNW	No Change	Per/Bus Tax	Streamline Application	Denial Letter	Appeal Letter
Initial Certification <1 year		Y	Y	Y	N/A	Y/Y	N/A	N/A	N/A
		Cert. Decision	SBA Size	DOT/SBA MOU	Control Review	Ownership Review	Removal Process Followed	Notice of Hearing	Notice of Decision
		N	N/A	N/A	Y	Y	N/A	N/A	N/A
						Concession Business	ACDBE Size Standards	PNW	ACDBE Dir.
						Y	Y	N/A	Y

SECTION 6 – ISSUES AND RECOMMENDATIONS

1. **Burden of Proof**

Basic Requirement: (49 CFR Part 26.61) UCPs must rebuttably presume that members of the designated groups identified in 26.67(a) are socially and economically disadvantaged. Individuals must submit a signed, notarized statement that they are a member of one of the groups in 26.67.

Discussion: During this UCP Compliance review, no deficiencies were found with requirements for burden of proof.

The Massachusetts Unified Certification Program (Mass UCP) policies and procedures indicate the Commonwealth of Massachusetts Supplier Diversity Office (SDO) will follow all certification procedures and standards of 49 CFR Part 26. The procedures also specify that SDO will make certification decisions based on the facts in the record as a whole. The Mass UCP procedures require all applicants to attend a precertification workshop/session before they submit a Uniform Certification Application. The Mass UCP is advised that waivers should be granted for individuals unable to attend the workshop since there is no requirement in the DBE rule for precertification workshop attendance. Certification requests for Airport Concessionaire Disadvantaged Business Enterprises (ACDBE) are evaluated by Massachusetts Port Authority (MassPort) using 49 CFR Part 23 and 26 certification standards.

2. **Group Membership**

Basic Requirement: (49 CFR Part 26.63) If a UCP has a well founded reason to question the individual's claim of membership in that group, you must require the individual to present additional evidence that he or she is a member of the group. You must provide the individual a written explanation of your reasons for questioning his or her group membership. You must take special care to ensure that you do not impose a disproportionate burden on members of any particular designated group.

Discussion: During this UCP Compliance Review, an advisory comment was made with the requirement for Group Membership.

The MassUCP policies and procedures state that the Certification Specialist will ensure that individuals relied upon for disadvantage status meet the requirements of social disadvantage as defined in 49 CFR Part 26.63. If the Specialist has a well-founded reason to question the applicant's claim to group membership, additional documentation justifying the individual's inclusion may be requested. The representative interviewed from SDO indicated that they have a supplemental list requesting driver's license and birth certificate, while the representative from MassPort indicated that they rely on the affidavit of group membership and request no documentation to support group membership. The Mass UCP is advised to include their proof of group membership procedures and documentation requirements in their policy and procedures.

3. Business Size

Basic Requirement: (49 CFR Part 26.65) A UCP must apply current SBA business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts. A firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts over the firm's previous three fiscal years, in excess of \$22.41 million.

Discussion: During this UCP Compliance Review, no deficiencies were found with the requirement of business size. The Mass UCP Policy and Procedure indicates that 49 CFR Part 26 will be utilized to certify firms as DBEs. The SDO certifying representative interviewed was familiar with the DOT DBE business size standard of \$22.41 million. The MassPort certifying representative was also familiar with current size standards for ACDBE certification.

4. Social and Economic Disadvantage

A) Presumption of Disadvantage

Basic Requirement: (49 CFR Part 26.67 (a)(1)) You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. You must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

Discussion: During this UCP Compliance Review, no deficiencies were found with the requirement for presumption of disadvantage.

Part 26.61 (c) states you must presume members of groups identified in Part 26.67(a) are socially disadvantaged. Part 26.67 (a)(1) requires the applicant to submit a signed, notarized certification that the disadvantaged owner is socially and economically disadvantaged. This notarized Affidavit of Certification is part of the Uniform Certification Application found in Appendix F of the DBE regulations. The certification files reviewed by the review team included the statement of disadvantage.

B) Personal Net Worth

Basic Requirement: (49 CFR Part 26.67 (a)(2)) A UCP must require each individual owner of a firm applying to participate as a DBE whose ownership and control are relied upon for DBE certification to certify that he or she has a personal net worth that does not exceed \$1.32 million.

Discussion: During this UCP Compliance Review, no deficiencies were found with the requirement for Personal Net Worth (PNW) statements.

The Mass UCP Policy and Procedures for DBE certification indicate that personal financial statements will be reviewed for each individual relied upon to establish social

and economic disadvantage. The SDO certification files reviewed included personal financial statements. The personal financial statements are reviewed by the UCP Auditor, which is a new position since August, 2009. The Auditor is a SDO employee and holds a Certified Public Accountant license. The files reviewed were analyzed appropriately for eligibility with the then \$750,000 personal net worth requirement minus applicable exclusions.

