



DBE Program Plan

Revised January 2024

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Introduction to MDT **Mission & Vision**

The mission of the Montana Department of Transportation (MDT) is to plan, build, operate, and maintain a safe and resilient transportation infrastructure to move Montana forward. The department's guiding vision to accomplish this mission is that MDT will set the gold standard for a highly effective, innovative, and people-centric department of transportation.

The core values that guide all MDT employee behavior, actions and approach are:

- We are **B**usiness focused,
- We **U**nify the organization,
- We **I**nnovate at all levels,
- We **L**ead by example,
- We are **D**edicated to MDT,
- We **E**mpower our employees,
- We **R**espect each other, and
- We **S**erve Montana with pride.

Team MDT – We are **B.U.I.L.D.E.R.S.**

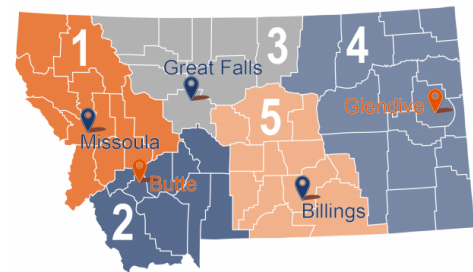
Organization

MDT is responsible for the planning, design, maintenance, operation, and management of Montana's state-owned roadways, walkways, rest areas, airports, and numerous public-use facilities. The departmental structure helps staff at the state, regional, and local level efficiently deliver transportation improvements, comply with relevant rules and regulations, and maintain and operate transportation infrastructure to enable daily movement of goods and people across the state.

Each division within the agency provides a critical function toward meeting MDT's mission of ensuring Montana's transportation network continues to remain a quality resource for all users. As transportation funding changes on both the federal and state levels, efficient management of resources to address needs assures Montana's transportation network continues to support the growth of businesses, communities, and the Montana way of life. MDT's leaders, employees, and partners are focused on the future of our state and finding the best ways to move Montana forward, together.

Montana's geographic and demographic diversity means regions in Montana face different travel demands and transportation challenges. Larger, metropolitan areas with a need to expand urban roadways or manage congested intersection operations may vary from rural Montana's need to reduce roadway departure crashes or manage the movement of large trucks through small towns. To address these unique challenges, the state is split into five transportation districts, each managed by district administrators focused on the individual transportation needs within their jurisdiction.

As a recipient of federal financial assistance from the United States Department of Transportation (USDOT) and its Operating Agencies, MDT is committed to comply with the DBE Program requirements in 49 CFR Part 23 and 26 to deliver its federally assisted programs, services, and activities in a fair and nondiscriminatory manner. This Program Plan outlines MDT's approach for complying with DBE Program requirements.



District 1 - Missoula
Phone: 406.523.5800

District 2 - Butte
Phone: 406.494.9600

District 3 - Great Falls
Phone: 406.454.5880

District 4 - Glendive
Phone: 406.345.8200

District 5 - Billings
Phone: 406.252.4138

GENERAL REQUIREMENTS

49 CFR 26 SUBPART A

Objectives

49 CFR 26.1

The objectives as indicated below are also found in the policy statement section of this program. This DBE Program Plan applies to all types of firms: contractors and consultants.

- a) To ensure nondiscrimination in the award and administration of DOT-assisted contracts in MDT's highway, transit, and airport financial assistance programs;
- b) To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
- c) To ensure that the DBE Program is narrowly tailored in accordance with applicable law;
- d) To ensure that only firms that fully meet 49 CFR Part 26 eligibility standards are permitted to participate as DBEs;
- e) To help remove barriers to the participation of DBEs in DOT-assisted contracts;
- f) To promote the use of DBEs in all types of federally-assisted contracts and procurement activities conducted by recipients;
- g) To assist the development of firms that can compete successfully in the marketplace outside the DBE Program;
- h) To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

Applicability

49 CFR 26.3

As a recipient of Federal funds, MDT is required to administer a DBE program in compliance with all laws, regulations, Executive Orders, and guidance.

MDT receives the following federal funds:

- Federal airport funds authorized by 49 U.S.C. 47101, *et seq.*
 - Applies to Lincoln Airport and Yellowstone Airport.
- Federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, 105 Stat. 1914, or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), [Pub. L. 105-178](#), 112 Stat. 107. Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), [Pub. L. 109-59](#), 119 Stat. 1144; and Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), [Pub. L. 112-141](#), 126 Stat. 405.; and
- Federal transit funds authorized by Titles I, III, V and VI of ISTEA, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA-21, [Pub. L. 105-178](#). Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), [Pub. L. 109-59](#), 119 Stat. 1144; and Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21), [Pub. L. 112-141](#), 126 Stat. 405.

Definitions

49 CFR 26.5

MDT adopted the definitions contained in 49 CFR 26.5 for this program. These definitions as well as those specific to MDT are located in Appendix D.

Non-Discrimination Requirements

49 CFR 26.7

MDT will not exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by this part on the basis of race, color, sex, or national origin.

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

MDT Record Keeping Requirements

49 CFR 26.11

Part a and b – Uniform Report

MDT reports DBE participation on the Uniform Report of DBE Awards or Commitments and Payments in the format included in 49 CFR Part 26, Appendix B. MDT collects data from subrecipients to ensure accurate reporting and only counts contracting opportunities as awards. MDT submits reports on a semi-annual basis to FHWA and FTA (by June 1 and December 1) and an annual basis to FAA (December 1).

Part c – Bidder's List

MDT maintains a bidder's list to provide data about the universe of DBE and non-DBE contractors and subcontractors who seek to work on MDT's Federally-assisted contracts and may be used in setting the overall goals.

MDT maintains electronic systems that identify the universe of DBE and non-DBE contractors and subcontractors and is derived from several sources including:

- Firms that bid on construction projects – after each bid letting, contractors provide a subcontractor report, which indicates names and types of work for firms that bid as a subcontractor, whether they were successful in obtaining a subcontract or not. The form is located here:
<https://mt.accessgov.com/mdt/Forms/Page/engineering-division/subcontractor-report/0>
- Firms that propose on consultant projects – proposals include any subconsultants that a firm intends to use.
- Availability data from disparity studies – the disparity study contacted firms that perform work types that MDT typically awards and created a list of those firms that seek to work on MDT contracts.
- Distribution lists – any other MDT contractor or consultant distribution lists that may indicate interest in working on MDT contracts.

At a minimum, the systems contain the following information about these firms, which can be queried at any time:

- Firm name;
- Firm address;
- Firm's status as DBE or non-DBE;
- Age of firm; and
- The annual gross receipts of the firm.

To keep the DBE directory accurate and up-to-date, DBE status is updated daily. The remaining information is updated via an annual survey, disparity study data, or as firms notify MDT of any changes within their firm.

MDT can also generate a Bidder's List report that indicates firms that have bid or proposed on a contract and whether they were successful in obtaining work on that contract, either as a prime contractor or subcontractor.

Part d – Maintain Records

MDT will retain indefinitely information that documents a DBE firm's compliance with the requirements of this part. At a minimum, MDT retains the following records for DBE firms:

- A complete application package;
- All affidavits of no-change;
- Change notices; and
- On-site reviews.

To ensure confidentiality, these records are maintained in a secure electronic content management system. Other certification or compliance related records are retained for a minimum of three (3) years. Records may be retained for a longer period based on applicable MDT record retention requirements.

Part e – Reporting

MDT is the UCP for Montana and as such reports the following information to the United States Departmental Office of Civil Rights by January 1 of each year:

- Percentage and location in Montana of certified DBE firms in the DBE Directory that are controlled by:
 - Women;
 - Socially and economically disadvantaged individuals (other than women); and
 - Individuals who are women and are otherwise socially and economically disadvantaged individuals.

Assurances

49 CFR 26.13

In accordance with 49 CFR 26.13(a), the following clause is placed in every financial assistance agreement with a DOT operating administration:

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

In accordance with 49 CFR 26.13(b), the following clause will be included in all DOT-assisted contracts between MDT and its contractors as well as every contract a subcontractor has with the prime:

The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry

out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.

As indicated in Standard Specification 108.09, a contractor's failure to comply with any provision of the DBE regulations will be considered a material contract breach.

ADMINISTRATIVE REQUIREMENTS

49 CFR 26 SUBPART B

DBE Program Updates

49 CFR 26.21

MDT's DBE Plan will be updated and approved by federal operating agencies when there have been significant changes to the current approved Plan. All MDT sub-recipients of federal funds must comply with MDT's DBE Plan and may not have a plan independent from MDT.

Policy Statement

49 CFR 26.23

MDT's Policy Statement is in Appendix A.

