

# Massachusetts Department of Public Utilities



Disadvantaged BusinessEnterprise Program

Submitted to Federal Transit Administration  
August 2021

**Massachusetts Department of Public Utilities**  
**Disadvantaged Business Enterprise**  
**Policy Statement**

The Massachusetts Department of Public Utilities (Mass DPU) has established a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 26. The Mass DPU has received Federal financial assistance from the Department of Transportation, and as a condition of receiving this assistance, the Mass DPU has signed an assurance that it will comply with 49 CFR Part 26.

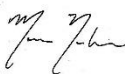
It is the policy of the Mass DPU to ensure that DBEs as defined in part 26, have an equal opportunity to receive and participate in DOT-assisted contracts. It is also our policy:

1. To ensure nondiscrimination in the award and administration of DOT - assisted contracts;
2. To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
3. To ensure that the DBE Program is narrowly tailored in accordance with applicable law;
4. To ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
5. To help remove barriers to the participation of DBEs in DOT assisted contracts;
6. To assist the development of firms that can compete successfully in the market place outside the DBE Program.

Mass DPU's Director of Transportation Oversight Division, currently Elizabeth Cellucci, has been delegated as the DBE Liaison Officer. In that capacity, the Director of the Transportation Oversight Division is responsible for implementing all aspects of the DBE program.

Implementation of the DBE program is accorded the same priority as compliance with all other legal obligations incurred by the Mass DPU in its financial assistance agreements with the Department of Transportation.

The Mass DPU has disseminated this policy statement to its Commissioners via email and all of the components of our organization. We have distributed this statement to DBE and non-DBE business communities that perform work for us on DOT- assisted contracts by emailing it to current vendors working on FTA-funded projects and by posting it on our website at <https://www.mass.gov/orgs/transportation-oversight-division>.



Matthew Nelson, DPU Commission Chair

7/21/2021

Date

## **SUBPART A - General Requirements**

### **Section 26.1 Objectives**

The objectives are found in the policy statement on the first page of this program.

### **Section 26.3 Applicability**

The Mass DPU is the recipient of Federal Transit funds authorized by Titles I, III, V, and VI of ISTEA, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, II, and V of the Teas-21, Pub. L. 105-178.

### **Section 26.5 Definitions**

The Massachusetts Department of Public Utilities will adopt the definitions contained in Section 26.5 for this program.

### **Section 26.7 Non-discrimination Requirements**

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

In administering its DBE program, the Mass DPU will not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the DBE program with respect to individuals of a particular race, color, sex, or national origin.

### **Section 26.11 Record Keeping Requirements**

Mass DPU will report DBE participation on a semi-annual basis, using the Uniform Report of DBE Commitments, Awards, and Payments.

### **Bidders List: 26.11(c)**

The Mass DPU will create a bidders list, consisting of information about all DBE and non-DBE firms that bid or quote on DOT-assisted contracts. Mass DPU will utilize our COMMBUYS procurement system to record and gather this information. The purpose of this requirement is to allow use of the bidders list approach to calculating overall goals. The bidder list will include the name, address, DBE non-DBE status, age, and annual gross receipts of firms.

### **Section 26.13 Federal Financial Assistance Agreement**

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

**Assurance: 26.13(a)**

The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT assisted contract or in the administration of its DBE Program or the requirements of 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT assisted contracts. The recipient's DBE Program, as required by 49 CFR part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to Mass DPU of its failure to carry out its approved program, the Department may impose sanction as provided for under 49 CFR Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).

Mass DPU does not currently have any subrecipients in its FTA program, but should that change, this language will appear in financial assistance agreements with sub-recipients.

**Assurance: 26.13(b)**

Mass DPU will ensure that the following clause is placed in every DOT-assisted contract and subcontract:

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

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

## **SUBPART B - ADMINISTRATIVE REQUIREMENTS**

**Section 26.21 DBE Program Updates**

Since the Mass DPU has received grants from FTA for planning, capital or operating, Mass DPU will continue to carry out this program until all funds from DOT financial assistance have been expended. Mass DPU will provide to DOT updates representing significant changes in the program.

## **Section 26.23 Policy Statement**

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

## **Section 26.25 DBE Liaison Officer (DBELO)**

Mass DPU designated the following individual as our DBE Liaison Officer:

Elizabeth Cellucci  
Director, Transportation Oversight Division  
Department of Public Utilities  
One South Station, 5th Floor, Boston, MA 02110  
Email: [Elizabeth.Cellucci@Mass.Gov](mailto:Elizabeth.Cellucci@Mass.Gov)  
Phone: 617.571.2247

In that capacity, the DBELO is responsible for implementing all aspects of the DBE program and ensuring that the Mass DPU complies with all provision of 49 CFR Part 26. The DBELO has direct, independent access to the Chair of the DPU Commission concerning DBE program matters. An organization chart displaying the DBELO's position in the organization is found in Attachment 1 to this program.

The DBELO is responsible for developing, implementing and monitoring the DBE program, in coordination with other appropriate officials. The DBELO additionally utilizes internal resources to assist in the administration of the program as noted below. The duties and responsibilities of the DBELO include the following:

1. Gathers and reports statistical data and other information as required by DOT.
2. Reviews third party contracts and purchase requisitions for compliance with this program.
3. Works with all departments to set overall and contract goals.
4. Ensures that bid notices and requests for proposals are available to DBEs in a timely manner.
5. Identifies contracts and procurements so that DBE goals are included in solicitations (both race-neutral methods and contract specific goals attainment and identifies ways to improve progress.
6. Analyzes Mass DPU's progress toward attainment and identifies ways to improve progress.
7. Participates in pre-bid meetings.
8. Advises the CEO\governing body on DBE matters and achievement.
9. Participates in pre-bid meetings when held.
10. Provides outreach to DBEs and community organizations to advise them of opportunities and training programs.

