Approved 3-19-84
Date

MINUTES OF THE House COMMITTEE ON Ways and Means.

The meeting was called to order by Bill Bunten at
Chairperson

1:30 a.m./p.m. on Monday, March 12, 1984 in room 514-S of the Capitol.

All members were present except: Representative Wisdom (excused)

Committee staff present:
Mary Galligan, Legislative Research
Lyn Goering, Legislative Research
Gloria Timmer, Legislative Research
Alan Conroy, Legislative Research
Jim Wilson, Officer of the Revisor
Dave Hanzlick, Administrative Assistant

Conferees appearing before the committee:

Bud Cornish, Kansas Assoc of Property Casualty Insurance Co.
Jim Todd, Kansas State Firefighters Association
Jerry Marlatt, Kansas State Council of Firefighters and Kansas State Firefighters Assoc.
Vern McNatt, City of Shawnee, Kansas Fire Department
Bob Morrissey, Division Administrator, Federal Highway Admn.
David Tittsworth, Chief Counsel, Kansas Department of Transportation.
Alonzo Harrison
Others present (Attachment 1)

Chairman Bunten called the meeting to order at 1:30 p.m.

A draft bill was presented to the committee concerning special education for exceptional children (Attachment 2). Representative Meacham made a motion that the bill be adopted. Seconded by Representative Chronister. Motion carried.

HB 2685 -- an act making and concerning appropriations for the fiscal year ending June 30, 1985, for the judicial council, state board of indigents' defense services, judicial branch and crime victims reparations board; authorizing certain transfers, imposing certain restrictions and limitations, and directing or authorizing certain receipts and disbursements and acts incidental to the foregoing.

Judicial Council, Section 2 - FY 85
Representative Chronister presented the report and moved that it be adopted. (Attachment 3). Seconded by Representative Turnquist. Motion carried.

INDIGENTS' DEFENSE SERVICES FY 84 and FY 85
Representative Teagarden presented the reports. (Attachments 4 and 5). Representative Shriver made a motion to delete Item #9 from the report. Seconded by Representative Luzzati. The motion failed. Discussion followed regarding use of assigned counsel vs. public defender in Sedgwick County. Representative Meacham moved that we take out any funds that are allocated for use in establishing a public defender office in Sedgwick County and that we continue to use the appointed counsel. Seconded by Representative Miller. Motion failed.

Representative Teagarden moved the report be adopted. Seconded by Representative Turnquist. Motion carried.

Judicial Branch, Section 4, FY 84 and FY 85
These 2 reports were presented by Representative Chronister (Attachments 6 & 7). Representative Shriver moved that the committee add 1/2 time position to 30th Judicial District at a cost of approximately $8,000. Representative Hamm seconded. Motion carried.

Representative Chronister moved the reports be adopted. Seconded by Representative Teagarden. Motion carried.

MINUTES OF THE House COMMITTEE ON Ways and Means,

room 514-S, Statehouse, at 1:30 a.m./p.m. on Monday, March 12, 19 84

A draft bill was presented for introduction dealing with probation services; imposing certain fees therefor. Representative Chronister moved we adopt the bill. Representative Louis seconded. The motion carried to introduce the bill and recommend it be referred back to this committee. (Attachment 8).

CRIME VICTIMS REPARATIONS BOARD, FY 84 and FY 85
Representative Turnquist presented the 84 and 85 reports and moved for adoption of the reports. Seconded by Representative Teagarden. Motion carried. (Attachments 9 and 10).

Representative Dyck moved that HB 2685, as amended, be recommended favorably for passage. Seconded by Representative Arbuthnot. Motion carried.

HB 2703 -- an act making and concerning appropriations for the fiscal year ending June 30, 1984 for the department of economic development, Kansas public employees retirement system, department of revenue, state board of pharmacy, department of human resources, department of education, state library, dept of revenue - school district income tax fund, university if KU Med Center, crime victims reparations board and attorney general - KBI; authorizing certain transfer, imposing certain restrictions and limitations, and directing or authorizing certain disbursements and act incidental to the foregoing.

Representative Shriver made the motion that $196,000 be added for Department of Revenue, salaries and wages. Seconded by Representative Duncan. Motion carried.

Representative Shriver moved that HB 2703, as amended, be recommended favorably for passage. Seconded by Representative Heinemann. Motion carried.

HB 3090 -- an act concerning taxes imposed on insurance premiums; imposing a tax on certain insurance premiums for the purposes of firefighters relief and directing the disposition thereof; disallowing certain credits based on such tax; prescribing certain duties for the commissioner of insurance; creating the state firefighters relief fund; amending K.S.A. 40-252 and 40-1701 to 40-1707, inclusive and repealing the existing sections.

Representative Duncan explained the bill. Representative Shriver said there would have been 6 minority reports if they had gone that route. This is a new bill....not one that was written as a result of agreement between insurance committee and House W/M subcommittee on fireman's relief.

Bud Cornish said he would support the bill as written with a change on page 14..lines 549/553.

Jim Todd, Kansas State Firefighters, gave full support to this bill - he had no objection to Cornish's change.

Jerry Marlatt, Kansas State Council of Firefighters and Kansas State Firefighters Assoc. supports the bill in its entirety.

Vern McNatt, City of Shawnee, Kansas Fire Department, said they could live with it.

No action taken on the bill.

HB 2961 -- an act enacting the Kansas highway contractor development act.
David Tittsworth introduced Bob Morrissey, Division Administrator, Federal Highway Administration, who spoke and answered questions, but stated that the Federal Highway Administration did not take a position on the bill. (Attachment 11).

MINUTES OF THE House COMMITTEE ON House Ways and Means,

room 514-S, Statehouse, at 1:30 a.m./p.m. on Monday, March 12, 19 84

Chair recognized David Tittsworth who explained the bill to the committee. He stated that the Federal Highway Administration did not take a position on the bill.

Mr. Tittsworth then introduced Bob Morrissey who presented testimony verbally but was not completely clear of his exact position on the bill.

Mr. Tittsworth then took over and finished explaining the testimony.

Alonzo Harrison appeared and testified in support of the bill on behalf of Disadvantaged Business Enterprises. (Attachment 12).

No action was taken on this bill.

Meeting adjourned at 3:35 p.m.

3-12-84.

GUESTS -- 1984

| | Name | Address | Representing |
|---|---|---|---|
| 1. | Bernadine Ferrell | 3240 SW 35th Topeka | Adult CSO Officer III Dist. Court Services |
| 2. | Terry Showalter | 6617 Tauromee - KCK | Wy. Co. Dist. Ct. |
| 3. | Evelyn A. Bowers | Colby | KADCCA |
| 4. | Neal Harrison | Leavenworth | Court Administrator |
| 5. | Ron Miles | Topeka | S.B.I.D.S. |
| 6. | Lova Duncan | Olathe | KADCC & P |
| 7. | Cliff Duncan | Gardner | Johnson City |
| 8. | Peter Keys | Topeka | KASB |
| 9. | Arlene Brookens | " | KBA |
| 10. | Burt Dr Baun | osage | House of Repr |
| 11. | Marvin Burris | Topeka | Bd of Regents |
| 12. | Marjorie Van Buren | " | OJA |
| 13. | Jerry Sloan | " | " " |
| 14. | Ken Bahr | " | CVRB |
| 15. | Randy M. Hearrell | Topeka | Judicial Council |
| 16. | M L Jenkins | " | Speakers Office |
| 17. | Phil Magathan | " " | K.A.C.S.O. |
| 18. | Ed. Dean Strickland | " | KACSO |
| 19. | Tyler A. Rora | " | KACSO |
| 20. | Alan J. Goldwasser | " | KACSO |
| 21. | David Stark | " | KACSO |
| 22. | Jim Green | " | KBI |
| 23. | Ron Jones | " | KBI |
| 24. | Chris McGinnis | " | League of KS Municip |
| 25. | James A Todd | Wichita | KSTA |

GUESTS -- 1984

| | Name | Address | Representing |
|---|---|---|---|
| 1. | Roy C Read | KCK | KCK FIRE DEPT |
| 2. | J E Johnson | Topeka | TTFD Firefighter |
| 3. | [illegible] | " | KDHR |
| 4. | [illegible] | " | KDHR |
| 5. | [illegible] | Topeka, Ks | Hy-Lin Egg Co |
| 6. | Jerry Marlatt | Emmett | KSCFF |
| 7. | [illegible] | Shawnee, Kans | Shawnee Fire Dept |
| 8. | [illegible] | Shawnee, Kansas | Shawnee Fire Dept. |
| 9. | JEFF JOHNSON | MISSION, KS | MISSION F.D. |
| 10. | John Earhart | Osage City, KS | KSFFA-Osage |
| 11. | Don Williams | Osage City, Ks | Osage City F.D. |
| 12. | Donald Knight | Lawrence Ks | KSCFF |
| 13. | Richard Sauge | Topeka, Ks | Topeka Fire Dept |
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HOUSE BILL NO. _____

By Committee on Ways and Means

AN ACT concerning special education for exceptional children; relating to the determination of the amount of state aid for the provision thereof; amending K.S.A. 72-967, 72-978 and 72-979, and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 72-967 is hereby amended to read as follows: 72-967. (a) Each board, in order to comply with the requirements of K.S.A. 72-933 and 72-966, and amendments to such sections, shall have the authority to:

(1) Establish ~~and~~, organize and provide approvable special education services for exceptional children within its schools.

(2) Provide for approvable special education services in the home, hospital or other facility.

(3) Contract with any school district for special education services. Before entering into any such contract, the special education services to be provided by such school district, and the contract therefor, shall be approved by the commissioner of education upon authorization by the state board, which approval shall be granted if the special education services provided for in such contract meet standards and criteria set by the state board in accordance with the state plan. Any such contract may provide for the payment of tuition by the contracting school district.

(4) Enter into cooperative or interlocal agreements with one or more other school districts for special education services, if such agreements are approved ~~as provided~~ by ~~this act~~ the state board.

(5) Contract with any accredited private nonprofit corporation or any public or private institution within or

without the state which has proper special education services for exceptional children. Prior to the time any school district enters into a contract with any private nonprofit corporation or any public or private institution for the education of any exceptional child the curriculum provided by such corporation or institution and the contract shall be approved by the commissioner of education upon authorization by the state board. Whenever an exceptional child is educated by a private nonprofit corporation or a public or private institution under the provisions of this paragraph, such child shall be considered a pupil of the school district contracting for such education hereunder to the same extent as other pupils of such school district for the purpose of determining entitlements and participation in all state, county and other financial assistance or payments to such school district.

(6) Provide transportation for exceptional children, whether such children are residents or nonresidents of such school district, to and from special education services attended. In lieu of paying for transportation, the board of the school district in which an exceptional child resides may pay all or part of the cost of room and board for such exceptional child at the place where the special education services attended are located.

(b) Special education services which are provided ~~by school districts~~ for exceptional children shall meet standards and criteria set by the state board in accordance with the state plan and shall be subject to approval by the state board.

(c) Any contract entered into by a board under the provisions of this section shall be subject to change or termination by the legislature.

Sec. 2. K.S.A. 72-978 is hereby amended to read as follows: 72-978. In each school year, in accordance with appropriations for special education services provided under this act, each school district and each interlocal cooperative which has provided special education services in compliance with the

requirements of the state plan and the provisions of this act, shall be entitled to receive: (a) Reimbursement for actual travel allowances paid to special teachers at not to exceed the rate ~~specified~~ fixed or prescribed in accordance with the provisions of K.S.A. ~~1976 Supp.~~ 75-3203, and amendments thereto, for each mile actually traveled during the school year in connection with teaching duties in providing special education services for exceptional children. Such reimbursement shall be computed by the state board by ascertaining the actual travel allowances paid to special teachers by the school district or interlocal cooperative for the school year and shall be in an amount equal to ~~eighty percent (80%)~~ 80% of such actual travel allowances; (b) reimbursement in an amount equal to ~~eighty percent (80%)~~ 80% of the actual travel expenses incurred for providing transportation for exceptional children to special education services. Such reimbursement shall not be paid if such child has been counted in calculating the state transportation aid received by ~~the~~ a school district under the provisions of K.S.A. 72-7047, and amendments thereto; (c) reimbursement in an amount equal to ~~eighty percent (80%)~~ 80% of the actual expenses incurred for the maintenance of an exceptional child at some place other than the residence of such child for the purpose of providing special education services. Such reimbursement shall not exceed ~~six hundred dollars ($600)~~ $600 per exceptional child per school year; (d) after subtracting the amounts of reimbursement in subsections (a), (b) and (c) ~~above~~ from the total amount appropriated for special education services under this act, an amount which bears the same proportion to the remaining amount appropriated as the number of full-time equivalent special teachers employed by the school district or interlocal cooperative for approved special education services bears to the total number of full-time equivalent special teachers employed by all school districts and interlocal cooperatives for approved special education services. For the purposes of this subsection, each special teacher who is a

paraprofessional as defined in K.S.A. 72-962, and amendments thereto, shall be counted as ~~one-half--(1/2)~~ 1/2 full-time equivalent special teacher. No special teacher in excess of the number of special teachers necessary to comply with the ratio of special teacher to exceptional children ~~authorized~~ required by the state board ~~for--the--school-district~~ under the state plan shall be counted in making computations under this section.

Sec. 3. K.S.A. 72-979 is hereby amended to read as follows: 72-979. (a) Payments under this act shall be made in a manner to be determined by the state board. In the event any school district or interlocal cooperative is paid more than it is entitled to receive under any distribution made under this act, the state board shall notify the school district or interlocal cooperative of the amount of such overpayment, and ~~such~~ the school district or interlocal cooperative shall remit the same to the state board. The state board shall remit any moneys so received to the state treasurer, and the state treasurer shall deposit the same in the state treasury to the credit of the general fund. If any ~~such~~ school district or interlocal cooperative fails so to remit, the state board shall deduct the excess amounts so paid from future payments becoming due to such school district or interlocal cooperative. In the event any school district or interlocal cooperative is paid less than the amount to which it is entitled under any distribution made under this act, the state board shall pay the additional amount due at any time within the school year in which the underpayment was made or within ~~sixty-(60)~~ 60 days after the end of such school year.

(b) The state board shall prescribe all forms necessary for reporting under this act. Funds shall be distributed to the respective ~~boards~~ school districts and interlocal cooperatives as soon as the state board deems practicable.

(c) Every board and every board of directors of an interlocal cooperative shall make such periodic and special reports of statistical and financial information to the state

board as it may request.

Sec. 4. K.S.A. 72-967, 72-978 and 72-979 are hereby repealed.

Sec. 5. This act shall take effect and be in force from and after its publication in the statute book.

SUBCOMMITTEE REPORT

Agency: Judicial Council Bill No. 2685 Bill Sec. 2

Analyst: Galligan Analysis Pg. No. 248 Budget Pg. No. 1-45

| Expenditure Summary | Agency Req. FY 85 | Governor's Rec. FY 85 | Subcommittee Adjustments |
|---|---|---|---|
| State Operations: | | | |
| All Funds | $ 197,568 | $ 190,056 | $ 94 |
| State General Fund | 197,568 | 190,056 | 94 |
| F.T.E. Positions | 3.0 | 3.0 | — |

Agency Request/Governor's Recommendation

The request for FY 1985 would support the current 3.0 F.T.E. positions and provide for approximately 60 Council and committee meetings. The request includes funds to produce two bulletins and supplements to the Kansas Benchbook and PIK-Criminal 2d.

The Governor's recommendation would maintain the current staff and provide for approximately 58 Council and committee meetings. The recommendation includes funds to produce the publications requested. The recommendation includes $4,906 for the proposed pay plan adjustment.

House Subcommittee Recommendation

The House Subcommittee concurs with the Governor's recommendation with the following exceptions:

1. In accordance with Committee policy, deletion of $4,906 budgeted for the pay plan adjustment.

2. Addition of $5,000 to upgrade the salaries of the permanent employees at the Council's discretion.

Rochelle Chronister
Representative Rochelle Chronister
Subcommittee Chairman

George Teagarden
Representative George Teagarden

Larry Turnquist
Representative Larry Turnquist

Agreed to by Senate Sub. Wise copy

3

SUBCOMMITTEE REPORT

Agency: Judicial Council Bill No. 2685 Bill Sec. 2

Analyst: Galligan Analysis Pg. No. 248 Budget Pg. No. 1-45

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Rochelle Chronister
Representative Rochelle Chronister
Subcommittee Chairman

George Teagarden
Representative George Teagarden

Larry Turnquist
Representative Larry Turnquist

3

SUBCOMMITTEE REPORT

Agency: Board of Indigents' Defense Services Bill No. NA Bill Sec. NA

Analyst: Galligan Analysis Pg. No. 249 Budget Pg. No. 1-127

| Expenditure Summary | Agency Req. FY 84 | Governor's Rec. FY 84 | Subcommittee Adjustments |
|---|---|---|---|
| All Funds: | | | |
| State Operations | $ 2,617,295 | $ 2,612,025 | $ — |
| Other Assistance | 200,853 | 197,731 | 3,122 |
| TOTAL | $ 2,818,148 | $ 2,809,756 | $ 3,122 |
| State General Fund: | | | |
| State Operations | $ 2,617,295 | $ 2,612,025 | $ — |
| Other Assistance | 200,853 | 197,731 | 3,122 |
| TOTAL | $ 2,818,148 | $ 2,809,756 | $ 3,122 |
| F.T.E. Positions | 19.5 | 19.5 | — |

Agency Request/Governor's Recommendation

The Board's estimate of expenditures for the current fiscal year is equal to the amount approved a year ago. The Board has increased its staff by 2.5 F.T.E. positions during the current fiscal year. Two of the positions are assigned to a newly-established conflicts office. A .5 F.T.E. clerical position has also been added to the administrative office.

The Governor's recommendation would reduce operating expenditures by $5,270 and the amount granted to Legal Services For Prisoners, Inc., (L.S.P.) by $3,122. The former amount would lapse at the end of the current fiscal year.

House Subcommittee Recommendation

The House Subcommittee concurs with the Governor's recommendation with the following exceptions:

1. The Subcommittee learned that the reduction recommended for L.S.P. will not result in any real current year savings to the state, because the grant to the corporation is made at the beginning of the fiscal year. Thus, the Subcommittee recommends restoration of the $3,122 already granted to the expenditure total for the current fiscal year.

2. The Subcommittee determined, by examining current year expenditures, that the Board may underspend the Governor's recommendation for the current year by approximately $90,000. The Subcommittee would therefore encourage the Board to begin working on the 18th District public defender office during FY 1984 in order that the savings anticipated as a result of the office may be realized as early as possible. The Subcommittee suggests that if the Senate Subcommittee is not in agreement with establishment of the new office, or the commencement of work during FY 1984, the anticipated savings be lapsed or reappropriated to offset the FY 1985 appropriation.

HOUSE SUBCOMMITTEE REPORTS

1984 HOUSE BILL NO. 2685

FY 1985 APPROPRIATION

Sec. 3 -- State Board of Indigents' Defense Services

Sec. 4 -- Judicial Branch

Rochelle Chronister
Representative Rochelle Chronister,
Subcommittee Chairperson

George Teagarden
Representative George Teagarden

Larry F. Turnquist
Representative Larry Turnquist

SUBCOMMITTEE REPORT

Agency: Board of Indigents' Defense Services Bill No. 2685 Bill Sec. 3

Analyst: Galligan Analysis Pg. No. 249 Budget Pg. No. 1-127

| Expenditure Summary | Agency Req. FY 85 | Governor's Rec. FY 85 | Subcommittee Adjustments |
|---|---|---|---|
| All Funds: | | | |
| State Operations | $ 3,680,817 | $ 3,343,143 | $ (140,555) |
| Other Assistance | 248,596 | 206,153 | (3,366) |
| TOTAL | $ 3,929,413 | $ 3,549,296 | $ (143,921) |
| State General Fund: | | | |
| State Operations | $ 3,680,817 | $ 3,343,143 | $ (140,555) |
| Other Assistance | 248,596 | 206,153 | (3,366) |
| TOTAL | $ 3,929,413 | $ 3,549,296 | $ (143,921) |
| F.T.E. Positions | 47.5 | 33.5 | — |

Agency Request/Governor's Recommendation

Major items in the FY 1985 request include a $265,995 increase over the current year estimate in the amount budgeted for assigned counsel; establishment of a public defender office in the 18th Judicial District (Sedgwick County); an additional public defender each for the 8th and 3rd Judicial Districts; an investigator for the 3rd District; and establishment of an appellate defender office.

The Governor's recommendation includes the $2,307,335 requested for assigned counsel and funds to establish a public defender office in Sedgwick County. The Governor does not recommend the requested new positions for the existing public defender offices nor are funds for the appellate defender office recommended.

House Subcommittee Recommendations

The House Subcommittee concurs with the Governor's recommendation with the following exceptions:

1. In accordance with Committee policy, deletion of $51,035 budgeted for the pay plan revision. Of that amount, $10,531 was budgeted for employees of Legal Services for Prisoners, Inc.

2. Deletion of $100,000 from the amount recommended for assigned counsel. This reduction would allow $2,207,335 to be expended for this purpose during FY 1984, which is $165,995 more than the agency's estimate of expenditures for the current fiscal year. Based on expenditures during the first two quarters of FY 1984, the Subcommittee is of the opinion that this amount should be adequate to allow the Board to pay the hourly rates that will be in effect during FY 1985. In making this recommendation, the Subcommittee has considered and included, the Board's estimate that $50,000 of assigned counsel expenditures will be made because the appellate defender office is not recommended.

3. Deletion of $1,400 of the $4,340 recommended for rental of the public defender office in the 28th Judicial District. The Subcommittee learned that a lease for FY 1985 has been negotiated at an approximate $7 per square foot rate rather than the recommended $10 per square foot.

5

4. Deletion of $4,865 of the $20,770 recommended for office space and copier rental for the 3rd Judicial District public defender office. The Subcommittee learned that the building in which the office is housed is being remodeled to permit access by the handicapped. This renovation eliminates the need for the office to relocate to potentially more expensive space.

5. Addition of $1,714 to the amount recommended for repairing and servicing to provide janitorial services for the 3rd District office.

6. Reduction of $1,900 from the amount budgeted for office space rental for the conflicts office. This office is located in the same building as the 3rd District office, and likewise will not have to relocate in FY 1985.

7. Addition of $400 for repair of equipment and janitorial services for the conflicts office.

8. Addition of $6,000 to the $26,000 recommended for office space and equipment rental in Wichita. The Subcommittee learned that the Board's staff has conducted a preliminary search for suitable space which indicates that the Governor's recommendation would be inadequate to meet the needs of the new office.

9. The Subcommittee recommends that a position limitation of 33.5 F.T.E. be included in the appropriation bill for the Board. The Subcommittee notes that the Board does not currently have such a limitation and is of the opinion that one should be imposed as for other agencies.

10. Addition of $7,165 to the amount budgeted for Legal Services for Prisoners, Inc. This addition would allow the corporation to maintain its current level of staff and continue accepting assignment to criminal cases involving inmates of the correctional institutions.

11. The Subcommittee notes that there have been reports that three attorneys may resign from the 3rd District Public Defender Office. The Subcommittee recommends that the Senate Subcommittee reviewing this budget determine whether the resignations will take place and whether there will be any resultant vacancy savings.

12. The Subcommittee notes that H.B. 2634 that would impose a $200 fee on attorneys who do not volunteer to serve on assigned counsel panels has been heard by this Committee but not acted upon.

HOUSE SUBCOMMITTEE REPORTS

1984 HOUSE BILL NO. 2685

FY 1985 APPROPRIATION

Sec. 3 — State Board of Indigents' Defense Services

Sec. 4 — Judicial Branch

Rochelle Chronister
Representative Rochelle Chronister,
Subcommittee Chairperson

George Teagarden
Representative George Teagarden

Larry F. Turnquist
Representative Larry Turnquist

SUBCOMMITTEE REPORT

Agency: Judicial Branch Bill No. 2685 Bill Sec. 4

Analyst: Galligan Analysis Pg. No. 257 Budget Pg. No. 1-47

| Expenditure Summary | Agency Req. FY 84 | Governor's Rec. FY 84 | Subcommittee Adjustments |
|---|---|---|---|
| State Operations: | | | |
| All Funds | $ 35,044,779 | $ 34,850,887 | $ (208,179) |
| State General Fund | 34,741,002 | 34,550,805 | (211,874) |
| F.T.E. Positions: | | | |
| Appellate Court Justices and Judges | 14.0 | 14.0 | — |
| District Court Judges | 211.5 | 211.5 | — |
| Nonjudicial Personnel | 1,326.5 | 1,326.5 | — |

House Subcommittee Recommendation

The House Subcommittee concurs with the Governor's recommendation with the following exceptions:

1. Restoration of the $541 reduction of expenditures from the Court Reporter Fee Fund and the $3,154 reduced from the budgeted expenditures from the Bar Admission Fee Fund. In making this recommendation the Subcommittee notes that expenditures from these two funds are made for specific purposes related to the testing and licensing of lawyers and court reporters as dictated by statute. Since unexpended amounts remain in the fee fund, the Subcommittee cannot see any particular reason to change the expenditure limitations established a year ago. The Subcommittee further notes that the anticipated carry-forward balance to FY 1985 in the Bar Admission Fee Fund will be $13,818 with $4,510 in the Court Reporter Fee Fund which amounts should be sufficient to avoid any cash-flow problems at the beginning of the year.

2. Restoration of $57,828 of State General Funds for judicial education projects to permit expenditure of $134,886 as approved a year ago.