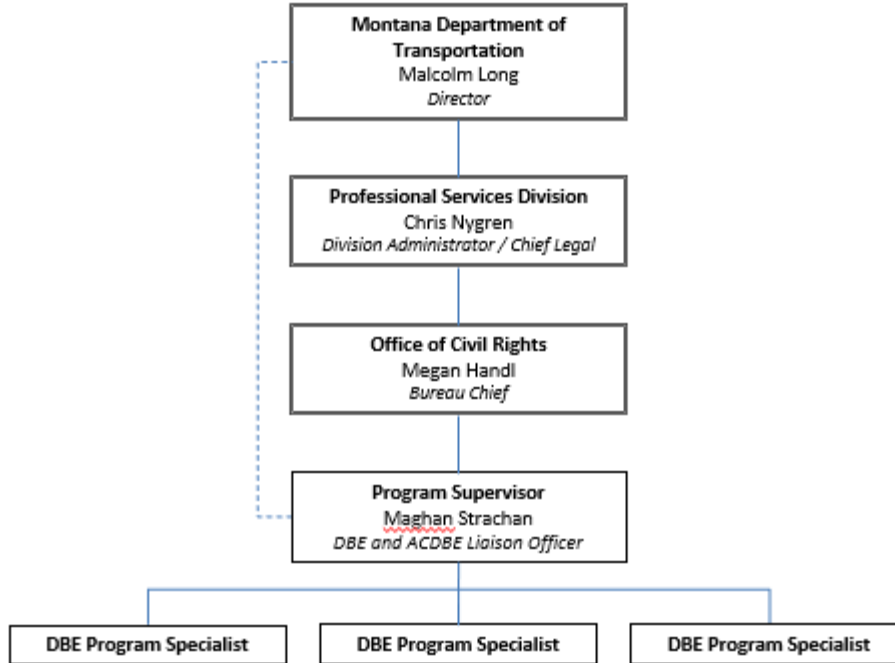
DBE Liaison Officer (DBELO)

49 CFR 26.25

MDT has designated the following individual to serve as DBELO:

Maghan Strachan
MDT Office of Civil Rights
2701 Prospect Ave.
PO Box 201001
Helena, MT 59620-1001
mastrachan@mt.gov
406-444-0841

In that capacity, the DBELO/OCR is responsible for implementing all aspects of the DBE program and ensuring that MDT complies with all provision of 49 CFR Part 26. The DBELO/OCR has direct, independent access to the Director of MDT concerning DBE program matters. An organizational chart displaying the DBELO's position in the organization is found below:



The DBELO/OCR is responsible for developing, implementing, and monitoring the DBE program, in coordination with other affected Administrative Team members and program areas. The DBELO oversees a staff of three specialists to assist in the administration of the program. The DBE Program staff responsibilities include the following:

1. Gather and report statistical data and other information as required by DOT.
2. Review third party contracts and purchase requisitions for compliance with this program.
3. Work with affected program areas to set overall annual goals.
4. Ensure that bid notices and requests for proposals are available to DBEs in a timely manner.
5. Identify contracts and procurements so that DBE goals are included in solicitations (both race-neutral methods and contract specific goals attainment and identify ways to improve progress).
6. Analyze MDT's progress toward attainment and identify ways to improve progress.
7. Participate in pre-bid meetings.
8. Advise the Director on DBE matters and achievement of DBE goals.
9. Provide DBEs with information and assistance in preparing bids, obtaining bonding and insurance.
10. Plan and participate in DBE training seminars.
11. Certify DBEs according to the criteria set by DOT and act as liaison to the Uniform Certification Process in Montana.
12. Provide outreach to DBEs and community organizations to advise them of opportunities.
13. Maintain MDT's updated directory on certified DBEs.

DBE Financial Institutions

49 CFR 26.27

It is the policy of the MDT to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community,

to make reasonable efforts to use these institutions, and to encourage prime contractors on DOT-assisted contracts to make use of these institutions.

To date we have identified two institutions within the state:

Eagle Bank
80 Heritage Ln.
Polson, MT 59860
406.883.2940

Native American Bank, National Association
125 North Public Square
Browning, MT 59417
800.307.9199

Information on the availability of such institutions can be obtained from the DBE Program Specialists or the Minority Depository Institutions list through the Federal Deposit Insurance Corporation at the following link [FDIC](#).

Prompt Payment

49 CFR 26.29 MCA 28-2-2103(2)(a)

Part a – Prompt Payment Clauses

MDT ensures that prompt payment provisions are included in every contract to ensure that subcontractors and suppliers are paid within the timeframes specified by federal or state law, whichever is more restrictive.

For construction contracts, §28-2-2103(2)(a), MCA, states that prompt payment is 7 days from receipt of payment. Therefore, on all construction contracts, MDT includes Standard Specification 108.01.3, which states the following:

Submit payment information for all subcontractors and suppliers to the Department within the timeframes shown. Identify any payments that have been withheld from subcontractors or suppliers.

- Prime contractors with first tier subcontractors or suppliers within 7 calendar days of payment from MDT.
- First tier subcontractors with second tier subcontractors or suppliers within 7 calendar days of payment from prime contractor.

Submit payment information at the following link: <https://app.mdt.mt.gov/spr/>

MDT reviews all subcontracts and ensures that subcontracts do not provide for a payment time frame longer than the law's mandated 7 days.

Prompt payment for consultant contracts falls under 49 CFR 26.29. The following language is included in all consultant contracts:

Consultant must pay all subconsultants within thirty (30) days from receipt of payment from MDT to Consultant for invoiced subconsultant services, Consultant shall pay subconsultants. Consultant shall pay subconsultants for satisfactory performance of their subcontracts. Identify any payments that have been withheld from subconsultants.

Report payment information at the following link:

<https://app.mdt.mt.gov/spr/>

Part b – Retention

MDT follows 49 CFR 26.29(b)(2) for retainage, which states:

You may decline to hold retainage from prime contractors and require a contract clause obligating prime contractors to make prompt and full payment of any retainage kept by prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed.

MDT does not hold retainage from prime contractors and has the following contract clause requiring prime contractors to pay retainage within 7 days after the subcontractor's work is satisfactorily completed:

Pay all subcontractors within 7 calendar days after receipt of a periodic or final payment from the Department. Payment must be for the full amount due the subcontractor (including retainage) for work performed or materials provided that were included in the periodic or final payment according to the provisions of Section 28-2-2103(2)(a) MCA. A subcontract may not provide for a time longer than the law's mandated 7 calendar days.

For sub-recipient contracts, MDT provides the above language for the sub-recipient to ensure prompt payment of subcontractors and suppliers. The sub-recipient reports subcontractors or suppliers and payments to MDT.

Part c – Acceptance of Work

MDT Construction Project Managers and staff verify work performed, whether done by the prime or subcontractor on all construction projects. Daily, MDT tracks work performed per the specifications. Monthly, the completed work items are reviewed and paid.

For consultants, MDT Project Managers review monthly invoices submitted by consultants, which includes invoices for subconsultant work. If items billed on the invoice are completed, MDT pays the invoice.

Part d – Monitoring and Enforcement

Prime contractors and subcontractors (if they have lower tier subcontractors) must enter payments into MDT's Subcontractor Payment Reporting (SPR) system within 7 days of receiving payment. The prompt payment Standard Specification also requires contractors to enter any payments that have been withheld and the justification for withholding payment. If the contractor does not enter payment information within 7 days, SPR sends an email to remind them of the requirements of § 28-2-2103(2)(a), MCA. MDT has a committee with members from Office of Civil Rights, Construction and Legal that reviews late payments and determines appropriate contract sanctions.

Part e – Additional Mechanisms

As previously set forth in the Assurances Section, Standard Specification 108.09, indicates contract sanctions MDT may use if a contractor fails to comply with any provision of the DBE regulations, including prompt payment. These include:

The Engineer will give written notice to the Contractor and surety of such delay, neglect, or default. Failure to correct the delay, neglect, or default within 10 calendar days after the Engineer's written notice gives the Department full authority without violating the contract to take over prosecution of the work from the Contractor. The Department may appropriate or use any or all materials and equipment at the project site that is suitable and acceptable and enter into an agreement for completing the contract. The Department may use any methods determined necessary to complete the contract.

All costs and charges incurred by the Department, including the cost of completing the work under the contract, will be deducted from any monies due or that may become due to the Contractor. If the expense exceeds the sum that would have been payable under the contract, then the Contractor and the surety are liable and must pay to the Department the amount of such excess.

FAA Funded Projects Only

Pursuant to Sec. 157 of the FAA Reauthorization Act of 2018, all complaints related to prompt payment will be reported in a format acceptable to the FAA, including the nature and origin of the complaint and its resolutions.

Directory

49 CFR 26.31

MDT is the UCP for Montana and maintains a directory identifying all firms eligible to participate as DBEs. The directory lists the firm's name, address, phone number, email, website if available, and the type of work the firm has been certified to perform as a DBE by using the most specific NAICS code available to describe each type of work.

