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involved in, or is threatened with, litigation with a contractor or vendor as a result of such direction by the Administrator, the recipient may request the United States to enter into such litigation.

### § 265.9 Affirmative action program—General.

Recipients of financial assistance under the Rail Acts and their contractors, as specified herein, shall develop and maintain an affirmative action program to insure that persons and businesses are not discriminated against because of race, color, national origin or sex in programs, projects and activities financed in whole or in part through financial assistance provided under the Rail Acts, and that minorities and MBEs receive a fair proportion of employment and contractual opportunities which will result from such programs, projects and activities.

### § 265.11 Submission of affirmative action program.

(a) Each application for financial assistance under any of the Rail Acts shall, as a condition to its approval and the extension of any financial assistance pursuant to the application, contain or be accompanied by two copies of a written affirmative action program for review by and approval of the Administrator. Recipients that have already entered into an agreement or other arrangement providing for such assistance shall, within 60 days after the effective date of this part, develop and submit to the Administrator two copies of a written affirmative action program for review by and approval of the Administrator and thereafter maintain such program.

(b)(1) Beginning 30 days after the effective date of this part, and until 120 days after such date, each recipient shall require any contractor, as a condition to an award of a contract, for \$50,000 or more for services or products on a project receiving federal financial assistance under a program covered by section 905 of the Act:

(i) To furnish to the recipient a written assurance that it will, within 90 days after the date of the award, develop and maintain a written affirmative action program meeting the re-

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quirements of this part for the project, program or activity covered by the contract,

(ii) To require each of its subcontractors receiving an award of a subcontract for \$50,000 or more within 120 days after the effective date of this part, to furnish to the contractor as a condition to such an award the written assurance described in paragraph (b)(1)(i) of this section.

(2) Beginning 120 days after the effective date of this part, each recipient shall require as a condition to the award of a contract or subcontract of \$50,000 or more that the contractor or subcontractor furnish a certificate to the recipient or contractor as appropriate that a written affirmative action program meeting the requirements of this part has been developed and is being maintained.

(3) Notwithstanding paragraphs (b)(1) and (2) of this section, each contractor or subcontractor having a contract or \$50,000 or more but less than 50 employees shall be required to develop and maintain a written affirmative action program only for contracts in accordance with § 265.13(c) of this part.

(4) A recipient or contractor shall not procure supplies or services in less than usual quantities or in a manner which is intended to have the effect of avoiding the applicability of this paragraph.

### § 265.13 Contents of affirmative action program.

(a) *General.* A prerequisite to the development of a satisfactory affirmative action program is the identification and analysis of problem areas inherent in minority employment and utilization of MBEs, and an evaluation of opportunities for utilization of minority group personnel and MBEs. Therefore, an affirmative action program to guarantee employment and contractual opportunities shall provide for specific actions keyed to the problems and needs of minority persons and MBEs including, where there are deficiencies based on past practices, and with respect to future plans for hiring and promoting employees or awarding contracts, the development of specific goals and timetables for the prompt achievement and maintenance of full

opportunities for minority persons and MBEs with respect to programs, projects and activities subject to this part.

(b) *Employment practices.* (1) The affirmative action program for employment showing the level of utilization of minority employees, and establishing a plan to insure representative opportunities for employment for minority persons shall be developed in accordance with the regulations of the Department of Labor at 41 CFR 60-2.

(2) Railroad applicants or recipients shall develop their program for each establishment in their organization and by job categories in accordance with the requirements of the Joint Reporting Committee of the Equal Employment Opportunity Commission and the Department of Labor. Other applicants, recipients or contractors may use any program format or organization which has been approved for use by other Federal agencies enforcing equal opportunity laws.

(3) The affirmative action program shall show the source of statistical data used.

(4) The affirmative action program shall include a listing by job category of all jobs which may be established or filled by the applicant, recipient or contractor as a result of the project, program or activity funded by federal financial assistance under the Rail Acts for the first five years of such project, program or activity or the period during which such project, program or activity will be undertaken, whichever is the lesser ("program period").

(5) The affirmative action program shall set forth in detail a plan to insure that with respect to the project, program or activity financed in whole or in part through financial assistance under the Rail Acts, minority persons have an opportunity to participate in employment in proportion to the percentage of the minority work force in the area where the applicant's, recipient's or contractor's operations are located as compared to the total work force, and that such minority persons have an equal opportunity for promotion or upgrading. Where appropriate because of prior underutilization of minority employees, the program

shall establish specific goals and timetables to utilize minority employees in such projects, programs or activities in the above-mentioned proportion.