3. Restoration of $2,177 of State General Fund expenditures reduced from the Commission on Judicial Qualifications, OOE account. The Subcommittee notes that expenditures from this account are made on an as-needed basis in compliance with the Commission's statutory responsibilities, and that it is not possible to predict with precision how much will be expended in any fiscal year.

4. Restoration of $864 of State General Fund expenditures reduced from the Judicial Nominating Commission account. The Subcommittee recognizes that the work of the Commission must be conducted as dictated by statute and that the reduction recommended by the Governor may impede the Commission's ability to function during the current fiscal year.

5. The Subcommittee concurs with the $107,071 of State General Fund expenditure reductions in the Appellate Courts salaries and wages and OOE accounts and the District Court OOE account and recommends that this amount be reappropriated to offset the FY 1985 appropriation.

6. The Subcommittee recommends that $15,000 of the $22,257 reduction recommended by the Governor for data processing be reappropriated to offset the FY 1985 appropriation.

7. During its examination of the Court's expenditures to date, the Subcommittee identified potential State General Fund savings during the current year totaling $280,000. The Subcommittee recommends that this amount be reappropriated to offset the FY 1985 appropriation.

SUBCOMMITTEE REPORT

Agency: Judicial Branch Bill No. 2685 Bill Sec. 4

Analyst: Mary Galligan Analysis Pg. No. 257 Budget Pg. No. 1-47

| Expenditure Summary | Agency Req. FY 85 | Governor's Rec. FY 85 | Subcommittee Adjustments |
|---|---|---|---|
| State Operations: | | | |
| All Funds | $ 40,255,993 | $ 37,772,819 | $ (1,268,413) |
| State General Fund | 40,058,292 | 37,581,379 | (1,268,041) |
| F.T.E. Positions | | | |
| Appellate Court Justice and Judges | 14.0 | 14.0 | — |
| District Court Judges | 213.5 | 211.5 | — |
| Nonjudicial Personnel | 1,339.5 | 1,326.5 | 4.0 |

| Revenue Summary[1] | Subcommittee Recommendation |
|---|---|
| State General Fund | $ 738,000 |

1) Estimate of revenue anticipated as a result of legislation recommended in items 15 and 16 below.

Agency Request/Governor's Recommendation

The Court's request for FY 1985 includes salary increases of $6,000 each for the Supreme Court justices and $3,000 each for Court of Appeals judges. Two new district court judgeships and thirteen additional nonjudicial personnel positions are requested. Salary upgrades for 466 employees and reclassification of 35 nonjudicial positions in the district courts are included in the request. The request for capital outlay for books and equipment totals $146,554. The requested amount for state operations is composed of $197,701 of special revenue funds of which $150,000 is from the Library Report Fee Fund.

The Governor's recommendation includes the requested salary increases for the appellate court justices and judges. None of the new positions or nonjudicial personnel salary increases are recommended. Capital outlay of $101,603 is recommended of which $82,525 is for books for the law library. The recommendation includes $191,440 of special revenue funds which includes the requested $150,000 expenditure from the Library Report Fee Fund.

House Subcommittee Recommendation

The House Subcommittee concurs with the Governor's recommendation with the following exceptions:

1. In accordance with Committee policy, deletion of $1,991,834 recommended for the pay plan revision. Of that amount, $372 is from the Bar Admission Fee Fund, with the balance from the State General Fund.

7

2. Deletion of $34,871 of the amount recommended for appellate court justices' and judges' salary increases. This reduction will allow for a $3,000 increase for the justices of the Supreme Court and a $1,500 increase for the judges of the court of appeals. The Subcommittee notes that legislation has passed the Senate which provides for greater salary increases than those recommended here. (The table at the end of this report provides a comparison of the current, requested and recommended base salaries.)

3. The Subcommittee notes, in connection with the Court's request for six additional Administrative Assistants for district court judges, that there are currently 61.3 F.T.E. Administrative Assistants in the district courts and 31 administrative judges. It appears to the Subcommittee that it would be possible for each administrative judge to have an Administrative Assistant if the existing positions were more equitably distributed. The Subcommittee requests that the Judicial Council examine the existing distribution of nonjudicial personnel of the district courts in light of the administrative and caseload changes that have taken place since unification and make recommendations about staffing to the Legislature at the start of the 1985 Session.

4. Addition of $383,386 to allow a two range upgrade of salaries for Court Services Officers. The Subcommittee notes that the Court requested additional funds to provide senority raises to those CSOs who have been employed by the Court for five years or more, and specifically recommends that those raises not be provided. The Subcommittee further recommends that the 1985 Legislature determine whether additional salary increases are necessary to achieve parity with parole officers.

5. Addition of $50,000 for the Court to use at its discretion to provide salary increases for nonjudicial personnel of the district courts. The Subcommittee notes that these funds are in addition to any cost-of-living or merit increases that may be provided for by the Legislature for FY 1985.

6. Addition of $81,916 for salaries and benefits of 4.0 F.T.E. additional positions for Central Research as requested by the Court and recommended by the Judicial Council in its study of the Court of Appeals. The positions requested and recommended by this Subcommittee are three attorneys and a secretary. The Subcommittee notes that this increase of staff may be the first step in an expansion of the Court of Appeals, but is of the opinion that this change should be in effect for a year before a decision is made about adding more judges.

7. Addition of $11,215 for office furniture and equipment requested by the Court in connection with the new positions for Central Research.

8. Deletion of $7,525 from the $82,525 recommended by the Governor to purchase books for the law library. The deletion leaves $75,000 to purchase books during FY 1985. This amount can be compared to $67,830 expended in FY 1983 and $69,000 budgeted in FY 1984 for this purpose.

9. Addition of $35,000 to enable the Court to begin work on the computerized case tracking system merger. The Subcommittee notes that the Court has embarked upon a $25,000 maintenance effort on the two existing systems during the current fiscal year, and strongly recommends that this work be done with the merger in mind in order that expenses during FY 1985 can be minimized. The Subcommittee also notes that this effort is projected to take two years to complete at a total cost of $80,000 with an anticipated three-year payback as a result of reduced maintenance costs.

10. The Subcommittee notes the Court's request for funds to place KIPPS terminals in the four urban Courts, and specifically does not recommend this project given the current difficulties with that system.

11. Addition of $3,300 for the requested Traffic Case Management Seminar. The Subcommittee notes that the Court requested an amendment to its budget that would provide $40,000 for training related out-of-state travel for judges during FY 1985. The Subcommittee specifically does not recommend the additional amount requested, but does not object to the court utilizing existing resources for this purpose.

12. Addition of $200,000 to enable the Court to automate the appellate operations, especially by providing word processing capability to the appellate courts as recommended by the Judicial Council. The Subcommittee recommends strongly that the Court and DISC explore the comparative costs of lease-purchase and outright purchase of the equipment for this project and that the most cost-effective alternative be pursued. Further, the Subcommittee notes that this recommendation is made on the basis of a preliminary plan submitted by the Court which lacks sufficient detail to make a definitive determination of costs. The Subcommittee therefore requests that the Court submit a detailed automation plan to next year's Legislature in order that any additional projects can be carefully considered.

13. Addition of $1,000 to enable the Law Library to access the DIALOG computer based research service.

14. Amendment of the appropriation bill to reflect the format of the FY 1984 appropriation, and inclusion of a proviso that will permit expense of up to $4,000 for official hospitality. The following technical amendments are recommended: 1) provide a $32,745 expenditure limitation on the Bar Admission Fee Fund to accurately reflect the Subcommittee adjustments to the Governor's recommendation; 2) provide a position limitation of 211.5 for judges of the district courts and 1,330.5 for nonjudicial personnel to reflect accurately the Governor's recommendation and the Subcommittee adjustments.

15. The Subcommittee recommends introduction of legislation that would impose a service fee on probationers. The fee would be $25 for misdemeanants and $50 for felons. The Subcommittee estimates that approximately $188,000 would be collected as the result of such a service fee.

16. The Subcommittee recommends introduction of legislation that would raise the traffic and fish and game docket fees by $2.00. Based on the FY 1983 caseload, the Subcommittee anticipates that approximately $550,000 additional revenue to the State General Fund will be realized by this increase.

TABLE I

FY 1985 Justices and Judges Salaries

| | FY 1985 Base | Gov. Rec. FY 1985 Base | Subcommittee Recommendation FY 1985 Base |
|---|---|---|---|
| Chief Justice | $55,646 | $ 61,646 | $ 58,646 |
| Associate Justices | 52,864 | 58,864 | 55,864 |
| Chief Judge | 51,752 | 54,752 | 53,252 |
| Associate Judges | 50,639 | 53,639 | 52,139 |
| Administrative District Judge | 49,526 | 49,526 | 49,526 |
| District Judge | 48,969 | 48,969 | 48,969 |
| Associate District District | 46,743 | 46,743 | 46,743 |
| District Magistrate Judge | 21,146 | 21,146 | 21,146 |

DRAFT BILL NO. _____

AN ACT concerning probation services; imposing certain fees therefor; prescribing the disposition of such fees; amending K.S.A. 1983 Supp. 21-4610 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. (a) Each person placed under the probation supervision of a court services officer or other officer or employee of the judicial branch by a judge of the district court under K.S.A. 21-4610 and amendments thereto, shall pay a probation services fee. If the person was convicted of a misdemeanor, the amount of the probation services fee is $25 and if the person was convicted of a felony, the amount of the probation services fee is $50, except that in any case the amount of the probation services fee specified by this section may be reduced or waived by the judge if the person is unable to pay that amount.

(b) The probation services fee imposed by this section shall be charged and collected by the district court. The clerk of the district court shall remit at least monthly all revenues received under this section from probation services fees to the state treasurer. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount thereof in the state treasury to the credit of the state general fund.

(c) This section shall not apply to persons placed on probation or released on parole to reside in Kansas under the uniform act for out-of-state parolee supervision.

Sec. 2. K.S.A. 1983 Supp. 21-4610 is hereby amended to read as follows: 21-4610. (1) Except as required by subsection (4), nothing in this section shall be construed to limit the authority

of the court to impose or modify any general or specific conditions of probation or suspension of sentence, except that the court shall condition any order granting probation or suspension of sentence on the defendant's obedience of the laws of the United States, the state of Kansas and any other jurisdiction to the laws of which the defendant may be subject.

(2) The court services officer may recommend and by order duly entered by the court may impose and at any time may modify any conditions of probation or suspension of sentence. Due notice shall be given to the court services officer before any such conditions are modified and such officer shall be given an opportunity to be heard thereon. The court shall cause a copy of any such order to be delivered to the court services officer and the probationer.

(3) The court may impose any conditions of probation or suspension of sentence that it deems proper, including but not limited to requiring that the defendant:

(a) Avoid such injurious or vicious habits as directed by the court or court services officer~~.~~;

(b) avoid such persons or places of disreputable or harmful character as directed by the court or court services officer~~.~~;

(c) report to the court services officer as directed~~.~~;

(d) permit the court services officer to visit the defendant at home or elsewhere~~.~~;

(e) work faithfully at suitable employment insofar as possible~~.~~;

(f) remain within the state unless the court grants permission to leave~~.~~;

(g) pay a fine or costs, applicable to the offense, in one or several sums and in the manner as directed by the court~~.~~;

(h) support the defendant's dependents~~.~~;

(i) reside in a residential facility located in the community and participate in educational, counseling, work and other correctional or rehabilitative programs~~.~~;

(j) perform community or public service work for local

governmental agencies, private corporations organized not for profit, or charitable or social service organizations performing services for the community~~.~~; and

(k) perform services under a system of day fines whereby the defendant is required to satisfy fines, costs or reparation or restitution obligations by performing services for a period of days determined by the court on the basis of ability to pay, standard of living, support obligations and other factors.

(4) In addition to any other conditions of probation or suspension of sentence, the court shall order the defendant to comply with each of the following conditions:

(a) Make reparation or restitution to the aggrieved party for the damage or loss caused by the defendant's crime, in an amount and manner determined by the court, unless the court finds compelling circumstances which would render a plan of reparation or restitution unworkable~~.~~;

(b) pay the probation services fee pursuant to section 1; and

(c) reimburse the state general fund for all or a part of the expenditures by the state board of indigents' defense services to provide counsel and other defense services to the defendant. In determining the amount and method of payment of such sum, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of such sum will impose. A defendant who has been required to pay such sum and who is not willfully in default in the payment thereof may at any time petition the court which sentenced the defendant to waive payment of such sum or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may waive payment of all or part of the amount due or modify the method of payment.

Sec. 3. K.S.A. 1983 Supp. 21-4610 is hereby repealed.

Sec. 4. This act shall take effect and be in force from and after its publication in the statute book.

SUBCOMMITTEE REPORT

Agency: Crime Victims Reparations Board Bill No. — Bill Sec. —

Analyst: Gilmore Analysis Pg. No. 262 Budget Pg. No. 4-43

| Expenditure Summary | Agency Req. FY 84 | Governor's Rec. FY 84 | Subcommittee Adjustments |
|---|---|---|---|
| All Funds: | | | |
| State Operations | $ 98,374 | $ 98,374 | $ (5,470) |
| Aid to Local Units | 6,000 | 6,000 | — |
| Other Assistance | 336,455 | 336,455 | — |
| TOTAL | $ 440,829 | $ 440,829 | $ (5,470) |
| State General Fund: | | | |
| State Operations | $ 97,074 | $ 97,074 | $ (5,470) |
| Other Assistance | 0 | 0 | — |
| TOTAL | $ 97,074 | $ 97,074 | $ (5,470) |
| F.T.E. Positions | 3.0 | 3.0 | — |

House Subcommittee Recommendation

The Subcommittee recommends total expenditures of $435,359 for FY 1984 which is $5,470 less than the Governor's recommendation. The Subcommittee adjustments to the Governor's recommendations are as follows:

1. Delete $972 in rental expenditures. The Subcommittee learned that the Board did not initiate monthly payments for a new copier and word processor until November, 1983.

2. Delete $3,998 for travel and subsistence. Based on the Board's expenditures to date and the reduced travel estimate for Board members due to their proximity to Topeka, the Subcommittee is of the opinion that expenditures for travel were overestimated.

3. Delete $500 for professional fees to hire court reporters whose services are required to transcribe formal hearings of appeals of claims. Historical expenditures do not indicate the need to maintain a $1,000 contingency fund for these services.

4. The Subcommittee is aware that receipts for the current year are estimated to exceed the revised revenue estimate included in the Governor's budget recommendation by $26,000. The Subcommittee recommends these additional receipts be carried forward to offset State General Fund expenditures for claims in FY 1985.

5. The Subcommittee concurs with the Governor's recommendation, included in H.B. 2703, to increase the expenditure limitation for claims payments from $255,750 to $294,000.

(9)

Rochelle Chronister

Representative Rochelle Chronister
Subcommittee Chairperson

Representative Larry Turnquist

George Teagarden

Representative George Teagarden

SUBCOMMITTEE REPORT

Agency: Crime Victims Reparations Board Bill No. 2685 Bill Sec. 5

Analyst: Gilmore Analysis Pg. No. 262 Budget Pg. No. 4-43

| Expenditure Summary | Agency Req. FY 85 | Governor's Rec. FY 85 | Subcommittee Adjustments |
|---|---|---|---|
| All Funds: | | | |
| State Operations | $ 107,194 | $ 107,344 | $ (9,036) |
| Aid to Local Units | 6,000 | 6,000 | — |
| Other Assistance | 412,016 | 412,016 | — |
| TOTAL | $ 525,210 | $ 525,360 | $ (9,036) |
| State General Fund: | | | |
| State Operations | $ 105,894 | $ 106,044 | $ (9,036) |
| Other Assistance | 0 | 110,022 | (26,000) |
| TOTAL | $ 105,894 | $ 216,066 | $ (35,036) |
| F.T.E. Positions | 3.0 | 3.0 | — |

House Subcommittee Recommendation

The Subcommittee recommends total expenditures of $516,324 for FY 1985 which is $9,036 less than the Governor's recommendation. The Subcommittee adjustments to the Governor's recommendations are as follows:

1. Delete $3,951 for the Governor's salary plan revision.

2. Delete $4,585 for travel and subsistence to reflect FY 1984 travel rates and with the assumption that the current board will continue through FY 1985.

3. Delete $500 for professional fees which are used to hire court reporters.

4. Shift $26,000 of financing for claims payments from the State General Fund to the Crime Victims Reparations Fund based on a higher than projected carryforward balance in the latter fund from FY 1984.

5. The Subcommittee was made aware of the Department of Health and Environment's interest in administering the rape prevention program in FY 1986. It is the opinion of this Subcommittee that this adjustment would settle the issue of which is the appropriate agency for administering the Federal Preventive Health and Health Services Block Grant.

| Resource Estimate | Actual FY 1983 | Estimated FY 1984 | Estimated FY 1985 |
|---|---|---|---|
| Beginning Balance | $ — | $ 52,478 | $ 58,478 |
| Net Receipts | 219,271 | 300,000 | 300,000 |
| Total Funds Available | $ 219,271 | $ 352,478 | $ 358,478 |
| Less: Expenditures | 166,793 | 294,000 | 304,478 |
| Ending Balance | $ 52,478 | $ 58,478 | $ 54,000 |

Rochelle Chronister

Representative Rochelle Chronister
Subcommittee Chairperson

Larry Turnquist

Representative Larry Turnquist

George Teagarden

Representative George Teagarden

# Kansas Department of Transportation

March 12, 1984

MEMORANDUM TO: House Ways and Means Committee

FROM: David G. Tittsworth
Chief Counsel

REGARDING: House Bill 2961

Section 105(f) of the 1982 Surface Transportation Assistance Act (Pub. L. 97-424) requires that "not less than ten per centum of the amounts authorized to be appropriated under this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." This section was modeled after provisions of the Public Works Employment Act of 1977 (Pub. L. 95-28). Like its predecessor, Section 105(f) was implemented in part to address the difficulties facing disadvantaged business owners in competing for economic benefits in federal programs.

The new provisions in the federal act represent a significant change from prior policies regarding equal opportunities for disadvantaged businesses in highway construction. In the past few years, states were required by federal regulation to use a "best efforts approach" in achieving minority participation goals. For example, in Kansas, disadvantaged business enterprise participation levels approximated 3% or less of all federal aid projects since 1980. No sanctions were imposed for failure to meet the goals established by each state.

11

Regulations promulgated under the 1982 STAA have dramatically changed such an approach. Under the new law, waivers or reductions from the 10% requirement will not be approved merely because a state has a small minority population nor will requests be granted if goals were unobtainable because of state statutes or local ordinances. The governor must also approve any request for any waiver and the state must demonstrate that all feasible means were undertaken to satisfy the 10% requirement. Finally, federal law mandates that federal funding from a particular project or further projects may be withheld if a state is in noncompliance because it failed to submit an acceptable goal or failed to remedy an insufficient disadvantaged business enterprise (DBE) level.

The necessity of compliance with the federal law is clearly established when considered in the context of the necessity of continued federal highway financing. Federal apportionments in FFY 1983 approximated $150 million for Kansas (an increase of nearly $50 million from the previous fiscal year).

Following the enactment of the 1982 STAA, the Kansas Department of Transportation took immediate steps to insure compliance with the federal act and to protect the federal financing which is crucial to our operations. A goal of 8.3% for DBE participation was designated by the Federal Highway Administration (FHWA)for KDOT for FFY 1983.[1] A

[1] The 8.3% level was implemented for FFY 1983 because the 1982 STAA did not become effective until January 6, 1983.

10% goal for DBE participation for the current federal fiscal year has been submitted by KDOT and approved by FHWA.

For FFY 1983, the State of Kansas achieved a level of 8.8% DBE participation. For the present federal fiscal year, a cumulative level of 10.8% DBE participation has occurred through February, 1984.

These increases are the result of the following actions taken by the Department, which include the following:

1. The Department analyzes all construction contracts on a project-by-project basis to ascertain the appropriate level of participation by disadvantaged businesses for each project. These determinations are based on the availability of disadvantaged businesses, geographic considerations, expertise required for a particular project or portion thereof, and other considerations.

2. The Department seeks out qualified disadvantaged firms on a statewide basis. The Department has met and will continue to meet with such firms on a regular basis to ascertain concerns and

problems. Seminars are offered for disadvantaged businesses to instruct such firms on various construction contract issues and general business training and to ascertain problems which may arise in the construction area.

3. The Department certifies firms which meet the criteria established by federal regulations for disadvantaged businesses. KDOT will attempt to certify only such firms that are "truly" disadvantaged.

4. The Department monitors construction contracts to insure that disadvantaged business requirements are met and to avoid problems which may arise. The Compliance Section of the Bureau of Construction and Maintenance is responsible for following up on disadvantaged business requirements after contracts are awarded to insure that all requirements are met.

5. The Department has revised its special contractual provisions relating to disadvantaged business participation. The primary change is to require contractors to supply disadvantaged business information (name of disadvantaged firm, description of work to be done, value of such work, and percentage of total contract) at the time a bid is submitted. Such information is not subject to revision after bids are opened. Low bidders who do not meet the prescribed disadvantaged business goals are required to submit evidence of their good faith efforts, within two working days after notification, to demonstrate their attempts to meet the contractual DBE goal.

6. The Department has received approval of a Department regulation change which has the effect of making public the bidders list of contractors who have requested plans from the Department to other contractors, suppliers and DBEs. This policy change

helps to enable DBEs, among others, to acquire useful information in determining which contractors may require their services. In addition, it should assist prime contractors in meeting necessary levels of DBE participation.

House Bill 2961 would add another means of assuring compliance with Section 105(f) of the 1982 STAA. The heart of the bill is contained in Section 2(b) which states that:

"...the secretary of transportation is empowered, but is not limited, to:

...

(b) designate certain highway construction contracts or portions thereof to be set aside for bid by disadvantaged business enterprises solely..."

Under current Kansas law, the Department has no authority to set aside projects, or portions thereof, to DBEs. K.S.A. 68-410 provides in relevant part that:

"All contracts for the construction, improvement, reconstruction, and maintenance of the highway system, the cost of which exceeds one thousand dollars ($1,000), except contracts between the secretary of transportation and the various

counties, shall be awarded at a public letting to the lowest responsible bidder: **Provided,however,** That no contract for a single project or structure shall be divided into two or more contracts and awarded without public letting and to other than the lowest responsible bidder..."

The Department believes that the set aside authority which would be granted by House Bill 2961 would help to achieve the intent underlying the 1982 STAA and would aid the Department, contractors and DBEs in complying with federal law. The constitutionality of a 10% set aside of federal funds for minority businesses was originally upheld in Fullilove v. Klutznick, 448 U.S. 448, 65 L.ED 2d 902 (1980). Writing for the majority, Chief Justice Burger explained that: "Congress could prefer minority contractors in order to a void perpetuating the effects of prior discrimination." 448 U.S. at 472-78. Essentially, the Court was persuaded by the fact that the quota was a temporary measure, remedial in purpose, flexible in administration, with a restricted adverse impact on non-minorities. More recently, the United States Sixth Circuit Court of Appeals upheld Ohio's DBE set side statute. Ohio Contractors Ass'n. v. Keip, 713 F.2d 167 (1983).

Other states have found set aside legislation to be a legitimate and desirable mechanism to address the issue of disadvantaged business participation in highway programs. Based on returns of 42 states in a survey conducted by the American Association of State Highway and Transportation Officials (AASHTO) in October, 1983, it was reported that at least ten (10) states have already enacted set aside legislation.

I would like to emphasize three major points with regard to the set aside authority contained in House Bill 2961:

1. Set asides will help to further the Congressional intent of Section 105(f) of the 1982 STAA by permitting DBEs to establish "track records" as competent highway contractors and subcontactors. This in turn will help the process of encouraging the development of such businesses and should aid in assisting such businesses to receive the opportunity to compete in the mainstream of highway construction work on an equal basis.

2. The bill is drafted to comport with Section 105(f) of the 1982 STAA. House Bill 2961 clearly states that the legislation is designed to meet the mandate of such federal law and that the provisions of the bill only apply to federally aided highway construction projects. Section 4 of the bill adopts all terms and words as defined in the federal act and all regulations and amendments thereto. Finally, it should be noted that Section 5 provides for the

sunset of such legislation on September 30, 1986, concurrent with the length of the 1982 STAA. Thus, the bill is explicitly interwoven with the federal law and does not involve a new appropriation of state funds or use of set asides where only state funds are used.

3. Passage of House Bill 2961 would help to shift the burden of locating and utilizing DBEs from the prime contractors to the Department. As noted above, the primary tool which the Department currently is compelled to use to achieve our approved DBE goal is to require contractors to achieve a specified subcontract goal in each project. The set aside legislation would in some ways place the Department in the shoes of a general contractor as to the successful DBE bidder. The legislation would also permit greater flexibility in determining the types of work to be required under a set aside project and in achieving an equitable distribution of such projects throughout the state.

The Department recommends one technical amendment to the bill. The clause which appears at lines 0040-0042 and which reads "...except that no contract shall be awarded to any bidder whose bid exceeds estimates prepared by the department of transportation by 10% or more" should be stricken. Current procedures and specifications of the Department provide for mechanisms to reject bids for any irregularities, including bids which are considered too high. The clause in House Bill 2961 is thus unnecessary

and should be deleted.