Several files were reviewed from MassPort for personal net worth requirements in regards to 49 CFR Part 23 concerning Airport Concessionaire DBEs. In particular, the certification file for [REDACTED] was reviewed for proper allocation of the \$3 million exclusion. The two disadvantaged owners of the DBE firm submitted personal net worth information during the annual update. The disadvantaged owners each had 29% ownership interest in the firm and both wanted to exclude \$3 million from each of their personal net worth statements. Even though the presumptively disadvantaged owners did not have 100% ownership interest in the firm, they wanted to distribute 100% of the firm's loan liability between the two of them. Therefore, these owners wanted to exclude a combined \$6 million in personal assets on loan guarantees of \$2.8 million and \$500 thousand guaranteed by six and five persons in the firm jointly and severally, respectively. MassPort correctly removed the firm's certification in accordance to 26.87 procedures subsequent to several correspondences with the firm's legal counsel.

C) Individual determinations of social and economic disadvantage

Basic Requirement: (49 CFR Part 26.67 (d)) Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged may apply for DBE certification. UCPs must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged.

Discussion: During the UCP Compliance Review, no deficiencies were found with the requirement of individual determinations.

The Mass UCP certifying members interviewed understood requirements of Appendix E in the DBE regulations. The SDO representative indicated that a firm requested information about individual determinations but did not follow through with process. The MassPort representative indicated that they had not received an individual determination request during her three-year tenure with the agency.

The Mass UCP Policy and Procedures for DBE certification specifies that applicants that are not presumably disadvantaged may apply for DBE certification. These cases are reviewed on a case-by-case basis for Appendix E requirements. None of the certifying members had files to review on an individual basis of social and economic disadvantage.

5. Ownership

Basic Requirement: (49 CFR Part 26.69) In determining whether the socially and economically disadvantaged participants in a firm own the firm, UCPs must consider all

the facts in the record, viewed as a whole. To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.

Discussion: During this UCP Compliance Review, no deficiencies were found with the requirement of ownership.

UCPs must evaluate if applicant firms are at least 51 percent owned by socially and economically disadvantaged individuals. The firm's ownership by socially and economically disadvantaged individuals must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. Based on the certification files reviewed, it appears that the Mass UCP certifying staff members are appropriately evaluating ownership considerations for socially and economically disadvantaged owners for certification.

Due to a concurrent FAA review, MassPort delivered copies of their certification files to SDO office for review. The older certification information for [REDACTED] was not included in the file copy provided to the review team to ascertain compliance with ownership determinations. However, [REDACTED] is no longer in the program due to removal of DBE certification.

6. Control

Basic Requirement: (49 CFR Part 26.71) In determining whether socially and economically disadvantaged owners control a firm, UCPs must consider all the facts in the record, viewed as a whole.

Discussion: During this UCP Compliance Review, no deficiencies were found with determining control.

The review team analyzed firms with approved, denied, and removed certifications. The determinations of the certification staff identified a thorough understanding of control requirements. The SDO certification staff has access to legal staff for control evaluations on an as needed basis. MassPort contracts with a consultant to assist them with eligibility requirements by providing recommendations. The availability of these resource experts was reflective in the determination narratives and other analytical documentation generated by the certification staff.

Due to a concurrent FAA review, MassPort delivered copies of their certification files to the SDO office for review. The older certification information for [REDACTED] and [REDACTED] were not included in the file copies provided to the review team to ascertain compliance with control determinations. [REDACTED] certification was removed and [REDACTED] is an active DBE.

7. Other rules affecting certification

Basic Requirement: (49 CFR Part 26.73) UCPs must not consider commercially useful function issues in any way in making decisions about whether to certify a firm as a DBE.

You may consider, in making certification decisions, whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program. DBE firms and firms seeking DBE certification shall cooperate fully with UCP requests for information relevant to the certification process.

Discussion: During this UCP Compliance Review, no deficiencies were found with other rules affecting certification.

This section requires that UCPs must not refuse to certify a firm solely on the basis that is a newly formed firm. The MassUCP does not have a requirement precluding newly formed firms from applying for certification.

The DBE regulations in Part 26.73 initially included provisions for evaluating eligibility of Indian tribes, Alaska Native Corporations, and Native Hawaiian organizations in the 1999 issuance. The 2003 amended DBE regulations included a separate evaluation process for an Alaska Native Corporations (ANCs) seeking DBE certification. None of the certifying members expressed experience with processing ANC certification determinations.

8. UCP Requirements

A) UCP Agreement

Basic Requirements: (49 CFR Part 26.81) All DOT recipients in a state must participate in a Unified Certification Program. Recipients must sign an agreement establishing the UCP for the state and submit the agreement to the Secretary for approval.

Discussion: During this UCP Compliance Review, deficiencies were found regarding the Mass UCP Agreement.

The Mass UCP submitted their Memorandum of Understanding (MOU) to the Secretary of Department of Transportation on March 4, 2002. The MOU stated that applicants for MBE or WBE and DBE certification may apply for both certifications through a single application and process provided that is demonstrated in a written decision that the DBE determination is based on solely on the criteria of 49 CFR Part 26, Subparts D and E. State certification regulations governing then-SOMWBA certifications of MBEs and WBEs were also provided to the Secretary in their MOU submission. SOMWBA agreed that all staff participating in DBE certification activities would be thoroughly knowledgeable of the criteria for DBE certification and of any distinction between the two regulations and that all standards and procedures of the federal regulations would be met.