The DBELO is assisted with administering the program through the assistance of the following:

- DPU's Chief Financial Officer
  - Provides input to and reviews overall goal and contract goals with the DBELO to ensure compliance with Federal requirements

- Provides financial and data information to assist in setting goals and developing reports on attainment
- Provides information on FTA grant status
- DPU's Procurement Officer
  - Include required DBE clauses in FTA-funded procurements
  - Include DBE goals in solicitations when provided by the DBELO
  - Review bids/proposals to ensure compliance with DBE requirements

## **Section 26.27 DBE Financial Institutions**

It is the policy of the Mass DPU to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community, to make reasonable efforts to use these institutions, and to encourage prime contractors on DOT-assisted contract to make use of these institutions. Mass DPU searched the Federal Reserve's listing of Minority Depository Institutions listing and has identified one bank, OneUnited Bank located in Boston, MA. This information, along with the information regarding use of DBE Financial Institutions has been provided to Mass DPU's Chief Financial Officer to determine if the agency can use their services. Additionally, the Mass DPU has included this information on this institution on our procurement website encouraging their use.

Additional information on the availability of such institutions can be obtained from the DBE Liaison Officer.

## **Section 26.29 Prompt Payment Mechanisms**

The Mass DPU will include the following clause in each DOT-assisted prime contract:

The prime contractor agrees to pay each subcontractor under this prime contract for satisfactory performance of its contract no later than 15 days from the receipt of each payment the prime contract receives from the DPU. Because DPU does not hold retainage on its FTA-funded prime contracts, prime contractors are prohibited from withholding retainage from any of its subcontractors on these contracts. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of the DPU. This clause applies to both DBE and non-DBE subcontracts. The DPU will monitor payments through its invoice approval process. If the DPU notes prime contractor non-compliance with prompt payment requirements, no future payments will be made until any issues of non-compliance have been addressed.

## **Section 26.31 Directory**

The Massachusetts Unified Certification Program maintains a directory identifying all firms eligible to participate as DBEs. The directory lists the firm's name, address, phone number, date of the most recent certification, and the type of work the firm has been certified to perform as a DBE. The directory can be found at <https://www.mass.gov/unified-certification-program-ucp>.



### **Section 26.33 Overconcentration**

The DPU has not identified that overconcentration exists in the types of work that DBEs perform.

### **Section 26.35 Business Development Programs**

The DPU has not established a business development program.

### **Section 26.37 Monitoring and Enforcement Mechanisms**

The DPU will take the following monitoring and enforcement mechanisms to ensure compliance with 49 CFR Part 26.

1. Mass DPU will bring to the attention of the Department of Transportation any false, fraudulent, or dishonest conduct in connection with the program, so that DOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the DOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in 26.109.
2. Mass DPU will consider similar action under our own legal authorities, including responsibility determinations in future contracts. Attachment 3 lists the regulation, provisions, and contract remedies available to us in the events of non-compliance with the DBE regulation by a participant in our procurement activities.
3. Mass DPU will also provide a monitoring and enforcement mechanism to verify that work committed to DBEs at contract award is actually performed by the DBEs. This will be accomplished by reviewing invoices submitted and by reviewing subcontracts to ensure that appropriate requirements such as: inclusion of non-discrimination clause, correct prompt payment language, a scope of work that matches that provided at contract award and aligns with the DBE's NAICS codes, inclusion of dollar amount that matches that provided at contract award, and non-inclusion of restrictive clauses. Additionally, DPU will conduct commercially useful function reviews to ensure that DBEs named on projects are actually performing and being paid promptly and fully. The checklist to be used for subcontract review and commercially useful function reviews are included as Attachment 3. The subcontract review will occur at within the first 10 days of notice to proceed for the prime contractor; invoice review will occur with each invoice provided; commercially useful function reviews will occur once a quarter after notice to proceed is issued for FTA funded projects.
4. Mass DPU will keep a running tally of actual payments to DBE firms for work committed to them at the time of contract award.

### **Section 26.39 Small Business Element**

While the number of FTA-funded procurements that Mass DPU will be awarding is small, the following will be undertaken to foster small business participation:

- Working with area stakeholders to publicize opportunities as they are advertised. It was noted during the consultation meeting for the 2022-2024 goal setting that the opportunities at Mass DPU were not widely known about among the firms that attended. Because it is understood that many small businesses do not also have a marketing staff, ensuring that they

- become aware of opportunities as they arise can assist them in forming or getting on a team.
- Working with area stakeholders and the businesses that have expressed interest in Mass DPU opportunities to ensure that they understand how to register in, and navigate COMMBUYS, the Massachusetts state government procurement portal.
- Working with the procurement office and FTA to ensure that full and open competition is achieved, while understanding that conflicts of interest in the state safety oversight program can present challenges. Because Mass DPU has an oversight role for MBTA, conflicts of interest for firms that contract with MBTA must be carefully evaluated; however, a better understanding of mitigation strategies may be able to yield more opportunities for small businesses in the region.
- Partnering with area stakeholders to provide information and resources to small businesses in order to help them compete. During its initial goal-setting exercise, Mass DPU's DBELO has formed good contacts with regional organizations that have a goal of assisting small businesses. It is expected that additional and continued contact with these organizations will provide Mass DPU access to and information about additional resources to assist small businesses.