Attached are several items relevant to House Bill 2961:

1. Current federal regulations which relate to DBE participation.

2. The Department's current special contract provision relating to DBE participation.

3. Secretary Dole's January 31, 1984 press release which relates to FFY 1983 levels of DBE participation.

4. Information relating to the number of DBEs and WBEs in Kansas and rejections of certification.

Governor Carlin and the Department respectfully urge favorable consideration of this measure. We will continue to keep the legislature and the Governor aware of the status of this matter and will attempt to provide any additional information which may be needed.

federal register

Thursday
July 21, 1983

Part II

# Department of Transportation

## Office of the Secretary

## Participation by Minority Business Enterprises in Department of Transportation Programs

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 23

[OST Docket No. 64c and 64d]

# Participation by Minority Business Enterprises in Department of Transportation Programs

AGENCY: Department of Transportation.

ACTION: Final rule; request for comments.

SUMMARY: This regulation implements section 105(f) of the Surface Transportation Assistance Act of 1982, which provides that, except to the extent that the Secretary determines otherwise, not less than ten percent of the amounts authorized to be appropriated under the Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals. The regulation adds a new Subpart D to the Department's existing minority business enterprise regulation. The Department also requests comments on § 23.67 of the final rule.

DATES: This regulation is effective August 22, 1983. Comments on § 23.67 should be provided no later than August 22, 1983.

ADDRESS: Comments on § 23.67 should be submitted to Docket Clerk, OST Docket No. 64, Department of Transportation, 400 7th Street, SW., Room 10105, Washington, D.C. 20590. Commenters wishing to have their submissions acknowledged should include a stamped, self-addressed postcard with their comments. Comments will be available for review at the above address from 9:00 a.m. to 5:30 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Robert C. Ashby, Office of the Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 400 Seventh Street, S.W., Room 10105, Washington, D.C. 20590; (202) 426-4723.

SUPPLEMENTARY INFORMATION:

## Background

### *The Existing Regulation*

On March 31, 1980, the Department of Transportation published a regulation on "Participation by Minority Business Enterprise in Department of Transportation Programs" (45 FR 21172). This regulation, codified as 49 CFR Part 23, established requirements for recipients of Department of Transportation financial assistance. The key features of this regulation, in its current form, include requirements for recipients to set overall and contract goals, award contracts goals, and certify the eligibility of firms to participate in DOT-assisted contracts as MBEs.

The Department's implementation of section 105(f) of the Surface Transportation Assistance Act of 1982 (STAA) builds upon this existing rule. The new Subpart D changes the way FHWA and UMTA recipients establish overall goals and also makes some changes concerning the eligibility of firms to participate in the program. Otherwise, the Department's program continues to operate in the same way as it is under the existing regulation.

### *Notice of Proposed Rulemaking and Comments*

The Department of Transportation published a notice of proposed rulemaking to carry out section 105(f) on February 28, 1983 (48 FR 8616). The original comment closing date of March 21 was later extended to April 5. The Department has received well over 1600 comments on this rulemaking. Members of Congress, minority contractors, non-minority contractors, women-owned businesses, state transportation agencies, transit authorities, other state and local agencies, transit vehicle manufacturers, and other parties were represented among the commenters. The Department fully considered the issues raised by these commenters as it made the policy decisions on which this final regulation is based.

In preparing this final rule, the Department wanted to respond fully to the numerous suggestions, questions, and requests for guidance the commenters made. In order to be responsive to these comments, it has been necessary to add explanatory material (e.g., Appendices A-D), include a detailed discussion of responses to comments in the Preamble, and add some additional provisions to the rule itself. The addition of this material, which we believe will help to clarify the Department's policy and the actions recipients and others must take under the rule, results in an unusually lengthy preamble. However, the regulation itself is of modest length.

### *The Statute*

The regulation implements section 105(f) of the STAA. Section 105(f) provides as follows:

> Except to extent that the Secretary determines otherwise, not less than ten percentum of the amounts authorized to be appropriated under this act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and relevant subcontracting regulations promulgated pursuant thereto.

This provision resulted from an amendment introduced by Representative Parren Mitchell on the House floor (Daily Congressional Record, December 6, 1982, at H 8954). The only legislative history for this amendment consists of a brief floor statement made by Representative Mitchell. In the statement, Representative Mitchell said that his amendment was designed, like a similar provision in the Public Works Act of 1977, "to ensure the participation of [small and disadvantaged] businesses in these massive public spending [programs.]" Mr. Mitchell said that the 1977 amendment had been found constitutional by the Supreme Court in 1980 and had succeeded in causing $600 million to be awarded to minority businesses. He pictured the amendment as a means of dealing with the high rate of unemployment among minority workers.

As originally introduced by Representative Mitchell and passed by the House, the amendment did not contain the introductory phrase "Except to the extent that the Secretary determines otherwise * * *." This phrase was introduced in the conference version of the STAA. The conference report provides no information concerning the rationale for the introduction of this language, saying only that section 105(f) "provides that not less than ten percent of amounts authorized to be appropriated under the bill shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." This conference report language does not suggest, as some commenters asserted, that the added phrase was intended to free individual recipients from responsibility to set and meet goals commensurate with the statute.

There was no parallel Senate provision. Senator Cranston made a floor statement (*Daily Congressional Record*, December 8, 1982 at S 14211) very similar to that which Representative Mitchell made in the House. However, Senator Cranston did not actually introduce an amendment. In the Department's notice of proposed rulemaking, it was erroneously stated that Senator Cranston "sponsored" an amendment similar to Representative Mitchell's. In formulating its final rule on this subject, the Department relied for evidence of the intent of Congress solely on the text of section 105(f) as enacted

by Congress, Representative Mitchell's floor statement, and the conference report.

By referencing the Public Works Act of 1977 and by speaking of section 105(f) as a "set-aside for small and disadvantaged businesses," Representative Mitchell, in his floor statement, explicitly viewed the statute as requiring affirmative action. As the repeated references to the 1977 statute indicate, Congress also should be regarded as having taken into account the more lengthly discussion of the need for affirmative action which occurred during Congressional consideration of the 1977 provision. The Department has considered the history of Congressional action underlying the 1977 statute, much of which is cited in *Fullilove* v. *Klutznick*, 448 US 448 (1980), which upheld the constitutionality of the earlier statute and its implementation by the Department of Commerce.

*Scope of the Statute*

In the preamble to its notice of proposed rulemaking, the Department discussed the question of the scope of section 105(f). The question arises because of the ambiguity of the reference in section 105(f) to funds authorized to be appropriated under "this Act." Section 105(f) appears in Title I of the STAA, which is titled the Highway Improvement Act of 1982. The Department concluded that, in context of the entire statute and its legislative history, "this Act" should be taken to refer to the entire STAA, and not just to Title I.

The majority of comments received on this subject, including comments from minority and nonminority contractors, members of Congress, and state and local governments, agreed with the Department's interpretation. Comments from one transit authority and one nonminority contractors' association took the opposite view. The Department believes that the analysis of the scope of the statute explained in the NPRM is correct, and retains this interpretation for the final rule.

*Program Exclusions*

The NPRM proposed, under the Secretary's discretionary authority in section 105(f), to exempt from coverage under this regulation several programs for which funds are authorized by the Act. The reasons for proposing these exclusions were that they were not funded by the gasoline user fee or had relatively little potential for job and business opportunity creation. In the Department's judgment, the MBE contracting opportunities gained by coverage of these programs would not justify the additional administrative burdens involved for recipients.

Most of the comments on this issue were received from minority businesses, with additional comments being received from members of Congress and some state and local agencies. The majority of the comments from minority businesses and members of Congress opposed the proposed exclusions. These commenters said that since section 105(f) applies to the entire Act, all programs funded by the Act should be covered by the regulations. Other commenters, including minority business groups and some state and local agencies, agreed that the exclusions would not seriously impair achievement of the statute's objectives and could help to avoid confusion and unnecessary administrative burden.

The Department is committed to achieving the objectives of section 105(f). However, the Department also has a responsibility to avoid the imposition of additional administrative burdens, particularly in situations where doing so is not likely to increase significantly the Department's ability to implement the statute. With respect to the NHTSA Highway Safety Grant Program, grants to states for Commercial Motor Vehicle Safety Programs, the Coast Guard State Recreational Boating Program, and the Reforestation and Promotion of Fisheries Programs (the latter two of which are not directly implemented by DOT), the Department believes that too few contracting opportunities will be created, for minority businesses or anyone else, to justify covering those programs under this regulation. Indeed, doing so would require these recipients to create MBE programs under the Department's existing regulation where none are now required. Consequently, the Department has decided to retain these exemptions. Since these exemptions relate to programs for which the authorizations are relatively small, the exemptions should not seriously impair the Department's ability to achieve the objectives of the statute.

One of the programs proposed for exclusion by the NPRM was the authorization for a supplemental discretionary fund for the FAA's Airport and Airway Improvement Program. This program was of particular interest to some commenters. While it was not funded from the gasoline user fee, it was a fairly large authorization ($475 million over three years). In addition, funds in the FAA airport program are often spent in construction, planning, engineering and other types of work in which minority contractors are used. At the time that the Department proposed the NPRM, Congress had not appropriated any of the funds authorized by the STAA for the airport program. This was the primary reason that the Department propose to exclude the program from coverage. However, Congress subsequently appropriated $150 million of the $200 million authorized for fiscal year 1983.

The Department has reconsidered the status of the FAA Supplemental Discretionary Fund with respect to this regulation. The Department has decided, however, not to cover this program under the final regulation. The most important reason for this decision is that the administrative mechanics of the regulation are designed with the Department's highway and transit programs in mind. Unlike the highway and transit programs (which involve, for the most part, continuous assistance to the same recipients), the FAA airport program is a program that involves discrete, often one-time, grants to various airports. While some larger airports receive very frequent FAA grants, many medium-size and smaller airports receive grants only periodically. For this reason, the final regulation, with its emphasis on overall goals and long-term aggregate achievement of disadvantaged business goals, does not fit the situation of many FAA recipients too well.

In addition, the supplemental discretionary fund authorized by the STAA is only a small part of FAA's overall Airport and Airway Improvement Program. Most of the funds for this program were authorized by other statutes. Consequently, section 105(f) would apply only to a small portion of airport program funds granted to airports in any given fiscal year. It would be very difficult to apply separate sets of administrative requirements to FAA funds authorized by the STAA and grants resulting from other authorizations. This is particularly true because, in about half the cases, funds authorized by the STAA are intermingled with funds authorized by other statutes in the same grant to the same airport.

Timing is also a factor. The FAA has already apportioned the funds appropriated for fiscal year 1983. Many grants have already been made from these apportionments. This final regulation was not issued until the beginning of the fourth quarter of fiscal year 1983. It is uncertain whether Congress will appropriate funds authorized by the Surface Transportation Assistance Act of 1982 for the airport program for fiscal years 1984 or 1985. In these circumstances,

there could be little opportunity for the administrative provisions of this regulation to actually operate with respect to airport funds appropriated from the STAA authorizations.

At the same time, the Department recognizes a responsibility to achieve the minority business participation objectives of Congress in any program creating substantial potential opportunities for minority business involvement. For this reason, in implementing the Department's existing minority business regulation with respect to airports, the FAA will seek, as a matter of policy, to achieve the ten percent level of participation established by section 105(f). This means that, in working with grantees under the Supplemental Discretionary Fund, FAA will strongly encourage them to set and meet ten percent goals. The Department believes that this policy commitment under existing administrative machinery is the best way to achieve the objectives of the statute in the context of the airport program.

For these reasons, the Department determines, under the Secretary's discretionary authority in section 105(f), that this final regulation will not apply to the following provisions of the STAA:

Section 203—NHTSA/FHWA Highway Safety Grant Program
Section 402—Grants to States for Commercial Motor Vehicle Safety Programs
Section 412—State Recreational Boating
Section 422—Reforestation
Section 423—Promotion of Fisheries
Section 426—Airway and Airport Development Program

The Department also recognizes that the direct Federal highway program and UMTA direct procurement activities are covered by section 105(f). The Department is committed to carrying out the ten percent participation requirement of the statute under these programs. However, since these are not Federal financial assistance programs, the provisions of this regulation do not apply to them. UMTA and FHWA will seek to achieve the ten percent level of participation through the Small Business Administration (SBA) 8(a) program, the section 8(d) Federal subcontracting program, and other tools available to the Department to encourage the use of small and disadvantaged businesses.

## Discussion and Comments

This portion of the preamble discusses the significant issues raised by comments to the NPRM. With respect to each issue, the discussion will describe comments made by various commenters, the Department's response to these comments, and the policy decisions the Department made for the final regulation. In preambles to final regulations, the Department usually includes a section-by-section analysis of the language of the final regulation. For this regulation, we are publishing the section-by-section analysis as Appendix A to the regulation. The reason for this decision is that, for this particular rulemaking, we think it would be useful to permit the descriptive and explanatory material of the section-by-section analysis to be codified along with the regulatory language to which it pertains. Consequently, this section-by-section material will be available to users of the Code of Federal Regulation who do not have a copy of the Federal Register publication available to them.

### Definitions

*Use of the Terms "Minority" and "Minority Business Enterprise"*

The NPRM used the term "minority" to refer to groups presumed to be socially and economically disadvantaged and the term "minority business enterprise" to refer to businesses owned and controlled by socially and economically disadvantaged individuals. The Department proposed to use these terms in order to be consistent with the terminology of the existing minority business regulation. However, some commenters thought that the use of these terms in context of this rulemaking was confusing. In addition, a commenter expressed concern that the use of the term minority business enterprise would imply that only members of minorities could be considered eligible for participation in the section 105(f) program. Since the statute references the "socially and economically disadvantaged" concept of section 8(d) of the Small Business Act, this distinction might be misleading.

For these reasons, the Department has decided to drop the use of the two terms. In place of the term "minority business enterprise," the final rule uses the term "disadvantaged business." A disadvantaged business is a small business concern owned and controlled by socially and economically disadvantaged individuals. The Department believes that using this term should help to avoid the confusion about which commenters were concerned.

Several commenters urged the Department to ensure that there was only one set of definitions of eligible businesses for all DOT financial assistance programs. The Department agrees that unifying the definitions is desirable. However, the differences between 49 CFR 23.5 definition of minority business enterprise and Subpart D's definition of disadvantaged businesses are so slight that recipients and contractors should have little problem in working with them. The Department does, however, intend to publish a proposed clarification and revision of the existing 49 CFR Part 23 in the future. Proposing a single definition for all pruposes under Part 23 will be considered in the context of that proposed rulemaking.

*Use of the "Social and Economic Disadvantage" Concept*

The proposed rule defined eligible businesses as being small business concerns owned and controlled by socially and economically disadvantaged individuals. The NPRM did so because section 105(f) explicitly directs the Department to use this definition, derived from section 8(d) of the Small Business Act. Several commenters, including minority businesses and recipients, asked that the Department instead use its existing definition of minority business in 49 CFR Part 23. Some of these commenters made this recommendation because they thought it would be less confusing. Others did so because they were concerned that the use of the 8(d) definition would eliminate the eligibility of many MBE firms, with the result that these MBE firms would be injured and that recipients would have a harder time meeting goals.

Given the language of section 105(f), the Department believes that it is required to use the "social and economic disadvantage" concept as the basis for its definition of eligible firms. The Department believes further that using this definition should render few firms ineligible to participate in the Department's financial assistance programs covered by Subpart D. The impact of the change should be limited to persons with origins in Burma, Thailand, and Portugal. Under the existing definition of MBE, persons with origins in Burma and Thailand are considered to be Asian-Americans. They are not considered to be Asian-Pacific Americans under the section 8(d) definition.

On December 10, 1981, the Department amended its minority business enterprise definition to include persons with origins in Spain and Portugal. However, the section 8(d) definition of socially and economically disadvantaged individuals includes only the term "Hispanic Americans." This term is defined, as provided in Office of

Management and Budget (OMB) Office of Statistical Policy Directive No. 15, to include persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race. The Department was informed by OMB at the time it made its December 1981 amendment that it was not appropriate to include Portuguese-Americans within this definition.

At that time, the Department avoided the problem by defining Portuguese-Americans as a separate eligible group. However, under the section 8(d) definition that the Department is required to use in this rulemaking, only persons who are members of groups named in the statute or groups later designated by SBA as socially and economically disadvantaged may be presumed to be socially and economically disadvantaged. As a group, Portuguese-Americans have not been so designated. Consequently, the Department is unable to define Portuguese-Americans as one of the "presumptive" groups.

Another matter of concern to some commenters was the requirement that eligible businesses be small business concerns as defined by Small Business Act. Commenters were particularly concerned that more successful firms capable of performing larger contracts might be rendered ineligible, with resulting hardship to the firms and to recipients. In using the business size criteria of the Small Business Act in the NPRM, the Department was not proposing any change from its existing MBE regulation. To be eligible under the present 49 CFR Part 23, a firm must also be a small business as defined by section 3 of the Small Business Act. In addition, section 105(f) requires the Department to use the Small business Act's business size criteria. For the convenience of recipients and contractors, Appendix B to the final regulation summarizes the SBA's regulatory criteria for business size applicable to DOT financial assistance programs. Recipients and contractors should consult this Appendix, or the SBA regulation from which it is drawn, in making determinations of business size.

*The Presumption of Social and Economic Disadvantage*

The NPRM provided that recipients may make a rebuttable presumption that individuals in the designated groups are socially and economically disadvantaged. That is, Black Americans, Hispanic Americans and members of the other groups would be presumed socially and economically disadvantaged, but the recipient could determine that a member of one of these groups was in fact not socially and economically disadvantaged. For example, a wealthy Black business owner might be considered ineligible because he was not economically disadvantaged. This approach is consistent with SBA's under the 8(a) program.

However, a commenter contended that the legislative history of section 8(d) indicates that the presumption that members of these groups are socially and economically disadvantaged was intended to be conclusive. (See report from the Committee on Small Business, House Report 95-949, March 13, 1978, at 9-10.) The report says that, for purposes of the section 8(d) program in direct Federal procurement, any member of one of the named groups is always to be considered socially and economically disadvantaged, regardless of his or her actual economic situation. The Department has carefully considered the application of this legislative history to the section 105(f) program.

In its comment to the docket, the Department of Justice (DOJ) recommended that DOT retain the rebuttable presumption. The basic reason for this recommendation was DOJ's view that, in the event of a legal challenge to section 105(f), a conclusive presumption will be more difficult to defend. The Department believes that DOJ's view has merit particularly in light of the Supreme Court's suggestion in *Fullilove* v. *Klutznick* that racial or ethnic criteria should be narrowly tailored to achieve the objective of remedying the effects of discrimination or disadvantage (see 448 U.S. at 480, 487). In the context of an affirmative action statute like section 105(f), presuming that all members of a given group are entitled to the benefit of participating in DOT-assisted programs as socially and economically disadvantaged individuals, without allowing a showing that a particular member of the group is not truly disadvantaged (and at the same time requiring that individuals who are not members of the designated groups demonstrate disadvantage) could raise serious legal problems.

While the legislative history of section 8(d) indicates that Congress wanted the presumption of social and economic disadvantage to be conclusive in the context of Federal agency direct procurement, the language and legislative history of section 105(f) do not indicate that Congress intended to enact legislation that would guarantee minority business owners who are not, in fact, socially and economically disadvantaged an unchallengeable status as socially and economically disadvantaged individuals. Indeed, there is no indication that, in enacting section 105(f), Congress explicitly considered the issue at all. We have concluded that we should retain the rebuttable presumption concept.

In deciding to retain the rebuttable presumption, the Department is not imposing on recipients the burden of making a social and economic disadvantage determination for every firm seeking certification. The recipient shall presume that a member of one of the designated groups is socially and economically disadvantaged. This means that the recipient assumes, and does not inquire into, the actual social and economic situation of a member of one of the groups as part of the certification process. However, if a third party challenges the socially and economically disadvantaged status of a business owner that the recipient has certified, the recipient must follow the challenge procedure of section 23.69.

A related issue is whether recipients should have the ability to make determinations, on an individual, case-by-case basis, that persons who are not members of any of the presumptive groups are nevertheless socially and economically disadvantaged. Under the Department's proposed rule, it was intended that recipients would have this authority. Many commenters, especially firms owned by women, expressed concern that women-owned firms would not be able to participate in any way in the section 105(f) programs. In the Department's April 11 Policy Statement (48 FR 15476), we explicitly stated that the Department intended recipients to make individual determinations of this kind.

Under the final rule, recipients are authorized to make individual determinations of social and economic disadvantage with respect to any person who is not a member of one of the groups presumed to be socially and economically disadvantaged. This applies not only to women contractors, but also to Portuguese-Americans, handicapped veterans, Appalachian White males, Hasidic Jews, or any other individual who can make a case that he or she is socially and economically disadvantaged. Appendix C to the final regulation provides guidance to recipients for making these individual determinations of social and economic disadvantage. This appendix also responds to comments from a number of parties who requested additional

guidance on the meaning of social and economic disadvantage.

The Department wishes to emphasize that a finding by a recipient that an individual who is not a member of one of the presumptive groups is socially and economically disadvantaged is not binding on other parties. For example, SBA would in no way be required to find that a firm or an individual was socially and economically disadvantaged for purposes of the 8(a) program because a DOT recipient had made such a determination for purposes of 49 CFR Part 23. The eligibility of firms for the 8(a) and 8(d) programs themselves is a matter completely separate from the determinations by recipients under this regulation that a firm is socially and economically disadvantaged for purposes of their DOT-assisted contracts.

**Section 105(f) and Businesses Owned and Controlled by Women**

Many women business owners and their groups were concerned that the Department's NPRM proposed to eliminate consideration of women-owned businesses (WBEs) from the Department's program. In addition to the ability of WBEs to seek certification as socially and economically disadvantaged on an individual basis, the Department of Transportation has an existing WBE program in 49 CFR Part 23. There are separate overall and contract goals for WBEs. Contractors must make good faith efforts to meet the WBE contract goals. These requirements are unaffected by this rule and will continue fully in force.

WBE commenters, and state agencies and some nonminority contractors who commented on the subject, were also concerned that, because of pressures to meet ten percent goals for disadvantaged businesses under the regulation, recipients might deemphasize WBEs programs or find themselves unable to devote sufficient resources to them. As a matter of policy, the Department believes that WBE programs are no less important than disadvantaged business programs, and expects recipients to continue to devote appropriate attention and resources to these programs.

Some WBE commenters also expressed the concern that if, to meet higher goals established under section 105(f), recipients had to make greater use of disadvantaged specialty firms (e.g., fencing, guardrail, engineering), opportunities for WBE firms in these fields might be reduced. (Some male-owned nonminority specialty firms expressed the same concern.) It is possible that this problem could exist in some cases, although the comments the Department received do not provide information from which the Department could analyze the frequency of its occurrence. Because the absolute number of highway contracts under the STAA will be higher than in the past, it is reasonable to suppose that any adverse impact on WBEs of the problem will be mitigated to some extent.

Two commenters requested that the Department adopt language in the legislative history of Public Law 95-507, from which the present sections 8(a) and 8(d) of the Small Business Act are derived. This language suggests that sex discrimination should be regarded as a basis for presuming that a woman business owner is socially disadvantaged. The Department has decided against adopting this language. First, it pertains to the 8(a) program, not the 8(d) program to which section 105(f) refers. Second, SBA itself has not chosen to take this approach with respect to certifications for the 8(a) program, and the Department does not wish to be inconsistent with SBA practice in this respect. As the guidance in Appendix C suggests, sex discrimination is one of the factors that a recipient should consider in making a social disadvantage determination with respect to a nonminority woman applicant for certification. However, the social disadvantage determination should be made on the basis of the totality of all factors affecting a particular applicant, and not presumed once evidence of sex discrimination has been produced.

**Goals**

*Minority Contractor Comments*

As one of the key provisions of the proposed regulation, the requirement of the NPRM that recipients have a ten percent overall goal, unless the Department granted a lower goal through the waiver process, generated a substantial amount of comment. Comments from minority contractors, their supporters in Congress, some local governments, and other organizations stressed that it was important for the Department to insist on recipients meeting ten percent goals. Doing so is necessary to comply with the statute, in their view. Moreover, they asserted that minority contractors were available in sufficient numbers to enable recipients to meet ten percent goals, if recipients and prime contractors were serious about using them. These commenters emphasized the need for recipients to make substantial efforts to assist minority businesses, such as technical assistance, relief from burdensome bonding requirements, and outreach to locate minority businesses.

*Comments From Nonminority Contractors and Recipients*

Most state transportation agencies (as well as a few transit authorities) and nonminority contractors who commented took a very different view of the availability of minority businesses. These commenters said that there were not sufficient MBE contractors available to permit some jurisdictions to meet a ten percent goal. Many of the state transportation agencies asserting that they could not meet a ten percent goal were from small, relatively rural states with small minority populations. Some of these commenters cited specific information as to the numbers of minority businesses which they believed were available to work on their projects, saying that these small numbers and their remoteness from population centers with higher numbers of minority businesses made achieving higher goals very difficult.

These commenters also asserted that increases in goals to comply with section 105(f) would mean that virtually all MBE contractors would be fully employed in their own jurisdictions, and consequently unavailable to work elsewhere. These commenters also cited other reasons, like existing minority businesses having failed because of recent economic conditions and the concentration of minority businesses in certain specialty fields, as limitations on MBE availability.

In making a point that ten percent goals would be difficult to achieve, some commenters made the point that they would have to be sharp increases in MBE participation in many jurisdictions. For example, one nonminority contractor said that Illinois would have to increase its MBE participation over 500 percent in the four year period from 1982 to 1986 to make a ten percent goal. A general contractors' association cited sharp percentage increases that would be necessary in various states. Since many states and nonminority contractors believed that these jurisdictions are already straining to meet existing MBE goals, these large increases struck them as impossible to make.