You may call in a request that a paper copy of the DBE Directory be mailed to you by contacting our office at: 406-444-6337, 800-531-2047, or (TTY) 800-335-7592.

The Directory is also available on the website at this web address:

<https://app.mdt.mt.gov/dbe/dbe/search>

Overconcentration

49 CFR 26.33

MDT has not identified that overconcentration exists in the types of work that DBEs perform. MDT will forward any allegations or determinations of overconcentration to the Operating Administration (OA) for consultation.

Business Development Programs

49 CFR 26.35

MDT has a business development program in accordance with 49 CFR 26.35 to assist firms in gaining the ability to compete successfully in the marketplace outside the DBE program.

The business development program (included in Appendix B) is explained in the DBE Supportive Services Statement of Work. For more information on the business development program or other supportive service programs, please contact:

Shannon Hahn

shahn@mt.gov

406-444-7287

Monitoring and Enforcement Mechanisms

49 CFR 26.37

Part a – Monitoring Prime Contractors and Sub-recipient Compliance

MDT maintains UCP agreements with sub-recipients to ensure they include the necessary assurances and are following MDT's DBE Program requirements. MDT conducts training with sub-recipients and works closely with them to ensure implementation of the DBE Program. Standard Specifications and this DBE Program Plan provide guidance and rules for prime contractor compliance. One example is Section 108.01.2 of the Standard Specifications requires that MDT consent to all subcontracts before a subcontractor at any contract tier can start work.

This review ensures appropriate prompt payment language, assurances, and wage rates are included in the subcontract.

Part b – CUF Reports

MDT Engineering Project Managers or delegated field staff prepare a Commercially Useful Function (CUF) report for each DBE on a project to ensure that work committed to DBEs at contract award or subsequently (e.g., as the result of modification to the contract) is actually performed by the DBEs to which the work was committed. See Appendix C for MDT's CUF report. Regardless of whether race-neutral or race-conscious measures are used on a contract, field staff conduct on-site monitoring through the CUF reviews on all DBE firms on each contract. Field staff are instructed to complete a CUF report when a DBE is initially on a project. If there are issues with performance or there is a change in work type, the MDT field staff complete another CUF report. After field staff prepare the report, they send the information to the DBE Program for review. The DBE Program works closely with field staff. MDT and/or OCR work to resolve any identified issues. The reports are stored in DBE files as well as the construction project files.

Part c – DBE Attainments

MDT maintains data that compares DBE commitments to DBE subcontracts and then generates reports that compare payments to subcontract amounts.

Goal attainment

MDT tracks annual goal attainment, DBE commitments, and DBE subcontracts monthly. Although MDT is currently solely race neutral, the tracking allows for the breakdown of race conscious and race neutral measures. If MDT implements race conscious measures, the monthly report will also include a review of race conscious and race neutral splits and use that data in setting future project specific goals.

Payment Tracking

Payments are monitored through MDT's prompt payment review process. MDT generates reports that compare the expected subcontractor payment amount (based on work items paid on an estimate that are part of the subcontract) to actual payment amounts and discrepancies are highlighted and reviewed with the prompt payment committee.

Tracking of Federal Funding Amounts

The Uniform Report reviews federal and state funding splits from MDT's billing vouchers and only includes project amounts based on the federal share of the project.

Small Business Participation

49 CFR 26.39

In accordance with 49 CFR 26.39, MDT fosters small business participation through several means, which include:

- Ensuring a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform. Some of the smaller contracts include safety improvement contracts and Transportation Alternative projects.
- Having prime contractors provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work involved. To encourage this, MDT proposed to set aspirational project specific goals in the FHWA Federal Fiscal Year 2023-2025 Goal Methodology. The goals will provide information to contractors on what DBE availability is for a project but does not impose any penalties if that goal is not met.
- Provide training to small businesses, including DBEs, to increase their capacity and improve overall business practices so they can succeed in the marketplace.

- Reviewing payments for all subcontractors to ensure they are paid promptly.

GOALS, GOOD FAITH EFFORTS, AND COUNTING

49 CFR 26 SUBPART C

Overall Goals

49 CFR 26.45

In accordance with 49 CFR 26.45(f), MDT will submit its overall goal to DOT by August 1 at three-year intervals, based on the schedule established by FHWA, FTA, and FAA as indicated below. When setting its three-year DBE goal, MDT hosts public meetings to consult with minority, women, and general contractor groups, community organizations, transit providers, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses. effects of discrimination, and effectiveness of MDT and industry efforts to establish a level-playing field. MDT factors the provided feedback into the goal calculation prior to submitting to each operating agency. A full description of the methodology to calculate the overall goal and the goal calculations can be found on MDT's DBE website:

<https://www.mdt.mt.gov/business/contracting/civil/programinfo.shtml>

FHWA: due August 1, 2022; August 1, 2025; and every three years thereafter.

FTA: due August 1, 2023; August 1, 2026; and every three years thereafter.

FAA Lincoln Airport: due August 1, 2023; August 1, 2026; and every three years thereafter.

FAA Yellowstone Airport: Due August 1, 2024; August 1, 2027; and every three years thereafter.

Shortfall Analysis

49 CFR 26.47(c)

Monthly, MDT monitors DBE participation towards the overall goal based on awards and commitments. After the Uniform Report due December 1st is submitted, MDT will evaluate whether the awards and commitments on the Uniform Report met the overall goal for the fiscal year. If the overall goal was not met, MDT analyzes the reasons for the shortfall and prepares a report to the appropriate OA within 90 days of the end of the fiscal year. The shortfall analysis will include such things as a review of projects awarded to see if the types of projects differed from those anticipated when the overall goal was established and the effectiveness of race neutral measures.

Transit Vehicle Manufacturer (TVM)

49 CFR 26.49

Each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, must certify that it has complied with the requirements of this section. If non-TVM vehicles are purchased, or DBE TVMs are not available, MDT will include the contract in its triennial DBE goal. Within 30 days of contract award, MDT's Transit Section reports TVM purchase information on FTA's website:

<https://www.surveymonkey.com/r/vehicleawardreportsurvey>

Methods to Achieve Overall Goals

49 CFR 26.51

In accordance with 49 CFR 26.51, MDT will meet the maximum feasible portion of the overall goal by using race-neutral means of facilitating DBE participation. As noted in the Goal Methodologies, MDT proposes to meet the overall goals for FHWA, FTA, and FAA solely through race neutral means.

In the FHWA goal for Fiscal Year 2023-2025, MDT proposed to set aspirational project specific goals. MDT utilizes information from the 2022 Disparity Study to determine the aspirational project specific goal. The data for businesses (DBE or non-DBE) includes types of work they can perform and locations throughout the state where they are willing to work. This data is compared to each upcoming project location and scope of work. MDT then calculates a weighted average of DBE availability for the project.

A committee with members from Construction and Office of Civil Rights meet to discuss the availability percentage calculated for each project. The committee may establish a 0% DBE aspirational goal on a project due to any of the following reasons: limited identified subcontracting opportunities, minimal contract days, and/or small contract dollar amount. A 0% DBE aspirational goal does not mean that a DBE may not be used on that project.

If the overall goal is not being met and MDT needs to implement race conscious goals, MDT will go through the same process to establish a project specific goal, except the project specific goal will only be the amount estimated that needs to be met through race conscious measures. As explained in the section on Monitoring DBE attainments, the monthly report will also include a review of race conscious and race neutral splits. That data will be used in setting future project specific goals to ensure the maximum feasible portion of the overall goal is met through race neutral means.

Good Faith Efforts Procedures

49 CFR 26.53

Currently, MDT is operating a solely race neutral program. If the overall DBE goal is not met and MDT implements race conscious measures, the following sections document MDT's procedures for reviewing good faith efforts.

Parts a and b – Demonstration of Good Faith Efforts

When there is a project specific goal, bidders have an obligation to make good faith efforts to meet the contract goal. The bidder can demonstrate that it has done so by 1) meeting the contract goal or 2) documenting good faith efforts were made.

All bidders must indicate DBE utilization with their bid. This includes name and address of DBE firm, work type to be performed, and the dollar amount of the DBE commitment. If the apparent low bidder (or all qualified bidders if design build) did not meet the project specific goal, they have 48 hours from the bid opening to provide evidence of good faith effort to the DBE Program.

Part c – Good Faith Effort Review

The DBE Program is responsible for reviewing good faith effort documentation. When reviewing the documentation, the DBE Program considers guidance for good faith efforts in Appendix A to Part 26 as well as criteria listed in Appendix E of this Program Plan. The DBE Program makes an initial recommendation on good faith efforts and present to the DBE Participation Review Committee, which includes members from MDT's Office of Civil Rights, Construction, and Legal. The Committee makes the final decision and notifies the bidder.