SDO representatives advised the review team that prior to 2006, SOMWBA had one application for M/W/DBE certification and maintained the information in one file. The two programs were segregated after 2006. Staff was allocated to specific programs and the files for state certification were separated from DBE certification files. As a result, specific staff administers and maintain files for state certification while another set of staff is responsible for DBE certification without overlap.

The creation of the Massachusetts Department of Transportation (MassDOT) and the Massachusetts Supplier Diversity Office (the result of a merger between the State Office of Minority and women Business Assistance and the Affirmative Market Program) necessitated the MOU to be revised in 2010. The revised memorandum was developed by MassDOT and the Executive Office of Administration and Finance Operational Services Division. The Mass UCP representative indicated that the revised MOU more accurately reflected the role of MassPort in providing certification of Airport Concession DBE certification and the role of the recently formed Supplier Diversity Office in certification activities.

Since the Massachusetts MOU has undergone substantial modification, it must be submitted to USDOT for approval. However, the review team advises the Mass UCP to review the MOU for consistent and clear explanation of responsibilities for all the certifying partners prior to submittal.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights (and FHWA-Massachusetts Division Civil Rights Specialist) a plan for submission of the MOU for Massachusetts UCP to the USDOT.

Recipient Response:

In accordance with (49 CFR Part 26.81) Mass DOT as the recipients in the state of Massachusetts and a requirement for participation in the Unified Certification Program, will sign an agreement establishing the UCP for the state of Massachusetts and submit the agreement to the Secretary for approval. The Massachusetts UCP will submit a revised Memorandum of Understanding to Mass DOT Office of Civil Rights at the December UCP meeting for review and subsequent submittal to FTA's Office of Civil Rights prior to the end of the federal fiscal year 12 (December 31, 2011) that will more accurately reflect the responsibilities of Mass Port Authorities as it relates to the certification of ACDBE program and Massachusetts UCP as it relates to the certification of DBE certification program.

DOT Response:

By May 20, 2012, submit to FTA's Office of Civil Rights a revised UCP Memorandum of Understanding.

B) UCP Directory

Basic Requirements: (49 CFR Part 26.31 and 26.81(g)) UCPs must maintain a unified DBE directory containing, for all firms certified by the UCP, the information required by 26.31. The listing shall include for each firm, its address, phone number, and the types of work the firm has been certified to perform as a DBE. The UCP shall update the electronic version of the directory by including additions, deletions, and other changes as soon as they are made.

Discussion: During this DBE compliance review, deficiencies were found with the requirements for the UCP directory.

The directory is hosted on the Commonwealth of Massachusetts website on the Supplier Diversity Office webpage. The interactive directory has query features for several data points. The SDO page has a link to the MassPort ACDBE directory. The MassPort directory is in a PDF format with approximately 20 certified firms. Although the directories are accessible on the same webpage, the regulations require a unified DBE directory.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a plan to incorporate SDO and MassPort DBE and ACDBE certified firms in a unified directory.

January 2011 DBE Program Rulemaking

This rulemaking requires that directories include, by August 26, 2011, the most specific NAICS that describes the type of work for which DBEs are certified. MassPort's directory already list firms by their certified types of work by NAICS code. The SDO directory has features to search and sort by NAICS code, however; the company detail did not show all the NAICS codes for which the firm was certified.

Recipient Response:

In accordance with (49 CFR Part 26.31 and 26.81(g)) the Mass UCP will maintain a unified DBE directory containing, for all firms certified by the UCP including MassPort certified ACDBE firms, the information required by 26.31. The listing will include for each firm, its name, address, phone number, NAICS code and the types of work the firm has been certified to perform as a DBE. The Mass UCP and MassPort will update the electronic version of the directory by including additions, deletions, and other changes as soon as they are made. The Massachusetts UCP has contracted with Steller Corporation, a IT company, to incorporate and combine the directory from MassPort and the Mass UCP by December 31, 2011, that will unify the directory, including:

- Name,
- Address,
- Phone number,
- NAICS code,
- and the types of work the firm has been certified to perform as a DBE

DOT Response:

By May 20, 2012, submit to FTA's Office of Civil Rights verification that the Mass UCP directory meets the following requirements:

- Is unified to include DBE and ACDBE firms;
- The UCP's directory of eligible DBEs specifies whether a firm is certified as a DBE for purposes of part 26, an ACDBE for purposes of part 23, or both in compliance with 49 CFR Part 23.31 (b) requirements; and
- Includes the most specific NAICS codes that describe the type of work for which DBEs are certified.

9. UCP Procedures

A) On-site Visits

Basic Requirements: (49 CFR Part 26.83(c)) UCPs must perform an on-site visit to the offices of the firm. You must interview the principal officers of the firm and review their resumes and/or work histories. You must also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in your jurisdiction or local area.

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirements for on-site visits. However, an advisory comment was made regarding ACDBE on-site visits.