As an alternative to a requirement that each recipient, absent a waiver, establish a ten percent overall goal, nonminority contractors and recipients who believed that they could not make the ten percent goal offered an alternative. Essentially, the alternative was to continue the procedures of the existing regulation with respect to

overall goals. That is, each state would submit a goal based on its own understanding of the MBE participation it was able to achieve. This overall goal would not be required to be ten percent or any other figure. FHWA or UMTA would have the same authority they have now to review and approve overall goals. If the recipient's goal was less than ten percent, the recipient would not have to make any special showing in order to justify the goal.

The alternative is explicitly premised on a view of the statute as setting a nationwide target for MBE participation that was not intended to result in the imposition of specific goal requirements on any particular recipient. This approach, the commenters contend, is the appropriate way for the Secretary to utilize what the commenters characterized as the "broad discretionary waiver authority" given her by the statute.

*The Department's Response to the Comments*

The Department already has an MBE program with a goal-setting mechanism similar to that endorsed by many commenters opposing the ten-percent goal requirement of the NPRM. It has made progress in improving MBE participation in DOT financial assisted program. However, with respect to the largest of these programs, the Federal-highway program, the level of minority business participation has remained well below ten percent. In section 105(f), Congress conveyed a clear message that it wanted disadvantaged participation to increase to ten percent. The Department has an obligation to comply with this statutory requirement.

The Department can succeed at meeting its obligation to ensure that ten percent of funds in the FHWA and UMTA programs are expended with disadvantaged businesses only to the extent that the Department's individual recipients set and meet goals at at least a ten percent level. If individual recipients do not set and meet goals of at least ten percent, it would be very difficult for the Department to argue that it was conscientiously attempting to carry out its responsibility under the statute to achieve an aggregate a ten percent level of participation.

In section 105(f), Congress said that DOT shall expend not less than ten percent of funds authorized by the Act with disadvantaged businesses. By adding the phrase "Except to the extent that the Secretary determines otherwise * * *," Congress clearly provided an exception to this mandate. The Department believes, however, that to construe the statute to require nothing more with respect to setting goals than the pro· sions of the Department's existing regulation would result in the exception swallowing the rule. Had Congress desired the continued implementation of the Department's existing rule without change, Congress would not have passed section 105(f). The Department cannot nullify the intent of Congress by interpreting a statute calling for change in the Department's performance to require no change. For these reason, a basic premise of the final regulation is that the ten percent participation requirement of section 105(f) will be met only if recipients set and meet goals of at least ten percent. This is why recipients for goals of less than ten percent must be supported by adequate justification.

The second major point made by commenters opposed to the NPRM's requirement for ten percent goals was that many recipients could not meet ten percent goals. If this is the case (and minority contractors who commented did not agree that it is), then, under the Department's final rule, recipients will have the opportunity to justify a goal lower than ten percent. The Department has no objection to approving a goal lower than ten percent for a recipient that is able to demonstrate that the reasonable expectation for disadvantaged business participation in its DOT-assisted program is less than ten percent. Approving lower goals in this fashion is a proper use of the exception authority granted of the Secretary by the introductory phrase of the statute. The existence of this mechanism for approving goals lower than ten percent should adequately handle the situation of those recipients who genuinely could not be expected to meet a ten percent goal.

*The Issue of "Fronts"*

In addition to the main issues concerning goal setting, commenters also raised a number of other issues. Several commenters said that setting goals at a ten percent or higher level would create an incentive for prime contractors to create "fronts," businesses ostensibly owned and controlled by socially and economically disadvantaged individuals but in fact under the control of individuals who are not socially and economically disadvantaged. The Department is very conscious of the need to guard against the infiltration of its disadvantaged business program by fronts.

For this reason, the Department requires that each firm seeking to do business as disadvantaged business in a DOT-assisted program be certified as eligible by the recipient. In so doing, the recipient certifies that the firm meets the eligibility criteria of § 23.53 of the existing regulation. This certification requirement applies to all firms seeking work as disadvantaged businesses under the new Subpart D. The Department strongly urges recipients to carefully screen firms seeking work as disadvantaged businesses to ensure that fronts are not permitted to participate as disadvantaged businesses.

*Set-Asides, Quotas and Goals*

For purposes of clarity, the Department believes that it is important to distinguish carefully among three terms often used in the discussion of programs to encourage the use of minority businesses. The first, of these terms is "set-aside." As used in 49 CFR Part 23, "set-aside" has a very narrow and distinct meaning. It refers to an arrangement in which a particular contract is reserved for competition solely among minority businesses. If a recipient's solicitation for bids on a given contract provides that only disadvantaged businesses may bid on the contract, and no one else need apply, the contract is a "set-aside."

Section 23.45(k) of the existing DOT MBE regulation permits, but does not require, recipient to use "set-asides" on contracts as a means of meeting overall goals. Recipients may choose to use "set-asides" if they have the authority to do so. Section 23.45(k) continues to apply in the context of the new Subpart D. However, despite the frequent reference in comments to section 105(f) as a "set-aside" program, neither section 105(f) itself nor this regulation require the use of "set-asides" on any particular contract.

The second term is "quota." A "quota" is a flat numerical requirement that a recipient or contractor is required to meet in order to obtain a benefit. For example, if a recipient, in its solicitation for bids, provides that contractor must have ten percent MBE subcontracting participation to get the contract, regardless of circumstances or the good faith efforts that the contractor might make, the recipient has imposed a "quota." Likewise, if the Department told a recipient that must achieve a ten percent level of disadvantaged business participation or forfeit eligibility for Federal financial assistance, the Department would be imposing a "quota."

The key feature of a "quota" is that it is a simple numerical requirement that a recipient or contractor must meet, without consideration of any other factors. The recipient or contractor either makes the number or loses the

benefit. Some commenters, principally nonminority contractors, used the term "quota" rhetorically to refer to the use of goals in the existing 49 CFR Part 23 or new Subpart D. This is an incorrect understanding of the term. Under the existing DOT regulation and the new Subpart D, the Department of Transportation does not operate a "quota" system. Neither the proposed nor final Subpart D could impose penalties or sanctions on recipients simply because they fail to meet an overall goal.

The third term is "goal." A "goal" is a numerically expressed objective which recipients or contractors are required to make efforts to achieve. The key requirement is to make efforts. Results are, of course, important, but compliance does not turn simply on quantifiable results. In the case of the overall goals established by Subpart D, this means that a recipient is not in noncompliance with the regulation simply because it fails to meet an overall goal. Rather, if the recipient is unable to meet the goal, it must explain its inability to do so and, if directed by the Administrator, take remedial steps.

*Base for Calculating Goals*

Several commenters, principally minority contractors and some members of Congress, said that the base from which recipients' overall goals should be calculated should be the total amount of funds received from DOT by a recipient. The NPRM had proposed, by contrast, that the base amount be the funds received from DOT by the recipient and spent in contracts. The commenters reasoned that, since the statute referred to ten percent of funds authorized by the Act, basing goals on total funds received by the state rather the total funds used in contracts was closer to the language and intent of section 105(f).

However, the Department continues to believe that it is more sensible to base the goals on the amount of funds recipients use in contracts. Only funds that recipients use in contracts create contracting opportunities for minority businesses. If funds that recipients use for other purposes (e.g., purchase of right-of-way from land owners, payment of bus drivers' salaries) are included in the base from which goals are calculated, recipients would have to achieve MBE participation at a rate higher than ten percent of the funds that actually create contracting opportunities. In the Department's view, such a requirement would not be equitable. Consequently, the Department has decided to make use of the Secretary's discretionary authority under section 105(f) to exempt from the base from which overall goals are calculated Federal financial assistance not used by recipients in contracts.

Some minority contractors and associations also suggested that a ten percent minority business participation requirement be imposed with respect to each project or contract as well at the overall goal level. Adopting this suggestion would bring the program closer to a traditional "set-aside." The Department's existing regulation provides that recipients set contract goals for each of their contracts. However, these contract goals do not have to be ten percent or any other particular percentage for a given contract. A particular contract goal may be above or below the recipient's overall goal. The Department believes this flexibility is desirable in that it permits recipients to adapt contract goals to the particular circumstances of each contract. Moreover, imposing a ten percent project or contract goal requirement would probably involve the Department in a much more specific, extensive and probably burdensome program of waivers. For these reasons, the Department has decided not to adopt this suggestion.

**Requests for Goals of Less Than Ten Percent.**

*Should the Department Approve Goals of Less Than Ten Percent?*

Many minority contractors commenters were opposed to the waiver provision in the NPRM. In their view, section 105(f) requires states to use ten percent of their Federal assistance funds with minority businesses, and the Department should not approve goals of less than this level. If any waiver provision was implemented, they said, it should be used only in rare instances and applied very stringently.

As a matter of both policy and law, the Department believes it has an obligation to avoid imposing requirements that are factually beyond the capacity of recipients to achieve. In addition to being unfair, doing so would probably exacerbate the "front" problem. A process for approving goals of less than ten percent is an important way of avoiding this undesirable result. The Department's responsibility is to consider requests for goals of less then ten percent reasonably, on their merits, without making a prejudgment that they should be granted only rarely or applied very stringently.

*Should a Recipient Have to Justify a Request for a Goal of Less Then Ten Percent?*

Most nonminority contractors who commented on this issue, as well as a few recipients, recommended that recipients should not have to make any special justification in order to obtain approval for a goal of less then ten percent. Having to provide information about minority business availability and efforts being made to increase disadvantaged business participation were said to be unduly burdensome. These commenters asked that DOT, under what they called its "broad discretionary waiver authority," agree to goals of less then ten percent when recipients requested them, based on DOT's existing knowledge of each recipient's situation. Some of these comments also suggested that the Department should assume a "burden of proof" if it intended to reject any recipient's proposed goal of less than ten percent.

As mentioned in the discussion of goals, the Department's view is that achieving the objective of the statute is dependent on individual recipients setting and meeting overall goals of at least ten percent. Under the Secretary's discretionary authority, approval of lower goals may be granted in cases where the reasonable expectation for the recipient's performance is something less than ten percent. The Department believes that it is reasonable to seek information from recipients about the circumstances that would warrant the approval of a goal of less then ten percent, in the absence of which it would be difficult for the Department to make a well-informed decision. State transportation agencies and transit authorities, who are familiar with local conditions and the details of their own programs, are better situated to provide this information than FHWA or UMTA.

The Department will evaluate this information fully and fairly. However, the Department does not believe it would be useful to assume any "burden of proof" with respect to this information. A request for approval of a goal is not an adversary proceeding, to which litigation procedure terms like "burden of proof" are appropriate. The Department is interested solely in making a rational determination based on the best available information.

*Grounds for Requesting Lower Goals*

The NPRM proposed various "waiver criteria." Much of the comment about these criteria centered on statements made in the proposed rule or its

preamble concerning the weight which the Department would give to various kinds of information. For example, several state transportation agencies and other commenters said that the minority population of a jurisdiction should be given more weight concerning request for goals of less than ten percent than the NPRM indicated. Many of these same commenters also objected to the idea that the Department would give relatively little weight to state or local legal barriers that impede the participation of disadvantaged businesses.

After considering these comments, the Department has concluded that it is preferable not to establish, as a matter of regulation, the weights to which different kinds of information should be entitled. Doing so could cause the Department to appear to have prejudged the merit of certain grounds for lower goals that recipients have requested. The Department believes strongly that each request for a goal of less than ten percent should be considered on its individual merits, in light of the totality of circumstances relevant to that request. Consequently, while the final rule requests information with respect to such matters as legal barriers, minority participation, outreach efforts, etc., the final rule does not prescribe the weight which the Department is required to give to any of these factors or any other information recipients submit.

*Who Should Make the Decision?*

Many minority contractors suggested that the Secretary, rather than the FHWA or UMTA Administrator, should make the decision or whether to approve a goal of less than ten percent. This request seemed to be based on the ground that the statute says "except to the extent that *the Secretary* * * *." In other words, these commenters said that the statute prescribed that the Secretary personally has this responsibility. However, most statutes affecting the Department of Transportation provide that "the Secretary" shall carry out various duties and functions. This common statutory usage does not preclude the delegation of functions by Secretary to other responsible officials of the Department. Indeed, most highway or transit program functions are delegated by the Secretary to the FHWA or UMTA Administrator. Delegation of goal-approving responsibility under the rule is consistent with normal program delegations. In addition, this delegation places the decisionmaking authority with the offices closest to and most familiar with the program circumstances involved.

*Procedures*

Commenters raised two major procedural issues. First, several commenters (mostly minority contractors and some members of Congress) suggested that requests for goals lower than ten percent should be made at some point during the fiscal year to which the goals apply rather than at the beginning of fiscal year, as the NPRM suggested. The rationale for this suggestion was that, if recipients begin the year knowing they have a ten percent goal and could seek a waiver of that goal only after some months of the fiscal year had passed, recipients would have an additional incentive to increase their disadvantaged business participation efforts so that they could amply justify a waiver request.

The Department has not adopted this suggestion. In the Department's view, an overall goal is a statement of the reasonable expection for the recipient's future performance. Establishment of a goal is not a punishment or a reward for a recipient; it is simply a statement about the best performance that it is realistic to expect. Consequently, it makes the most sense to determine this expectation before the beginning of the period to which it applies. This permits all parties concerned to have firmly in mind what recipient's goal is, without the potentially disruptive possibility of a major mid-course correction. Moreover, providing that requests for goals of less than ten percent would be submitted in the middle of fiscal year could cause administrative problems for the Department and recipients.

For these reasons, the Department has decided that requests for goals of less than ten percent will be made prior to the beginning of the fiscal year to which the goals pertain. This is consistent with the procedural recipients have followed under the existing regulations for submitting overall goals, and it also will not require recipients to change their current timetables for determining and submitting goals.

The second procedural issue raised by recipients was that requiring a separate waiver request was burdensome. That is, if recipients have to submit their requested goal and have to make a separate submission for a waiver, they will have more steps to take than is necessary or desirable. In response to this comment, the Department has decided to combine the two steps into one. Sixty days prior to the beginning of the next fiscal year, the recipient will submit its overall goal to the Department for approval. If that overall goal is at least ten percent, the recipient will simply follow the submission procedure of the existing regulation. If the recipient requests a goal of less than ten percent, however, it will, in addition, have to submit a justification for its request and the other information set forth in § 23.65 of the final rule. While the information the recipient would have to submit under this system is about the same that it would have to submit in a separate waiver request, the Department is hopeful that the combined goal requests/justification mechanism will work more smoothly administratively.

*Public Participation*

The Department's notice of proposed rulemaking asked several questions on the subject of public participation with respect to requests for goal of less than ten percent. The questions asked whether there should be participation, from whom participation should be sought, and what form the participation should take.

Public participation was the subject of more comment than any other single issue raised in the rulemaking. A very large number of minority contractors and their supporters urged that the Department adopt a public participation mechanism. The most important reason cited by these commenters was their view that the Department would not have complete information on the availability of minority contractors and the efficacy of the efforts recipients were making to improve minority business participation if the Department received information only from the recipients who were requesting lower goals. The minority community or minority contractor community, these commenters said, have direct information on these matters that is relevant to the Department's decisions on requests for lower goals. The comments requesting a public participation mechanism usually suggested that input be obtained from designated regional, local, or community groups, or minority contractor groups.

Several recipients and a few nonminority contractors were opposed to having a public participation mechanism. The most important reason these commenters advanced was that public participation mechanisms can be burdensome and time-consuming. The Department believes that it is important for both recipients and the Department to have the advantage of the experience of minority community groups, minority contractors' groups, and other interested parties with respect to the availability of minority contractors and the efforts recipients are making to improve disadvantaged business participation. The Department is also conscious,

however, of the need to avoid elaborate participation mechanisms that can be overly time-consuming and burdensome.

In order to strike a balance between these concerns, the Department has decided to require recipients requesting a goal of less than ten percent to consult with relevant parties, such as minority and general contractors associations, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged businesses or the adequacy of recipients efforts to increase disadvantaged business participation. The consultation procedure is described in section 23.69 of the rule and section-by-section analysis. The Department will take the views and information provided by those parties consulted by recipients into consideration in making decisions on whether to grant goals of less than ten percent.

**Certification and Eligibility**

The NPRM did not propose to make any changes with respect to the means by which recipients certify the eligibility of contractors. Because the definition of a firm eligible for certification has changed somewhat, the substance of some certification decisions may be different. However, the basic requirement the recipients certify the eligibility of each recipient have the means by which the recipient carry outs the certification have not changed.

A substantial number of minority contractors and their Congressional supporters, as well as a few recipients, recommended that there be "reciprocity" among recipients with respect to certifications. That is one recipient would have to accept another recipient's certification of a firm as an eligible disadvantaged business. The rationale for this suggestion is that, in the absence of a reciprocity requirement, disadvantaged firms would have to seek certification separately from each recipient for which they want to work. Doing so takes time and imposes administrative burdens on the firm seeking certification.

The Department believes that a countervailing interest is more important, however. If each recipient must accept a certification granted by any other recipient on "full faith and credit," as the reciprocity suggestion indicates, it is likely that fronts and other firms of marginal eligibility would seek to be certified by those recipients with the least effective programs for screening out ineligible businesses. These firms could then take their certifications to other recipients, who would not have the authority to deny them eligibility for their own DOT-assisted programs. This kind of "forum-shopping" is not consistent with the strong emphasis of the Department of Transportation on limiting participation in the program established by this regulation to businesses which are genuinely eligible. However, the Department urges recipients to use their existing authority under 49 CFR Part 23 to accept the certification of firms by other recipients in whose certification decisions they have confidence. In addition, it would be useful for recipients in a given jurisdiction or geographic area to explore setting up a certification consortium that would process eligibility determinations for all its members.

**Compliance and Enforcement**

There appeared to be a misunderstanding on the part of some commenters concerning the kinds of recipient behavior that could lead to a finding of noncompliance under the proposed rule. A number of commenters appeared to be concerned that failure to meet an overall goal, in and of itself, constituted noncompliance with the regulation and made the recipient subject to funding sanctions. Most commenters who believed that this was the case objected.

The proposed regulation, however, did not provide that the mere failure to meet an overall goal would be regarded as noncompliance or grounds for imposing sanctions. The NPRM proposed only three situations in which a recipient would be regarded as out of compliance with Subpart D. Two of the situations do not differ significantly from the grounds on which recipients could fail to comply with existing regulation. Under the proposed Subpart D, a recipient could be in noncompliance if it failed to have an approved disadvantaged program or if it failed to have an approved overall goal for disadvantaged businesses. The third ground for noncompliance was new. Under the NPRM, if a recipient failed to meet its overall goal, could not satisfactorily explain the failure as being beyond its control, and then failed or refused to take additional steps ordered by the FHWA or UMTA Administrator to improve its disadvantaged business participation, the recipient would be in noncompliance. These same grounds for noncompliance are used in the final rule.

Some commenters appeared to object to making any provision for sanctions, believing that the sanctions were overly harsh. From the Department's point of view, the obligation to comply with the requirements of Subpart D is no different from the obligation to comply with any of the other conditions imposed by statute and regulation for the provision of Federal financial assistance. Indeed, the particular sanction authorities cited in Subpart D, such as 23 CFR 1.36, are precisely the same authorities that are used with respect to most other failures to comply with conditions on Federal financial assistance.

The NPRM proposed that, if a recipient was failing to meet its approved overall goal, it could avoid the necessity for taking additional remedial action if it explained, to the Administrator's satisfaction, that its failure to meet the goal was for reasons beyond the recipient's control. As examples of situations beyond the recipient's control, the NPRM cited such circumstances as floods or environmental lawsuits that delayed work on projects on which the recipients had expected to obtain substantial disadvantaged business participation. A few state transportation agencies suggested that circumstances beyond the control of the recipient should be understood somewhat more broadly. They pointed out, correctly, that under the Department's regulation, recipients may award contracts to contractors who do not meet contract goals if those contractors can demonstrate they have made good faith efforts to do so. Cumulatively, the effect of awarding contracts such contractor is likely to be that the recipient would fall short of its overall goal.

The Department believes that, consistent with the logic of the existing regulation, the award of contracts to contractors who demonstrate good faith efforts to meet contract goals, but do not meet the goals, should be taken into account in determining whether the recipient's failure to meet its overall goal was beyond the recipient's control. In taking this factor into account, FHWA and UMTA will consider not only the fact that the contracts have been awarded under these circumstances but also the adequacy of the recipient's scrutiny of contractors' good faith efforts and the adequacy of recipients' efforts to increase the availability of disadvantaged businesses to contractors through outreach, technical assistance, removal of barriers to participation, etc.

The NPRM mentioned the use of set-asides as an example of one remedial step that the FHWA or UMTA Administrator might direct a recipient to take. This suggestion drew objections from a substantial number of recipients, who argued that the use of set-asides was contrary to state or local law. In

prescribing remedial actions for recipients to take, the Administrators of FHWA and UMTA may recommend set-asides in any appropriate situation. However, the Administrators will not require a recipient to use set-asides if set-asides are contrary to state or local law.

**Transit Vehicle Manufacturers**

There has been a long-standing problem under the Department's existing regulation concerning the handling of purchases of buses and other transit vehicles. The existing regulation does not explicitly provide how minority business requirements are to be applied to these purchases. Unlike most contracting activities, which occur in recipients' own jurisdictions and which recipients can directly control, purchases of transit vehicles are made from a few manufacturers who are located far from most of the recipients' local areas. Moreover, more than 400 UMTA recipients purchase vehicles from only a handful of manufacturers. If manufacturers have to respond to differing goals and requirements imposed by each of the UMTA recipients who purchase vehicles from them, the administrative burdens on manufacturing could be substantial. Finally, the vehicle manufacturing industry is structured differently from other kinds of business in which disadvantaged business participation typically occurs in DOT-assisted programs.

The notice of proposed rulemaking did not treat transit vehicle manufacturers differently from any other contractor to a DOT recipient. Under the NPRM, vehicle manufacturers, like any other contractor, would have to meet a contract goal established by the recipient or demonstrate that it had made a good faith effort to do. This approach, while consistent with the approach taken by the regulation for all other contractors, did not address the problem referred to above. Several commenters, both transit authorities and vehicle manufacturers, suggested either that transit vehicle purchases be exempted from the requirements of the regulation or that a special provision be included to deal with the situation of transit vehicle manufacturers.

The Department does not believe that it would be appropriate to exempt transit vehicle purchases from the regulation. Section 105(f) requires that ten percent of funds authorized by the STAA be expended with disadvantaged businesses. While the Department has used its discretionary authority to exempt some programs from this requirement, UMTA funds used for the purchase of transit vehicles are too significant to exempt.

Instead, the Department has decided to create a special provision for transit vehicle manufacturers, located in section 23.67 of the final rule. Under this provision, transit vehicle manufacturers wishing to bid on UMTA-assisted vehicle procurements would have to certify to recipients that they have an UMTA-approved overall goal. In order to permit a reasonable phase-in time for manufacturers, this requirement would not go into effect until October 1, 1983. To give manufacturers and other interested parties a chance to provide their views on the specific provisions § 23.67, the Department requests comments on this section for 30 days from the publication date of this final rule. Prior to October 1, 1983, the Department will publish either a notice responding to the comments received or, if appropriate, an amendment to § 23.67.

**Technical Amendments to § 23.41**

The NPRM proposed technical amendments to § 23.41 (a)(2)(i) and (a)(3)(ii) of the existing rule. There were no comments on these proposals and they are adopted unchanged in the final rule. Inadvertantly, the Department omitted proposing similar changes in § 23.41 (a)(2)(ii) and (a)(3)(iii). The final rule remedies this oversight. Because these changes are minor technical amendments that simply follow the statute, the Department determines that there is good cause to promulgate them as final rules without prior notice and opportunity for comment. Because we do not anticipate the receipt of useful public comment on these amendments, publishing them in final form is also consistent with the Department's Regulatory Policies and Procedures.

**Other Comments**

*Rulemaking Procedures*

The original comment closing date for the February 28 NPRM was March 21. A broad spectrum of commenters requested that this comment period be extended in order to permit additional parties to comment and to permit commenters to have more time to analyze the NPRM. The Department granted this request, and the comment period was extended to April 5.

A few commenters, primarily members of Congress, requested that the effective date of the regulation be made retroactive to January 6, the date on which section 105(f) was enacted. The Department does not believe that it would be useful to do so. The basic provisions of the regulation—establishing ten percent goals or justifying a lower goal, explaining failure to meet an approved goal, taking remedial steps ordered by the FHWA or UMTA Administrator—are all actions which can take place only in the future. Since the actual requirements imposed by the regulation are prospective, making the effective date of the regulation retroactive would have little meaning.

The notice of proposed rulemaking noted that the Department was considering making the final rule effective immediately on publication, rather than observing the usual 30-day waiting period between the day of publication and effective date. Commenters did not address this suggestion. However, the Department has decided, in order to avoid any concern about the procedural propriety of the rulemaking, that this rule should go into effect 30 days from its date of publication. Recipients should be on notice as a result of this publication, however, that the Department desires the submission of FY 1984 goals to FHWA or UMTA for approval by August 1.

*Cost and Delays*

A large number of nonminority contractors and recipients said that adopting the Department's proposed rule would result in increased costs and would also cause delays in the implementation of projects under the STAA. It was difficult for the Department to evaluate the merit of these comments because, for the most part, the assertions about costs or delays were made without any supporting evidence or argumentation. Since contracting procedures of recipients are not changed at all by this regulation, it is difficult to see any reason to believe that Subpart D would have any effect on the speed with which contracts are let and projects completed. The comments did not provide any further illumination on this point.