Part d – Reconsideration

If the apparent successful bidder/offeror failed to meet good faith efforts, the DBE Participation Review Committee notifies them of the opportunity for administrative reconsideration. If the bidder seeks administrative reconsideration, it must notify the DBE Program within 3 calendar days from the date the bidder was notified of failure to make good faith effort.

If administrative reconsideration is requested, to ensure separation of functions, Megan Handl, MDT Civil Rights Bureau Chief will act as the reconsideration official. The bidder may submit written documentation, meet in person, or both, to discuss whether it made adequate good faith efforts. If the bidder wishes to meet, it must do so within 3 business days of its request for administrative reconsideration. The decision will be provided in writing and explain the basis for the decision; the decision is final.

The members of both the DBE Participation Review Committee and the administrative reconsideration decision maker will be trained on all laws, regulations, and guidance necessary to come to a fair and accurate decision.

Part f – Termination or Substitution of DBEs

MDT requires the prime contractor to notify the DBE Program immediately of the DBE's inability or unwillingness to perform on a contract.

As specified in 49 CFR 26.53(f), good cause determinations for terminating a DBE on a contract, are:

- The listed DBE subcontractor fails or refuses to execute a written contract;
- The listed DBE subcontractor fails or refuses to perform the work of its subcontract in a way consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the DBE subcontractor to perform its work on the subcontract results from the bad faith or discriminatory action of the prime contractor;
- The listed DBE subcontractor fails or refuses to meet the prime contractor's reasonable, nondiscriminatory bond requirements.
- The listed DBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;
- The listed DBE subcontractor is ineligible to work on public works projects because of suspension and debarment proceedings pursuant 2 CFR Parts 180, 215 and 1,200 or applicable state law;
- You have determined that the listed DBE subcontractor is not a responsible contractor;
- The listed DBE subcontractor voluntarily withdraws from the project and provides to you written notice of its withdrawal;
- The listed DBE is ineligible to receive DBE credit for the type of work required;
- A DBE owner dies or becomes disabled with the result that the listed DBE contractor is unable to complete its work on the contract;
- Other documented good cause that you determine compels the termination of the DBE subcontractor. Provided, that good cause does not exist if the prime contractor seeks to terminate a DBE it relied upon to obtain the contract so that the prime contractor can self-perform the work for which the DBE contractor was engaged or so that the prime contractor can substitute another DBE or non-DBE contractor after contract award.

If the prime contractor seeks to terminate a DBE subcontractor on a project with race conscious goals, they must notify the DBE subcontractor in writing, with a copy to the MDT DBE Program and the MDT Engineering Project Manager. The request must give the DBE subcontractor notice of the prime contractor's intent to terminate and the reason. The request must give the DBE 5 calendar days to respond to the notice and provide any reasons, if any, why it objects to the proposed termination and why the prime contractor's request to terminate should not be approved. If required in a particular case as a matter of public necessity (e.g., safety), the prime contractor may provide a response period shorter than five days.

The DBE Program will make the final determination and notify the prime contractor in writing of the decision. The decision is final with no right of appeal, formal or informal.

Part g – Substitution of a DBE

When a DBE subcontractor is terminated as provided in the previous section or fails to complete its work on the contract for any reason, the prime contractor must make good faith efforts to find another DBE subcontractor to substitute for the original DBE. The prime contractor must make good faith efforts to find another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the project specific goal. The contractor must document its good faith efforts. When the prime contractor proposes a substitution for the terminated DBE subcontractor and it does not meet the project specific goal, the prime contractor must provide good faith effort documentation to the MDT DBE Program within 7 calendar days of their request. This may be extended for an additional 7 days if necessary, at the request of the contractor. MDT will follow the same procedures outlined in Part c above when reviewing good faith effort documentation, making determinations, and notifying the prime contractor.

If a contractor eliminates, reduces, or attempts to eliminate or reduce a DBE's performance, without the consent of MDT, MDT and/or FHWA may impose sanctions. Contracts with project specific goals will include the following provisions:

- A. the contractor shall utilize the specific DBEs listed to perform the work and supply the materials for which each is listed unless the contractor obtains your written consent as provided 49 CFR 26.53(f); and
- B. unless MDT's consent is provided, the contractor shall not be entitled to any payment for work or material unless it is performed or supplied by the listed DBE.

If change orders to a contract significantly change the scope of work and affect the project specific goal, MDT construction will work with the DBE program prior to approval of the change order. MDT will consider if the additional work can be performed by DBEs or if removal of work may result in terminations of DBEs. MDT will follow the same good faith effort procedures for DBE utilization or termination as previously described in this part.

Part i – DBE is a Prime Contractor

Good faith efforts are reviewed in the same manner when the bidder on a contract with project specific goals is a DBE. The work committed to be performed by the DBEs own forces as a prime contractor as well as any work committed to be performed by DBE subcontractors and suppliers counts towards meeting the project specific goal. Any commitments to non-DBE subcontractors are not included towards the goal.

Part j – Subcontracts

MDT requires the prime contractor make available all subcontracts. Standard Specification 108.01.2 requires that one executed and certified copy of the subcontract must be provided before MDT can consent to the subcontract. The subcontractor shall ensure that all subcontracts or an agreement with DBEs to supply labor or materials require that the subcontract and all lower tier subcontractors perform in accordance with this part's provisions.

Counting DBE Participation
49 CFR 26.55

Part a – DBE Credit

When a DBE participates in a contract, MDT counts only the value of the work actually performed by the DBE toward DBE goals. Work performed by DBEs is verified through CUF reports as described previously under 49 CFR 26.37(b). CUFs are evaluated on a project by project basis. If work performed matches the subcontracted work, MDT counts DBE participation as follows:

- (1) MDT counts the entire amount of that portion of a contract that is performed by the DBE's own forces, including the cost of supplies and materials obtained by the DBE for the work of the contract and supplies purchased or equipment leased by the DBE. If supplies or

- equipment is purchased or leased from the prime contractor or its affiliate, MDT does not count those amounts towards DBE goals.
- (2) MDT counts the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, toward DBE goals, provided the fee is determined to be reasonable and not excessive as compared with fees customarily allowed for similar services.
 - (3) When a DBE subcontracts part of the work of its contract to another firm, MDT only counts the value of the subcontracted work toward DBE goals if the DBE's subcontractor is itself a DBE. MDT does not count work that a DBE subcontracts to a non-DBE firm toward DBE goals.

Part b – Joint Ventures

When a DBE performs as a participant in a joint venture, MDT counts a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.

Part c – Commercially Useful Function (CUF)

As previously described in 49 CFR 26.37(b), MDT field staff prepare CUF reports and send to the DBE Program for review. The DBE Program is responsible for making the CUF determination. The determination is based on an evaluation of:

- the amount of work subcontracted
- industry practices
- whether the amount the firm is to be paid under the contract is commensurate with the work it is performing, and the DBE credit claimed for its performance of the work, and
- other relevant factors.

If a DBE does not perform or exercise responsibility for the portion of work that a contract would be expected based on normal industry practice for the type of work or acts as a pass through or extra participant, then MDT will presume the DBE is not performing a CUF. If the DBE Program presumes that a DBE is not performing a CUF, MDT will notify the DBE and the prime contractor of this determination. The DBE must present evidence to rebut the presumption. If the evidence does not support that the DBE is performing a CUF, then the DBE subcontract amount will not count towards the goal. The DBE firm can provide a written notice to appeal the CUF determination to the DBE Program. At that point, the MDT Director will designate a decision-maker for the final CUF determination who was independent from the original decision and is knowledgeable about the DBE certification requirements and 49 CFR 26. The OA may review CUF decisions; however, CUF determinations are not administratively appealable to USDOT.

Part d – Trucking

MDT counts participation from trucking firms for the total value of transportation services for vehicles owned or leased by DBE firms if they are performing a CUF. MDT tracks trucking participation through subcontracts and CUF reports prepared by the MDT field staff. If the DBE firm leases trucks from a non-DBE firm and uses non-DBE drivers, MDT counts credit up to the value of transportation services provided by the DBE's own trucks. If the DBE uses their own employees in trucks leased from non-DBE firms, MDT counts full credit for the value of the transportation services.

Part e – Materials or Supplies

MDT counts expenditures with DBEs for materials and supplies toward DBE goals as follows:

- If the materials or supplies are obtained from a DBE manufacturer, MDT counts 100 percent of the cost of the materials or supplies toward DBE goals.
- If the materials or supplies are purchased from a DBE regular dealer, MDT counts 60 percent of the cost of the materials or supplies toward DBE goals.

- With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, MDT counts the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, provided the fees are reasonable and not excessive as compared with fees customarily allowed for similar services. The portion of the cost of the materials and supplies themselves do not count toward DBE goals.
- MDT determines the amount of credit awarded to a firm for the provisions of materials and supplies (e.g., whether a firm is acting as a regular dealer or a transaction expediter) on a contract-by-contract basis.