The Mass UCP Policy and Procedures for DBE certification outlines the on-site visit process for SDO. The Certification Specialist schedules a mutually convenient time to conduct the site visit with the firm. A Site Visit Questionnaire form is used for the interview process. The SDO representative indicated during the interview that the Specialist will also visit a job site with the applicant when applicable. This job site visit requirement was also included in the Mass UCP policy and procedures. These procedures require an interview with all principals and any other persons possessing relevant information as to the applicant's operations, including, among possible other employees, subcontractors, consultants, legal counsel, accountants, and government personnel. Once the interview is conducted, the Specialist prepares a detailed report on the applicant recommending the Executive Director or Legal Counsel either to certify or deny the applicants request for certification. SDO Specialist will conduct another on-site visit every five years for firm located within the Commonwealth.

The majority of the MassPort applicants are out-of-state DBEs with concessions in other states. The MassPort representative indicated that they would go to the airport location to interview the owner. The review team was informed by MassPort that they would sometimes wait until the concession space was completed prior to conducting the onsite visit. Some of the files the review team analyzed took many months to process. (See table in Section 9 – UCP Procedures of this report). MassPort is advised to follow the Department's recommendation in the pre-amble of the ACDBE Federal Register for firms with no immediate airport location:

Subpart C – Certification of ACDBEs.....On-site reviews are a key part of the concession certification process. The Department realizes that, particularly for a concession that does not yet have a location established on an airport, it may be difficult to identify a “job site” at which to conduct such a review. In this case, recipients could conduct the on-site review solely at the firm’s headquarters or other principal place of doing business.

B) Uniform Application

Basic Requirements: (49 CFR Part 26.83 (i)) UCPs must use the application form provided in Appendix F of the regulations without change or revision. However, you may provide in your DBE program, with the approval of the concerned operating

administration, for supplementing the form by requesting additional information not inconsistent with this part.

Discussion: During this DBE Compliance Review, no deficiencies were found with the requirements for using the Uniform Certification Application Form in Appendix F.

The Uniform Application is available on the SDO and MassPort websites to download. The forms on the websites are in accordance with the form in appendix F of the DBE regulations.

MassPort states in their ACDBE Program that they will use the Uniform Application Form found in Appendix F to Part 26 with additional instructions as stated in section 23.39 (g). They also acknowledge that the provisions of Part 26, sections 26.83(c) (2-6) do not apply to certifications for purposes of Part 23 of the ACDBE regulations.

The January 2011 DBE Program Rulemaking

If an applicant for DBE certification withdraws its application before you have issued a decision on the application, the applicant can resubmit the application at any time. As a UCP, you may not apply the waiting period provided under Part 26.86(c) of this part before allowing the applicant to resubmit its application.

Mass UCP Policy and Procedures states, “Where an applicant withdraws its request or is nonresponsive, Certification Specialist will prepare a brief report detailing the basis for the action. Except that, no withdrawal will be permitted after Certification Specialist has conducted the on-site or phone interview, rather such a request will be deemed as acceptance of an administrative denial.”

As a recipient or UCP, you must advise each applicant within 30 days from your receipt of the application whether the application is complete and suitable for evaluation and, if not, what additional information or action is required.

Several of the SDO files included an email from the Certification Specialist advising the applicant that their application was received and explaining the certification process and timeline.

C) Annual Updates

Basic Requirements: (49CFR Part 26.83) Once you have certified a DBE, it shall remain certified until and unless you have removed its certification. If you are a DBE, you must provide to the UCP, every year on the anniversary of the date of your certification, an affidavit sworn to by the firm’s owners before a person who is authorized by state law to administer oaths.

Discussion: During this DBE Compliance Review, advisory comments were made with the requirement for annual updates and certification decisions.

The files reviewed for SDO contained the required annual updates for firms in the DBE program longer than one year. SDO sends the DBE an Annual No Change Affidavit for completion with requests for supporting documentation.

MassPort also sends out the No Change Affidavit 30 days prior to the ACDBE's anniversary. However, the [REDACTED], [REDACTED], and [REDACTED] files did not contain the annual affidavits. As mentioned previously, MassPort delivered copies of their files to the on-site review. Some of the file's older information was not copied and provided for the review team. The two files for [REDACTED] and [REDACTED] included several years of collected annual updates.

Part 26.83 states that you must make decisions on applications for certification within 90 days of receiving from the applicant firm all information required under this part. You may extend this time period once, for no more than an additional 60 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension.

The certification files reviewed for SDO and MassPort appear to exceed the 90-day timeframe. It was inconclusive as to when the certifying partners considered the application complete and the exact time for processing a completed application. The certification files show evidence of requests for information and clarification that extended for months on some occasions. The timeframe from application receipt to onsite visit had the largest gap in months. However, the timeframe shortened once the on-site visit was conducted. Mass UCP is advised to incorporate measures to track processing timeframes. The table below gives a breakdown of the certification actions.