Some comments did suggest two possible grounds on which costs could increase. First, some commenters suggested that the regulation would increase demand for disadvantaged businesses beyond the supply of such businesses, thus "bidding up" the prices that disadvantaged businesses could charge. However, the goal establishment mechanism of the final regulation (including the provision for setting overall goals of less than ten percent where the recipient justifies them) should prevent any substantial disparity between the demand for disadvantaged businesses and their actual availability. In any event, nothing in either the

existing regulation or the new Subpart D requires a contractor, as part of its good faith efforts obligation, to pay an unreasonable price for the services of a disadvantaged business.

Some recipients expressed concern that there would be greater administrative costs to them for implementing the new Subpart D. Recipients who commented on this subject did not provide any quantification of what these extra costs may be. It is possible that recipients who do not now have active programs for outreach, technical assistance, and other forms of assistance for disadvantaged business may have to create or improve such programs, thereby devoting resources to disadvantaged business matters that they do not now devote. The Department believes that, in order to carry out requirements of section 105(f), increased efforts by some recipients may be necessary. However, we believe that the costs of these increased efforts are clearly justified in order to implement the intent of Congress for this Federally-assisted program.

**Rulemaking Process Requirements**

This rule is not a major rule as defined by Executive Order 12291. It is a significant rule under the terms of the Department of Transportation's regulatory policies and procedures. A regulatory evaluation has been prepared and is on file in the rulemaking docket. This regulation may have a signifcant economic impact on substantial numbers and small entities. For this reason, the Department has, in conjunction with its regulatory evaluation, prepared a regulatory flexibility analysis.

**List of Subjects in 49 CFR Part 23**

Minority businesses, Highways, Mass transportation.

## PART 23—[AMENDED]

For the reasons set forth in the preamble, the Department proposes to amend Title 49 of the Code of Federal Regulations, Part 23, as follows:

1. By adding a new Subpart D, to read as follows:

### Subpart D—Implementation of Section 105(f) of the Surface Transportation Assistance Act of 1982

Sec.

23.61 Purpose.
23.62 Definitions.
23.63 Applicability.
23.64 Submission of overall goals
23.65 Content of justification.
23.66 Approval of overall goals
23.67 Special provision for transit vehicle manufacturers
23.68 Compliance.
23.69 Challenge procedure.
Appendix A Section-by-Section Analysis.
Appendix B Determinations of Business Size.
Appendix C Guidance for Making Determinations of Social and Economic Disadvantage.
Appendix D Justifications for Requests for Approval of Overall Goals of Less than Ten Percent.

**Authority:** Sec. 105(f) of the Surface Transportation Assistance Act of 1982 (Pub. L. 97–424).

**§ 23.61 Purpose.**

(a) The purpose of this subpart is to implement section 105(f) of the Surface Transportation Assistance Act of 1982 (Pub. L. 97–424) so that, except to the extent the Secretary determines otherwise, not less than ten percent of the funds authorized by the Act for the programs listed in § 23.63 of this Subpart is expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.

(b) The ten percent level of participation for disadvantaged businesses established by section 105(f) will be achieved if recipients under the programs covered by this Subpart set and meet overall disadvantaged business goals of at least ten percent.

**§ 23.62 Definitions.**

The following definitions apply to this subpart. Where these definitions are inconsistent with the definitions of § 23.5 of this part, these definitions control for all other purposes under this part.

"Act" means the Surface Transportation Assistance Act of 1982 (Pub. L. 97–424).

"Disadvantaged business" means a small business concern: (a) Which is at least 51 percent owned by one or more socially and economically disadvantaged individuals, or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals; and (b) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

"Small business concern" means a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto.

"Socially and economically disadvantaged individuals" means those individuals who are citizens of the United States (or lawfully admitted permanent residents) and who are Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans and any other minorities or individuals found to be disadvantaged by the Small Business Administration pursuant to section 8(a) of the Small Business Act. Recipients shall make a rebuttable presumption that individuals in the following groups are socially and economically disadvantaged. Recipients also may determine, on a case-by-case basis, that individuals who are not a member of one of the following groups are socially and economically disadvantaged.

(a) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;

(b) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race;

(c) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;

(d) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the U.S. Trust Territories of the Pacific, and the Northern Marianas; and

(e) "Asian-Indian Americans," which includes persons whose origins are from India, Pakistan, and Bangladesh.

**§ 23.63 Applicability.**

This subpart applies to all DOT financial assistance in the following categories that recipients expend in DOT-assisted contracts:

(a) Federal-aid highway funds authorized by Title I and section 202 of Title II of the Act; and

(b) Urban mass transportation funds authorized by Title I or III of the Act or the Urban Mass Transportation Act of 1964, as amended.

**§ 23.64 Submission of overall goals.**

(a) Each recipient of funds to which this subpart applies that is required to have an MBE program under § 23.41 of this part shall establish an overall goal for the use of disadvantaged businesses.

(b) Each recipient required to establish an overall goal shall calculate it in terms of a percentage of one of the following bases, as applicable:

(1) For recipients of Federal-aid highway funds, all such funds that the recipient will expend in DOT-assisted contracts in the forthcoming fiscal year; or

(2) For recipients of urban mass transportation funds, all such funds (exclusive of funds to be expended for

purchases of transit vehicles) that the recipient will expend in DOT-assisted contracts in the forthcoming fiscal year. In appropriate cases, the UMTA Administrator may permit recipients to express overall goals as a percentage of funds for a particular grant, project, or group of grants and/or projects.

(c) Each recipient of Federal-aid highway funds or urban mass transportation funds shall submit its overall goal to FHWA or UMTA, as appropriate, for approval 60 days before the beginning of the Federal fiscal year to which the goal applies. An UMTA recipient calculating its overall goal as a percentage of funds for a particular grant, project, or group of grants or projects shall submit its overall goal to UMTA at a time determined by the UMTA Administrator.

(d) Recipients submitting a goal of ten percent or more shall submit the goal under the procedures set forth in § 23.45(g) of this part.

(e) If an FHWA or UMTA recipient requests approval of an overall goal of less than ten percent, the recipient shall take the following steps in addition to those set forth in § 23.45(g) of this Part:

(1) Submit with its request a justification including the elements set forth in § 23.65;

(2) Ensure that the request is signed, or concurred in, by the Governor of the state (in the case of a state transportation agency) or the Mayor or other elected official(s) responsible for the operation of a mass transit agency; and

(3) Consult with minority and general contractors' associations, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged businesses and the adequacy of the recipient's efforts to increase the participation of such businesses. If it appears to the Administrator that the recipient has failed to consult with a relevant person or organization, the Administrator may direct the recipient to consult with that person or organization.

**§ 23.65 Content of justification.**

An FHWA or UMTA recipient requesting approval of an overall goal of less than ten percent shall include information on the following points in its justification. Guidance concerning this information is found in Appendix D.

(a) The recipient's efforts to locate disadvantaged businesses;

(b) The recipient's efforts to make disadvantaged businesses aware of contracting opportunities;

(c) The recipient's initiatives to encourage and develop disadvantaged businesses;

(d) Legal or other barriers impeding the participation of disadvantaged businesses at at least a ten percent level in the recipient's DOT-assisted contracts, and the recipient's efforts to overcome or mitigate the effects of these barriers;

(e) The availability of disadvantaged businesses to work on the recipient's DOT-assisted contracts;

(f) The size and other characteristics of the minority population of the recipient's jurisdiction, and the relevance of these factors to the availability or potential availability of disadvantaged businesses to work on the recipient's DOT-assisted contracts; and

(g) A summary of the views and information concerning the availability of disadvantaged businesses and the adequacy of the recipient's efforts to increase the participation of such businesses provided by the persons and organizations consulted by the recipient under § 23.64(f)(3).

**§ 23.66 Approval and disapproval of overall goals.**

(a) The Administrator reviews and approves any overall goal of ten percent or more submitted by a recipient as provided in § 23.45(g) of this Part.

(b) The Administrator of the concerned Departmental element approves a requested goal of less than ten percent if he or she determines, on the basis of the recipient's justification and any other information available to the Administrator, that

(1) The recipient is making all appropriate efforts to increase disadvantaged business participation in its DOT-assisted contracts to a ten percent level; and

(2) Despite the recipient's efforts, the recipient's requested goal represents a reasonable expectation for the participation of disadvantaged businesses in its DOT-assisted contracts, given the availability of disadvantaged businesses to work on these contracts.

(c) Before approving or disapproving a requested goal of less than ten percent, the Administrator provides the Director of the DOT Office of Small and Disadvantaged Business Utilization with an opportunity to review and comment on the request.

(d) If the Administrator does not approve the goal the recipient has requested, the Administrator, after consulting with the recipient, establishes an adjusted overall goal. The adjusted overall goal represents the Administrator's determination of a reasonable expectation for the participation of disadvantaged businesses in the recipient's DOT-assisted contracts, and is based on the information provided by the recipient and/or other information available to the Administrator.

(e) The Administrator may condition the approval or establishment of any overall goal on any reasonable future action by the recipient.

**§ 23.67 Special provision for transit vehicle manufacturers.**

(a) Each UMTA recipient shall require that each transit vehicle manufacturer, as a condition of being authorized to bid on transit vehicle procurements in which UMTA funds participate, certify that it has complied with the requirements of this section. This requirement shall go into effect on October 1, 1983.

(b) Each manufacturer shall establish and submit for the UMTA Administrator's approval an annual percentage overall goal. The base from which the goal is calculated shall be the amount of UMTA financial assistance participating in transit vehicle contracts to be performed by the manufacturer during the fiscal year in question. Funds attributable to work performed outside the United States and its territories, possessions, and commonwealths shall be excluded from this base. The requirements and procedures of § 23.64 (d) and (e)(1) and sections 23.65–23.66 of this subpart shall apply to transit vehicle manufacturers as they apply to recipients.

(c) The manufacturer may make the certification called for in paragraph (a) if it has submitted the goal required by paragraph (b) and the UMTA Administrator has either approved it or not disapproved it.

**§ 23.68 Compliance.**

(a) Compliance with the requirements of this subpart is enforced through the provisions of this section, not through the provisions of Subpart E of this part.

(b) Failure of a recipient to have an approved MBE program, including an approved overall goal, as required by § 23.64 of this subpart, is noncompliance with this subpart.

(c) If a recipient fails to meet an approved overall goal, it shall have the opportunity to explain to the Administrator of the concerned Department element why the goal could not be achieved and why meeting the goal was beyond the recipient's control.

(d)(1) If the recipient does not make such an explanation, or if the Administrator determines that the

recipient's explanation does not justify the failure to meet the approved overall goal, the Administrator may direct the recipient to take appropriate remedial action. Failure to take remedial action directed by the Administrator is noncompliance with this subpart.

(2) Before the Administrator determines whether a recipient's explanation of justifies its failure to meet the approved overall goal, the Administrator gives the Director, Office of Small and Disadvantaged Business Utilization, an opportunity to review and comment on the recipient's explanation.

(1) In the event of noncompliance with this subpart by a recipient of Federal-aid highway funds, the FHWA Administrator may take any action provided for in 23 CFR 1.36.

(e)(2) In the event of noncompliance with this subpart by a recipient of funds administered by UMTA, the UMTA Administrator may take appropriate enforcement action. Such action may include the suspension or termination of Federal funds or the refusal to approve projects, grants, or contracts until deficiencies are remedied.

**§ 23.69 Challenge procedure.**

(a) Each recipient required to establish an overall goal under § 23.64 shall establish a challenge procedure consistent with this section to determine whether an individual presumed to be socially and economically disadvantaged as provided in § 23.62 is in fact socially and economically disadvantaged.

(b) The recipient's challenge procedure shall provide as follows:

(1) Any third party may challenge the socially and economically disadvantaged status of any individual (except an individual who has a current 8(a) certification from the Small Business Administration) presumed to be socially and economically disadvantaged if that individual is an owner of a firm certified by or seeking certification from the recipient as a disadvantaged business. The challenge shall be made in writing to the recipient.

(2) With its letter, the challenging party shall include all information available to it relevant to a determination of whether the challenged party is in fact socially and economically disadvantaged.

(3) The recipient shall determine, on the basis of the information provided by the challenging party, whether there is reason to believe that the challenged party is in fact not socially and disadvantaged.

(i) If the recipient determines that there is not reason to believe that the challenged party is not socially and economically disadvantaged, the recipient shall so inform the challenging party in writing. This terminates the proceeding.

(ii) If the recipient determines that there is reason to believe that the challenged party is not socially and economically disadvantaged, the recipient shall begin a proceeding as provided in paragraphs (b) (4), (5), and (6) of this paragraph.

(4) The recipient shall notify the challenged party in writing that his or her status as a socially and economically disadvantaged individual has been challenged. The notice shall identify the challenging party and summarize the grounds for the challenge. The notice shall also require the challenged party to provide to the recipient, within a reasonable time, information sufficient to permit the recipient to evaluate his or her status as a socially and economically disadvantaged individual.

(5) The recipient shall evaluate the information available to it and make a proposed determination of the social and economic disadvantage of the challenged party. The recipient shall notify both parties of this proposed determination in writing, setting forth the reasons for its proposal. The recipient shall provide an opportunity to the parties for an informal hearing, at which they can respond to this proposed determination in writing and in person.

(6) Following the informal hearing, the recipient shall make a final determination. The recipient shall inform the parties in writing of the final determination, setting forth the reasons for its decision.

(7) In making the determinations called for in paragraphs (b) (3), (5), and (6) of this paragraph, the recipient shall use the standards set forth in Appendix C to this Subpart.

(8) During the pendancy of a challenge under this section, the presumption that the challenged party is a socially and economically disadvantaged individual shall remain in effect.

(c) The final determination of the recipient under subparagraphs (b)(3)(i) and (b)(6) may be appealed to the Department by the adversely affected party to the proceeding under the procedures of § 23.55 of this Part.

**§ 23.41 [Amended]**

2. By amending § 23.41(a)(2)(i) of Title 49 of the Code of Federal Regulations to read as follows:

(a) * * *

(2) * * *

(i) Applicants for funds in excess of $250,000, exclusive of transit vehicle purchases, under sections, 3, 5, 9, 9A, 17 and 18 of the Urban Mass Transportation Act of 1964, as amended, and Federal-aid urban systems.

* * * * *

3. By amending § 23.41(a)(2)(ii) of Title 49 of the Code of Federal Regulations to read as follows:

(a) * * *

(2) * * *

(ii) Applicants for planning funds in excess of $100,000 under section 6, 8, 9 or 9A of the Urban Mass Transportation Act of 1964, as amended.

* * * * *

4. By amending § 23.41(a)(3)(ii) of Title 49 of the Code of Federal Regulations to read as follows:

(a) * * *

(3) * * *

(ii) Applicants for funds in excess of $500,000, exclusive of transit vehicle purchases, under sections 3, 5, 9, 9A, 17 and 18 of the Urban Mass Transportation Act of 1964, as amended, and Federal-aid urban systems.

* * * * *

5. By amending § 23.41(a)(3)(iii) of Title 49 of the Code of Federal Regulations to read as follows:

(a) * * *

(3) * * *

(iii) Applicants for planning funds in excess of $200,000 under section 6, 8, 9 and 9A of the Urban Mass Transportation Act of 1964, as amended.

* * * * *

Issued in Washington D.C. this 18th day of July, 1983.

Elizabeth Hanford Dole,

*Secretary of Transportation.*

**Appendix A—Section-by-Section Analysis**

This section-by-section analysis describes the provisions of the final rule. This material is normally published in the preamble to the final rule. However, the Department believes that it may be useful to recipients, contractors, and the public to publish this information in an appendix to the final regulation. As a result, this information will be available to users of the Code of Federal Regulations as well as to persons who have access to the Federal Register print of the regulation.

*Section 23.61 Purpose.*

This section states that the purpose of Subpart D is to implement section 105 (f) of the Surface Transportation Assistance Act of 1982. The rest of the section restates the text of the statute and states that the ten percent level of disadvantaged business participation established by the statute will be

achieved if recipients set and meet goals of at least ten percent. The Department of Transportation is committed to carrying out section 105(f) and achieving its objectives, and intends to enforce the obligations of the recipients and contractors under section 105(f) and 49 CFR Part 23.

*Section 23.62 Definitions.*

As used in subpart D, the word "Act" means the Surface Transportation Assistance Act of 1982. The definition of the term "disadvantaged business" in Subpart D is very similar to the definition of the term "minority business enterprise" used for other purposes in 49 CFR Part 23. A different term is employed in recognition of the fact that a slightly different set of individuals is eligible to own and control a disadvantaged business than is eligible to own and control a minority business enterprise. In either case, at least 51 percent of the business must be owned by one or more of the eligible individuals, and the firm's management and daily business operations must be controlled by one or more of the eligible individuals who own it. It is important to note that the business owners themselves must control the operations of the business. Absentee ownership, or titular ownership by an individual who does not take an active role in controlling the business, is not consistent with eligibility as a disadvantaged business under this regulation. In order to be an eligible disadvantaged business, a firm must meet the criteria of § 23.53 of this regulation and must be certified as 49 CFR Part 23 provides.

"Small business concern" is defined as a small business meeting the standards of section 3 of the Small Business Act and relevant regulations that implement it. These regulations are summarized in Appendix B to the Subpart. It should be emphasized that any business which fails to qualify under the standards as a small concern, including a firm certified by SBA under the 8(a) program, cannot be certified as a disadvantaged business, even though it is owned and controlled by socially and economically disadvantaged individuals. Since the small business status of a firm can change over the years, we recommend that recipients make a point of reviewing periodically the small business status of firms with existing certifications periodically to make sure that they still qualify.

"Socially and economically disadvantaged individuals" is the term that defines the persons eligible to own and control a disadvantaged business. The term includes the following people: First, anyone found to be socially and economically disadvantaged by SBA under the 8(a) program is regarded as socially and economically disadvantaged for the purpose of DOT-assisted programs. Second, any individual who is a member of one of the designated groups (Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and Asian Indian-Americans) is rebuttably presumed to be socially and economically disadvantaged. By "rebuttably presumed," we mean that the socially and economically disadvantaged status of any individual who is a member of one of the groups is normally assumed by the recipient. With the exception of persons whose origins are from Burma, Thailand, and Portugal, the members of these presumed groups are exactly the same persons who are considered to be minorities for purposes of the § 23.5 definition of "minority."

Individuals whose origins are from Burma, Thailand, and Portugal are not presumed to be socially and economically disadvantaged individuals for purposes of Subpart D. This means that firms owned and controlled by such individuals are eligible to be considered as MBEs for purposes of FRA, FAA, NHTSA and other DOT financial assistance programs but not as disadvantaged businesses for purposes of FHWA and UMTA programs (unless their owners are determined to be socially and economically disadvantaged on an individual basis). If SBA determines any additional groups to be presumptively socially and economically disadvantaged, these groups will become eligible for consideration as owners of disadvantaged businesses on the same basis as Black Americans, Hispanic Americans, and members of the other presumptive groups.

A recipient may, through its certification program, determine that individuals who are not members of any of the presumptive groups are socially and economically disadvantaged. On this basis, for example, nonminority women, disabled Vietnam veterans, Appalachian white males, Hasidic Jews, or any other individuals who are able to demonstrate to the recipient that they are socially and economically disadvantaged may be treated as eligible to own and control a disadvantaged business, on the same basis as a member of one of the presumptive groups. It must be emphasized that these individuals are not determined to be socially and economically disadvantaged on the basis of their group membership. Rather, the social and economic disadvantage of each must be determined on an individual, case-by-case basis. Guidance for making these determinations is found in Appendix C.

*Section 23.63 Applicability.*

This section provides that Subpart D applies to all DOT financial assistance in two categories that recipients expend "in DOT-assisted contracts." This last phrase is very important. The base from which goals are calculated is not the total amount of money which each recipient receives from FHWA or UMTA. It is the amount of money that the recipient expends in DOT-assisted contracts. Funds that the recipient does not expend in contracts (i.e., funds spent by an FHWA recipient to acquire right-of-way or pay its own employees to supervise construction; funds used by an UMTA recipient to pay salaries of bus drivers) not part of the base from which the overall goal is calculated. Only those funds to be expended by the recipient in contracts are available to create contracting opportunities for disadvantaged businesses, so only these funds comprise the base from which goals for the use of disadvantaged businesses are calculated.

The first category of program funds to which Subpart D applies is Federal-aid highway funds authorized by Title I of the Act and highway safety program funds authorized by section 202 of Title II of the Act. The second category is Urban Mass Transportation funds authorized by Title I or Title III of the Act or the Urban Mass Transportation Act of 1964, as amended. Non-STAA funds authorized by the Urban Mass Transportation Act of 1964, as amended, should be counted as part of the base for calculating UMTA goals on the same basis as funds authorized by the STAA. The Urban Mass Transportation Administration is including these funds in the base in order to minimize administrative inconvenience resulting from the joint use of funds authorized by different statutes. Otherwise, two different procedures would have to be used, often with respect to the same grant or project. UMTA takes this action under the authority of section 19 of the Urban Mass Transportation Act 1964, as amended.

*Section 23.64 Submission of Overall Goals.*

This section concerns the procedures for submission of overall goals to be used by recipients of funds covered by this Subpart. Paragraph (a) is intended to avoid the imposition of new administrative burdens on recipients of

relatively low amounts of DOT financial assistance. This paragraph provides that only those recipients who are required to have MBE programs under 49 CFR Part 23 must comply with the goal setting requirements of Subpart D. This includes all state transportation agencies who receive FHWA funds and UMTA recipients who receive at least $250,000 in UMTA capital and operating funds, exclusive of funds for transit vehicle purchases, or $100,000 in UMTA planning funds. UMTA recipients who are not required to have an MBE program by § 23.41 need not comply with the goal setting provisions of Subpart D.

Paragraph (b) describes how recipients calculate their overall goals. Recipients of FHWA funds use as the base for calculating their percentage goal all Federal-aid funds that the recipient will expend in DOT-assisted contracts in the forthcoming fiscal year. Funds authorized by section 202 of the STAA are considered to be Federal-aid highway funds for this purpose. For UMTA funds, the base is all Federal funds (exclusive of funds to be expended for transit vehicle purchases) that the recipient will expend in DOT-assisted contracts in the forthcoming fiscal year. The UMTA Administrator may, however, allow recipients to base their goals on Federal funds received for a particular grant, project, or group of grants or projects.

The Department is aware that recipients may not be aware of the exact amount of Federal funds to be received or to be used in Federally-assisted contracts in the forthcoming fiscal year. However, it is reasonable to expect that recipients will have a close enough projection so that they can determine a reasonable expectation for disadvantaged business participation expressed in percentage terms.

Paragraph (c) provides that, with the exception of UMTA recipients calculating their goals on a grant or project basis, each UMTA and FHWA recipient which must submit an overall goal is required to do so by the August 1 preceding the beginning of the fiscal year to which the goals apply. For example, goal submissions pertaining to fiscal year 1985 are due August 1, 1984. In the case of Fiscal Year 1984, DOT expects recipients to submit their overall goals for approval as close to August 1 as possible.

Paragraph (d) provides that, if the recipient is submitting a goal of ten percent or more, the recipient simply submits the goal under the procedures of § 23.45(g) of this part, exactly in the manner that goals have been required to be submitted under the existing regulation.

Paragraph (e) concerns the situation in which a recipient is requesting approval of an overall goal of less than ten percent. Such a recipient is required to comply with the steps set forth in § 23.45(g). However, it is required to take three additional steps. First, it must submit a justification for its request containing the information listed in § 23.65.

Second, it must ensure that the request is signed or concurred in by the Governor of the state (in the case of a state transportation agency) or the Mayor or other elected official responsible for the operation of a mass transit agency. If the official responsible for the operation of a mass transit agency is not a Mayor, another appropriate elected official or officials should provide the signature or concurrence (e.g., a County Executive, the Chairman of a Board of Directors for a transit authority consisting of elected officials, etc.). The reason for this requirement is to ensure that a request for a goal of less than ten percent has the backing of the responsible elected official. This should help to prevent frivolous requests or requests based solely on the views of the non-elected staff of a state or local agency. It is also intended to protect the Department from becoming involved in a disagreement between, for example, a state transportation agency and a governor over disadvantaged business policy. It will also signal to the Department that a request for a lower goal has the backing of the highest responsible elected official involved with the jurisdiction.

The third requirement is that, before making a request for a goal of less than ten percent, the recipient must consult with minority and general contracting associations, community organizations (particularly minority community organizations) and other officials or organizations which can be expected to have information concerning the availability of disadvantaged businesses and the adequacy of recipients' efforts to increase the participation of such businesses. This consultation need not involve a formal public comment period. However, it should involve contact between responsible official(s) of the recipient and representatives of the organizations consulted, which should also have the opportunity to provide written information.

The provision is based on the belief that the organizations consulted are likely to be in a position to give the recipient useful information concerning the availability of disadvantaged businesses and the effectiveness of and problems with the recipient's efforts to increase disadvantaged business participation. The information sought in the consultation is intended to include the views of the consulted parties on the points listed in paragraph (a)—(f) of § 23.65. Such information is important to the recipient in formulating a request for a goal of less than ten percent, the Department in evaluating such a request, and to both the recipient and the Department in attempting to determine what additional steps would be appropriate to increase disadvantaged business participation in the future.

There may be some circumstances in which a recipient will have failed to consult with a party whose information could be very useful to the formulation and evaluation of a request for a goal less than ten percent. If the Administrator becomes aware of such a case, the Administrator has the discretion to tell the recipient to go back and consult with that party. Pending this further consultation, the Administrator would not approve the request for a goal of less than ten percent.

