

## **FHWA DBE Goal Methodology Montana Department of Transportation Federal Fiscal Year 2017 – 2019**

The Montana Department of Transportation (MDT), in accordance with United States Department of Transportation (USDOT) guidelines, determines MDT's Disadvantaged Business Enterprise (DBE) Goal for Federal Highway Administration (FHWA) funded contracts on a staggered three-year schedule.

MDT calculates the goal using the criteria set forth in 49 CFR Part 26.45. The determination of the level of DBE participation is based on the availability of all DBE businesses that are ready, willing, and able to participate in FHWA-assisted contracts in the State of Montana in relationship to all comparable businesses which are known to be available to compete for FHWA-assisted contracts.

For Federal Fiscal Year 2017 – 2019, MDT has established an overall DBE goal of 6.14% to be accomplished through the use of race neutral means.

This methodology and the supporting evidence complies with the requirements of the federal regulations and federal guidance, as well as relevant court decisions, including *Western States Paving v. Washington State Dept. of Transportation*, 907 F.3d 963 (9<sup>th</sup> Cir. 2005).

### **Step 1: Determining the Base Figure**

For the Step 1 Base Figure, MDT determined the relative DBE availability in accordance with 49 CFR Part 26.45 (c)(3), which is to use data from a disparity study. MDT utilized data from the 2016 Availability and Disparity Study Report compiled by Keen Independent Research LLC to set the base figure. According to the report, 89% of MDT contract dollars during the study period went to firms with Montana offices. Therefore, Montana was determined to be the market area.

The Step 1 Base Figure is based on current DBEs and not potential DBEs. As noted on Chapter 6, Page 2 of the 2016 Disparity Study, MDT could have included potential DBEs (minority- and women-owned firms) in its base figure; however, chose not to for the following reasons:

- Changes in DBE certification status of a number of firms makes it difficult to determine whether some former DBEs would be eligible to be counted as potential DBEs for the future;
- In MDT's experience, some minority- and women-owned firms that initially appear eligible do not qualify for certification under the Federal DBE Program; and
- A number of Montana firms started DBE certification applications during the study period but never completed them, which also raises a question about inclusion of non-certified MBEs and WBEs in the base figure.

To avoid overstating the base figure by including minority- and women-owned firms that might not be eligible for DBE certification or would not take all the steps required to do so, Keen Independent calculated the base figure from firms that were DBE-certified.

Keen Independent’s availability analysis indicates that the availability of current DBEs for MDT’s FHWA-funded transportation contracts is 7.41% based on current availability information and analysis of FHWA-funded contracts awarded from October 2009 through September 2014. The contracts MDT intends to let during this Federal Fiscal Year 2017 – 2019 Goal Methodology are reasonably similar to projects reviewed in the Disparity Study. Therefore, MDT established the base figure as 7.41%.

## **Step 2: Adjustments to the Base Figure**

During Step 2, MDT examined all of the evidence available in its jurisdiction, including analyses performed in the 2016 Disparity Study, to determine what adjustment, if any, is needed to the base figure in order to arrive at the overall DBE participation goal. MDT considered the following Step 2 adjustments:

- Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years;
- Information related to employment, self-employment, education, training and unions;
- Any disparities in the ability of DBEs to get financing, bonding and insurance; and
- Other relevant factors

### ***Current Capacity***

To determine the impacts of the current local market conditions and work performed by DBE firms in recent years, MDT reviewed the Uniform Report of DBE Awards or Commitments and Payments and the 2016 Disparity Study current capacity analysis. The 2016 Disparity Study included 6 years (Federal Fiscal Years 2010-2015) of DBE utilization; however it indicated MDT might use a shorter length of time for the assessment. MDT did use a shorter time frame (Federal Fiscal Years 2011-2015) for the analysis. These years are based on MDT’s most recent goal methodology cycles (2011-2013 and 2014-2016) and are consistent with the current operation of Montana’s DBE Program. Table 1 indicates DBE utilization based on awards or commitments for the past five years.

**Table 1 – DBE Utilization for Federal Fiscal Years 2011 through 2015**

<b>Federal Fiscal Year</b>	<b>% DBE Utilization</b>
2015	4.86%
2014	6.66%
2013	5.99%
2012	3.85%
2011	4.07%

DBE utilization ranged from a high of 6.66% of total dollars to a low of 3.85%. USDOT's "Tips for Goal Setting" indicates that the goal setting process will be more accurate if using the median of your past participation to make an adjustment because the process of determining the median excludes all outliers (abnormally high or abnormally low) past participation percentages. The median for the past five years is 4.86%.