SDO Determination Timeframe

Company	Application Received	Onsite Conducted	Decision Made
[REDACTED]	9-30-03	(update) 6-15-05	12-4-03
[REDACTED]	2-25-10	5-18-10	6-22-10
[REDACTED]	4-22-09	5-15-10	6-22-10
[REDACTED]	5-9-05	5-26-05 (phone-out-of-state)	7-18-05
[REDACTED]	10-1-10	3-3-11	3-16-11
[REDACTED]	9-1-09	3-4-10	6-23-10
[REDACTED]	7-9-09	4-9-10	7-12-10

MassPort Determination Timeframe

Company	Application Received	Onsite Conducted	Decision Made
[REDACTED]	9-5-07	5-9-08	6-11-08
[REDACTED]	4-9-08	9-23-08	10-1-08
[REDACTED]	12-30-09	Out-of-state	12-17-10
[REDACTED]	Unknown	12-18-08 (update conducted at	1-5-09 (recert)

		concession location)	
	Unknown	Out-of-state	Unknown
	Unknown	Out-of-state	2001

The January 2011 DBE Program Rulemaking:

Once you have certified a DBE, it shall remain certified until and unless you have removed its certification, in whole or in part, through the procedures of section 26.87. You may not require DBEs to reapply for certification or require “recertification” of currently certified firms.

Mass UCP will need to revise their procedures and correspondence to reflect this guidance.

10. DOT / SBA MOU

The January 2011 DBE Program Rulemaking

49 CFR Part 26.84 has been removed.

49 CFR Part 26.85 was replaced with Interstate certification requirements.

Massachusetts UCP will need to revise current program policies to implement interstate certification procedures in the new DBE rulemaking by January 1, 2012. This includes the Initial Certification Procedures section A. Administrative Procedures. It states that the Certification Specialist will ensure the company has filed with the Massachusetts Secretary of the Commonwealth’s Office or its municipality and has obtained all necessary licenses required by the state for its operation.

The 2011 DBE Program Rulemaking states in the pre-amble, With respect to state requirements for business licenses, the Department believes that states should not erect a “Catch 22” to prevent DBE firms from other states from becoming certified. That is, if a firm from State A wants to do business in State B as a DBE, it is unlikely to want to pay a fee to State B for a business license before it knows whether it will be certified. Making the firm get the business license and pay the fee before the certification process takes place would be an unnecessary barrier to the firm’s participation that would be contrary to this regulation.

11. Denials of Certification

A) Initial Request Denials

Basic Requirement: (49 CFR Part 26.86) When a UCP denies a request by a firm, which is not currently certified with them, to be certified as a DBE, the UCP must provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that support each reason for the denial.

Discussion: During this UCP Compliance Review, no deficiencies were found with the requirement for denial of initial certification request. The Massachusetts UCP denial letters (both SDO and MassPort) in the files reviewed clearly outlined the reasons for denial based on the DBE regulations.

B) Removing Existing Certification

Basic Requirement: (49 CFR Part 26.87) If a UCP determines that there is reasonable cause to believe that the firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination.

Discussion: During this UCP Compliance Review, deficiencies were found with the requirements for removing existing certification.

MassPort

The MassPort procedures for removal of ACDBE eligibility is described in their ACDBE program plan. The written process is in accordance with 49 CFR Part 26.87. MassPort sends a notice of their intent to remove with an opportunity for a hearing to DBE firms no longer meeting the requirements. Their procedures also state the final decision, will be communicated to the firm in writing, and will include notification that the decision may be appealed to DOT (26.89). However, the letters reviewed indicated that if no hearing is requested, the firm's certification is removed as of an effective date.

The review team analyzed three removal of certification by MassPort. [REDACTED] was removed due to the disadvantaged individual exceeding the PNW threshold. A notice of removal was sent to the firm which is in accordance to the exception rule of 26.87. [REDACTED] was also removed due to exceeding the PNW threshold. Since the disadvantaged individuals contested MassPort's PNW evaluation, the full removal process was followed. The third file, [REDACTED], was sent a notice to remove letter with information to request an informal hearing due to the firm not submitting the PNW information on the correct form. The intent to remove letter indicated that the firm's certification would be removed at a specific date if they didn't request a hearing. [REDACTED] did not request a hearing and the firm's certification was removed. MassPort should have sent a final determination letter as described in their procedures and the DBE regulations advising them of their USODT appeal rights for removed firms.

SDO

The Mass UCP Policy and Procedures describes the informal hearing process. The DBE Appeals Board Members consist of one member from the transit authority, one from Aviation, one from the Port Division and from the Mass DOT Office of Civil Rights and the Administrative Law Judge from Mass DOT.

A third party complaint was received by SDO from [REDACTED] of [REDACTED] on April 29, 2010. The company alleged unfair competitive advantage of DBE contracts because of relationship between [REDACTED] and [REDACTED]. [REDACTED] SDO conducted an on-site visit on August 26, 2010 and determined that

the allegation was not supported by the evidence and the firm remained eligible for DBE certification.