## **SUBPART C - GOALS, GOOD FAITH EFFORTS, AND COUNTING**

### **Section 26.43 Set-asides or Quotas**

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

### **Section 26.45 Overall Goals**

A description of the methodology to calculate the overall goal and the goal calculations can be found in Attachment 4 to this program. This section of the program will be updated annually.

In accordance with Section 26.45(f) the DPU will submit its overall goal to DOT on August 1 every three years beginning on August 1, 2021. Before establishing the overall goal each year, the DPU will consult with local minority/woman and non-minority/women business organizations to obtain information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and the DPU's efforts to establish a level playing field for the participation of DBEs.

Following this consultation, Mass DPU will post the goal and the information provided during the consultation on our website. Our overall goal submission to DOT will include a summary of information and comments received during this public participation process and our responses.

Mass DPU will begin using our overall goal on October 1 of each year unless Mass DPU has received other instructions from DOT. If Mass DPU establishes a goal on a project basis, Mass DPU will begin using our goal by the time of the first solicitation for a DOT-assisted contract for the project.



## **Section 26.49 Transit Vehicle Manufacturers Goals**

Because Mass DPU receives funds for FTA's State Safety Oversight Program, we do not anticipate that Mass DPU will be purchasing transit vehicles. If, however that changes, Mass DPU will require each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, to certify that it has complied with the requirements of this section.

## **Section 26.51(a-c) Breakout of Estimated Race-Neutral & Race-Conscious Participation**

The breakout of estimated race-neutral and race-conscious participation can be found in Attachment 4 to this program.

## **Section 26.51(d-g) Contract Goals**

The DPU will use contract goals to meet any portion of the overall goal that it does not project being able to meet using race-neutral means. Contract goals are established so that, over the period to which the overall goal applies, they will cumulatively result in meeting any portion of our overall goal that is not projected to be met through the use of race-neutral means.

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

Mass DPU will express our contract goals as a percentage of the total amount of a DOT-assisted contract.

## **Section 26.53 Good Faith Efforts Procedures Demonstration of good faith efforts**

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

The DBELO is responsible for determining whether a bidder/offeror who has not met the contract goal has documented sufficient good faith efforts to be regarded as responsible.

Mass DPU will ensure that all information is complete and accurate and adequately documents the bidder/offer's good faith efforts before it commits to the performance of the contract by the bidder/offeror.

## **Information to be submitted (26.53(b))**

The DPU treats bidder/offers' compliance with good faith efforts' requirements as a matter of

responsibility.

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

1. The names and addresses of DBE firms that will participate in the contract;
2. A description of the work that each DBE will perform;
3. The dollar amount of the participation of each DBE firm participating;
4. Written and signed documentation of commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;
5. Written and signed confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment and
6. If the contract goal is not met, evidence of good faith efforts.

Attachment 4 includes the forms that DPU will include with its solicitations that contain a DBE goal.

#### **Administrative reconsideration (26.53(d))**

Within 10 days of being informed by the DPU that it is not responsible because it has not documented sufficient good faith efforts, a bidder/offeror may request administrative reconsideration. Bidder/offerors should make this request in writing to Mass DPU's General Counsel. Currently the contact information for the General Counsel is Shane Early, One South Station, Boston, MA 02110; (617) 305-3500; [shane.early@mass.gov](mailto:shane.early@mass.gov). The reconsideration official will not have played any role in the original determination that the bidder/offeror did not document sufficient good faith efforts.

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

#### **Good Faith Efforts when a DBE is replaced on a contract (26.53(f))**

If a prime contract intends to terminate, substitute, or not use a DBE that was named at award in relation to a contract with a goal, the DPU will require the prime to notify the DBE in writing (with a cc to the DBELO) and provide the DBE five days to respond. Only after that process can the prime request a substitution. If approved, the DPU will require a contractor to make good faith efforts to replace a DBE that is terminated or has otherwise failed to complete its work on a contract with another certified DBE, to the extent needed to meet the contract goal.

In this situation, Mass DPU will require the prime contractor to obtain our prior approval of the substitute DBE and to provide copies of new or amended subcontracts, or documentation of good

faith efforts.

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

### **Section 26.55 Counting DBE Participation**

Mass DPU will count DBE participation toward overall and contract goals as provided in 49 CFR 26.55.

## **SUBPART D - CERTIFICATION STANDARDS**

### **Section 26.61 - 26.73 Certification Process**

The DPU is not a certifying member of the Massachusetts Unified Certification Program (UCP). We require that any DBE used for attainment on our contracts and/or on our semi-annual reports are correctly certified in the Mass UCP directory located at:

<https://www.mass.gov/unified-certification-program-ucp>.

## **SUBPART E - CERTIFICATION PROCEDURES**

### **Section 26.81 Unified Certification Programs**

The DPU is not a certifying member of the Massachusetts Unified Certification Program (UCP). Mass DPU will require that any DBE used for attainment on our contracts and/or on our semi-annual reports are correctly certified in the Mass UCP directory located at:

<https://www.mass.gov/unified-certification-program-ucp>.

## **SUBPART F - COMPLIANCE AND ENFORCEMENT**

### **Section 26.109 Information, Confidentiality, Cooperation**

Mass DPU will safeguard from disclosure to third parties information that may reasonably be regarded as confidential business information, consistent with Federal, state, and local law. The Department may withhold from public disclosure information that may reasonably be regarded as confidential business information consistent with Massachusetts General Law, Chapter 4 § 7(26)(h).

Notwithstanding any contrary provisions of state or local law, Mass DPU will not release personal financial information submitted in response to the personal net worth requirement to a third party (other than DOT) without the written consent of the submitter.