Part f – DBE credit if not certified at time of award

If a firm is not currently certified as a DBE at the time of contract execution, MDT does not count participation toward DBE goals. MDT does count payments made to a DBE towards the overall goal after they have become certified in accordance with the standards of subpart D.

Part g – DBE credits if no longer certified

MDT does not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward your overall goal. Payments up until the DBE is no longer certified are counted towards the overall goal.

Part h – Credit for payment

MDT does not count the participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE. MDT confirms this through the subcontractor payment reporting system.

CERTIFICATION STANDARDS

49 CFR 26 SUBPART D

Burdens of Proof/Group Membership

49 CFR 26.61 & 49 CFR 26.63

In determining whether to certify a firm as eligible to participate as a DBE, MDT applies the standards of this subpart:

- The applicant seeking certification has the burden of demonstrating to MDT, by a preponderance of the evidence, that it meets the requirements of this subpart concerning group membership or individual disadvantage, business size, ownership, and control.
- MDT rebuttably presumes that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. MDT requires applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged. Applicants also have the obligation to provide MDT information concerning their economic disadvantage. Per USDOT's 2014 Final Rule, an individual must be an enrolled member of a Federally or State of Montana recognized Indian tribe to receive the presumption of social disadvantage as a Native American. As such, the owner may provide Indian tribal roll cards, a letter from a community group, education institution, religious leader, or government agency corroborating that the individual is a member of the claimed group.
- Individuals who are not presumed to be socially and economically disadvantaged, and individuals concerning whom the presumption of disadvantage has been rebutted, have the burden of proving to MDT, by a preponderance of the evidence, that they are socially and economically disadvantaged.

- MDT makes determinations concerning whether applicants have met their burden of demonstrating group membership, ownership, control, and social and economic disadvantage (where disadvantage must be demonstrated on an individual basis) by considering all the facts in the record, viewed as a whole.

If, after reviewing the signed notarized statement of membership in a presumptively disadvantaged group, and MDT has a well-founded reason to question the individual's claim of membership in that group, MDT requires the applicant to present additional evidence that he or she is a member of the group.

MDT provides the applicant a written explanation of reasons for questioning his or her group membership and a written request for additional evidence. MDT takes special care to ensure that a disproportionate burden on members of any particular designated group is not imposed. MDT requires documentation proving the person has held himself out to be a member of the group over a long period of time prior to application for certification and whether the person is regarded as a member of the group by the relevant community.

If MDT determines that an individual claiming to be a member of a group presumed to be disadvantaged is not a member of a designated disadvantaged group, the individual must then demonstrate social and economic disadvantage on an individual basis.

MDT's decisions concerning membership in a designated group are subject to the certification appeals procedure.

Business Size

49 CFR 26.65

An applicant including its affiliates must be an existing for-profit small business, as defined by Small Business Administration (SBA) standards. MDT applies current SBA business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts, including the primary industry classification of the applicant.

Even if the applicant including its affiliates meets the SBA size standards, the applicant becomes DBE ineligible in any Federal fiscal year if the firm including its affiliates has had a three-year fiscal average annual gross receipts in excess of \$26.29 million.

Social and Economic Disadvantage

49 CFR 26.67

To ensure the use of the proper Personal Net Worth (PNW) form, MDT will provide a link to the form along with the application on its website and will provide the form with all requests for applications. MDT will also inform potential applicants that the use of the USDOT PNW form is mandatory for all applicants and must be signed and notarized.

In reviewing the PNW, MDT will ensure appropriate supporting documentation is provided. Where necessary to accurately determine an individual's personal net worth, MDT may, on a case-by-case basis, require additional financial information from the owner of an applicant firm (e.g., information concerning the assets of the owner's spouse, where needed to clarify whether assets have been transferred to the spouse or when the owner's spouse is involved in the operation of the company). Requests for additional information shall not be unduly burdensome or intrusive.

In determining an individual's net worth, MDT will observe the following requirements:

- A. Exclude an individual's ownership interest in the applicant firm;

- B. Exclude the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). The equity is the market value of the residence less any mortgages and home equity loan balances. Recipients must ensure that home equity loan balances are included in the equity calculation and not as a separate liability on the individual's personal net worth form. Exclusions for net worth purposes are not exclusions for asset valuation or access to capital and credit purposes.
- C. Do not use a contingent liability to reduce an individual's net worth.
- D. With respect to assets held in vested pension plans, Individual Retirement Accounts, 401(k) accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time without significant adverse tax or interest consequences, include only the present value of such assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time.

An individual's presumption of economic disadvantage may be rebutted in two ways:

- 1. If the statement of personal net worth and supporting documentation that an individual submits shows that the individual's personal net worth exceeds \$1.32 million, the individual's presumption of economic disadvantage is rebutted.
- 2. If the statement of personal net worth and supporting documentation that an individual submits demonstrates that the individual is able to accumulate substantial wealth, the individual's presumption of economic disadvantage is rebutted. In making this determination, MDT considers factors that include, but are not limited to, the following:
 - a. Whether the average adjusted gross income of the owner over the most recent three-year period exceeds \$350,000;
 - b. Whether the income was unusual and not likely to occur in the future;
 - c. Whether the earnings were offset by losses;
 - d. Whether the income was reinvested in the firm or used to pay taxes arising in the normal course of operations by the firm;
 - e. Other evidence that income is not indicative of lack of economic disadvantage; and
 - f. Whether the total fair market value of the owner's assets exceed \$6 million.

If a presumption of economic disadvantage falls under option 2 or if there is a reasonable basis to believe than an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged, MDT may start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. MDT's proceeding procedures follow those listed in the section on Removal of a DBE's Eligibility (49 CFR 26.87). MDT may require the individual to produce information relevant to the determination of his or her disadvantage.

Assets are attributed to an individual claiming disadvantaged status in which the individual has transferred to an immediate family member, to a trust a beneficiary of which is an immediate family member, or to the applicant firm for less than fair market value, within two years prior to a concern's application for participation in the DBE program or within two years of recipient's review of the firm's annual affidavit, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support. Any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements are not attributed to an individual claiming disadvantaged status.

Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. MDT makes a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to MDT, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds \$1.32 million shall not be deemed to be economically disadvantaged. In making these determinations, MDT uses the guidance found in 49 CFR 26, Appendix E.

Ownership

49 CFR 26.69

In order to determine ownership, MDT will collect:

Partnerships or Joint Ventures

- Original and any amended Partnership or Joint Venture Agreements

Corporation or LLC

- Official Articles of Incorporation (signed by the state official)
- Both sides of all corporate stock certificates and firm's stock transfer ledger
- Shareholder's Agreements
- Minutes of all stockholders and board of directors' meetings
- Corporate by-laws and any amendments
- Corporate bank resolution and bank signature cards
- Official Certificate of Formation and Operating Agreement with any amendments (for LLCs)

MDT will review this documentation to ensure a firm is at least 51 percent owned by socially and economically disadvantaged individuals.

(1) In the case of a corporation, such individuals must own at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding.

(2) In the case of a partnership, 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged individuals. Such ownership must be reflected in the firm's partnership agreement.

(3) In the case of a limited liability company, at least 51 percent of each class of member interest must be owned by socially and economically disadvantaged individuals.

Control

49 CFR 26.71

In determining whether socially and economically disadvantaged owners control a firm, MDT will consider all the facts in the records viewed. MDT will evaluate independence, formal and informal restrictions which limit discretion of socially and economically disadvantaged owners, direction of management and policies of the firm, and understanding of managerial and technical competence and experience directly related to the type of business in which the firm is engaged by the socially and economically disadvantaged owners.

Montana state law does not require owners of professional services firms hold a professional license and certification will not be denied solely on the ground that the person lacks the license

or credential. However, MDT may consider the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.

Part n1 – NAICS Codes

MDT is committed to assigning the NAICS code that most narrowly describes the work the disadvantaged owner is able to control and the work that the firm performs or intends to perform on federally-assisted contracts. MDT will review each requested NAICS and work with each firm to ensure the code is suitable. Multiple NAICS codes may be assigned where appropriate. The MDT DBE Directory will list each firm's NAICS and a work type description.

Other Rules

49 CFR 26.73

CUF (Commercially Useful Function) is not a certification issue and is not appealable to USDOT. MDT will use the certification standards of Subpart D of Part 26 to determine the eligibility of firms to participate as DBEs in DOT-assisted contracts and will not deny certification based on prequalification status or state business licenses. To be certified as a DBE, a firm must meet all certification eligibility standards. MDT makes our certification decisions based on the facts as a whole.