The review team analyzed three recipient-initiated removals of certification files conducted by SDO. [REDACTED] (for structure change) and [REDACTED] (for failure to respond) were sent intent to remove notices which included information for an informal hearing. A second letter was sent by Mass DOT Director of Civil Rights to these firms advising them that they had waived their hearing rights and their certification was removed. However, no information to appeal the final determination to the USDOT was included in the letters.

The third DBE firm, [REDACTED], was certified by then SOMWBA in 2005 for Temporary Employment Services. SOMWBA sent a letter to the firm on July 1, 2008 advising that the firm had exceeded their primary type of business activity in NAICS code 561320 for Temporary Employment Services. The company was denied certification as a DBE under the above NAICS code. The letter included information to appeal to the USDOT within 30 days. Since this was a currently certified firm, the removal process of 26.87 should have been followed. The Official USDOT Q &A cites the following in this regard:

CAN A RECIPIENT REMOVE THE ELIGIBILITY OF A CURRENTLY CERTIFIED FIRM THROUGH ANY MEANS OTHER THAN THOSE OF 26.87?

A. With one exception, 26.87 is the only means by which a recipient can remove the certification of a currently certified firm.

The exception involves a situation in which there is no dispute that the firm's owners have exceeded the personal net worth limit. (See Q&A entitled "When a recipient determines that an owner of a certified DBE firm exceeds the owner's \$750,000 personal net worth cap, what happens? Must the firm be decertified? If so, must the recipient use the procedures of 26.87 to decertify the firm?").

In all other cases in which a recipient questions a currently-certified firm's eligibility, 26.87 applies. (emphasis added).

The Mass UCP Policy and Procedures describes two procedures SDO will follow for removal of DBE eligibility as administrative removal and decertification. The decertification process is in accordance with 49 CFR Part 26.87. The administrative removal process applies to any certified company deemed non-responsive during the annual renewal process or any company that fails to respond to requests for information in accordance with 49 CFR Part 26.

In the process of communicating with its certified companies, Certification Specialist will make every effort to contact or locate those companies. The Specialist assigned to the company will attempt to contact the company by mail, phone, and fax, if necessary. In communications by mail, Certification Specialist will give the company two opportunities to respond, with at least one letter sent by certified mail.

The administrative removal does not engender a right of appeal or provide any opportunity for a local hearing. Rather, the company's non-responsiveness creates the presumption that the company no longer wishes to remain certified.

The (Mass DOT) Director of Civil Rights will treat any affirmative requests by the company to withdraw its certification in a similar manner and administratively remove the company, the Director of Civil Rights will accept the written withdrawal request of a company as final notice and immediately remove the company from the directory.

The review team inquired if SDO/Mass UCP received any guidance in drafting their administrative removal process since it is not described in the DBE Regulations or Official USDOT Questions and Answers. The FHWA-Massachusetts Division Civil Rights Specialist indicated at the exit conference meeting that he gave this guidance to SDO which was received from Joseph Austin of the USDOT. Subsequent to the review, the FHWA representative forwarded an email from May 2009 to the review team leader. The email below was from the FHWA representative to Mass DOT Director of Civil Rights summarizing a phone conversation with Joe Austin.

*From: Chandler, David <FHWA>
Sent: Monday, May 18, 2009 9:32 AM
To: 'Lozada, John (EOT)'
Cc: 'Mark.Waterbury@state.ma.us'; Finkle, Lester <FHWA>
Subject: DBETracking_DecertShowCause_5 15 09 (2).xls*

Good Morning John,

As you and Mark finalize the certification procedures, there are a couple of points I would like to make regarding due process, especially where there is no requirement to propose ineligibility proceedings under 26.87.

The only exceptions to following 26.87 are non-responsiveness and exceeding the PNW threshold of 750K. Additionally, if a firm has exceeded the size standard under one of many NAICs codes for which it has been certified, the congratulatory "graduation" letter can be sent; however, where the firm's DBE eligibility (in whole) is removed, 26.87 must be followed.

In a phone conversation with Joe Austin, an official of the US DOT, he stated that due process must be afforded to the firm, regardless whether or not a proceeding under 26.87 is required. In the "exceptions" to 26.87 I mentioned above, Mr. Austin stated that a three-letter approach to satisfy the due process is required. This process demonstrates an effort to locate the firm and provide it with a few opportunities to respond before the final action is taken. Mr. Austin provided the following guidance:

- *Eligibility Removal Process – 49 CFR Part 26 allows administrative removal of eligibility in non-responsive/failure to cooperate situations under the following conditions:*
 1. *1st Letter – Non-certified mail letter is sent to the DBE firm;*
 2. *2nd Letter – After a brief investigative effort to locate the firm, a Certified letter is sent (attach copy of the 1st letter) indicating that a second failure to respond may jeopardize the firm's eligibility and that the firm may be referred to an eligibility proceeding;*
 3. *3rd Letter – Certified letter sent removing the firm's eligibility. Record is documented with copies of all the letters.*

The review team has analyzed the email summary and concluded that condition number 2 above says that the firm may be referred to an eligibility proceeding. However, the Mass UCP procedures do not provide the DBE an opportunity for any proceeding or hearing of eligibility under their administrative removal guidelines.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a plan and schedule for ensuring compliance with removing certification of firms in accordance with 49 CFR Part 26.87

Recipient Response:

In accordance to (49 CFR Part 26.87) If Mass UCP determines that there is reasonable cause to believe that the firm is ineligible, we will provide written notice to the firm that we propose to find the firm ineligible, setting forth the reasons for the proposed determination for the removal of a DBE certified firm and provide the DBE certified firm with an opportunity for a proceeding or hearing of eligibility under our administrative removal guidelines by December 31, 2011.