### **Monitoring Payments to DBEs**

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

As part of the commercially useful function reviews, Mass DPU will perform interim audits of contract payments to DBEs. The audit will review payments to DBE subcontractors to ensure that the actual amount paid to DBE subcontractors equals or exceeds the dollar amounts states in the schedule of DBE participation.

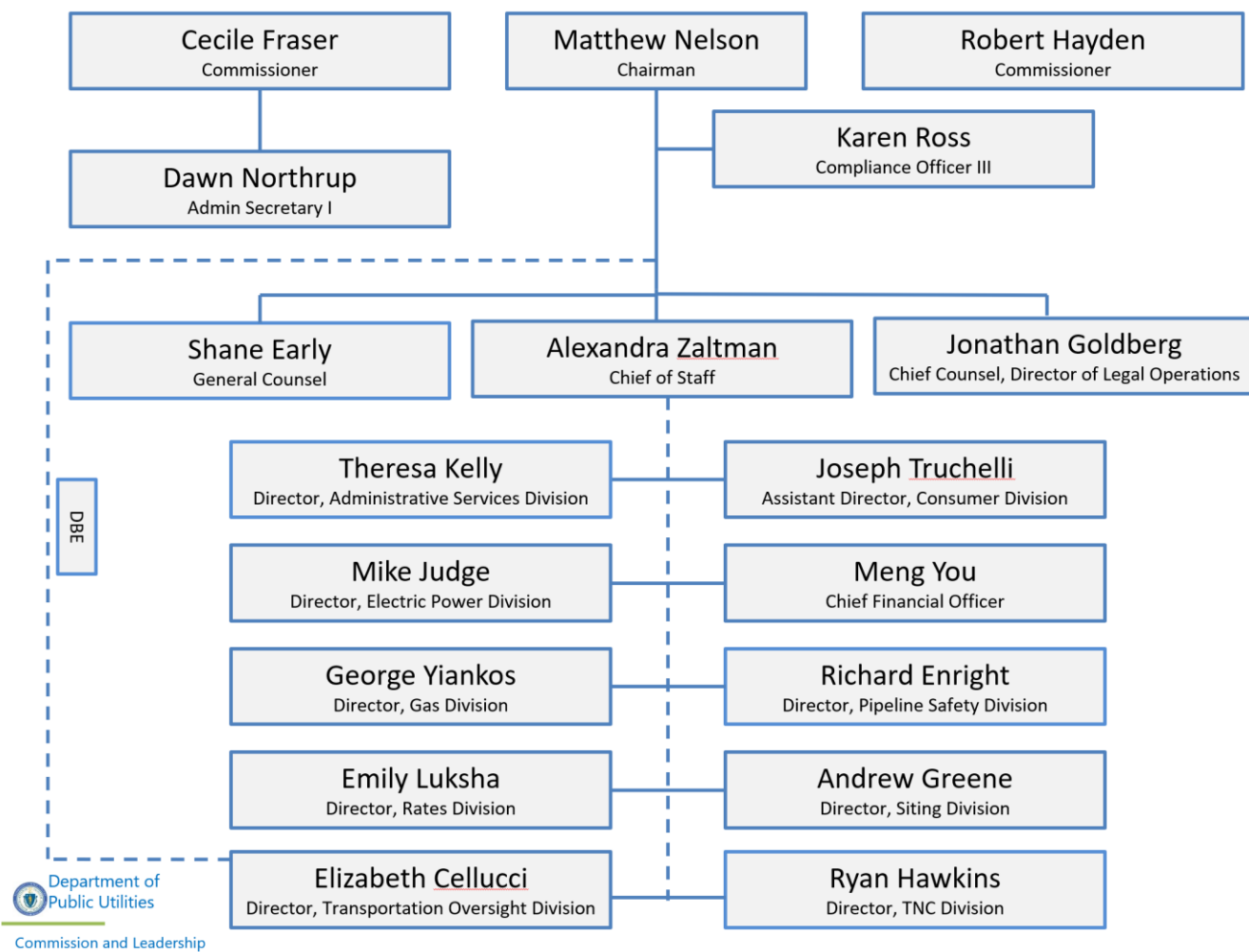
### **ATTACHMENTS**

- Attachment 1 Organizational Chart
- Attachment 2 DBE Directory
- Attachment 3 Monitoring and Enforcement Mechanisms
- Attachment 4 Overall Goal Calculation
- Attachment 5 Form 1 & 2 for Demonstration of Good Faith Efforts
- Attachment 6 Regulations: 49 CFR part 26

# Attachment 1

## Massachusetts Department of Public Utilities

### Organizational Chart



## **Attachment 2**

### **DBE Directory**

The current directory of DBE firms in the Massachusetts Unified Certification Program can be found at <https://www.mass.gov/unified-certification-program-ucp>.



## **Attachment 3**

### **Monitoring and Enforcement Mechanisms**

Mass DPU has available several remedies to enforce the DBE requirements, including, but not limited to, the following:

- Breach of contract action, pursuant to the terms of the contract;
- Withholding of invoice approval and payments;

In addition, the federal government has available several enforcement mechanisms that it may apply to firms participating in the DBE problem, including, but not limited to, the following:

- Suspension or debarment proceedings pursuant to 49 CFR part 26
- Enforcement action pursuant to 49 CFR part 31
- Prosecution pursuant to 18 USC 1001.

The following documents will be used to support and standardize Mass DPU's monitoring procedures. Copies of these documents follow.