DBE Certification Information, Instructions, and Forms can be found on the website at:

<http://www.mdt.mt.gov/business/contracting/civil/dbe.shtml>

For information about the certification process or to apply for certification, firms can contact the DBE Program as follows:

Maggie Metzger
406-444-6337
mmetzger@mt.gov

Stefanie Enochs
406-444-6042
senochs@mt.gov

MDTDBEProgram@mt.gov

800-883-5811
(TTY) 800-335-7592

DBE Program
2701 Prospect Ave.
PO Box 201001
Helena, MT 59620-1001

CERTIFICATION PROCEDURES

49 CFR 26 SUBPART E

Unified Certification Programs

49 CFR 26.81

MDT administers the Montana Unified Certification Program (UCP). The UCP will meet all of the requirements of this section. MDT's UCP approval is in Appendix F or at the link below:

[MDT UCP Approval](#)

Procedures for Certification Decisions

49 CFR 26.83

MDT is the sole UCP in Montana and will process all DBE applications. Onsite visits will be conducted at the firm's principal place of business (or virtually in accordance with DOT's guidance) with two DBE Program Specialists. MDT will interview the principal officers and review their résumés and/or work histories. MDT will also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in the state. No fee will be charged to DBE applicants.

MDT will advise each applicant within 30 calendar days from receipt of the application whether the application is complete and suitable for evaluation and, if not, what additional information or action is required. MDT will make a final decision of DBE certification within 90 calendar days of receiving a complete application from the firm. MDT may extend this time period once, for no more than an additional 60 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension.

Once a DBE is certified, it shall remain certified until and unless MDT has removed its certification, in whole or in part, through the procedures of §26.87, except as provided in §26.67(b)(1).

DBEs must inform MDT in writing of any change in circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material change in the information provided in its application form. If such changes are reported, supporting documentation will be requested. If appropriate in light of changed circumstances, MDT will conduct a new on-site review.

DBEs must provide to MDT, every year on the anniversary of the date of certification, an affidavit sworn to by the firm's owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material changes in the information provided in its application form, except for changes about which you have notified the recipient. The affidavit shall specifically affirm that the firm continues to meet SBA business size criteria and the overall gross receipts cap. MDT will only require the firm to provide federal taxes to confirm business size with its Annual Affidavit submission.

Based on the [Official Questions and Answers](#) of the DBE Program Regulations, MDT will update on-site reviews over 3 years old to ensure they reflect the current status of the DBE firm.

Interstate Certification

49 CFR 26.85

MDT will not mandate new applications for firms certified in their home states. MDT will require all out-of-state applicants to provide:

- a complete copy of the application form, all supporting documents, and any other information submitted to the home state or any other state related to your firm's certification. This includes affidavits of no change (see §26.83(j)) and any notices of changes (see §26.83(i)) that you have submitted to the home state, as well as any correspondence you have had with the home state's UCP or any other recipient concerning your application or status as a DBE firm.
- any notices or correspondence from states other than the home state relating to its status as an applicant or certified DBE in those states.
- If a certification appeal has been filed with DOT (see §26.89), the applicant must inform MDT of the fact and provide the letter of appeal and DOT's response to MDT.

- an affidavit sworn to by the firm's owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that all the information required by 49 CFR 26.85(c) has been submitted and the information is complete and, in the case of the information required by §26.85(c)(1), is an identical copy of the information submitted to the home state.

Within seven days of receiving an out-of-state application, MDT will contact the firm's home state and request a copy of the site visit review report for the firm (see §26.83(c)(1)), any updates to the site visit review, and any evaluation of the firm based on the site visit.

MDT will determine whether there is good cause to believe that the home state's certification of the firm is erroneous or should not apply in Montana. On rare occasion that this may occur, MDT will contact the home state to discuss any questions or concerns before making that determination.

If, unless determined that there is good cause to believe that the home state's certification is erroneous or should not apply in Montana, MDT will, no later than 60 days from the date on which all the information required is received from the applicant firm, send to the applicant firm a notice that it is certified and place the firm on MDT's directory of certified firms.

If MDT has determined that there is good cause to believe that the home state's certification is erroneous or should not apply in Montana, MDT will, no later than 60 days from the date on which all the information required is received by the applicant firm, send to the applicant firm a notice stating the reasons for its determination.

Denials of Initial Requests for Certification

49 CFR 26.86

When a firm is denied DBE certification, MDT will provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. The letter will inform the firm of their right to appeal. All documents and other information on which the denial is based will be made available to the applicant, on request.

When a firm is denied certification, twelve months must elapse before the firm may reapply to MDT for certification. The time period for reapplication begins to run on the date the explanation is received by the firm.

An applicant for DBE certification may withdraw its application before a decision has been issued on the application, the applicant can resubmit the application at any time (the waiting period does not apply). However, the reapplication will be placed at the "end of the line," behind other applications that have been made since the firm's previous application was withdrawn.

MDT will post all denials to United States Departmental Office of Civil Rights web-based database.

Removal of a DBE's Eligibility

49 CFR 26.87

In the event MDT proposes to remove a DBE's certification, we will follow procedures consistent with 49 CFR 26.87.

MDT DBE Program will address third party ineligibility complaints, or recipient initiated disclosures of possible ineligibility by reviewing records concerning the firm, any material provided by the firm and the complainant, and other available information. Within 7 business days of receiving the complaint, MDT Office of Civil Rights will contact the complainant. MDT may also

request additional information from the firm or conduct any other investigation that we deem necessary. MDT accepts anonymous complaints on a case-by-case basis.

If MDT determines, based on this review, that there is reasonable cause to believe that the firm is ineligible, MDT provides a written proposal notice to the firm, setting forth the reasons for the determination. All statements of reasons for findings on the issue of reasonable cause will specifically reference the evidence in the record on which each reason is based. If the reasonable cause is due to a third-party complaint and determined it does not exist, MDT notifies the complainant and the firm in writing of this determination and the reasons for it.

When MDT notifies a firm that there is reasonable cause to remove its eligibility, MDT gives the firm an opportunity for an informal hearing, at which time the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified. MDT maintains a complete recorded transcript of the hearing. The firm may also elect to present information and arguments in writing, without going to a hearing. In such a situation, MDT bears the same burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards, as MDT would during a hearing.

If an informal hearing is requested, to ensure separation of functions, the MDT Director will designate a decision-maker for the decertification proceedings who was independent from the eligibility decision and is knowledgeable about the DBE certification requirements and 49 CFR 26.

A firm remains an eligible DBE during the pendency of MDT's proceeding to remove its eligibility. A firm becomes ineligible when MDT provides the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice informs the firm of the consequences of MDT's decision and of the availability of an appeal to the US Department of Transportation under §26.89.

Any firm or complainant may appeal MDT's decision in a certification matter to US Department of Transportation. The appeal must be sent to: S33AppealsManagementrecords@dot.gov

Suspension of Certification

49 CFR 26.88

MDT will immediately suspend a DBE's certification without adhering to the requirements in §26.87(d) when an individual owner whose ownership and control of the firm are necessary to the firm's certification dies or is incarcerated.

MDT may immediately suspend a DBE's certification without adhering to the requirements in §26.87(d) when there is adequate evidence to believe that there has been a material change in circumstances that may affect the eligibility of the DBE firm to remain certified, or when the DBE fails to notify the recipient or UCP in writing of any material change in circumstances as required by §26.83(i) of this part or fails to timely file an affidavit of no change under §26.83(j).

In determining the adequacy of the evidence to issue a suspension, MDT will consider all relevant factors, including how much information is available, the credibility of the information and allegations given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result.

When a firm's eligibility is suspended, MDT will immediately notify the DBE of the suspension by certified mail, return receipt requested, to the last known address of the owner(s) of the DBE. The suspension takes effect when the DBE receives, or is deemed to have received, the Notice of Suspension.

Following receipt of the Notice of Suspension, if the DBE believes it is no longer eligible, it may voluntarily withdraw from the program, in which case no further action will be taken. If the DBE

believes that its eligibility should be reinstated, it must provide to MDT the information demonstrating that the firm is eligible notwithstanding its changed circumstances. Within 30 days of receiving this information, MDT will either lift the suspension and reinstate the firm's certification or commence a decertification action under §26.87. If MDT commences a decertification proceeding, the suspension will remain in effect during the proceeding.

Certification Appeals

49 CFR 26.89

Any firm or complainant may appeal MDT's decision in a certification matter to USDOT. Appeals must be sent to: S33AppealsManagementrecords@dot.gov

For further information about how the USDOT handles Appeals please visit their site at: <https://www.civilrights.dot.gov/disadvantaged-business-enterprise/do-you-qualify/appeal-process>

Certification Appeal Decisions

49 CFR 26.91

If the USDOT determines that MDT erroneously certified a firm, MDT will remove the firm's eligibility on receipt of the determination, without further proceedings. Effective on the date of MDT's receipt of USDOT's determination, the consequences of a removal of eligibility set forth in §26.87(i) take effect.