DOT Response:

By May 20, 2012, submit to FTA's Office of Civil Rights Mass UCP administrative removal guidelines to include boilerplate letters that will be used in the removal process.

C) Appeals to the DOT

Basic Requirement: (49 CFR Part 26.89) When the Department receives an appeal and requests a copy of the recipient's administrative record, the UCP must provide the administrative record, including a hearing transcript, within 20 days of the Department's request.

Discussion: During this DBE Compliance Review, no deficiencies were made with the Appeals to the USDOT.

The review team examined the SDO denials of [REDACTED] and [REDACTED] and MassPort denial of [REDACTED]. All of the denial letters included information for the applicants to appeal the determination to the USDOT.

12. Compliance and Enforcement

A) DBE Enforcement Actions

Basic Requirement: (49 CFR Part 26.107) If a firm does not meet the eligibility criteria of subpart D and attempts to participate in a DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, the Department may initiate suspension or debarment proceeding against you under 49 CFR part 29.

Discussion: During this DBE Compliance Review, no deficiencies were found with DBE Enforcement Actions.

[REDACTED] was decertified by SDO in April 2009 for failure to prove the company was independent and controlled by an eligible DBE owner. The DBE appealed the decision locally but eventually rescinded the request for an appeal.

Subsequently they were decertified and debarred from the program for a three (3) year period. The company is eligible to reapply to the DBE program July, 2012.

B) Confidentiality

Basic Requirement: (49 CFR Part 26.109 (a)) Notwithstanding any provision of Federal or state law, UCPs 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 for DBE certification and supporting documentation.

Discussion: During this DBE Compliance Review, deficiencies were found with the confidentiality issues in the Mass UCP.

Mass UCP's confidentiality policy states that Mass DOT and SDO will safeguard from disclosure to third parties information that may reasonable be regarded as confidential business information, consistent with Federal, state and local law. This would include any information that was relied upon for the certification or renewal of a DBE firm.

SDO's contract with Mass DOT will provide that to the extent permissible under relevant law SDO will not release personal financial information submitted in response to the personal net worth requirement to a third party (other than USDOT) without the written consent of the submitter.

SDO received three Freedom of Information Act Requests from two attorneys. Kathleen Shea, Esq. requested information on July 30, 2010, for [REDACTED] and [REDACTED] owned both by [REDACTED]. Peter Parker, Esq. requested information on January 20, 2011, for [REDACTED].

49 CFR Part 26.109 states, *Notwithstanding any provision of Federal or state law, you must not release any 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 information.*

The Department issued additional guidance concerning confidentiality in the Official Questions & Answers. *Under the DOT DBE regulation, a recipient or UCP is prohibited from disclosing to any third party, without the submitter's written consent, a personal net worth statement or supporting documentation. UCPs are likewise prohibited from disclosing confidential business information, including applications for DBE certification and supporting information. These prohibitions apply even in the face of a request under a state freedom of information or open records law.*

The language used in Mass UCP policy and procedures suggests that requests for certification information need to be consistent with Federal, state and local law. Being that Mass UCP has received previous Freedom of Information requests, it is imperative that the correct reference is included in the policy and procedures of the UCP.

Corrective Action and Schedule: Within 30 days of receipt of the draft report, submit to FTA's Office of Civil Rights a plan to:

- ensure verbatim language from Part 26.109 is used in the Mass UCP procedures
- provide actions taken on past Freedom of Information requests and documentation that the submitters consent was given.

Recipient Response:

A. In accordance (49 CFR Part 26.109 (a) Notwithstanding any provision of Federal or state law, Mass UCP will not release any 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 for DBE certification and supporting documentation. The Mass UCP will revise the language in its policy and procedures by December 31, 2011.

B. Please note the Mass UCP received Freedom of Information Requests for three (3) DBE certified firms. We did not receive permission from the DBE certified firms to release any information in accordance to (49 CFR Part 26.109 (a). The information that was released as a result of the Freedom of Information requests excluded the following items:

- i. Taxes (both Federal and State)
- ii. Income Statements
- iii. Balance Sheets
- iv. All documents containing any information relative to social security numbers or federal identification numbers
- v. Professional Licenses
- vi. Copies of any loan documents
- vii. Copies of any leases
- viii. Banking information
- ix. Race or
- x. Gender information

As we move forward the Mass UCP will insure that (49 CFR Part 26.109(a) will be strictly enforced.

DOT Response:

By May 20, 2012, submit to FTA's Office of Civil Rights Mass UCP confidentiality procedures consistent with 49 CFR Part 26.109. Verify if the personal net worth forms and supporting documentation were also excluded from the three Freedom of Information requests.