*Section 23.65 Content of Justification.*

Section 23.65 lists the types of information that a recipient seeking a goal of less than ten percent must provide to the Administrator. The purpose of this information is to enable the Department to make an informed determination of what the reasonable expection for the recipient's disadvantaged business participation level is for the forthcoming fiscal year. These items of information are discussed in greater detail in Appendix D. In the absence of a justification, the FHWA and UMTA Administrators will not be able to consider a request for a goal of less than ten percent.

*Section 23.66 Approval and Disapproval of Overall Goals.*

Paragraph (a) of this section concerns the situation in which a recipient submits for approval an overall goal of ten percent or more. In response to such a request, the Administrator follows the review and approval procedure provided in § 23.45(g) of the existing rule. The FHWA and UMTA Administrators will review and approve goals submitted under this paragraph in the same manner and in accordance with the same policies as they have reviewed and approved overall goals under the existing 49 CFR Part 23.

Paragraph (b) concerns a situation in which a recipient has requested approval of a goal of less than ten

percent. In order to approve the goal the recipient has requested, the Administrator must make two determinations. First, the Administrator must determine that the recipient is making all appropriate efforts to increase disadvantaged participation on its DOT-assisted contracts to at least a ten percent level. Second, the Administrator must determine that, despite the recipient's efforts, the goal requested by the recipient is the reasonable expectation, short of ten percent, for the participation of disadvantaged businesses in its DOT-assisted contracts, given the availability of disadvantaged businesses to work on these contracts.

Both of these determinations are very important. The concept of a goal as the reasonable expectation for the recipient's performance recognizes the possibility that there may be limits, related to the availability of disadvantaged businesses, that prevent the attainment of a ten percent goal. Before granting a request for a goal below ten percent, the Administrator must determine that such a limit does in fact exist. However, the idea of a reasonable expectation also assumes that the recipient is doing everything it can to increase disadvantaged business participation, both by seeking to increase the availability of disadvantaged businesses and seeking to increase the ability of available disadvantages businesses to work on its contracts. If the recipient is not taking all appropriate steps to increase disadvantaged business participation, then the goal it has requested is not its reasonable expectation for disadvantaged business participation.

If the Administrator does not approve the goal the recipient has requested, the Administrator, after consulting with the recipient, establishes an adjusted overall goal, which represents his or her determination of the reasonable expectation for recipient's disadvantaged business participation. This adjusted overall goal is on information provided by the recipient or any other information available to the Administrator from other sources, including input from interested groups and the past performance of the recipient or other recipients whose situation is analogous to that of the recipient in question. In approving either the goal requested by the recipient or in establishing an adjusted overall goal, the Administrator may always condition the approval or establishment of an overall goal on any reasonable future action by the recipient.

*Section 23.67 Special Provision for Transit Vehicle Manufacturers.*

This section addresses the special situation of the purchase of transit vehicles by UMTA recipients. The intent of this section is to provide a simplified method by which transit vehicle manufacturers and UMTA recipients can meet disadvantaged business obligations. The Department does not directly regulate transit vehicle manufacturers, since they are not the recipients of Federal financial assistance from UMTA. Rather, they are contractors to UMTA recipients. Consequently, paragraph (a) imposes the basic obligation of this section on UMTA recipients themselves.

Paragraph (a) is a requirement that UMTA recipients condition the authority of manufacturers to bid on UMTA-assisted transit vehicle procurements on a certification by the manufacturer that it has complied with the other provisions of this section. In order to permit manufacturers reasonable start-up time, and to avoid disruption of the whole procurement process, this requirement does not go into effect until October 1, 1983.

Paragraph (b) requires that, in order to make this certification, manufacturers have UMTA-approved overall goal. The base for calculating these goals is the amount of UMTA financial assistance participating in transit vehicle contracts to be performed by the manufacturer during the fiscal year in question. The Department is aware that UMTA recipients order some vehicles from foreign manufacturers and that the vehicles produced by domestic manufacturers use foreign components in some cases. The Department's regulation does not, of course, have extraterritorial application. Consequently, the manufacturer may exclude from the base from which the goal is calculated the value of the work performed abroad. For example, suppose an UMTA recipient buys a bus from a Canadian manufacturer for $100,000. Fifty percent of the work on the bus is performed in Canada. In this case, the amount of funds contributing toward the base from which the manufacturer's goal is calculated is $40,000 (i.e., eighty percent of the $50,000 of the value of the bus attributable to work performed in the United States).

In submitting an overall goal for the UMTA Administrator's approval, the manufacturer is required to follow the same procedures as recipients with respect to timing, justification of goals, etc. The Administrator follows the same criteria and has the same authority with respect to approval and conditioning of recipient's overall goals as he or she does with respect to recipient's goals. The UMTA Administrator may issue additional guidance with respect to procedures for the submission of overall goals and the content or justification of overall goals that take into account special circumstances of transit vehicle manufacturers, if this appears appropriate.

Paragraph (c) provides that the manufacturer may make the certification to recipients required by paragraph (a) if it has submitted the goals provided for by this section and the UMTA Administrator has either approved them or not disapproved them. This provision is intended to prevent delays in transit vehicle procurements.

*Section 23.68 Compliance.*

Paragraph (a) points out that compliance with Subpart D, as distinguished from compliance with other portions of the regulation, is enforced through § 23.68 rather than through Subpart E of the regulation. For example, a recipient's failure to have an approved overall goal as required by Subpart D would be treated under § 23.68. A complaint of discrimination against a recipient by a particular disadvantaged business would be handled under the procedures of Subpart E. Paragraphs (b) and (d)(1) list the three circumstances in which a recipient may find itself in noncompliance with Subpart D. These are the only three circumstances in which a recipient may be found in noncompliance with Subpart D. While a recipient may be in noncompliance with 49 CFR Part 23 for other reasons, these other types of noncompliance are handled through the procedures of Subpart E.

Paragraph (b) names the first two situations in which a recipient may be found in noncompliance with Subpart D. First, the recipient can be in noncompliance by failing to have an approved overall goal as required by § 23.64. This includes not only the situation in which the recipient does not submit a goal to the Department for approval, but also situations in which a recipient does not accept an adjusted overall goal established by the Administrator or fails or refuses to carry out conditions established by the Administrator under § 23.66(e).

Second, a recipient may be in noncompliance if it does not have an approved disadvantaged business program. Subpart D does not, in itself, require the creation of such a program. However, such a program, as prescribed by other provisions of 49 CFR Part 23, is

essential if a recipient is to comply with the disadvantaged business participation requirements of Subpart D. Consequently, the failure to have a program, or failure to have a program which fully meets the requirements of 49 CFR Part 23, is noncompliance with Subpart D.

For example, 49 CFR Part 23 requires that, before a recipient awards a contract, it ensure that the apparent successful bidder has met the contract goal or has demonstrated good faith efforts to do so. If a recipiet's program does not provide for making this determination before the award of contract, but instead provides for checking the disadvantaged business participation efforts of the contractor only after the award of the contract, the recipient has a program that does not conform to 49 CFR Part 23. The recipient may therefore be found in noncompliance with Subpart D.

Paragraphs (c) and (d)(1) concern the procedure that recipients and the Department must follow when a recipient is falling or has fallen short of its approved overall goal. The goal-setting process is intended to determine, in advance, the reasonable expectation for the recipient's disadvantaged business participation. These paragraphs are intended to provide for the situation in which the recipient's performance does not meet this expectation. At any time the Administrator requests it, or at the recipient's own initiative, the recipient would make an explanation to the Administrator concerning why the goal could not be achieved. This explanation, if it is to be satisfactory to the Administrator, must demonstrate that recipient's failure to meet the goal is for reasons beyond the recipient's control.

For example, if the recipient expected substantial disadvantaged business participation in a major project, and the project was postponed by litigation or a natural disaster, the recipient could make a case that its failure to meet the goal was attributable to factors beyond its control. A situation that might arise more frequently concerns the failure of contractors to meet contract goals. Under the Department's regulation, recipients may award contracts to contractors who do not meet contract goals if these contractors demonstrate to the recipient that they have made good faith efforts to do so. It is conceivable that a recipient would have set contract goals commensurate with its overall goal, would have given appropriate scrutiny to the claims of contractors that they made unsuccessful but good faith efforts to meet these contract goals, and awarded contracts to contractors who did not meet contract goals in a number of instances. Collectively, these contract awards would cause the recipient to fall below its overall goal.

The Administrator may take circumstances of this kind into account in determining whether a recipient's failure to meet its overall goal was because of factors beyond the recipient's control. In doing so, however, the Administrator also would consider the degree of scrutiny by the recipients of contractors' claims of unsuccessful good faith efforts and the efforts the recipient made in order to make up for shortfalls in particular contracts and prevent such shortfalls in other contracts.

If the recipient's explanation that factors beyond its control prevented achievement of the overall goal is determined by the Administrator to justify the failure to reach the goal, the matter is closed. If the recipient does not provide an explanation or if the Administrator determines that the recipient's explanation is not adequate, the Administrator may take the additional step of directing the recipient to take appropriate remedial action. Remedial action includes prospective steps to improve disadvantaged business participation, such as additional outreach, assistance to disadvantaged businesses or, where not inconsistent with state or local law, the use of set-asides. In order to take the remedial steps which the Administrator prescribes, the recipient may have to devote additional resources to the task.

Failure or refusal by the recipient to take these remedial steps is the third form of noncompliance with Subpart D. The Department wants to make it very clear that failure to meet an overall goal, as such, does not constitute noncompliance with Subpart D. However, if the recipient fails to meet the goal, does not satisfactorily explain its failure to meet the goal as being beyond its control, and then fails or refuses to take remedial steps prescribed by the Administrator, it would be in noncompliance.

Paragraph (e) sets forth the sources of sanctions for recipient noncompliance under Subpart D. These sanctions are the same measures that are available to the UMTA or FHWA Administrator with respect to the failure of a recipient to carry out any condition of receiving Federal financial assistance.

*Section 23.69 Challenge Procedure.*

The proposal in the NPRM to make the presumption of social and economic disadvantage rebuttable caused some confusion among recipients who commented. They asked whether this meant that they had to investigate the social and economic status of each business owner that sought certification for programs covered by Subpart D. They also asked by what criteria, and through what procedure, the rebuttable presumption would be applied.

This section is intended to answer these questions. First, the basic meaning of a presumption of social and economic disadvantage is that the recipient *assumes* that a member of the designated groups is socially and economically disadvantaged. In making certification decisions, the recipient relies on this presumption, and does not investigate the social and economic status of individuals who fall into one of the presumptive groups.

However, saying that the presumption is rebuttable means that a third party may challenge the actual social and/or economic disadvantage of a business owner who has received or is seeking certification for his firm from the recipient. The procedures for making such a challenge are spelled out in this section. They are set forth in detail in § 23.69 and are basically self-explanatory. Two points deserve emphasis. First, the procedures are intended to be informal. Recipients are not required to establish elaborate court-like tribunals, use strict rules of evidence, etc. Second, while a challenge is in progress, the presumption of social and economic disadvantage remains in effect. Therefore, if a firm has been certified, and the social and economic disadvantage of its owner is under challenge, the firm continues to be certified and eligible to be considered a disadvantaged business for purposes of the recipient's DOT-assisted contracting activities.

*Amendments to § 23.41(a)*

The NPRM proposed to make technical amendments to § 23.41(a)(2)(i) and § 23.41(a)(3)(ii). These amendments added additional UMTA funding sources (e.g. Section 9A) to the list of sources from which funds would contribute toward the threshold amounts for determining whether UMTA recipients had to have MBE programs. There were no comments on these proposed changes. These amendments are adopted unchanged from the NPRM. The final rule makes similar amendments to § 23.41 (a)(2)(ii) and (a)(3)(iii).

*Relationship Between Subpart D and the Remainder of 49 CFR Part 23*

In order to prevent uncertainty, the Department wishes to restate the

relationship between Subpart D and the remainder of 49 CFR Part 23. Under 49 CFR Part 23, certain recipients are required to have MBE programs. It is only these recipients who are required to follow the provisions of Subpart D. Recipients who must implement Subpart D do so only with respect to their FHWA and UMTA programs cited in Subpart D. For example, a state department of transportation receiving funds from FHWA, UMTA, NHTSA, FRA, and FAA would be required to follow the Subpart D goal procedures with respect only to its FHWA and UMTA funds. It would not be required to do so for its FAA, NHTSA, and FRA funds. The recipient would continue to follow all applicable procedures of 49 CFR Part 23 with respect to the FAA, FRA, and the NHTSA funds.

With respect to its FHWA and UMTA-assisted programs, the recipient continues to set two separate goals, both at the overall goal and contract goal level: one is for disadvantaged businesses (this *replaces* the existing rule's goal for MBEs) and the other is for women-owned businesses. In the event that a business owned and controlled by a nonminority woman is found to be disadvantaged on an individual basis, the amount of contracts to that firm could not be double-counted, any more than a contract to a firm owned by a minority woman could be double-counted under the other provisions of 49 CFR Part 23.

The contract award procedures of 49 CFR Part 23 apply to contracts under Subpart D just as they do to contracts under other provisions of 49 CFR Part 23. Recipients may award contracts to those successful bidders who meet contract goals or demonstrate that they made good faith efforts to do so.

Recipients must certify the eligibility of firms to participate under Subpart D programs just as they do with respect to programs covered by other provisions of 49 CFR Part 23. For businesses owned and controlled by members of the presumptive groups listed in the definition of socially and economically disadvantaged individuals in Subpart D, the certification process is, with one exception, exactly the same as the certification process that has existed all along under 49 CFR Part 23. The exception is that individuals with origins in Burma, Thailand, and Portugal are presumed to be socially and economically disadvantaged. They can be eligible under Subpart D only if they successfully demonstrate to the recipient that they are socially and economically disadvantaged as individuals.

However, businesses owned and controlled by individuals with origins in these countries continue to be eligible minority businesses under other provisions of 49 CFR Part 23. The result is that these firms may be certified for participation in FAA, FRA, NHTSA, or other DOT-assisted programs as before, but must make an individual showing of social and economic disadvantage in order to be regarded as eligible to participate in FHWA and UMTA programs as disadvantaged businesses. The same requirement for an individual determination of social and economic disadvantage applies to any individual who is not a member of one of the presumptive groups, such as a nonminority woman, a handicapped person, etc.

*Decertification Procedures*

Substantial concern has been expressed about the infiltration of DOT-assisted programs by "fronts"—businesses that claim to be owned and controlled by minorities, women, or other disadvantaged individuals, but which, in fact are ineligible for participation is DOT-assisted programs as MBEs, WBEs or disadvantaged businesses.

The Department wants to take this opportunity to reemphasize the importance of scrutiny of all firms seeking to participate in DOT-assisted programs. We believe strongly that recipients should take prompt action to ensure that only firms meeting the eligibility criteria of 49 CFR Part 23 participate as MBEs, WBEs, or disadvantaged businesses in DOT-assisted programs. This means not only that recipients should carefully check the eligibility of firms applying for certification for the first time, but also that they should review the eligibility of firms with existing certifications in order to ensure that they are still eligible. A firm's circumstances, organization, ownership or control can change over time, resulting in a once-eligible firm becoming ineligible. A second look at a firm previously found to be eligible may reveal factors leading, on renewed consideration, to a determination that it is ineligible.

49 CFR Part 23 does not, as presently drafted, prescribe any particular procedures for actions by recipients to remove the eligiblity of firms that they have previously treated as eligible. When a recipient comes to believe that a firm with a current certification is not eligible, the Department recommends that the recipients take certain steps before removing the firm's eligibility. The recipient should inform the firm in writing of its concerns about the firm's eligibility, give the firm an opportunity to respond to these concerns in person and in writing, and provide the firm a written explanation of the reasons for the recipient's final decision. This process may be brief and informal. For example, the firm's opportunity to respond to the recipient's concerns need not involve a formal court-type hearing. However, in the interest of ensuring that eligibility removal decisions are made fairly, these steps should take place before a firm's eligibility is removed. The Department believes that such a procedure in so-called "decertification" cases will make the procedure fairer and better administratively, as well as help prevent unnecessary procedural litigation. Procedures of this kind are not a regulatory requirement, but the Department believes that, as a matter of policy, that they are advisable for recipients to use.

Once a recipient has made a final decision on certification, that determination goes into effect immediately with respect to the recipient's DOT-assisted contracts (see § 23.53(g)). If a firm that has been denied certification or has been decertified appeals the recipient's action to the Department under § 23.55, or if a third party challenges the recipient's decision to certify the firm under § 23.55, the recipient's action remains in effect until and unless the Department makes a determination under § 23.55 reversing the recipient's action. The recipient's action is not stayed during the pendancy of a § 23.55 appeal.

For example, if a recipient has decertified a firm and the firm appeals the decertification to DOT, the firm remains ineligible for consideration as a disadvantaged business with respect to the recipient's DOT-assisted programs until and unless the Department finds that the firm is eligible. Likewise, if the recipient has certified the firm as eligible, the firm remains eligible while the Department's consideration of a third party's challenge to its eligiblity is pending. The Department has followed this policy and interpretation of its regulations consistently under the existing rule, and we will continue to do so with respect to Subpart D.

There is only one exception to this rule. Section 23.55(c) provides that, in appropriate cases, the Secretary may deny the firm in question eligiblity to participate as an MBE (or disadvantaged business) on DOT-assisted contracts let during the pendacy of the investigation, after providing the firm an opportunity to show cause by written statement to the Secretay why this should not occur. This

paragraph is intended, and has been consistently interpreted and applied by the Department, to cover only a situation in which the recipient has decided that a firm is eligible and a third party has challenged the correctness of the recipient's determination. As a matter of policy, the Department believes that the award of contracts to ineligible firms is a very serious blow to the integrity of the Department's program. Consequently, if it appears to the Department that a challenged firm's eligibility is in serious doubt, the Department, under § 23.55(c), can administratively "enjoin" the firm's participation pending a final determination on the merits of the challenge to its certification. This provision does not, however, authorize the Department to maintain a firm's certification in effect pending the outcome of the § 23.55 Appeal, when the recipient has refused to certify or has decertified the firm.

## Appendix B—Determinations of Business Size

In determining the eligibility of businesses for purposes of 49 CFR Part 23, recipients must determine whether or not a business is a small business concern as defined by Section 3 of the Small Business Act. If a business is not a small business concern according to these standards, then it is not eligible to participate as an MBE, WBE, or disadvantaged business under 49 CFR Part 23. This is true even though the business may be owned and controlled by minorities, women, or socially and economically disadvantaged individuals and is eligible in all other respects. Even a firm certified by the SBA under the 8(a) program is not eligible under this regulation if it is not a small business.

In determining whether a business is a small business concern, recipients should apply the standards established by the Small Business Administration in 13 CFR Part 121. In particular, recipients should refer to § 121.3–8 (Definition of Small Business for Government Procurement) and § 121.3–12 (Definition of Small Business for Government Subcontractors). This Appendix lists the most frequent applications of these sections to the kinds of contracting done by FHWA and UMTA recipients. For information on types of businesses not listed in this Appendix (e.g., manufacturers), recipients should consult § 121.3–8 and the Appendices to 13 CFR Part 121.

Recipients should apply the following size standards:

1. *Subcontracts of $10,000 or less:* A business is small if, including its affiliates, it does not have more than 500 employees.

2. *Subcontracts over $10,000 and prime contracts:*

A business is regarded as small if it meets the following criteria:

(a) *Construction.*

(1) General Construction (in which less than 75 percent of the work falls into one of the categories in paragraph (2)): The firm's average annual receipts for the three preceding fiscal years do not exceed $12 million.

(2) Special trade contractors:

| Type of firm | Maximum average annual receipts in preceding 3 fiscal years |
|---|---|
| Plumbing, heating (except electric) and air-conditioning | $5 million for all types of contractors on this list |
| Painting, paperhanging, and decorating | |
| Masonry, stone setting, and other stonework | |
| Plastering, drywall, acoustical and insulating work | |
| Terrazzo, tile, marble and mosaic work | |
| Carpentering and flooring | |
| Floor laying and other floorwork | |
| Roofing and sheet metal work | |
| Concrete work | |
| Water well drilling | |
| Structural steel erection | |
| Glass and glazing work | |
| Excavating and foundation work | |
| Wrecking and demolition work | |
| Installation or erection of buildings equipment | |
| Special trade contractors, not elsewhere classified | |

(b) *Suppliers of manufactured goods:* The firm, including its affiliates, must not have more than 500 employees.

(c) *Service contractors:*

| Type of firm | Maximum average annual receipts in preceding 3 fiscal years (in millions of dollars) |
|---|---|
| Engineering | $7.5 |
| Janitorial and custodial | 4.5 |
| Computer programming or data processing | 4 |
| Computer Maintenance | 7 |
| Protective Services | 4.5 |
| Others not mentioned in 13 CFR 121.3–8(e) | 2 |

## Appendix C—Guidance for Making Determinations of Social and Economic Disadvantage

Before making any determination of social and economic disadvantage, the recipient should always determine whether a firm is a small business concern. If it is not, then the firm is not eligible to be considered a disadvantaged business, and no further determinations need be made.

Under the definition of "socially and economically disadvantaged individual" used in Subpart D of this Part, members of the named groups (Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and Asian-Indian Americans) and persons certified as socially and economically disadvantaged by the Small Business Administration (SBA) under the SBA's section 8(a) program are presumed to be both socially and economically disadvantaged. This presumption is rebuttable. This means that, as part of a challenge to the eligibility of a firm a recipient has certified under § 23.69 of this regulation, a third party may present evidence that the firm's owners are not truly socially and/or ecomonically disadvantaged, even though they are members of one of the presumptive groups. Recipients must follow the challenge procedure in § 23.69 when a challenge is made, using this Appendix for guidance in making determinations under that procedure.

Under the regulation, anyone who has been certified by SBA under its 8(a) program as socially and economically disadvantaged is automatically considered to be a socially and economically disadvantaged individual for purposes of this regulation. However, the absence of an 8(a) certification does not mean that an individual or firm is ineligible under this regulation.

Recipients should continue the existing practice of making their own judgments about whether an individual is in fact a member of one of the presumptive groups. If an individual has not maintained identification with the group to the extent that he or she is commonly recognized as a group member, it is unlikely that he or she will in fact have suffered the social disadvantage which members of the group are presumed to have experiences. If an individual has not held himself or herself out to be a member of one of the groups, has not acted as a member of a community of disadvantaged persons, and would not be identified by persons in the population at large as belonging to the disadvantaged group, the individual should be required to demonstrate social disadvantage on an individual basis.

For example, an individual could demonstrate that he had a Chinese ancestor. However, this hypothetical person has never lived in a Chinese-American community, has held himself

out to be white for driver's license or other official records purposes, has not previously claimed to be a Chinese-American, and would not be perceived by others in either the Chinese-American community or non-minority community to be a Chinese-American (or any other sort of Asian-Pacific American) by virtue of his appearance, culture, language or associations. The recipient should not regard this individual as an Asian-Pacific American.

Individuals who are not presumed to be socially and economically disadvantaged by virtue of membership in one of these groups may, nevertheless, be found to be socially and economically disadvantaged on a case-by-case basis. If an individual requests that his or her business be certified as an eligible disadvantaged business under Subpart D, the recipient, as part of its certification process, is responsible for making a determination of social and economic disadvantage.

In making determinations of social and economic disadvantage, recipients should be guided by the following standards, which have been adopted from materials prepared by the SBA.

**A. Social Disadvantage**

(1) *Elements of Social Disadvantage.* In order to determine that an individual is socially disadvantaged, the recipient must conclude that the individual meets the following standards:

(i) The individual's social disadvantage must stem from his or her color; national origin; gender; physical handicap; long-term residence in an environment isolated from the mainstream of American society; or other similar cause beyond the individual's control. The individual cannot establish social disadvantage on the basis of factors which are common to small business persons who are not socially disadvantaged. For example, because of their marginal financial status, many small businesses have difficulty obtaining credit through normal banking channels. An individual predicating a social disadvantage claim on denial of bank credit to his or her firm would have to establish that the denial was based on one or more of the listed causes, or similar causes—not simply on the individual's or the firm's marginal financial status.

(ii) The individual must demonstrate that he or she has personally suffered social disadvantage, not merely claim membership in a non-designated group which could be considered socially disadvantaged. This can be achieved, for example, by describing specific instances of discrimination which the individual has experienced, or by recounting in some detail how his or her development in the business world has been thwarted by one or more of the listed causes or similar causes. As a general rule, the more specific an explanation of how one has personally suffered social disadvantage, the more persuasive it will be. In assessing such facts, the recipient should place substantial weight on prior administrative or judicial findings of discrimination experienced by the individual. Such findings, however, are not necessarily conclusive evidence of an individual's social disadvantage; nor are they a prerequisite for establishing social disadvantage.

(iii) The individual's social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries.

(iv) The individual's social disadvantage must be chronic, longstanding, and substantial, not fleeting or insignificant. Typically, a number of incidents illustrating a person's social disadvantage, occurring over a substantial period of time, would be necessary to make a successful claim. Usually, only by demonstrating a series of obstacles which have impeded one's progress in the business world can an individual demonstrate chronic, longstanding, and substantial social disadvantage.

(v) The individual's social disadvantage must have negatively affected his or her entry into, and/or advancement in, the business world.

The closer the individual can link social disadvantage to impairment of business opportunities, the stronger the case. For example, the recipient should place little weight on annoying incidents experienced by an individual which have had little or no impact on the person's career or business development. On the other hand, the recipient should place greater weight on concrete occurrences which have tangibly disadvantaged an individual in the business world.