If USDOT determines that MDT erroneously failed to find reasonable cause to remove the firm's eligibility, MDT will expeditiously commence a proceeding to determine whether the firm's eligibility should be removed, as provided in §26.87.

If USDOT determines that MDT erroneously declined to certify or removed the eligibility of the firm, MDT will certify the firm, effective on the date of MDT's receipt of the written notice of USDOT's determination.

If USDOT determines that MDT erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, MDT will take appropriate corrective action as determined by the USDOT.

If USDOT affirms MDT's determination, no further action will be taken.

COMPLIANCE AND ENFORCEMENT

49 CFR 26 SUBPART F

Information, Confidentiality, Cooperation, and Intimidation or Retaliation

49 CFR 26.109

In accordance with 49 CFR 26.109, we will safeguard information that may be regarded as confidential business information, consistent with Federal, state, and local law unless MDT has written consent from the firm that submitted the information.

Appendix A – MDT Policy Statement



Malcolm D. Long, Director

2701 Prospect • PO Box 201001
Helena MT 59620-1001

MDT's Policy Statement for ACDBE and DBE Programs

The Montana Department of Transportation (MDT) has established an Airport Concession Disadvantaged Business Enterprise (ACDBE) program in accordance with regulations of the U.S. Department of Transportation (DOT), 49 CFR Part 23 and a Disadvantaged Business Enterprise (DBE) program in accordance with 49 CFR Part 26. MDT receives Federal financial assistance from the DOT, and as a condition of receiving this assistance, MDT has signed an assurance that it will comply with 49 CFR Parts 23 and 26.

It is the policy of MDT to ensure that ACDBEs and DBEs, as defined in Parts 23 and 26, have an equal opportunity to receive and participate in DOT-assisted contracts and concession opportunities. It is also our policy:

- a) To ensure nondiscrimination in the award and administration of DOT-assisted contracts and opportunities for concessions in MDT's highway, transit, and airport financial assistance programs;
- b) To create a level playing field on which ACDBEs can compete fairly for opportunities for concessions and DBEs can compete fairly for DOT-assisted contracts;
- c) To ensure that the ACDBE and DBE Programs are narrowly tailored in accordance with applicable law;
- d) To ensure that only firms that fully meet 49 CFR Parts 23 and 26 eligibility standards are permitted to participate as ACDBEs and DBEs;
- e) To help remove barriers to the participation of ACDBEs in opportunities for concessions at our airports and DBEs in DOT-assisted contracts;
- f) To promote the use of ACDBEs and DBEs in all types of federally-assisted contracts and procurement activities conducted by recipients;
- g) To assist the development of firms that can compete successfully in the marketplace outside the ACDBE and DBE Programs;
- h) To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for ACDBEs and DBEs.

Maghan Strachan, Civil Rights Program Supervisor, has been designated as the ACDBE Liaison Officer (ACDBELO) and DBE Liaison Officer (DBELO). In that capacity, Ms. Strachan is responsible for implementing all aspects of the ACDBE and DBE Programs. Implementation of the ACDBE and DBE Programs is accorded the same priority as compliance with all other legal obligations incurred by MDT in its financial assistance agreements with the DOT.

The Director, Administrative Team, and Office of Civil Rights have disseminated this policy statement to the Transportation Commission, the Aeronautics Board, and applicable staff and facilitates distribution to ACDBE/DBE and non-ACDBE/-DBE communities that perform work for MDT on DOT-assisted contracts.


Malcolm D. Long, Director

1-9-2023
Date


Maghan Strachan, ACDBELO and DBELO

1/9/23
Date

Director's Office
Phone: (406) 444-6201
Fax: (406) 444-7643

An Equal Opportunity Employer

Web Page: www.mdt.mt.gov
Road Report: (800) 226-7623 or 511
TTY: (800) 335-7592

Appendix B – Supportive Services Business Development Program

MDT has implemented a Business Development Program (BDP) to assist DBEs in gaining the ability to compete in their business industry. Program participation is divided into two stages; (1) a developmental stage and (2) a transitional stage in accordance with Appendix C to 49 CFR 26. The MDT DBE Program advertises the BDP on its website and encourages firms that fit the criteria for the BDP to apply. Unless a firm has graduated from a stage or continues to not meet the minimum requirements for the Program, they will be accepted as a BDP participant. For a firm to enter or remain eligible for program participation;

- a. Each firm must meet and continue to meet all eligibility criteria described in 49 CFR 26.
- b. Each firm must meet the requirements of the Business Development Program stage they are enrolled in.

Developmental Stage

The developmental stage is designed for new or existing DBE firms that have not worked or have done little highway-related work for MDT and are looking to expand into that market. Firms that complete the developmental stage will gain knowledge and skills that increase their chances of obtaining contracts in the highway-related industry.

Each participant must meet with MDT DBE Program's business plan specialist to either create or update their business plan, including forecasts for contract awards for the upcoming year. Based on the business plan, MDT DBE Program will facilitate at least 3 trainings that the firm must attend to complete the program. One required training would be to meet with the MDT staff that most closely relate to their line of work to learn how to do business with MDT. The remaining trainings would be established based on the needs of the firm and could include trainings on topics such as financials, certified payrolls, bidding/estimating, bonding, other topic specific trainings with partners such as Procurement Technical Assistance Centers (PTAC) and Small Business Development Centers (SBDC), etc.

An updated business plan and forecasts as well as a minimum of three trainings will be required annually for a DBE firm to remain in the BDP Developmental stage. Once MDT DBE Program determines that the firms' goals of the Developmental stage have been achieved, the firm will be notified in writing of its completion. The firm can then choose to enroll in the Transitional stage.

Transitional Stage

If a DBE firm is successfully competing for contracts at MDT and is looking to expand to other contracting industries, they can enter the transitional stage of the BDP. It is designed to prepare the participant for successfully competing in their business industry. The MDT DBE Program will meet with the DBE firm to develop a transition management plan that will include specific details, goals and relevant action items to continue building on the progress of the DBE firm. The MDT DBE Program will facilitate at least 3 meetings or trainings based on items identified in the transition management plan to provide the firm the knowledge and skills to succeed outside the DBE Program. MDT DBE Program will work in conjunction with the DBE firm to assure this is updated annually and applies to the specific needs of the DBE firm. Once MDT DBE Program determines that the firms' goals of the Transitional stage have been achieved, the firm will be notified in writing of its completion. Each firm will have 45 days to appeal the decision that it has completed the Transitional Stage and may be re-instated based on the facts of the appeal.

Appendix C – Commercially Useful Function Report



Montana Department of Transportation
Office of Civil Rights
DBE Commercially Useful Function (CUF) Report



Date Review Conducted By EPM

Contract Number Project Name Prime Contractor

DBE Firm DBE Foreman

1. Work Type 2. Approximate Percent Complete

3. Will the work type performed by this DBE change throughout the course of the project? Yes No

*Note: If work type changes, a new CUF Report must be completed.

4. Does the DBE have their own employees and direct their work? Yes No

5. Are any of the DBE's employees on any other contractor's payroll? Yes No

If yes, whose?

6. Who does the DBE foreman/superintendent report to?

7. List the names and crafts of the DBE's crew as observed. Attach additional sheets if necessary.

DBE Employee	Craft	
		-
		-
		-

Add Row

8. Does the equipment used have the DBE's name and/or logo on it? Yes No

9. Does the DBE own the equipment used on the project? Yes No

10. Has any other contractor performed work that was to be performed by the DBE? Yes No

11. Has the DBE owner been present on the job site? Yes No

12. If any of your selected answers are in a shaded box, please provide explanation. Also, provide any other comments or concerns:

A CUF Report is required when:

- A DBE is initially on a project
- There is an issue with performance
- There is a change in work type (e.g. striping to fencing)

Return to MDT Office of Civil Rights DBE Program:

MDT Office of Civil Rights
Attn: DBE Program
PO Box 201001
Helena MT 59620

mdtdbeprogram@mt.gov

Appendix D – Definitions

Affiliation has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR part 121. Except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when, either directly or indirectly:

- One concern controls or has the power to control the other; or
- A third party or parties controls or has the power to control both; or
- An identity of interest between or among parties exists such that affiliation may be found.

In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

Alaska Native means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

Alaska Native Corporation (ANC) means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, *et seq.*).

Assets mean all the property of a person available for paying debts or for distribution, including one's respective share of jointly held assets. This includes, but is not limited to, cash on hand and in banks, savings accounts, IRA or other retirement accounts, accounts receivable, life insurance, stocks and bonds, real estate, and personal property.

Business, business concern or business enterprise means an entity organized for profit with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the United States economy through payment of taxes or use of American products, materials, or labor.

Compliance means that a recipient has correctly implemented the requirements of this part.

Contingent Liability means a liability that depends on the occurrence of a future and uncertain event. This includes, but is not limited to, guaranty for debts owed by the applicant concern, legal claims and judgments, and provisions for federal income tax.