### ***Employment, Education, Training, and Unions***

The 2016 Disparity Study conducted analysis related to marketplace conditions in Montana and found that there are barriers that certain minority groups and women face related to entry and advancement and business ownership in the Montana construction and engineering industries. Specifically Native Americans working in the Montana construction industry were less likely than non-minorities to own construction businesses and women working in the Montana engineering industry were less likely than men to own engineering companies.

Keen Independent estimated the availability of minority- and women-owned firms but for the effects of race- and gender-based discrimination and determined there could be a possible 4.33% upward adjustment to the base figure (calculation shown in Figure 9-3).

The upward adjustment for barriers related to entry and advancement and business ownership is based on potential DBEs (minority- and women-owned firms). MDT chose not to do this upward Step 2 adjustment to be consistent with the Step 1 Base Figure, which evaluates current DBEs and not potential DBEs.

### ***Financing, Bonding, and Insurance***

The 2016 Disparity Study found quantitative and qualitative evidence of disadvantages for minorities, women, and minority- and women-owned firms relating to access to financing and bonding. Although the analysis indicates an upward adjustment could be made to address these barriers, the impact of those factors could not be quantified (Chapter 9, Page 9). As a result, MDT chose not to make this Step 2 adjustment.

### ***Other Factors***

The other factors examined in the 2016 Disparity Study were related to success of minority- and women-owned firms relative to majority-owned businesses in the Montana marketplace. The Study noted quantitative evidence that minority- and women-owned firms are less successful than majority-owned firms and face greater barriers in the marketplace. There was also qualitative information that suggests discrimination on the basis of race, ethnicity and gender affects minority- and women-owned firms in the Montana transportation contracting industry. Although the analysis indicates an upward adjustment could be made to address these barriers, the impact of those factors could not be quantified (Chapter 9, Page 9). As a result, MDT chose not to make this Step 2 adjustment.

**Final Step 2 Adjustments to Step 1 Base Figure**

After examining all evidence available and evaluating all Step 2 adjustment options, MDT will apply the median past DBE participation (4.86%) to the Step 1 Base Figure (7.41%) by calculating the average:

$$(7.41 + 4.86) / 2 = 6.14\%$$

MDT adjusts the Step 1 Base Figure to an overall DBE participation goal of 6.14%.

**Race Conscious / Race Neutral Evaluation**

MDT used both race conscious and race neutral measures in Federal Fiscal Year 2013 and a portion of 2014 to achieve its overall goal. Table 2 indicates the race neutral achievements based on awards and commitments from the Uniform Reports for Fiscal Years 2011 through 2015.

**Table 2 – Race Neutral Participation for Federal Fiscal Years 2011 through 2015**

<b>Federal Fiscal Year</b>	<b>Overall DBE Goal</b>	<b>% Total DBE Utilization</b>	<b>% of Race Neutral DBE Participation</b>
2015	3.55%	4.86%	4.86%
2014	5.83%	6.66%	5.85%
2013	5.83%	5.99%	3.60%
2012	5.83%	3.85%	3.85%
2011	5.83%	4.07%	4.07%

The median race neutral DBE past participation from 2011 through 2015 was 4.07%. However, data from the two most recent fiscal years indicates that contractors and consultants for MDT’s FHWA-funded transportation contracts know what the overall DBE goal is and are able to achieve it through race neutral means. As a result, MDT proposes to meet the 6.14% overall DBE goal solely through race neutral means.

MDT evaluates DBE participation for awards and commitments on a monthly basis and reports DBE utilization to FHWA on a semi-annual basis. If the Uniform Report indicates that MDT fell short or will fall short of meeting the overall goal, MDT will re-evaluate how much of the overall goal can be met through race neutral means and implement race conscious measures (i.e. project specific goals) to meet the remainder of the goal.

**Race Neutral Initiatives**

MDT has implemented several race neutral measures to ensure the maximum feasible portion of the overall goal is achieved through race neutral means, in accordance with 49 CFR 26.51. These include:

- An Annual Needs Assessment to solicit input from minority, women, contractor groups, and MDT employees to gauge the availability of disadvantaged and non-disadvantaged businesses. The results of this survey show that the highway-related firms on the DBE Directory are either actively bidding on MDT related contracts or have participated on MDT-related highway project over the last year.
- A Business Development Program where MDT works with DBEs to retrieve information on the current state of business in Montana and to determine the DBEs workforce obstacles in order to define the most effective strategies needed to increase the DBEs capacity and availability.
- MDT continues to develop its relationship with trade organizations including, Montana Contractor's Association (MCA) and American Council of Engineering Companies (ACEC), by training and educating contractors and consultants about the DBE program and the overall goal. Information is provided on the availability of DBEs, the capacity of DBEs, and the newest certified DBEs within the state. These meetings allow disadvantaged and non-disadvantaged businesses opportunities to provide feedback about the program. This relationship is strengthened with the intent of creating greater opportunity to conduct business with DBEs.
- MDT is also proposing to have aspirational DBE goals on construction and engineering contracts. This allows MDT, contractors, and consultants to know what may be expected for DBE utilization on certain projects in order to achieve the overall goal, but does not impose penalties or require information for good faith efforts if the aspirational goal was not met on a specific project.

MDT provides the following Supportive Services for DBEs:

- Long-term development assistance to increase opportunities
- Trainings in contracting procedures
- Assistance to start-up firms; and
- Identification of potential highway-related DBEs

## **SUBMISSION AND PUBLICATION OF APG**

On February 29, 2016, MDT published its proposed DBE goal and methodology (2017-2019) for contracts using FHWA funds. MDT posted the information in:

- MDT's website

- MDT's Newsline publication
- Montana newspapers:
  - Billings Gazette
  - Missoulian
  - Helena Independent Record
  - Butte Montana Standard
  - Great Falls Tribune
  - Bozeman Chronicle

MDT also sent the information to:

- Montana Contractor's Association
- American Council of Engineering Companies- Montana Chapter
- MDT's certified DBE firms
- MDT's contractor list
- MDT's consulting list
- MDT's disparity study technical panel
- Partnering agencies including the Native American Development Corporation and the Montana Indian Business Alliance.

The proposed Goal Methodology was available for review on MDT's website and at MDT's Headquarters Building, Office of Civil Rights, 2701 Prospect Avenue, Room 201, Helena, Montana.

MDT held a public hearing on March 29, 2016 in Missoula and a public hearing in Billings on March 31, 2016 concerning the proposed overall DBE goal. In addition, MDT held five virtual public hearings: three on March 23, 2016 and two on April 1, 2016. MDT asked for public comments about its proposed overall three-year DBE goal. Comments were accepted through multiple avenues from February 29 through April 8, 2016. MDT received comments from five commenters and provided them to FHWA. The comments and MDT's responses are as follows:

1. Commenters questioned MDT's Step-2 adjustment to the base figure.

Response: Once the base figure is calculated, 49 CFR 26.45 requires MDT to examine available evidence to determine what adjustment, if any is needed to arrive at its overall goal. In this case, MDT considered past participation, and made an adjustment based upon median past participation as provided in 49 CFR 26.45 (d)(1)(i) and USDOT guidance document *Tips for Goal – Setting in the DBE Program*.

2. Commenters were concerned about when race conscious measures may be implemented.

Response: At the end of six months, MDT will review its Uniform Report of Awards or Commitments and Payments (Uniform Report). 49 CFR 26.47 provides that if the information in MDT's Uniform Report demonstrates that current trends make it unlikely that MDT will achieve DBE awards and commitments necessary to meet its overall goal, MDT will review its race-conscious/race-neutral split.

3. A commenter requested official minutes and/or recordings of the public hearings, and MDT's response to public comment.

Response: MDT's response to public comment is provided herein. An audio recording of the Billings' hearing will be provided. No formal public testimony was given at the Missoula hearing.

4. A commenter requested MDT factor in actual DBE participation in setting its goal.

Response: In making its Step 2 adjustment, MDT applied a downward adjustment for past DBE participation.

5. A commenter requested MDT review the types of projects MDT intends to let in the next three years to determine if it is similar to the projects awarded during the Disparity Study review period.

Response: The projects MDT intends to let during this Federal Fiscal Year 2017 – 2019 Goal Methodology are reasonably similar to projects reviewed in the Disparity Study. Keen Independent conducted some sensitivity analyses regarding dollar-weighted availability based on future projects and dollar-weighted DBE availability changed by less than 0.1 percentage point.

6. Commenters questioned MDT's decision to not implement race conscious measures.

Response: 49 CFR 26.51 requires MDT to meet the maximum feasible portion of its goal using race-neutral means. The trends indicate that the goal can be met through race neutral means. However, if the goal is not met, MDT will modify its race neutral/ race conscious split under 49 CFR 26.47.

7. A commenter was concerned that unless MDT implement race conscious measures, the program offers no assistance to DBEs and does not incentivize primes to use DBE contractors.

Response: MDT has race neutral elements that assist small businesses in the industry.