(c) *Contracts.* (1) The affirmative action program shall include details of proposed contracts in excess of \$10,000 to be awarded in connection with projects, programs and activities funded in whole or in part through financial assistance under the Rail Acts, including contracts for professional and financial services, for the program period. The details shall include a description of the services or products which will be sought including estimated quantities, the location where the services are to be provided, the manner in which proposals will be solicited (e.g., cost plus fixed fee, fixed price), the manner in which contracts will be awarded (e.g., competitive or sole source). The plan shall also give details as to bidding procedures, and information as to other qualifications for doing business with the applicant, recipient or contractor. Upon request by the applicant, recipient or contractor, any information submitted to the Administrator shall be kept confidential to the extent permitted by law.

(2) The affirmative action program shall review the procurement practices of the applicant, recipient or contractor for the full year preceding the date of the submission of the affirmative action program and evaluate the utilization of MBE in its procurement activities. Such evaluation of utilization of MBEs shall include the following:

(i) An analysis of awards of contracts to MBEs during such year describing the nature of goods and services purchased and the dollar amount involved; and

(ii) A comparison of the percentage of awards of contracts to MBEs (by number of contracts and by total dollar amount involved) to the total procurement activity of the applicant, recipient or contractor for said year.

(3) The affirmative action program shall set forth in detail applicant's, recipient's or contractor's plan to insure that MBEs are afforded a fair and representative opportunity to do business with applicant, recipient or contractor

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(both in terms of number of contracts and dollar amount involved) for the program period. Such plan shall identify specific actions to be taken to:

(i) Designate a liaison officer who will administer the MBE program;

(ii) Provide for adequate and timely consideration of the availability and potential of MBEs in all procurement decisions;

(iii) Assure that MBEs will have an equitable opportunity to compete for contracts, by arranging solicitation time for the preparation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation of MBEs and by assisting MBEs who are potential contractors in preparing bid materials and in obtaining and maintaining suitable bonding coverage in those instances where bonds are required;

(iv) Maintain records showing that the policies set forth in this part are being complied with;

(v) Submit quarterly reports of the records referred to in paragraph (c)(3)(iv) of this section in such form and manner as the Administrator may prescribe; and

(vi) Where appropriate because of prior underutilization of MBEs, establish specific goals and timetables to utilize MBEs in the performance of contracts awarded.

(d) *Successor organizations.* Where applicant, recipient or contractor is a successor organization, its affirmative action program shall review the hiring and procurement practices of its predecessor organization or organizations.

### § 265.14 Determining the MBE status of a business.

FRA or a recipient may, on the basis of available information, determine that a business is not an MBE within the meaning of this part. This determination shall be final, except as provided in § 265.14-1, for that contract and other contracts being let by that contracting agency at the time of the determination. Businesses may correct deficiencies in their ownership and control and apply as MBEs only for future contracts.

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### § 265.14-1 Appeals of determination of MBE status.

(a) *Filing.* Any firm who believes that it has been wrongly determined not to be an MBE under § 265.14 by the FRA or a recipient may file an appeal in writing with the Administrator. The appeal shall be filed no later than 30 days after the date of the determination. The Administrator may extend the time for filing or waive the time limit in the interest of justice, specifying in writing the reasons for so doing. Third parties who have reason to believe that a business has been wrongly denied or granted status as an MBE may advise the Administrator. This information is not considered an appeal pursuant to this section.

(b) *Decision to investigate.* The Administrator ensures that a prompt investigation is made of those cases with investigative merit (except those being reviewed on the merits by the Comptroller General), pursuant to prescribed DOT Title VI (49 CFR part 21) investigation procedures.

(c) *Status during the investigation.* The Administrator may deny the business in question eligibility to participate as an MBE in direct or FRA-assisted contracts let during the pendency of the investigation, after providing the business in question an opportunity to show cause by written statement to the Administrator why this should not occur.

(d) *Cooperation in investigation.* All parties shall cooperate fully with the investigation. Failure or refusal to furnish relevant information or other failure to cooperate is a violation of this part.

(e) *Determinations.* The Administrator will make one of the following determinations and so inform the business in writing of the reasons for the determination:

(1) The business is considered to be an MBE within the meaning of this part; or

(2) The business is not considered to be an MBE within the meaning of this part and is denied eligibility to participate as an MBE in any direct or FRA-assisted contract until a further determination is made by FRA that the