- Subcontract review checklist
- Commercially useful function interview form

## Massachusetts Department of Public Utilities

### Subcontract Review Checklist

Prime Contractor: \_\_\_\_\_ Contract Number: \_\_\_\_\_

DBE Subcontractor: \_\_\_\_\_ Date of Review: \_\_\_\_\_

Review Item	Revision to Subcontract Required	Comments
<b>1. Scope</b>		
<b>2. Contract Amount:</b>		
<b>3. Contract Assurance [49 CFR 26.13 (b)]</b>  Each subcontract the prime contractor signs with a subcontractor must include the following assurance:  <i>The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate, which may include, but is not limited to:</i>  <i>(1) Withholding monthly progress payments;</i> <i>(2) Assessing sanctions;</i> <i>(3) Liquidated damages; and/or</i> <i>(4) Disqualifying the contractor from future bidding as non-responsible</i>		
<b>4. Prompt Payment [49 CFR 26.29]</b>  Ensure that prompt payment timeframe of 10 days is in subcontract.		
<b>5. Prompt Return of Retainage [49 CFR 26.29]</b>		

Review Item	Revision to Subcontract Required	Comments
Ensure that there is no retainage held from subcontractor		
<p><b>6. Counting Rules [49 CFR 26.55]</b></p> <p>Count the entire amount of that portion of a contract that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).</p> <p>When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.</p>		
<p><b>7. Termination [49 CFR 26.53(f)]</b></p> <p><i>(f)(1) You must require that a prime contractor not terminate a DBE subcontractor listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm) without your prior written consent. This includes, but is not limited to, instances in which a prime contractor seeks to perform work originally designated for a DBE subcontractor with its own forces or those of an affiliate, a nonDBE firm, or with another DBE firm.</i></p> <p><i>(g) When a DBE subcontractor is terminated or fails to complete its work on the contract for any reason, you must require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal you established for the procurement.</i></p> <p><i>The prime Contractor must have good cause to terminate the DBE which may include the DBE's</i></p>		

Review Item	Revision to Subcontract Required	Comments
<p><i>voluntary and verifiable withdrawal from the project, or the death or incapacity of the DBE. If the DBE Program Office approves the termination or substitution, the Prime Contractor is required to make a good faith effort to re-contract the same or other commercially useful work with another certified DBE no later than seven days following receipt of the DBE Program Office approval.</i></p>		
<p><b>8. Restrictive Clauses [49 CFR 26.71]</b></p> <p>Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.</p> <p>A DBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm.</p>		
<p><b>9. Other</b></p>		

**Massachusetts Department of Public Utilities  
DBE Commercially Useful Function Interview Form**

*General Information*

DBE Firm Name	
Person (and Title) Interviewed	
Prime Contractor	
Project Description	
DBE Original Subcontract Amount	
Is the DBE Subcontract signed, if so, record the date.	
DBE Current Contract Amount	
Paid to Date (or Total Paid)	

*Work Performed*

What is the work performed by DBE?	
Verify that DBE is certified in these areas of work. (print UCP screen)	
How was DBE solicited for this project?	
What type of equipment is required for scope of work?	
Does DBE own this equipment?	
If yes, do vehicles have identification related to the DBE firm	
If leased/borrowed, identify company and arrangement.	
Does the prime lease/lend equipment to DBE?	
Has DBE subcontracted any work on this project?	

If yes, work subcontracted	
Name of DBE's subcontractor	
Dollar amount of subcontracted work	

### **Payment**

<b>Certified Payroll</b>	
Review certified payroll of DBE (if applicable) and record the employees being reported.	Payroll Period: _____ Employees: _____
<b>Retainage</b>	
How is retainage addressed in DBE's subcontract?	
Is retainage being withheld from this DBE?	
If Yes:	
➤ What is the rate of retainage?	
➤ Is agency withholding retainage from the prime?	
➤ What is the DBE's understanding of when they will be paid retainage amounts withheld?	
<b>Progress Payments</b>	
What are the prompt payment terms in the prime contract?	
What are the prompt payment terms in the subcontract?	
Attach any payment verifications conducted.	
Collect (or arrange to collect) invoices for last two payments.	
What is the DBE's understanding of prompt payment terms?	
Does prime pay DBE through third party/joint checks? (Name of DBE and supplier on same check)	
<b>Change Orders</b>	
Has the DBE's original contract amount changed (additions or deletions)?	
If so, explain:	
Have these changes been documented in writing? (contract modification agreements)	



If so, attach.	
Are there any disputes regarding work performance or payments?	
If so, describe.	

### *Employees*

<b>Current Employees</b>	
How many employees are currently working on this project?	
How many are full time employees?	
How many are part-time employees?	
<b>Recruitment</b>	
How does the DBE recruit for employees? Who at the DBE firm leads recruitment?	
<b>Supervision of Work</b>	
Who supervises the DBEs work on the project?	

## **Attachment 4**

### **Section 26.45: Overall Goal Calculation**



## **Massachusetts Department of Public Utilities (Mass DPU)**

Overall Disadvantaged Business Enterprise  
Goal Setting Methodology for Federal Fiscal Years (FFYs) 2022-2024

Massachusetts Department of Public Utilities (Mass DPU)

Overall Disadvantaged Business Enterprise  
Goal Setting Methodology for Federal Fiscal Years (FFYs) 2022-2024

The Massachusetts Department of Public Utilities (Mass DPU) has established an overall goal of 4.1% for Disadvantaged Business Enterprise (DBE) participation for Federal Fiscal Years (FFYs) 2022-2024. The overall combined DBE goal is projected to be achieved through 3.1 percent race/gender-conscious means and 1 percent race/gender-neutral means. The goal includes Federal Transit Administration (FTA) funded projects and is based upon 49 CFR Part 26 "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs" and the US Department of Transportation's "Tips for Goal-Setting in the Disadvantaged Business Enterprise Program".