(2) *Evidence of Social Disadvantage.* The recipient should entertain any relevant evidence in support of an individual's claim of social disadvantage. In addition to a personal statement from the individual claiming to be socially disadvantaged, such evidence may include, but is not limited to: third party statements; copies of administrative or judicial findings of discrimination; and other documentation in support of matters discussed in the personal statement. The recipient should particularly consider and place emphasis on the following experiences of the individual, where relevant: education, employment, and business history. However, the individual may present evidence relating to other matters as well. Moreover, the attainment of a quality education or job should not absolutely disqualify the individual from being found socially disadvantaged if sufficient other evidence of social disadvantage is presented the recipient.

(i) *Education.* The recipient should consider, as evidence of an individual's social disadvantage, denial of equal access to business or professional schools; denial of equal access to curricula; exclusion from social and professional association with students and teachers; denial of educational honors; social patterns or pressures which have discouraged the individual from pursuing a professional or business education; and other similar factors.

(ii) *Employment.* The recipient should consider, as evidence of an individual's social disadvantage: discrimination in hiring; discrimination in promotions and other aspects of professional advancement; discrimination in pay and fringe benefits; discrimination in other terms and conditions of employment; retaliatory behavior by an employer; social patterns or pressures which have channelled the individual into non-professional or non-business fields; and other similar factors.

(iii) *Business History.* The recipient should consider, as evidence of an individual's social disadvantage, unequal access to credit or capital; acquisition of credit under unfavorable circumstances; discrimination in receipt (award and/or bid) of government contracts; discrimination by potential clients; exclusion from business or professional organizations; and other similar factors which have retarded the individual's business development.

**B. Economic Disadvantage**

Recipients should always make a determination of social disadvantage before proceeding to make a determination of economic disadvantage. If the recipient determines that the individual is not socially disadvantaged, it is not necessary to make the economic disadvantage determination.

As a general rule, economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities, as compared to others in the same or similar line of business and competitive market area who are not socially

disadvantaged. In determining the degree of diminished credit and capital opportunites of a socially disadvantaged individual, consideration will be given to both the disadvantaged individual and the applicant concern with which he or she is affiliated.

In considering the economic disadvantage of firms and owners, it is important for recipients to understand that they are making a comparative judgment about relative disadvantage. Obviously, someone who is destitute is not likely to be in any position to own a business. The test is not absolute deprivation, but rather disadvantage compared to business owners who are not socially disadvantaged individuals and firms owned by such individuals.

It is the responsibility of applicant firms and their owners to provide information to the recipient about their economic situation when they seek eligibility as disadvantaged businesses. Recipients are encouraged to become as knowledgeable as they can about the types of businesses with which they deal, so that they can make a reasonably informed comparison between an applicant firm and other firms in the same line of business. Recipients are not required to make a detailed, point-by-point, accountant-like comparison of the businesses involved. Recipients are expected to make a basic judgment about whether the applicant firm and its socially disadvantaged owner(s) are in a more difficult economic situation than most firms (including established firms) and owners who are not socially disadvantaged.

### Other Eligibility Considerations

It is very important for recipients to realize that making a determination of social and economic disadvantage, standing alone, does not mean that a firm is eligible. The recipient must also determine that the firm is 51 percent owned by socially and economically disadvantaged individuals and that these individuals control the firm. In making these latter determinations, recipients should continue to follow §§ 23.51–23.53 of Subpart C of 49 CFR Part 23.

If a firm or other party believes that any recipient's social and economic disadvantage determination is in error, the firm or party may make an administrative certification appeal to the Department as provided in 49 CFR 23.55.

## Appendix D—Justification for Requests for Approval of Overall Goals of Less Than Ten Percent

The purpose of a justification for a request for approval of an overall goal of less than ten percent is to explain why the goal requested by the recipient is the reasonable expectation for the participation of disadvantaged businesses in the recipient's DOT-assisted contracts. The justification has two basic elements. First, the recipient should show that it is doing as much as it can to increase disadvantaged business participation to at least a ten percent level. Second, the recipient should show that, given the availability of disadvantaged businesses, the requested goal is the reasonable expectation for the level of disadvantaged business participation that these efforts are likely to obtain.

With respect to the specific elements of the justification listed in § 23.65, the Department offers the following guidance, usually in the form of questions the answers to which will help the Department make an informed decision. It should be emphasized that this material is guidance, and is not intended to create a regulatory requirement or a mandatory list of the contents for recipient's submissions. However, it will help the Department to make expeditious and well-informed decisions if recipients provide reasonably complete and detailed information. Doing so will also facilitate suggestions by the Department on additional ways recipients can increase disadvantaged business participation.

(a) *Efforts to locate disadvantaged businesses.* What contacts has the recipient made with sources of information about disadvantaged businesses (such as minority contractors, associations, the Commerce Department's Minority Business Development Administration, DOT Office of Small and Disadvantaged Utilization (and its Program Management Centers), and other recipients' directories of disadvantaged businesses)? In what geographic areas has it sought to locate additional disadvantaged businesses? Have these or other information sources produced additional names of disadvantaged businesses potentially available to work on the recipient's DOT-assisted contract? What follow-up was done with respect to these firms?

(b) *Efforts to make disadvantaged businesses aware of contracting opportunities.* What steps does the recipient take through publications, advertising, pre-bid conferences, direct contact, putting disadvantaged businesses in touch with firms that may bid on prime contracts, and other means to let disadvantaged businesses know about specific contracting and subcontracting opportunities as they arise? (Activity of this kind by the recipient is important because, in many cases, disadvantaged businesses may not be in a position to learn of contracting opportunities through informal communications networks available to non-disadvantaged firms.)

(c) *Initiatives to encourage and develop disadvantaged businesses.* What is the recipient doing to assist the formation and growth of disadvantaged firms, by means such as training, technical assistance, financial assistance and involvement of other sources of support (such as the FHWA Supportive Services Program and other Federal, state, or local agencies and associations)? What has the recipient done to facilitate the ability of disadvantaged businesses to perform contracts (e.g., splitting a large contract or project into smaller segments that disadvantaged businesses can more readily perform)?

(d) *Legal or other barriers to disadvantaged business participation.* What specific barriers to disadvantaged business participation has the recipient identified? (Common barriers include bonding, prequalification and licensing requirements; difficulty in obtaining financing; any state or local residency requirement or preference, or any other formal or informal limitations on the area from which disadvantaged businesses are sought; and the reluctance of some members of the non-disadvantaged contracting community to use firms owned and controlled by socially and economically disadvantaged persons.) What is the recipient doing about the barriers it has identified? (Examples of efforts to overcome or mitigate the effect of these barriers include changes to or exceptions from state or local requirements as they affect disadvantaged businesses, technical or financial assistance to disadvantaged businesses to help them meet existing requirements, or cooperative efforts with financial institutions and non-minority contractors' associations.)

(e) *The availability of disadvantaged businesses.* How many disadvantaged businesses are available to perform work for the recipient on DOT-assisted contracts? The starting point for the recipient's information should be its directory or list of certified disadvantaged businesses. The number of firms in this directory may not give a complete picture, however. Disadvantaged firms in other jurisdictions, not currently certified by the recipient, may be willing and able to work on the recipient's contracts. On the other hand, firms in the directory may have limited availability (e.g., lack of

interest in the recipient's work, other commitments, limitations of the amount of work they can handle). In some cases (e.g., where a state spends a large portion of its funds on a single large project requiring very specialized contractors), the availability of work that disadvantaged firms can perform could be a limitation. The recipient, as appropriate, should discuss these factors as they affect a determination of the reasonable expectation for disadvantaged business participation in its DOT-assisted contracts.

The recipient should not only advise the Department how many disadvantaged firms exist, but also analyze the dollar volume of the recipient's work the available firms are likely to be able to perform in the fiscal year (or other period) in question.

(f) *Size and other characteristics of the recipient's jurisdiction's minority population.* What is the size of the minority population of the recipient's jurisdiction? (In some cases, not only the size but also the composition or residence pattern of the minority population may be relevant). Where relevant, what is the size of the minority population of nearby jurisdictions?

Minority population is usually not an exact index of the availability of disadvantaged businesses. In some cases, disadvantaged business participation levels for various recipients have ranged well above or below the minority population of the jurisdictions involved. In any event, recipients should tie any assertions they make on the basis of minority population to the effect they believe it has on disadvantaged business availability.

(g) *Views and information from the consultation process.* With whom has the recipient consulted and what did the consulted parties say with respect to anything in paragraph (a)–(f)? In particular, what were the views of and information provided by the disadvantaged business community concerning the availability of such firms, barriers to their participation and what is needed to overcome them, the efficacy of the recipient's efforts to increase disadvantaged business participation and what could be done to improve these efforts?

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KANSAS DEPARTMENT OF TRANSPORTATION

REQUIRED CONTRACT PROVISION

FEDERAL AID CONTRACTS

UTILIZATION OF MINORITY AND FEMALE-OWNED BUSINESSES

(49 CFR Part 23)

1. GENERAL: The specific requirements for the utilization of Disadvantaged Businesses, hereinafter called DBs, and Female-Owned Business Enterprises, hereinafter called WBEs, and Joint-Ventures which include minority or female businesses under this contract, are set forth in this Required Contract Provision and are imposed pursuant to 49 CFR Part 23, hereinafter called the regulations.

   A. Definitions:

      For the purpose of this required Contract Provision, the following words and phrases shall have the meanings ascribed to them herein unless the context in which they are used clearly requires otherwise:

      (1) a. "Disadvantaged Business" (DB) means a small business concern, as defined pursuant to Section 3 of the Small Business Act and implementing regulations, which is owned and controlled by one or more socially and economically disadvantaged individuals.

      b. "Female-Owned Business Enterprise" (WBE) means a small business concern, as defined pursuant to Section 3 of the Small Business Act and implementing regulations, which is owned and controlled by one or more women.

      (2) "Owned and Controlled" means a business:

      a. Which is at least 51 percentum (51%) owned by one or more socially and economically disadvantaged individuals or women, or, in the case of publicly owned business, at least 51 percentum (51%) of the stock of which is owned by one or more socially and economically disadvantaged individuals or women, and

      b. Whose management and daily business operations are controlled by one or more such individuals.

      (3) "Socially and Economically Disadvantaged Individuals " means a person is a citizen or lawful permanent resident of the United States, and who is a(n):

      a. Black American (a person having origins in any of the black racial groups of Africa);

b. Hispanic American (includes a person of Mexican, Puerto Rican, Cuban, Central or South America, or other Spanish culture or origin, regardless of race);

c. Native American (includes a person who is American Indian, Eskimo, Aleut, or Native Hawaiian);

d. Asian-Pacific American (includes a person whose origin is from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Phillipines, Samoa, Guam, the U. S. Trust Territories of the Pacific, or the Northern Marianas);

e. Asian-Indian American (includes a person whose origin is from India, Pakistan or Bangladesh);

f. Members of groups, or other individuals, found to be economically and socially disadvantaged by the Small Business Administration under Section 8 (a) of the Small Business Act, as amended (15 U.S.C. 637 (a)).

(4) "Joint Venture" means an association of two or more businesses to carry out a single business enterprise for profit for which purpose they combine their property, capital, efforts, skills and knowledge.

2. DB/WBE CONTRACT GOALS

A. Required DB/WBE information:

The specific DB and/or WBE or combined DB/WBE contract goals will be found in the "Project Special Provision". The bidder shall submit the following information pertaining to DB/WBE contract goals for this project, at the same time his/her bid proposal is submitted to KDOT, on the form provided in the proposal:

(1) The name of DB/WBE firms that will participate in the contract (if none, so indicate);

(2) A description of the work each named DB/WBE firm will perform (if none, so indicate);

(3) The dollar amount of participation by each named DB/WBE firm (if $0, so indicate); and

(4) Percentage of DB/WBE participation to total contract amount (if 0%, so indicate).

A PROPOSAL WILL NOT BE READ IF THE ABOVE INFORMATION IS NOT SUBMITTED ON THE FORM PROVIDED WITH THE PROPOSAL. EXCEPT AS NOTED ELSEWHERE, SUCH REQUIRED DB/WBE INFORMATION SHALL NOT BE SUBJECT TO REVISION AFTER BIDS ARE OPENED

B. Good faith determination:

(1) If the low bidder's required DB/WBE information meets or exceeds the DB/WBE contract goals in the proposal, the contract will proceed toward award. Further, there will be no immediate review by KDOT that the items in 3B of this Required Contract Provision have been fulfilled prior to the award. This does not relieve the low bidder from the requirements of 3B, but will expedite the award of the contract.

(2) If the low bidder's required DB/WBE information does not meet the DB/WBE contract goals, such bidder must submit to KDOT (Bureau of Construction and Maintenance) upon request, information outlined in 3B of the Required Contract Provision. Such information shall be submitted to KDOT within two (2) working days after such a request is made.

(3) KDOT shall review all information submitted to determine a bidders's good faith effort in meeting the DB/WBE contract goals. If other bidders have met the DB/WBE contract goals, there is a strong presumption that all contractors could have met such goals, and this will have a major bearing in determining a bidder's good faith effort.

(4) If KDOT determines that a bidder's good faith effort is insufficient, such bid shall be rejected. The above procedures will then be applied to the next lowest bidder, and other bidders if necessary, until a bidder is found who establishes good faith efforts in meeting the DB/WBE contract goals.

(5) KDOT reserves the right to reject all bids and readvertise the contract if none of the bids include a satisfactory level of DB/WBE participation at a reasonable price.

C. When projects are state or contractor tied, KDOT will construe DB/WBE contract goals as if the tied projects are one project. To check DB/WBE percentage on tied projects the following method will be used:

(1) Multiply the respective DB/WBE percentage shown in the individual contracts times the total amount bid on the individual tied contracts.

(2) Add the dollar amount as determined in (1) for the individual tied projects. This becomes the required minimum dollar amount to be subcontracted to DB/WBEs.

(3) If the total dollar amount actually subcontracted to DB/WBEs on the tied contracts is equal to or greater than the dollar amount as computed in (2) above, it will be determined the DB/WBE goals have been met.

(4) If a State of Kansas funded project is tied to a federal funded project, the DB/WBE contract goals and subcontracted work will be utilized only on the federal funded project.

3. DB/WBE CONTRACT GOAL CRITERIA

A. DB, WBE, and Joint Venture participation shall be counted toward meeting the DB/WBE contract goals pursuant to this contract as follows:

(1) Once a firm is determined to be an eligible DB/WBE in accordance with the regulations, the total dollar value of the contract awarded to the DB/WBE is counted toward the applicable contract goals.

(2) The total dollar value of a contract to a DB owned and controlled by both socially and economically disadvantaged males and non- socially and economically disadvantaged females is counted toward the goals for minorities and women, respectively, in proportion to the percentage of ownership and control of each group in business. The total dollar value of a contract with an DB owned and controlled by socially and economically disadvantaged women is counted toward either the DBs goal or the goal for WBEs, but not to both. The contractor employing the firm may choose the goal to which the contract value is applied.

(3) If a contractor forms a joint venture with a DB/WBE, the joint venture will still have to meet the DB/WBE contract goals as set with other than the firm involved in the joint venture. If a DB/WBE bids as a prime contractor on a project with DB/WBE contract goals, it must fill the subcontracting requirements with another DB/WBE subcontractor to meet the DB/WBE contract goals.

(4) A contractor may count toward its DB/WBE contract goals only expenditures to DB/WBEs that are related to a commercially useful function; i.e., when it is responsible for execution of a distinct element of the work on contract and carrying out its responsibilities by actually performing, managing, and supervising the work involved. To determine whether an DB/WBE is performing a commercially useful function, the contractor shall evaluate the amount of work subcontracted, industry practices, and other relevant factors.

(5) Consistent with normal industry practices, an DB/WBE may enter into subcontracts. If a DB/WBE contractor subcontracts a significantly greater portion of the work on the contract than would be expected on the basis of normal industry practices, the DB/WBE shall be presumed not to be performing a commercially useful function. The DB/WBE may present evidence to rebut this presumption to KDOT. KDOT's decision on the rebuttal of this presumption is subject to review by the Department of Transportation (FHWA).

(6) A contractor may count toward its WBE contract goals expenditures for materials and supplies and expenditures to manufacturers, provided that the DB/WBEs assume the actual and contractual responsibility for the provision of the materials and supplies.

a. The contractor may count its entire expenditure to a DB/WBE manufacturer (i.e., a supplier who produces goods from raw materials or substantially alters them before resale).

b. The contractor may count twenty percent (20%) of its expenditures to DB/WBE suppliers who are not manufacturers, provided that the DB/WBE supplier performs a commercially useful function in the supply process.

B. To demonstrate good faith efforts to meet DB/WBE contract goals, documentation shall be maintained. Such documentation includes, but is not limited to, the following:

(1) Attendance at pre-bid meetings, if any, scheduled by KDOT to inform DB/WBEs of subcontracting opportunities.

(2) Advertisement in general circulation, trade association, and minority-focus media of subcontracting opportunities.

(3) Written notification of DB/WBEs that their interest in the contract is solicited, in sufficient time to allow the DB/WBEs to participate effectively.

a. Whether the contractor followed up initial solicitations of interest by contracting DB/WBEs to determine with certainty whether the DB/WBEs were interested.

(4) Efforts made to select portions of the work proposed to be performed by DB/WBEs in order to increase the likelihood of achieving the goal pursuant to this contract.

(5) Efforts to negotiate with DB/WBEs for specific bids including at a minimum:

a. The names, addresses, and telephone numbers of DB/WBEs that were contacted.

b. A description of the information provided to DB/WBEs regarding the plans and specifications for portions of the work to be performed.

c. A statement of why additional agreements with DB/WBEs were not reached.

(6) Evidence of DB/WBEs which the contractor contacted but rejected as unqualified, accompanied by reasons for rejection based on a thorough investigation of such DB/WBEs' capabilities.

(7) Efforts made to assist DB/WBEs that needed assistance in obtaining bonding or insurance required by the contractor.

(8) Efforts by the contractor in utilizing the services of available minority community organizations, minority contractor groups, local, state and federal minority business assistance offices and other organizations that provide assistance in the recruitment and placement of DB/WBEs.

C. A contractor is required to make good faith efforts to substitute a DB/WBE subcontractor, who is unable to perform successfully, with another DB/WBE respectively. Any substitution of subcontractors as submitted in the Prime Contractors DB/WBE Plan must be approved by KDOT after bid opening and during contract performance in order to ensure that such substitutions are eligible DB/WBEs.

4. SEEKING DB/WBE SUBCONTRACTORS

A. The contractor shall seek DB/WBE subcontractors in the same geographic area as they seek non-DB/WBE subcontractors. If the contractor cannot meet the goals using DB/WBEs from such geographic area, the contractor, as part of its efforts to meet the DB/WBE contract goal, shall expand its search to a reasonable geographic area.

B. In accordance with the regulations, the contractor agrees as follows:

(1) To abide by the following statements and to include them in all subsequent subcontracts, agreements, and purchase orders (in excess of $10,000) exercised pursuant to this contract:

a. DB, and WBE, as defined in the regulations, shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with Federal funds under this contract.

b. DB and WBE shall have the maximum opportunity to participate in the performance of contracts and subcontracts financed in whole or in part with Federal funds provided under this contract. Accordingly, all necessary and reasonable steps shall be taken in accordance with the regulations to ensure that DB and WBE have the maximum opportunity to compete for and perform contracts. No person(s) shall be discriminated against on the basis of race, color, national origin, or sex in the award and performance of DOT assisted contracts.

(2) Failure to carry out the requirements set forth in this Required Contract Provision shall constitute a breach of contract and, after notification of the DOT (FHWA), may result in termination of this contract or such remedy as KDOT deems appropriate.

5. FOLLOW THROUGH

To ensure that all obligations under contracts awarded to DBs and WBEs are met, KDOT shall review the contractor's DB/WBE involvement efforts during the performance of the contract. The contractor shall bring to the attention of KDOT any situation in which regularly scheduled progress payments are not made to DB/WBE subcontractors.

REQUIRED CONTRACT PROVISIONS

PROJECT SPECIAL PROVISION

This proposal will not be read due to any one or more of the following causes:

1. Failure to submit a unit price for each item of work listed in the proposal other than the items with a quantity of one and a unit of each. Items with a quantity of one and a unit of each will be accepted with unit price shown in either the unit price or amount column or shown in both columns.

2. Proposal not signed by principal.

3. Bid Bond not executed and signed by principal and surety.

4. Failure to submit a completed non-collusion sworn statement.

5. Failure to submit required DB/WBE information.

Ties and Riders

This proposal will be read but the following shall not be considered as part of the proposal if:

1. All ties and riders such as (deducts, additions, etc.) are not shown or indicated under Item No. 5 on the proposed sheet (D.O.T. Form Nos. 202, 202C or 202U).

PROJECT SPECIAL PROVISION
KANSAS DEPARTMENT OF TRANSPORTATION
PROJECT NO. _____
COUNTY _____

NOTE: Whenever this "Project Special Provision" conflicts with the Plans or Standard Specifications this Project Special Provision shall govern.

1. The (DB) goals for this contract are _____ percent to be subcontracted.

2. The (WBE) goals for this contract are _____ percent to be subcontracted.

3. The combined (DB and/or WBE) goals for this contract are _____ percent to be subcontracted.

IDENTIFICATION OF DB-WBE PARTICIPATION, AS SHOWN ABOVE

| | Name of DB/WBE Firm (if none, so indicate) | Description of Work or Line Item Number (if none, so indicate) | $ Value of Work (if $0, so indicate) | % of Total Contract (if 0%, so indicate) |
|---|---|---|---|---|
| 1. | | | | |
| 2. | | | | |
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| 17. | | | | |
| 18. | | | | |
| 19. | | | | |
| 20. | | | | |

_____
Name of Bidder

By _____

_____
Title of Person Signing

Total DB _____ _____

Total WBE _____ _____

(Note if additional sheets are needed attach to this sheet. However, show the contract total on this sheet.)

7-19-80-R4

U.S. Department of Transportation

# News:

Office of Public Affairs
Washington, D.C. 20590

FOR IMMEDIATE RELEASE
Tuesday, January 31, 1984

DOT 14-84
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## FEDERAL-AID HIGHWAY CONTRACTS TO MINORITY FIRMS SET ALL-TIME RECORD, SECRETARY DOLE ANNOUNCES

Minority-owned businesses were awarded nearly $720 million in federally funded highway contracts during Fiscal Year 1983, Secretary of Transportation Elizabeth Hanford Dole announced today. "This record level of awards represents a 209 percent increase in minority contracts during the three years of the Reagan Administration, and underscores the President's commitment to ensure that small, disadvantaged businesses are afforded the opportunity to compete for highway construction contracts and related services."

Dole noted that many contracts awarded in 1983 contain provisions for additional subcontracts for minorities to be awarded in future years. The actual minority contracts awarded in 1983, coupled with future subcontract commitments, bring the total dollar volume of minority contract opportunities to nearly $800 million. This represents 9.83 percent of the nearly $8 billion in total highway contracts let during the year, exceeding a nationally established goal of 8.84 percent by nearly a full percentage point.

Dole also pointed out that 1983 is the third year in a row that the Reagan Administration has achieved record levels of minority contract awards in the highway program. Minority awards totaled $415 million in Fiscal Year 1982 and $355 million in Fiscal Year 1981. The previous high achieved in the last Administration was $233 million in Fiscal Year 1980.

Dole noted that most states posted enormous gains in the dollar amounts of minority contracts awarded in 1983. Many states doubled, tripled and quadrupled minority contract awards during the year, Dole explained.

- more -

Dole added that the overwhelming increase in minority contract opportunities in FY 1983 was in keeping with a congressional mandate, contained in the Surface Transportation Assistance Act of 1982 (STAA) and signed into law by the President just a year ago, to expand minority contractor participation in highway building programs to 10 percent wherever possible. The STAA also provided a significant increase in federal funding available to the states for highway construction and rehabilitation.

The STAA was signed into law on January 6, 1983, with only nine months remaining in the Fiscal Year. The 10 percent nationwide goal therefore was adjusted to a weighted average of 8.84 percent, the Secretary explained.

"I am proud of the accomplishments of the states in exceeding the 1983 goals," Dole said. She added, "We have every expectation of improving on these accomplishments in Fiscal Year 1984."