C) Cooperation

Basic Requirement: (49 CFR Part 26.109 (c)) All participants in the Department's DBE program are required to cooperate fully and promptly with DOT and recipient compliance reviews, certification reviews, investigations, and other requests for information. (49 CFR Part 26.73 (c)) DBE firms and firms seeking DBE certification shall cooperate fully with your requests (and DOT requests) for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial or removal of certification.

Discussion: During this DBE Compliance Review, no deficiencies were made with cooperation. However, an advisory comment was made regarding cooperation language.

The Mass UCP Policy and Procedures indicates that all participants in the Mass DOT's DBE program (including, but not limited to, subrecipients, DBE firms and applicants for DBE certification, complainants and appellants, and contractors using DBE firms to meet contract goals) will cooperate fully and promptly with USDOT and Mass DOT's compliance reviews, certification reviews, investigations, and other requests for information.

The review advises the Mass UCP to update their procedures and reference Mass UCP cooperation policies rather than Mass DOT DBE program.

SECTION 7 – SUMMARY OF FINDINGS

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action(s)	Response Days/Date
1. Burden of Proof	26.61	AC	Provide waivers for precertification workshop attendance		
2. Group Membership	26.63	AC	Consider adding procedures for determining group membership		
3. Business Size	26.65	ND			
4. Social and Economic Disadvantage	26.67				
a) Presumption of Disadvantage		ND			
b) Personal Net Worth		ND			
c) Individual determination		ND			
5. Ownership	26.69	ND			
6. Control	26.71	ND			
7. Other Certification Rules	26.73	ND			
8. UCP Requirements					
a) UCP agreement	26.81	D	MOU changed and needs approval	Submit to FTA's Office of Civil Rights a revised UCP Memorandum of Understanding.	May 20, 2012
b) UCP directory	26.31	D	DBE directory not unified	Submit to FTA's Office of Civil Rights verification that the Mass UCP directory meets the following requirements: <ul style="list-style-type: none"> • Is unified to include DBE and ACDBE firms; • The UCP's directory of eligible DBEs specifies whether a firm is certified as a DBE for purposes of part 26, an ACDBE for purposes of part 23, or both in compliance with 49 CFR Part 23.31 (b) requirements; and • Includes the most specific NAICS codes that describe 	May 20, 2012

Requirement of 49 CFR Part 26	Ref.	Site visit Finding	Description of Deficiencies	Corrective Action(s)	Response Days/Date
				the type of work for which DBEs are certified.	
9. UCP Procedures					
a) on-site visits	26.83	AC	MassPort should consider conducting on-sites for firms w/o concessions		
b) Uniform Application		ND			
c) Annual Updates		AC	90 day processing time needs evaluating.		
10. DOT/SBA MOU	26.84 – 26.85	N/A			
11. Denials					
a) Initial Request	26.86	ND			
b) Remove Existing	26.87	D	Procedures and process inconsistent with removal procedures	Submit to FTA's Office of Civil Rights Mass UCP administrative removal guidelines to include boilerplate letters that will be used in the removal process.	May 20, 2012
c) Appeals	26.89	ND			
12. Compliance and Enforcement					
a) DBE Enforcement Actions	26.107	ND			
b) Confidentiality	26.109	D	Confidentiality language inconsistent with DBE regulations	Submit to FTA's Office of Civil Rights Mass UCP confidentiality procedures consistent with 49 CFR Part 26.109. Verify if the personal net worth forms and supporting documentation were also excluded from the three Freedom of Information requests.	May 20, 2012
c) Cooperation	26.109	ND			

Findings at the time of the site visit: ND = No deficiencies found; D = Deficiency; NA = Not Applicable; NR = Not Reviewed

SECTION 8 - LIST OF ATTENDEES

Name	Organization	Title	Phone	Email
FTA: (via teleconference)				
Peggy Griffin	FTA – Region I	Civil Rights Officer	617-494-2397	Margaret.griffin@fta.dot.gov
Ryan Inman	FTA - Office of Civil Rights	EO Specialist, DBE Technical Lead	202-366-5017	Ryan.inman@dot.gov
FHWA:				
David Chandler	FHWA	Civil Rights Specialist	617-494-2542	David.chandler@dot.gov
Mass UCP Members:				
Reginald Nunnally	Supplier Diversity Office (SDO)	Executive Director	617-502-8806	Reggie.nunnally@state.ma.us
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Janice Chen	SDO	Case Auditor	617-502-8848	Janice.chen@state.ma.us
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Donald Mayes	Massachusetts Port Authority	Manager, DBE	617-568-3197	Dmayes@massport.com
William McAvoy	Commonwealth of Massachusetts	General Counsel	617-720-3327	William.mcavoy@state.ma.us
Milligan & Co LLC:				
Benjamin Sumpter	Milligan & Co., LLC	Lead Reviewer	215-496-9100	Bsumpter@milligancpa.com
Habibatu Atta	Milligan & Co., LLC	Reviewer	215-496-9100	Hatta@milligancpa.com