The following sources of information were utilized in the development of the triennial goal:

- Projected federally funded projects by North American Industry Classification System (NAICS) codes;
- Dollar value of all projected federally funded projects;
- The Mass DPU market area consisting of the Commonwealth of Massachusetts;
- The Census Bureau's County Business Patterns (CBP) database (<http://www.census.gov/econ/cbp/>); and
- State Unified Certification Program (UCP) DBE Directory for the Commonwealth of Massachusetts.

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## I. Background

The Massachusetts Department of Public Utilities (Mass DPU) is an adjudicatory agency overseen by a three-member Commission. It is responsible for oversight of investor-owned electric power, natural gas, and water utilities in the Commonwealth. In addition, the DPU is charged with developing alternatives to traditional regulation, monitoring service quality, regulating safety in the transportation and gas pipeline areas, and the siting of energy facilities. Mass DPU is a direct recipient of Federal Transit Administration (FTA) funds through 49 USC 5329 - (MAP 21) State Safety Oversight Formula Grant Program.

Mass DPU uses a combination of in-house staff and third-party project management consultants to provide oversight, investigations, and conduct analysis for State Safety Oversight of MBTA and related DBE program and other compliance requirements.

Mass DPU has projected three (3) project types to be awarded in federal fiscal years 2022-2024, upon which this goal methodology is based - **Table 1**.

**Table 1: Mass DPU – List of Projects for Federal Fiscal Years –2022-2024**

	PROJECT	AMOUNT
1	Technical Assistance	\$380,000
2	MBTA Studies/Audits	\$200,000
3	Rail Database Maintenance	\$172,800
	TOTALS	\$752,800

The proposed project list for the federal fiscal year is provided by Mass DPU’s Transportation Oversight Division and grouped by NAICS code, description/activity, and dollar amount. The projected activities are for Management Consultants and Information Technology services. The NAICS codes and project activities are listed in **Table 2**. These projects will be directly solicited, awarded and administered by Mass DPU.

**Table 2: Project/Activity Listing by NAICS Code Description**

NAICS Code	NAICS Code Description Projects/Activities	Estimated Project Cost
541611	<b>Management Consultants</b>	<b>\$580,000</b>
541330	<i>Technical Assistance</i>	
541690	<i>MBTA Studies/Audits</i>	
541614		
541512	<b>Information Technology</b>	<b>\$172,800</b>
	<i>Rail Database Maintenance</i>	
	TOTALS	\$752,800

## II. Methodology Used to Calculate Overall Goal

### Step 1 – Determining Availability of Ready, Willing and Able DBEs

The available pool of ready, willing and able firms to participate in Mass DPU’s FTA-funded contracting opportunities is analyzed based on the specific NAICS codes and descriptions. The data sources used to derive the relative availability of DBEs in Mass DPU’s market area is the Census Bureau County Business Patterns<sup>1</sup> (CBP) database ([www2.census.gov/programs-surveys/cbp/data/2019](http://www2.census.gov/programs-surveys/cbp/data/2019)) and the Unified Certification Program (UCP) DBE Directory of the Commonwealth of Massachusetts as of June 2021. The market area utilized for analysis was the Commonwealth of Massachusetts. This was selected based on the DPU’s span of oversight for statewide rail, a review of the location of firms currently under contract to the DPU, and the type of FTA-funded work projected (primarily consulting with no construction). Information from those sources is displayed in **Tables 3 and 4**.

**Table 3: Number of All Firms - Census Bureau County Business Patterns Database - By NAICS Code**

Number of Total Firms	NAICS Code	Description
1509	541330	Engineering Services
1139	541512	Computer software consulting services or consultants
1737	541611	General management consulting services
205	541614	Transportation management consulting services
542	541690	Safety Consulting Services
<b>5132</b>	<b>Total Firms From Census Data Business Patterns Database</b>	

**Table 4: Number of DBE Firms – Commonwealth of Massachusetts Unified Certification Program DBE Directory**

Number of Total Firms	NAICS Code	Description
61	541330	Engineering Services
30	541512	Computer software consulting services or consultants
49	541611	General management consulting services
10	541614	Transportation management consulting services
31	541690	Safety Consulting Services
<b>181</b>	<b>Total Firms From MA Unified Certification Program DBE Directory</b>	

<sup>1</sup> Published in April 2021 using 2019 data. The Census Bureau County Business Patterns data is published on an annual schedule.



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Based upon the above total number for all firms and DBE firms, the unweighted relative DBE availability is calculated as follows:

$$\text{Unweighted base figure} = \frac{181 \text{ (Ready, Willing and Able DBEs)}}{5,132 \text{ (Total Firms Ready, Willing and Able)}} = 3.53\%$$

Step 1 Base Figure Weighting – Weighting can help ensure that the Step 1 Base Figure is as accurate as possible. To establish the “Weighted Base Goal”, the availability of DBEs in each NAICS code is computed and used to determine DBE contractible dollars. The total DBE contractible dollars are then divided by the total projected contracting dollars to determine the weighted base DBE goal, expressed as a percentage - **Table 5**.