Contract means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them. For purposes of this part, a lease is considered to be a contract.

Contractor means one who participates, through a contract or subcontract (at any tier), in a DOT-assisted highway, transit, or airport program.

Days mean calendar days. In computing any period of time described in this part, the day from which the period begins to run is not counted, and when the last day of the period is a Saturday, Sunday, or Federal holiday, the period extends to the next day that is not a Saturday, Sunday, or Federal holiday. Similarly, in circumstances where the recipient's offices are closed for all or part of the last day, the period extends to the next day on which the agency is open.

Department or DOT means the U.S. Department of Transportation, including the Office of the Secretary, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).

Disadvantaged business enterprise or DBE means a for-profit small business concern that is:

- At least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and
- Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

DOT-assisted contract means any contract between a recipient and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

Good faith efforts mean efforts to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

Home state means the state in which a DBE firm or applicant for DBE certification maintains its principal place of business.

Immediate family member means father, mother, husband, wife, son, daughter, brother, sister, grandfather, grandmother, father-in-law, mother-in-law, sister-in-law, brother-in-law, and domestic partner and civil unions recognized under State law.

Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. See definition of "tribally-owned concern" in this section.

Joint venture means an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

Liabilities mean financial or pecuniary obligations. This includes, but is not limited to, accounts payable, notes payable to bank or others, installment accounts, mortgages on real estate, and unpaid taxes.

Native Hawaiian means any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.

Native Hawaiian Organization means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

Noncompliance means that a recipient has not correctly implemented the requirements of this part.

Office of Civil Rights or **OCR** means the Office of Civil Rights at the Montana Department of Transportation.

Operating Administration or **OA** means any of the following parts of DOT: The Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The “Administrator” of an operating administration includes his or her designees.

Personal net worth means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include: The individual's ownership interest in an applicant or participating DBE firm; or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

Primary industry classification means the most current North American Industry Classification System (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the North American Industry Classification Manual—United States, which is available on the Internet at the U.S. Census Bureau Web site: <http://www.census.gov/eos/www/naics/>.

Primary recipient means a recipient which receives DOT financial assistance and passes some or all of it on to another recipient.

Principal place of business means the business location where the individuals who manage the firm's day-to-day operations spend most working hours. If the offices from which management is directed and where the business records are kept are in different locations, the recipient will determine the principal place of business.

Program means any undertaking on a recipient's part to use DOT financial assistance, authorized by the laws to which this part applies.

Race-conscious measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

Race-neutral measure or program is one that is, or can be, used to assist all small businesses. For the purposes of this part, *race-neutral* includes gender-neutrality.

Recipient is any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance.

Secretary means the Secretary of Transportation or his/her designee.

Set-aside means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

Small Business Administration or **SBA** means the United States Small Business Administration.

SBA certified firm refers to firms that have a current, valid certification from or recognized by the SBA under the 8(a) BD or SDB programs.

Small business concern means, with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small

Business Act and Small Business Administration regulations implementing it (13 CFR part 121) that also does not exceed the cap on average annual gross receipts specified in §26.65(b).

Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a member of groups and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual's control.

- Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis. An individual must demonstrate that he or she has held himself or herself out, as a member of a designated group if you require it.
- Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
 - “Black Americans,” which includes persons having origins in any of the Black racial groups of Africa;
 - “Hispanic Americans,” which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
 - “Native Americans,” which includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians;
 - “Asian-Pacific Americans,” which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Marianas Islands, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;
 - “Subcontinent Asian Americans,” which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
 - Women;
 - Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.
- Being born in a particular country does not, standing alone, mean that a person is necessarily a member of one of the groups listed in this definition.

Spouse means a married person, including a person in a domestic partnership or a civil union recognized under State law.

Subcontractor Payment Reporting System or ***SPR*** refers to MDT’s system where contractors are required to enter payment information to subcontractors or suppliers.

Transit vehicle manufacturer means any manufacturer whose primary business purpose is to manufacture vehicles specifically built for public mass transportation. Such vehicles include, but are not limited to: Buses, rail cars, trolleys, ferries, and vehicles manufactured specifically for paratransit purposes. Producers of vehicles that receive post-production alterations or retrofitting to be used for public transportation purposes (e.g., so-called cutaway vehicles, vans customized for service to people with disabilities) are also considered transit vehicle manufacturers. Businesses that manufacture, mass-produce, or distribute vehicles solely for personal use and for sale “off the lot” are not considered transit vehicle manufacturers.

Tribally-owned concern means any concern at least 51 percent owned by an Indian tribe as defined in this section.

Unified Certification Program or **UCP** refers to the agreement, whereas Montana Department of Transportation was approved to be the certifying agency for Montana.

You refers to a recipient, unless a statement in the text of this part or the context requires otherwise (i.e., 'You must do XYZ' means that recipients must do XYZ).

Appendix E – Criteria to Determine Good Faith Efforts

In addition to Appendix A to CFR Title 49, Part 26, “Guidance Concerning Good Faith Efforts,” MDT will use the following criteria to judge if a bidder who has not met the DBE Utilization Goal has demonstrated sufficient Good Faith Effort to be eligible for award of the contract. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases. A determination whether a bidder has made sufficient good faith efforts is, by its very nature, a judgment call.

1. NOTIFICATION

- Has the bidder notified all active certified DBEs, who have the capability to perform the specific work of the contract, listed in the Department’s most current DBE Directory at least 5 business days prior to bid opening?
- Has the bidder used the DBE Quote Request available at: <https://app.mdt.mt.gov/dbeqt/>?
- Has the bidder provided the DBEs no less than 5 business days to respond to the bidder?
- Has the bidder completely and accurately logged each contact with a DBE firm?
- Has the bidder followed-up initial notifications by contacting all certified DBEs, who have the capability to perform the specific work of the contract, to determine whether or not they will be bidding, and documented the follow-up contact?
- Has the bidder provided interested DBEs with adequate information about plans, specifications, and requirements of the contract in a timely manner?

2. IDENTIFYING WORK

- Has the bidder selected portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved?
- Has the bidder broken out contact work items into economically feasible units to facilitate DBE participation?
- Has the bidder selected for DBE participation work items the bidder might otherwise perform with its own work forces?

3. DBE ASSISTANCE

- Has the bidder made efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the Department or the bidder?
- Has the bidder made efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services?

4. NEGOTIATING IN GOOD FAITH

It is the bidder’s responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation.

A bidder using good business judgment would consider a number of factors in evaluating subcontractors, including DBE subcontractors, and would take a firm’s price and capabilities as well as contract goals into consideration. The fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a

bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. However, bidders are not required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

A variety of business factors may affect whether the difference between bids is reasonable or not, including but not limited to the following:

- The bidder's prior experiences with a subcontractor.
- The number of bidders on an item.
- The subcontractor's experience and capabilities for performing the work.
- The degree that the work is routine or complex.
- The degree that the work has time constraints.

In addition to evaluating the foregoing business factors, the Department may consider other factors in determining whether a bidder made a good faith, including but not limited to:

- Whether the bidder rejected a reasonable bid to do the work himself.
- Whether other bidders met the contract goal.
- The bidder's prior history utilizing DBE's

5. AFTER AWARD OF CONTRACT

Items 1 through 4 will be utilized to evaluate any request from the Contractor after award for a reduction in the DBE Utilization Goal due to the default or decertification of a DBE and the Contractor's subsequent inability to obtain additional DBE participation. For further information regarding DBE default or decertification and considerations for a reduction in the DBE Utilization goal, refer to 49 CFR §26.53 f. 1-4.

Appendix F – UCP Approval



U.S. Department of
Transportation
Office of the Secretary
of Transportation

General Counsel

400 Seventh St., S.W.
Washington, D.C. 20590

JAN 17 2008

Vicky A. Koch, Chief
Civil Rights Bureau
Montana Department of Transportation
2701 Prospect Avenue
PO Box 201001
Helena, MT 59620-1001

Dear Ms. Koch:

The Department of Transportation (DOT) has reviewed the Unified Certification Program (UCP) you submitted to us on behalf of the Montana Department of Transportation and other recipients of DOT financial assistance in Montana. The certification component of your DBE program, which is made part of the UCP, successfully accommodated the comments that DOT staff had provided to you.

Consequently, I am pleased to approve the Montana UCP as provided by the Department's disadvantaged business enterprise regulations (49 CFR §26.81(a)(4)). Please remember that any inconsistency or ambiguity in the UCP agreement shall be resolved by giving precedence to the following in this order: 49 CFR 23 and 26, USDOT Directives, DBE Program as approved by DOT and applicable Montana regulations.

We look forward to working with you as you implement the UCP, which should significantly reduce burdens on small businesses seeking to participate in the DBE program in Montana.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Kirk K. Van Tine".

Kirk K. Van Tine
General Counsel