# # #

# STATE-BY-STATE COMPARISON OF DBE ACHIEVEMENTS WITH TARGET GOALS FOR FY 1983

| State Name | FY 1983 Target Goals (Percentage) | FY 1983 DBE Achievements (Percentage) | Actual DBE Prime Contract Awards; Plus Future Subcontract Commitments in Contracts Let in FY 1983 |
|---|---|---|---|
| Alabama | 7.7% | 11.4% | $17,638,509 |
| Alaska | 9.0 | 24.1 | 7,219,212 |
| Arizona | 9.3 | 13.0 | 14,066,202 |
| Arkansas | 8.0 | 9.0 | 8,355,200 |
| California | 13.0 | 13.1 | 54,863,763 |
| Colorado | 10.0 | 14.2 | 17,519,591 |
| Connecticut | 8.8 | 9.9 | 18,211,411 |
| Delaware | 8.3 | 6.3 | 2,186,376 |
| Dist. of Col. | 25.0 | 61.7 | 15,182,389 |
| Florida | 8.3 | 5.9 | 15,836,054 |
| Georgia | 8.1 | 8.6 | 29,249,571 |
| Hawaii | 17.0 | 23.7 | 14,650,519 |
| Idaho | 8.4 | 6.4 | 3,539,012 |
| Illinois | 8.3 | 6.1 | 27,793,065 |
| Indiana | 8.0 | 8.8 | 17,041,804 |
| Iowa | 7.8 | 4.4 | 8,700,415 |
| Kansas | 8.3 | 8.8 | 8,787,295 |
| Kentucky | 8.0 | 9.4 | 19,060,926 |
| Louisiana | 8.4 | 8.3 | 19,252,428 |
| Maine | 3.0 | 3.4 | 917,877 |
| Maryland | 10.0 | 13.0 | 29,116,432 |
| Massachusetts | 8.1 | 11.3 | 7,560,288 |
| Michigan | 8.8 | 11.6 | 25,281,614 |
| Minnesota | 8.0 | 3.9 | 5,859,518 |
| Mississippi | 8.1 | 10.6 | 12,320,383 |
| Missouri | 7.9 | 8.9 | 18,810,889 |
| Montana | 5.2 | 7.7 | 8,238,885 |
| Nebraska | 7.9 | 6.7 | 6,682,482 |
| Nevada | 9.0 | 67.9 | 17,487,933 |
| New Hampshire | 3.0 | 3.7 | 1,129,085 |
| New Jersey | 8.3 | 9.0 | 13,547,287 |
| New Mexico | 9.0 | 9.2 | 10,800,232 |
| New York | 9.5 | 12.9 | 49,043,420 |
| North Carolina | 8.4 | 6.4 | 7,174,161 |
| North Dakota | 7.7 | 2.8 | 2,131,252 |
| Ohio | 8.8 | 15.2 | 36,850,142 |
| Oklahoma | 8.5 | 11.3 | 11,991,269 |
| Oregon | 8.8 | 13.2 | 18,002,712 |
| Pennsylvania | 8.3 | 8.4 | 29,895,710 |
| Rhode Island | 8.5 | 9.2 | 2,736,758 |
| South Carolina | 8.0 | 8.2 | 8,979,437 |
| South Dakota | 7.6 | 8.2 | 4,693,067 |
| Tennessee | 8.1 | 8.8 | 19,827,723 |
| Texas | 7.9 | 7.9 | 41,248,609 |
| Utah | 8.0 | 8.8 | 9,685,540 |
| Vermont | 7.8 | 8.5 | 2,705,368 |
| Virginia | 8.3 | 7.2 | 17,190,659 |
| Washington | 10.0 | 12.1 | 18,626,386 |
| West Virginia | 8.0 | 8.1 | 16,160,935 |
| Wisconsin | 8.0 | 5.5 | 7,800,000 |
| Wyoming | 7.6 | 4.6 | 3,140,466 |
| Puerto Rico | 98.9 | 100.0 | 15,017,731 |
| TOTALS: | 8.84% | 9.83% | $799,807,992 |

STATE-BY-STATE COMPARISON OF DISADVANTAGED
BUSINESS ENTERPRISE (MINORITY-OWNED) CONTRACT AWARDS
FOR FISCAL YEARS 1982-1983 (FEDERAL AND STATE MATCHING FUNDS)

| State Name | FY 1982 DBE Contract Awards (Federal/State Matching Funds) | FY 1983 Actual Prime DBE Contract Awards (Federal/State Matching Funds) | Percentage of Increase/Decrease |
|---|---|---|---|
| Alabama | $1,468,594 | $9,967,644 | 578.7% |
| Alaska | 9,386,166 | 7,219,212 | - 23.1 |
| Arizona | 5,532,269 | 11,551,599 | 108.8 |
| Arkansas | 3,493,962 | 9,155,170 | 162.0 |
| California | 47,504,023 | 54,667,276 | 15.1 |
| Colorado | 8,700,897 | 21,157,252 | 143.2 |
| Connecticut | 2,030,858 | 3,366,264 | 65.8 |
| Delaware | 2,146,073 | 2,832,036 | 32.0 |
| Dist. of Col. | 9,838,520 | 13,804,783 | 40.3 |
| Florida | 12,054,633 | 15,948,262 | 32.3 |
| Georgia | 11,201,611 | 8,730,166 | - 22.0 |
| Hawaii | 12,198,699 | 14,672,555 | 20.3 |
| Idaho | 1,563,988 | 3,944,629 | 152.2 |
| Illinois | 9,204,868 | 29,088,368 | 216.0 |
| Indiana | 2,929,242 | 10,608,590 | 262.0 |
| Iowa | 1,846,697 | 10,626,079 | 475.4 |
| Kansas | 2,114,729 | 9,434,435 | 346.1 |
| Kentucky | 3,635,845 | 16,334,694 | 349.0 |
| Louisiana | 6,794,803 | 11,454,433 | 68.6 |
| Maine | 755,473 | 1,173,066 | 55.3 |
| Maryland | 31,739,183 | 30,504,055 | - 3.9 |
| Massachusetts | 4,161,094 | 8,178,798 | 96.5 |
| Michigan | 11,261,980 | 25,938,594 | 130.3 |
| Minnesota | 9,835,810 | 7,022,741 | - 28.6 |
| Mississippi | 2,496,573 | 5,924,070 | 137.0 |
| Missouri | 2,168,429 | 13,430,388 | 519.3 |
| Montana | 1,199,567 | 6,936,047 | 478.2 |
| Nebraska | 1,458,861 | 4,876,841 | 234.3 |
| Nevada | 7,699,524 | 17,502,849 | 127.3 |
| New Hampshire | 858,113 | 1,367,226 | 59.3 |
| New Jersey | 3,413,096 | 6,822,253 | 99.9 |
| New Mexico | 6,154,374 | 8,022,607 | 30.3 |
| New York | 37,988,346 | 65,146,163 | 71.5 |
| North Carolina | 3,895,800 | 10,642,303 | 173.0 |
| North Dakota | 851,843 | 2,233,841 | 162.2 |
| Ohio | 33,036,326 | 48,361,129 | 46.4 |
| Oklahoma | 7,049,565 | 8,294,806 | 17.6 |
| Oregon | 6,999,251 | 22,041,016 | 214.9 |
| Pennsylvania | 10,333,319 | 8,502,527 | - 17.7 |
| Rhode Island | 2,406,154 | 3,539,227 | 47.1 |
| South Carolina | 2,183,451 | 6,175,645 | 182.5 |
| South Dakota | 85,950 | 6,108,385 | 7006.0 |
| Tennessee | 2,796,635 | 20,258,296 | 624.0 |
| Texas | 5,087,929 | 26,752,546 | 425.8 |
| Utah | 1,934,711 | 6,835,834 | 253.3 |
| Vermont | 2,160,619 | 3,456,996 | 60.0 |
| Virginia | 6,747,535 | 5,644,673 | - 16.3 |
| Washington | 19,981,402 | 18,859,421 | - 5.6 |
| West Virginia | 3,316,261 | 19,790,692 | 500.0 |
| Wisconsin | 2,341,567 | 6,679,331 | 185.2 |
| Wyoming | 285,334 | 4,110,205 | 1340.0 |
| Puerto Rico | 29,212,559 | 24,044,580 | - 17.7 |
| **TOTALS:** | **$415,543,120** | **$719,740,598** | **73.0%** |

KANSAS DEPARTMENT OF TRANSPORTATION DB/WBE LISTING AS OF MARCH 1, 1984

| | | |
|---|---|---|
| Black | 60 | DB |
| | 2 | WBE |
| | 1 | Native Am/Black |
| TOTAL | 63 | or 53.4% |
| Hispanic | 14 | DB or 11.9% |
| Native American | 9 | DB |
| | 1 | WBE |
| TOTAL | 10 | or 8.5% |
| Asian-American | 3 | DB or 2.5% |
| Asian-Indian | 2 | DB or 1.7% |
| Women Owned Business | 26 | WBE or 22.0% |

DB/WBE TOTAL = 118

DB/WBE REJECTIONS/APPEALS AS OF MARCH 1, 1984

Rejections

Black - 3 DB or 18.8%

Hispanic - 1 DB or 6.2%

Native American - 8 or 50%

Women Owned Business - 3 or 18.8%

Other (Caucasion-lack of information re: minority status) - 1 or 6.2%

TOTAL = 16

Appeals

Black - 2 (both were awarded DB status after winning appeal hearings . . .
N. I. K. and Alpha Construction)

TOTAL = 2

K.D.O.T. DB/WBE APPLICATIONS PENDING AS OF MARCH 1, 1984

Black - 16

Hispanic - 7

Native American - 8

Asian-American - 0

Asian-Indian - 1

Women Owned Business - 17

TOTAL 49

HB 2961

**STATEMEMT OF MR. ALONZO HARRISON**

**ON HOUSE BILL 2961 PRESENTED TO**

**HOUSE WAYS AND MEANS COMMITTEE**

First and foremost I want to thank you all for affording me this time.

I along with my business associates; would like very much to urge passage of **House Bill 2961** . It is our sincere belief, that in so doing you will at one and the same time disrobe and dethrone our piercing familarity with the traditional myths of minority contractors inability to perform, and you will hereby open the doors of trust and cooperation.

Specifically, with the passage of **House Bill 2961** , Disadvantaged Business Enterprises (DBE's), will be afforded a more excellent avenue to opportunity, on an arena wherein we may show to all who would observe, our ability to perform in the area of construction. Passage of this bill will relieve majority contractors of some of their "**burden**" of finding quality DBEs. At the same time, majority contractors will have an unguilded opportunity to observe the performance of many DBEs without the "preconceived liability" of working with them. Further, majority contractors will be able to select from a certified pool of quality DBEs to work with.

Moreover, and with equal importance with passage of this bill additional direct benefits will result to the State and to DBE's. First, the State will be able to increase its DBE participation percentage, thereby ensuring a continuous flow of federal highway funds, while helping foster new business enterprises and developing greater employment opportunities for its citizens.

12

Clearly, it is equally true, that there will be no loss in the quality of service provided to the state as a result of passing this bill. This is so, due to the fact, that job specification and quality control will be monitored as they are currently, that is, determinined and supervised by state inspectors.

Secondly, DBE's will be afforded an opportunity :

1) Showcase their skills and talents.

2) Develop a track record of performance.

3) Create employment opportunities for themselves and others.

4) Become more competitive.

5) Develope goodwill with the State, lending institutions, contractors and suppliers.

6) Become bondable.

These are, of course, only a few of the direct benefits that will result from passing **House Bill 2961 .** I and my associates, harried and haunted by the age old myths of traditional thinking, lay our case before you here today seeking passage of this bill. We unitedly, pettion each of you to extend unto DBE's a more excellent avenue to opportunity and too, with this bill create a new vitality and interest into the dangleing discord of DBE construction participation. This bill is creative and responsible, yet it is not a panacea, however, it will serve not only DBE's but the State and majority contractors as well. To disrobe and dethrone misunderstandings and distrust will be by-products of your passing this bill. A negative vote simply serves to prolong age old Aristotelian Syllogism that perpetuate divisiveness and disdain held by some who have had questionable DBE experience.

THANK YOU

REPORTS OF STANDING COMMITTEES

MR. SPEAKER:

Your Committee on Ways and Means

Recommends that House Bill No. 2685

"AN ACT making and concerning appropriations for the fiscal year ending June 30, 1985, for the judicial council, state board of indigents' defense services, judicial branch and crime victims reparations board; authorizing certain transfers, imposing certain restrictions and limitations, and directing or authorizing certain receipts and disbursements and acts incidental to the foregoing."

Be amended:

On page 1, in line 35, by striking "$190,056" and inserting in lieu thereof "$190,150";

On page 2, in line 57, by striking "$3,549,296" and inserting in lieu thereof "$3,405,375"; by striking all in lines 84 to 97, inclusive, and inserting in lieu thereof the following material to read as follows:

"Appellate courts -- salaries and wages.....$2,904,674

Provided, That any unencumbered balance in excess of $100 as of June 30, 1984, is hereby reappropriated for fiscal year 1985: Provided, however, That expenditures from such reappropriated balance shall not exceed $39,519 except upon approval of the state finance council acting on this matter which is hereby characterized as a matter of legislative delegation and subject to the guidelines prescribed in subsection (c) of K.S.A. 75-3711c and amendments thereto.

Appellate courts -- automated data processing..... 425,015

Provided, That any unencumbered balance in excess of $100 as of June 30, 1984, is hereby reappropriated for fiscal year 1985: Provided, however, That expenditures from such reappropriated balance shall not exceed $15,000 except upon approval of the state finance council acting on this matter which is hereby characterized as a matter of legislative delegation and subject to the guidelines prescribed in subsection (c) of K.S.A. 75-3711c and amendments thereto: Provided further, That contracts for computer input of judicial opinions under this appropriation shall be executed in the name of the supreme court by the chief justice and may be interrelated with contracts for the comprehensive legislative information system: And provided further, That all such contracts for computer input

of judicial opinions and all purchases thereunder shall not be subject to K.S.A. 75-3739 and amendments thereto.

Appellate courts -- other operating expenditures..... 565,584

Provided, That any unencumbered balance in excess of $100 as of June 30, 1984, is hereby reappropriated for fiscal year 1985: Provided, however, That expenditures from such reappropriated balance shall not exceed $70,196 except upon approval of the state finance council acting on this matter which is hereby characterized as a matter of legislative delegation and subject to the guidelines prescribed in subsection (c) of K.S.A. 75-3711c and amendments thereto: Provided further, That expenditures from this account for official hospitality shall not exceed $4,000.

Assigned retired justices and judges -- salaries and wages..... 32,000

Judges of the district courts -- salaries and wages.... 9,564,509

Provided, That any unencumbered balance in excess of $100 as of June 30, 1984, is hereby reappropriated for fiscal year 1985: Provided, however, That expenditures from such reappropriated balance shall not exceed $75,000 except upon approval of the state finance council acting on this matter which is hereby characterized as a matter of legislative delegation and subject to the guidelines prescribed in subsection (c) of K.S.A. 75-3711c and amendments thereto.

Nonjudicial personnel of the district courts -- salaries and wages.....21,918,725

Provided, That any unencumbered balance in excess of $100 as of June 30, 1984, is hereby reappropriated for fiscal year 1985: Provided, however, That expenditures from such reappropriated balance shall not exceed $165,000 except upon approval of the state finance council acting on this matter which is hereby characterized as a matter of legislative delegation and subject to the guidelines prescribed in subsection (c) of K.S.A. 75-3711c and amendments thereto.

District courts -- other operating expenditures..... 279,790

Provided, That any unencumbered balance in excess of $100 as of June 30, 1984, is hereby reappropriated for fiscal year 1985: Provided, however, That expenditures from such reappropriated balance shall not exceed $37,356 except upon approval of the state finance council acting on this matter which is hereby characterized as a matter of legislative delegation and subject to the guidelines prescribed in subsection (c) of K.S.A. 75-3711c and amendments thereto.

Commission on judicial qualifications -- salaries and wages..... 6,446

Commission on judicial qualifications -- other operating expenditures..... 34,789

Judicial nominating commissions..... 7,432

Criminal justice projects..... 179,662";

Also on page 2, in line 99, by striking "$37,581,379" and inserting in lieu thereof "$35,918,626";

On page 3, in line 114, by striking "25,575" and inserting in lieu thereof "32,745"; in line 123, by striking "$216,066" and inserting in lieu thereof "$175,560"; following line 123, by inserting the following material to read as follows:

"Provided, That any unencumbered balance in excess of $100 as of June 30, 1984, is hereby reappropriated for fiscal year 1985: Provided, however, That expenditures from such reappropriated balance shall not exceed $5,470 except upon approval of the state finance council acting on this matter which is hereby characterized as a matter of legislative delegation and subject to the guidelines prescribed in subsection (c) of K.S.A. 75-3711c and amendments thereto.";

Also on page 3, in line 130, by striking "$278,478" and inserting in lieu thereof "$304,478"; following line 157, by inserting the following material to read as follows:

"State Board of Indigents' Defense Services.. 33.5";

Also on page 3, in line 163, by striking "212.5" and inserting in lieu thereof "211.5"; in line 165, by striking "1,325.5" and inserting in lieu thereof "1,331.0";

And the bill be passed as amended.

_____Chairperson

3-12 4 minutes 3-22-84

CRH2703k1

REPORTS OF STANDING COMMITTEES

MR. SPEAKER:

Your Committee on Ways and Means

Recommends that House Bill No. 2703

"AN ACT making and concerning appropriations for the fiscal year ending June 30, 1984, for the department of economic development, Kansas public employees retirement system, department of revenue, state board of pharmacy, department of human resources, department of education, state library, department of revenue -- school district income tax fund, university of Kansas medical center, crime victims reparations board and attorney general -- Kansas bureau of investigation; authorizing certain transfers, imposing certain restrictions and limitations, and directing or authorizing certain disbursements and acts incidental to the foregoing."

Be amended:

On page 2, preceding line 56, by inserting the following material to read as follows:

"(a) There is appropriated for the above agency from the state general fund the following:

Salaries and wages..... $196,000";

Also on page 2, in line 56, by striking "(a)" and inserting in lieu thereof "(b)"; following line 58, by inserting the following material to read as follows:

"(c) The expenditure limitation established by the state finance council on the salaries and wages account of the division of vehicles operating fund is hereby increased from $8,925,883 to $9,275,883.";

Also on page 2, in line 64, by striking "$229,719" and inserting in lieu thereof "$227,719"; preceding line 68, by inserting the following material to read as follows:

"(a) On the effective date of this act, of the $1,861,628 appropriated for the above agency by section 7(a) of chapter 24

of the 1983 Session Laws of Kansas from the state general fund in the salaries and wages account, the sum of $57,592 is hereby lapsed.

(b) On the effective date of this act, of the $216,665 appropriated for the above agency by section 7(a) of chapter 24 of the 1983 Session Laws of Kansas from the state general fund in the other operating expenditures account, the sum of $5,000 is hereby lapsed.";

Also on page 2, in line 68, by striking "(a)" and inserting in lieu thereof "(c)"; following line 72, by inserting the following material to read as follows:

"(d) Any transfers of any work incentive program moneys from the employment security administration fund to other state agencies shall be in addition to any expenditure limitation imposed on this fund.

(e) Expenditures from the employment security administration fund for equipment shall not exceed $235,000.

(f) No expenditures may be made from the employment security administration fund for any capital improvements including but not limited to (1) maintaining, repairing or remodeling existing buildings; (2) acquiring land or constructing new buildings or additions to existing buildings; (3) purchasing buildings; or (4) paving or landscaping.

(g) The expenditure limitation established by section 7(b) of chapter 24 of the 1983 Session Laws of Kansas on the Kansas veterans' commission fund is hereby increased from $85,000 to $90,000.

(h) The expenditure limitation established by section 7(b) of chapter 24 of the 1983 Session Laws of Kansas on the special employment security fund is hereby decreased from no limit to $0.

(i) The expenditure limitation established by the state finance council on the job training partnership act -- title II-A -- disadvantaged training fund is hereby decreased from no limit to $7,839,223.

(j) The expenditure limitation established by the state finance council on the job partnership training -- title II-B -- summer youth training fund is hereby decreased from no limit to $2,194,034.

(k) The expenditure limitation established by the state finance council on the job partnership training act -- title III -- dislocated workers fund is hereby decreased from no limit to $2,023,753.

(l) The position limitation established by the state finance council on all other personnel of the department of human resources is hereby decreased from 1,040.1 to 1,021.1.";

Also on page 2, preceding line 84, by inserting the following material to read as follows:

"Special education services aid..... 287,550";

Also on page 2, in line 84, by striking "$170,725" and inserting in lieu thereof "$458,275"; following line 84, by inserting the following material to read as follows:

"(b) On the effective date of this act, of the $9,192,800 appropriated for the above agency by section 6(a) of chapter 19 of the 1983 Session Laws of Kansas from the state general fund in the special education transportation aid account, the sum of $287,550 is hereby lapsed.

(c) On the effective date of this act, of the $665,770 appropriated for the above agency by section 6(a) of chapter 19 of the 1983 Session Laws of Kansas from the state general fund in the municipal university out-district state aid account, the sum of $61,125 is hereby lapsed.

(d) On the effective date of this act, of the $645,000 appropriated for the above agency by section 6(a) of chapter 19 of the 1983 Session Laws of Kansas from the state general fund in the bilingual education programs aid account, the sum of $61,900 is hereby lapsed.

(e) On the effective date of this act, of the $38,502,385

appropriated for the above agency by section 6(a) of chapter 19 of the 1983 Session Laws of Kansas from the state general fund in the state school transportation aid account, the sum of $329,873 is hereby lapsed.

(f) On the effective date of this act, of the $10,000,000 appropriated for the above agency by section 6(a) of chapter 19 of the 1983 Session Laws of Kansas from the state general fund in the post-secondary aid for vocational education account, the sum of $74,380 is hereby lapsed.";

Also on page 2, in line 103, by striking "decreased" and inserting in lieu thereof "increased"; in line 104, by striking "$89,286,622" and inserting in lieu thereof "No limit";

On page 3, by striking all in lines 108 to 124, inclusive, and inserting in lieu thereof the following material to read as follows:

"(a) There is appropriated for the above agency from the university of Kansas hospital fund the following:

Moveable patient care equipment for neonatal intensive care unit..... $100,000

(b) On June 30, 1984, any unencumbered balance in the renovation of old hospital areas account of the federal revenue sharing fund is hereby lapsed.";

Also on page 3, following line 144 by inserting the following material to read as follows:

"Sec. 13.

1-199 STATE BOARD OF COSMETOLOGY

(a) The expenditure limitation established by the state finance council on the cosmetology fee fund is hereby increased from $224,035 to $226,729.

Sec. 14.

3-37 KANSAS STATE UNIVERSITY

(a) On the effective date of this act, of the $36,992,270

appropriated for the above agency by section 3(a) of chapter 22 of the 1983 Session Laws of Kansas from the state general fund in the salaries and wages account, the sum of $50,000 is hereby lapsed.

Sec. 15.

3-25 EMPORIA STATE UNIVERSITY

(a) There is appropriated for the above agency from the state general fund the following:

Salaries and wages..... $65,342

(b) On the effective date of this act, of the $697,599 appropriated for the above agency by section 22(a) of chapter 26 of the 1983 Session Laws of Kansas from the state general fund in the student salaries and wages account, the sum of $65,342 is hereby lapsed.

(c) The expenditure limitation established by section 5(b) of chapter 22 of the 1983 Session Laws of Kansas on the parking fees fund is hereby increased from $88,000 to $109,000.

Sec. 16.

3-59 PITTSBURG STATE UNIVERSITY

(a) There is appropriated for the above agency from the state general fund the following:

Salaries and wages..... $59,144

(b) On the effective date of this act, of the $552,760 appropriated for the above agency by section 23(a) of chapter 26 of the 1983 Session Laws of Kansas from the state general fund in the student salaries and wages account, the sum of $59,144 is hereby lapsed.

Sec. 17.

3-83 UNIVERSITY OF KANSAS

(a) On the effective date of this act, of the $7,101,065 appropriated for the above agency by section 7(a) of chapter 22 of the 1983 Session Laws of Kansas from the state general fund in the other operating expenditures (including official hospitality)

account, the sum of $750,000 is hereby lapsed.

(b) The expenditure limitation established by section 7(b) of chapter 22 of the 1983 Session Laws of Kansas on the general fees fund is hereby increased from $22,691,000 to $23,441,000.

Sec. 18.

3-97 WICHITA STATE UNIVERSITY

(a) On the effective date of this act, of the $2,448,563 appropriated for the above agency by section 8(a) of chapter 22 of the 1983 Session Laws of Kansas from the state general fund in the other operating expenditures (including official hospitality) account, the sum of $230,000 is hereby lapsed.

(b) The expenditure limitation established by section 8(b) of chapter 22 of the 1983 Session Laws of Kansas on the general fees fund is hereby increased from $10,200,000 to $10,430,000.

Sec. 19.

5-1 STATE BOARD OF AGRICULTURE

(a) There is appropriated for the above agency from the state general fund the following:

| | |
|---|---|
| Administrative and statistical services program..... | $8,420 |
| Regulation of weights and measures program..... | 25,000 |
| Regulation of pesticides and plant pests and diseases program..... | 15,000 |
| Total..... | $48,420 |

(b) On the effective date of this act, the expenditure limitation established by section 15(b) of chapter 26 of the 1983 Session Laws of Kansas on the postage reimbursable fund is hereby decreased from $17,000 to $10,000.

(c) On the effective date of this act, the expenditure limitation established by section 15(b) of chapter 26 of the 1983 Session Laws of Kansas on the weights and measures fee fund is hereby decreased from $50,000 to $25,000.

(d) On the effective date of this act, the expenditure limitation established by section 15(b) of chapter 26 of the 1983 Session Laws of Kansas on the entomology fee fund is hereby

decreased from $142,633 to $127,633.

Sec. 20.

5-27 BOARD OF STATE FAIR MANAGERS

(a) On the effective date of this act, of the $150,000 appropriated for the above agency by section 5(a) of chapter 17 of the 1983 Session Laws of Kansas from the state general fund in the special maintenance of fairground facilities, including utility, building and grounds improvements account, the sum of $12,000 is hereby lapsed.

Sec. 21.

5-17 KANSAS ANIMAL HEALTH DEPARTMENT

(a) The expenditure limitation established by the state finance council on the animal health department fee fund is hereby increased from $58,211 to $59,565.";

And by renumbering sections accordingly;

On page 1, in the title, in line 25, by striking "and" and inserting in lieu thereof a comma; also in line 25, preceding the semicolon by inserting the following: ", state board of cosmetology, Kansas state university, Emporia state university, Pittsburg state university, university of Kansas, Wichita state university, state board of agriculture, board of state fair managers and Kansas animal health department";

And the bill be passed as amended.

_____Chairperson