**Table 5 – Calculation of Mass DPU’s Weighted DBE Goal for Federal Fiscal Years 2022-2024**

NAICS Code	NAICS Code Description	Estimated Project Costs	Number of Firms		DBE %	DBE Dollars
			DBE	Total		
541611	Technical Assistance	\$380,000	61	1509	4.04%	\$15,361
541330	MBTA Studies/Audits	\$200,000	89	3081	2.89%	\$5,777
541690						
541614						
541512	Rail Database Maintenance	\$172,800	31	542	5.72%	\$9,883
<b>TOTALS</b>		<b>\$752,800</b>	<b>181</b>	<b>5132</b>		<b>\$31,022</b>
Base Triennial Goal						
Total DBE Dollars		\$31,022	4.12%			
Total Estimated Project Costs		\$752,800				

**Step 2 – Adjusting the Base Figure**

Once the DBE base figure has been calculated, 49 CFR Part 26.45(d) requires that “all of the evidence available” in your jurisdiction must be examined to determine what adjustment, if any, is needed to the base figure to arrive at your overall goal.

The regulations further state that there are several types of evidence that must be considered when adjusting the base figure. The following summarizes Mass DPU’s review of each item noted:

- The current capacity of DBEs to perform work in your DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years.

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- Because FFY 2022 will be the first year of Mass DPU's DBE program there is not relevant past participation data to make an adjustment for this factor.
- Evidence from disparity studies conducted anywhere within your jurisdiction, to the extent it is not already accounted for in your base figure.
  - The following disparity studies were found in Mass DPU's jurisdiction; however adjustments were not made based on these studies for the reasons stated below:
    - **Commonwealth of Massachusetts Division of Capital Asset Management and Maintenance Disparity Study published on December 22, 2017.** The focus of this study was construction and design-related contracts and not specifically relatable to the type of work that Mass DPU. Additionally, the data that supported this study primarily covered the period from 2010-2014.
    - **2020 City of Boston Disparity Study, published in February 2021.** This study was narrowly focused on the City of Boston and, based on an examination of Appendix E of the study, did not include the NAICS codes or industry types that have been identified as relatable to Mass DPU's FTA-funded opportunities.
- If your base figure is the goal of another recipient, you must adjust it for differences in your local market and your contracting program.
  - Because Mass DPU's base figure was not that of another recipient, no adjustment was made for this factor. However, Mass DPU did review MassDOT's FTA DBE goal once the base figure was developed. While the types of FTA-funded contracting opportunities that MassDOT projects include types that Mass DPU will not contract for, their overall goal of 5 percent is within the range of Mass DPU's proposed goal of 4.1 percent.
- Available evidence from related fields that affect the opportunities for DBEs to form, grow and compete, such as statistical disparities in the ability of DBEs to get the financing, bonding and insurance required to participate in your program and data on employment, self-employment, education, training and union apprenticeship programs, to the extent you can relate it to the opportunities for DBEs to perform in your program.
  - No additional information or analysis was found relating to these subjects that would lead Mass DPU to adjust their goal. However, information contained in the 2021 Boston disparity study will be used to inform our efforts in leveling the playing field.

**Step 3 – Determining the Race/Gender-Neutral and Race/Gender-Conscious Split**

DBE Program guidelines at 49 CFR Part 26.51(a) states, *"You must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating race-neutral DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive*

*procurement procedures or is awarded a subcontract on a prime contract that does not carry a DBE contract goal.”*

Because Mass DPU does not have a past participation history for DBE attainment, we examined available information from other Massachusetts recipients. The attainment in Mass DOT’s latest FTA goal submission (FFY 2019-2021) noted that 10 percent of their past attainment was achieved race-neutrally. Mass DPU also reviewed MBTA’s latest goal submission where they projected that 20 percent of their overall goal (4 percent) was projected to be met race-neutrally. Considering this information, Mass DPU is projecting that 20 percent of its overall goal can be achieved race-neutrally. When applied to the projected overall goal, Mass DPU is projecting to achieve 3.1 percent through race/gender conscious measures and 1 percent through race/gender neutral measures.

Based on recommendations from the 2020 Boston Disparity Study, actions that Mass DPU will undertake to attain the race/gender neutral portion of their goal will include:

- Providing information directly to DBE firms with applicable NAICS codes on opportunities with Mass DPU,
- Providing information to DBE firms on how to use Mass DPU’s CommBuys system to identify opportunities to bid on as a prime and subconsultant, and
- Partnering with local entities such as Mass DOT and MBTA to conduct and participate in outreach and capacity-building sessions.

### **III. Consultation and Publication of the Overall Goal**

DBE Regulations 49 CFR Part 26.45 requires that: *“In establishing an overall goal, you must provide for consultation and publication. This includes: Consultation with minority, women's and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and your efforts to establish a level playing field for the participation of DBEs.”*

Mass DPU’s proposed goal has been posted on the agency’s website. A virtual consultation meeting was held on August 18, 2021. Invitations were sent to the following stakeholders:

- Women’s Transportation Seminar
- Massachusetts Minority Contractors Association
- Construction Industries of Massachusetts
- COMTO\*
- Associated Builders & Contractors, Inc. (ABC)

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- US Haitian Chamber of Commerce Email
- Builders of Color Coalition
- Black Economic Council
- American Council of Engineering Companies\*
- Massachusetts Electrical Contractors Association
- Latino Business Association
- Greater Boston Chamber of Commerce
- New England Veterans Chamber of Commerce
- Center for Women & Enterprise – Eastern Massachusetts
- Women Entrepreneurs Boston
- Greater New England Minority Supplier Development Council
- Massachusetts Supplier Diversity Office

\*These contacts also distributed the invitation to their members

The following were in attendance at the meeting:

#	Name	Organization	Email
1	Abbie Goodman	American Council of Engineering Companies of Massachusetts	<a href="mailto:agoodman@engineers.org">agoodman@engineers.org</a>
2	Betsy Lawson	CDW Consultants	<a href="mailto:blawson@cdwconsultants.com">blawson@cdwconsultants.com</a>
3	Lidy Chan	COMTO	<a href="mailto:lidy.chan@state.ma.us">lidy.chan@state.ma.us</a>
4	William Murphy	COMTO	<a href="mailto:william.murphy2@state.ma.us">william.murphy2@state.ma.us</a>
5	Kurt A. Fraser	Fraser Poly-Engineering Services	<a href="mailto:kurt@fraseres.com">kurt@fraseres.com</a>
6	Kristine C. Gorman	Jacobs	<a href="mailto:kristine.gorman@jacobs.com">kristine.gorman@jacobs.com</a>
7	Chris Collins	Jacobs	<a href="mailto:chris.collins@jacobscom">chris.collins@jacobscom</a>
8	Chris Costello	Jacobs	<a href="mailto:chris.costello@jacobs.com">chris.costello@jacobs.com</a>
9	Darnell L. Williams	MassDOT and the MBTA	<a href="mailto:dwilliams1@mbta.com">dwilliams1@mbta.com</a>
10	Jack O'Neill	MBTA	<a href="mailto:jack.oneill@jacobs.com">jack.oneill@jacobs.com</a>
11	Brian Craig	RND Consultants, Inc.	<a href="mailto:briancraig@rndconsultants.net">briancraig@rndconsultants.net</a>
12	Paul Tyrell	STV, Inc.	<a href="mailto:paul.tyrell@stvinc.com">paul.tyrell@stvinc.com</a>
13	Kevin Dandrade	TEC, Inc.	<a href="mailto:kdandrade@theengineeringcorp.com">kdandrade@theengineeringcorp.com</a>
14	Estey Masten	Triunity, Inc.	<a href="mailto:estey.masten@triunityeng.com">estey.masten@triunityeng.com</a>
15	Matt Hodson	Windwalker Group	<a href="mailto:matthew.hodson@windwalker.com">matthew.hodson@windwalker.com</a>
16	Jennifer Cargill	Mass DPU	<a href="mailto:jennifer.cargill@state.ma.us">jennifer.cargill@state.ma.us</a>
17	Pam Mondugno	Mass DPU	<a href="mailto:pam.modugno@state.ma.us">pam.modugno@state.ma.us</a>
18	Elizabeth Cellucci	Mass DPU	<a href="mailto:elizabeth.cellucci@state.ma.us">elizabeth.cellucci@state.ma.us</a>
19	Kristin Tighe	Milligan Consulting, LLC	<a href="mailto:ktighe@miconsult.net">ktighe@miconsult.net</a>
20	Denise Bailey	Milligan Consulting, LLC	<a href="mailto:dbailey@miconsult.net">dbailey@miconsult.net</a>

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A copy of the presentation provided at the meeting is included as an attachment to this document. At the conclusion of the meeting, each attendee introduced themselves and the organization they represented. Comments provided included information that Mr. Darnell Williams gave regarding new efforts that Massachusetts DOT is undertaking to address full utilization of minority and woman-owned businesses. This includes examining issues that present barriers and challenges to disadvantaged businesses, scaling of contract opportunities and business assistance resources. Attendees representing organizations (COMTO and American Council of Engineering Companies of Massachusetts) noted they're willing to work with Mass DPU on collaborations, including distributing bid notices when they are advertised. Attendees were provided with an email address to provide any additional comments should they have any after the meeting. This was noted again when the attendees were emailed the presentation and the attendee list. No additional comments were received after the conclusion of the meeting.

## Attachment 5

### Forms 1 & 2 for Demonstration of Good Faith Efforts

[Forms 1 and 2 should be provided as part of the solicitation documents.]

#### **FORM 1: DISADVANTAGED BUSINESS ENTERPRISE (DBE) UTILIZATION**

The undersigned bidder/offeror has satisfied the requirements of the bid specification in the following manner (please check the appropriate space):

\_\_\_\_\_ The bidder/offeror is committed to a minimum of \_\_\_\_\_% DBE utilization on this contract.

\_\_\_\_\_ The bidder/offeror (if unable to meet the DBE goal of \_\_\_\_\_%) is committed to a minimum of \_\_\_\_\_% DBE utilization on this contract and submits documentation demonstrating good faith efforts.

Name of bidder/offeror's firm: \_\_\_\_\_

State Registration No. \_\_\_\_\_

By \_\_\_\_\_  
(Signature)

Title



**FORM 2: LETTER OF INTENT**

Name of bidder/offeror's firm: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_

State: \_\_\_\_ Zip: \_\_\_\_

Name of DBE firm: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ Telephone: \_\_\_\_

State: \_\_\_\_

Zip: \_\_\_\_

Description of work to be performed by DBE firm:

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The bidder/offeror is committed to utilizing the above-named DBE firm for the work described above. The estimated dollar value of this work is \$\_\_\_\_\_.

**Affirmation**

The above-named DBE firm affirms that it will perform the portion of the contract for the estimated dollar value as stated above.

By \_\_\_\_\_

(Signature) (Title)

If the bidder/offeror does not receive award of the prime contract, any and all representations in this Letter of Intent and Affirmation shall be null and void.

(Submit this page for each DBE subcontractor.)

## **Attachment 6**

### **Regulations: 49 CFR Part 26**

The current regulation can be access at

[https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr26\\_main\\_02.tpl](https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr26_main_02.tpl)