

amendment to Public Law 107-117 "making appropriations for the Department of Defense for the fiscal year ending September 30, 2002, and for other purposes," has superseded the application of § 26.73(h) to ANC-owned firms.

Section 702 of Public Law 107-117 amended 43 U.S.C. 1626(e), a provision of the Alaska Native Claims Settlement Act, to say that:

Any entity (*i.e.*, a subsidiary, partnership, or joint venture of an ANC) that satisfies subsection (e)(2) of this section (which establishes ownership and control criteria for ANC-related entities) that has been certified under section 8 of Public Law 85-536 (*i.e.*, is certified by the Small Business Administration under the 8(a) or small disadvantaged business programs) is a Disadvantaged Business Enterprise for the purposes of Public Law 105-178 (*i.e.*, TEA-21).

Based on the above language, an entity meeting criteria to be an ANC-owned firm must be certified as a DBE, even if it does not meet size, ownership, and control criteria otherwise applicable to DBEs. For example, an ANC-related entity could exceed SBA small business size standards or have its daily business operations controlled by a non-disadvantaged individual and still be certified if it met the section 702 criteria.

Consequently, the Department is deleting references to ANC-related entities from § 26.73(h) and creating a new § 26.73(i). The new paragraph sets forth certification criteria for ANC-related entities consistent with 43 U.S.C. 1626(e). Because these certification criteria differ from those applicable to all other DBE applicants, recipients would not use the new DOT Uniform Application Form for ANC-related entities. Recipients instead would collect (and applicants would have to provide) sufficient documentation that an ANC-related entity meets the new criteria including information sufficient to allow the recipients to administer their DBE programs with respect to ANC-related entities. If an ANC-related entity did not meet all the requirements (*e.g.*, it had not been certified by SBA), then its certification would continue to be processed under § 26.73(h), in the same manner as Indian Tribal firms.

The statutory requirement to treat ANC-owned entities differently from all other applicants for certification in the DBE program, because of the reference in section 702 to TEA-21, on its face applies only to firms seeking work on FTA- and FHWA-assisted contracts. The statute does not apply to firms seeking work on FAA-assisted contracts. To

avoid confusion and unnecessary administrative complexity, however, in this rule the Department is applying the altered certification requirements for ANC-related entities to all parts of the DBE program, including FAA-assisted contracts and concessions.

#### IV. Clarification Regarding Multi-Year Projects and Other Revisions

##### Multi-Year Projects

A recipient of DOT funds—FAA, FTA, or FHWA—may set an overall project goal for a particular project. Typically, such a goal would be used for a large multi-year project. The recipient's overall project goal for the project would be separate from the recipient's annual overall goal for the rest of its DOT-assisted contracting activities. The recipient's submission of the overall project goal would have to meet the same requirements as for any other overall goal (§ 26.45(f)(3)), specifically including a breakout of the participation anticipated through race neutral and race conscious means. DOT would review the goal submission just as it does in other cases. This change to the regulation would apply to all such projects the option for a project goal currently available to design-build contracts.

With respect to its other DOT-assisted contracting activities, the recipient would also submit its regular annual overall goal for review. In doing so the recipient, in calculating the annual overall goal for a given fiscal year, would not consider funds or contracting opportunities attributable to the project covered by the separate project goal. For example, suppose a recipient will expend \$150 million on Project X in Years 1-3. The recipient will also expend \$40 million on other projects in each year during the same period. The recipient could submit a single project overall goal for Project X, based on the \$150 million to be expended over the life of the project. The recipient would also submit an overall goal each year for its other DOT-assisted contracting activities in Year 1, Year 2, and Year 3, based on the \$40 million the recipient was expending in each of those years.

An overall project goal can be used for a multi-modal project. For example, suppose FHWA Recipient W and FTA Recipient Z are cooperating on a project, which involves the total expenditure of \$500 million. Recipients W and Z can submit jointly a single overall project goal for the project. W and Z would also each submit regular annual overall goals for their other activities during the time that the project was under way.

Many large projects with which it could be useful to establish an overall project goal include design-build contracts. In such a case, the overall project goal would serve as the goal for the master contractor. The master contractor would then proceed to establish contract goals for the subcontracts it is letting at a level appropriate to meet the race conscious portion of the project overall goal.

Currently, part 26 explicitly authorizes the use of project goals in FAA and FTA projects. While nothing in the rule precludes the use of project goals in FHWA projects, the rule does not explicitly mention FHWA projects in this context. It is the Department's view, however, that recipients of funds from all three operating administrations can make use of project goals.

##### Clarification Concerning Primary Industry Classification

Section 26.5 of the DBE final rule defined primary industrial classification as the four-digit Standard Industrial Classification (SIC) code designation defined in 13 CFR part 121 by the Small Business Administration. In the final rule we further stated that as the North American Industrial Classification System (NAICS) replaces the SIC system, reference to SIC codes and the SIC Manual are deemed to refer to the NAICS manual and applicable codes. We would like to take this opportunity to remind recipients that effective October 1, 2000, the Small Business Administration is no longer using the SIC system for its small business standards. The SBA published a final rule on May 15, 2000, adopting small business size standards based on the NAICS (65 FR 30840). The new table of small business size standards that accompanied the rule contained errors, so the SBA published a replacement table in the **Federal Register** on September 5, 2001 (65 Fed. Reg. 53533). Therefore, the term "Standard Industrial Classification" and the acronym "SIC" will be replaced with "North American Industrial Classification System" and the acronym "NAICS" throughout the text of the regulation. Although this change was not included in the Interim Final Rule, the change is editorial in nature and does not require notice and comment.

The SBA rule on NAICS standards can be obtained through the Internet at: <http://www.sba.gov/size/>. Further information about NAICS, including a table matching SIC codes to NAICS codes, is available on the U.S. Bureau of Census' Web page at: <http://census.gov/epcd/www/naics.html>. The *North American Industry Classification*