

Montana Department of Transportation



Civil Rights Manual
December 2010

Introduction

As a recipient of federal funds, the Montana Department of Transportation (MDT) is required to comply with the rules and regulation of the U.S. Department of Transportation, Federal Highway Administration, as they pertain to the federal-aid highway program.

MDT's internal and external civil rights programs are a function of the Civil Rights Bureau in the Human Resources Division. The Bureau is responsible for:

- Agency wide Title VI program
- Agency wide Title VII program
- Disadvantaged Business Enterprise (DBE) program
- American with Disabilities Act (ADA) program
- DBE Supportive Services program
- Equal Opportunity Employment (EEO) contract compliance
- Labor Compliance programs
- On-the-Job (OJT) Training program

This manual does not include information on the Title VII program, which is contained in other policies and procedures of the Bureau.

Staff working for the Bureau include:

- Civil Rights Bureau Chief
- DBE Program Manager
- ADA Program Manager
- DBE Supportive Services Program Coordinator
- EEO/Labor Compliance Program Manager
- Title VI/EEO Compliance Program Manager
- Compliance Technician

MDT's Civil Rights Bureau (CRB) is committed to eliminating unlawful discrimination on the basis of race, color, national origin, creed, political belief, marital status, sex, age, and disability in State, Federal and Federally-Assisted MDT programs. In addition, we ensure that all beneficiaries and potential beneficiaries of these programs are offered an equal participation opportunity.

The CRB also protects the civil rights of department employees and applicants for employment.

Section 1



Equal Employment Opportunity

SECTION 1 - EQUAL EMPLOYMENT OPPORTUNITY

A. DEFINITION

Equal Employment Opportunity (EEO) is defined by Executive Orders 11246 and 11375 which require equal employment opportunity (no discrimination) and affirmative action (assuring equal employment opportunity for minorities and females) on federal-aid highway construction projects. These are set forth in Required Contract Provisions (Form FHWA 1273, located at http://www.mdt.mt.gov/publications/docs/forms/dbe/eeo_board/fhwa-1273.pdf). These Special Provisions are imposed pursuant to Section 140 of Title 23, U.S.C., as established by Section 22 of the Federal Aid Highway Act of 1968.

B. PURPOSE

Montana Department of Transportation (MDT), as a contracting agency, has a responsibility to ensure that all federal-aid sub-recipients, contractors, subcontractors, vendors, and material suppliers do not discriminate in employment and contracting practices based on age, marital status, sex, race, creed, national origin, color, mental or physical disability, religion or genetic information.

Wages, working conditions, employee benefits, and personnel actions of every type, including hiring, upgrading, promotion, transfer, demotion, layoff, and termination, shall be established and administered in a non-discriminatory manner.

C. CONTRACTOR REQUIREMENTS

The contractor will work with MDT and the Federal Highway Administration (FHWA) to carry out their EEO obligations and in their review of contractor activities under the contract.

The contractor and all subcontractors, not including material suppliers, holding subcontracts of \$10,000 or more must comply with the specific activities of EEO. The prime contractor will include these requirements in all contracts by physically attaching the FHWA 1273 to all contracts and must ensure all subcontractors comply with these requirements.

Minimum EEO requirements include but are not limited to:

1. Equal Employment Opportunity Policy

Contractors are required to provide MDT with an annual (January 1 thru December 31) Equal Employment Opportunity (EEO) submission. The EEO requirements are found in the FHWA 1273, paragraph II. NON-DISCRIMINATION.

MDT has provided a sample format that addresses the issues outlined and can be found at: <http://www.mdt.mt.gov/publications/forms.shtml#eeo>. Each year refer to the website for the most current version. This sample format reflects the basic Federal EEO

requirements and MDT timelines. MDT offers this submission format so a contractor can eliminate an extra expense to obtain legal counsel to create a company EEO policy. If a company already has an EEO policy, it must meet the current State and Federal requirements and not be in conflict with FHWA 1273 and discrimination laws.

The contractor must designate an EEO Officer. This Officer must be capable of effectively administering and promoting an active EEO program and must be assigned adequate authority and responsibility to do so. When there is a change in the EEO Officer, the contractor must notify MDT immediately of the new officer.

2. Dissemination of Policy

All members of the contractor's supervisory staff will be made aware of, and will implement, the contractor's equal employment opportunity policy and responsibilities. To meet this requirement, at a minimum the contractor should provide the following:

- Periodic meetings of supervisory and Human Resources employees conducted by a knowledgeable company official will be held before the start of work and at least once every six months to review the equal employment opportunity policy and its implementation;
- All new supervisory or Human Resources employees will be provided thorough EEO training by a knowledgeable company official within thirty days of the hire date;
- All personnel who are engaged in direct recruitment for the project will be instructed by a knowledgeable company official on the contractor's procedures for locating and hiring minority group employees;
- Ensure all employees, prospective employees and potential sources of employees are aware of the contractor's EEO obligations by:
 - Displaying notices and posters outlining the contractor's equal employment opportunity policy in readily accessible areas.
 - Conducting meetings, employee handbook distribution, or other appropriate means.

3. Bulletin Boards

Bulletin boards must be located in areas readily accessible and available at all times to all employees, applicants for employment and potential employees. They are not to be located inside tool vans.

The bulletin boards must display the EEO Required Bulletin Board Materials located at: <http://www.mdt.mt.gov/publications/forms.shtml#eoo>

Bulletin board options for on-site employees include:

- Post a board at the project site. Post all materials required. Ensure accessibility.
- Erect a mailbox on a stand or attached to a trailer at the site. Put a binder with all the posters and bulletin boards materials inside the mailbox. Clearly label the mailbox "Bulletin Board".

If you are extremely mobile such as a painting/ striping company, put a bulletin board binder in an unlocked vehicle at the project site.

If you are a subcontractor, contact your prime contractor and request to be included in their bulletin board. A subcontractor who shares the prime contractor's bulletin board will only have to provide their EEO Submission, which includes the Discrimination Complaint Procedures and complaint form.

4. Recruitment

When recruiting employees, the contractor will include the notation that they are "An Equal Opportunity Employer."

All advertisements will be published in newspapers or other publications having a large circulation among minority groups in the area from which the project work force would normally be recruited.

The contractor will, unless precluded by a valid bargaining agreement (see Unions below), conduct systematic and direct recruitment through public and private employee referral sources likely to yield qualified minority group applicants. For assistance, see MDT's referral source listing at http://www.mdt.mt.gov/publications/docs/brochures/dbe_eeo/referral_list.pdf.

In addition, the contractor will identify sources of potential minority group employees, establish procedures to refer minority group applicants and encourage its present employees to refer minority group applicants for employment by:

- Posting appropriate notices or bulletins in areas accessible to all such employees;
- Discussing information and procedures with regard to referring minority group applicants.

5. Personnel Actions.

All contractors' personnel actions shall be taken without regard to age, marital status, sex, race, creed, national origin, color, mental or physical disability, religion or genetic information, to include but not limited to:

Wages	Hiring	Upgrading
Working conditions	Promotion	Transfer
Employee benefits	Demotion	Layoff and Termination

To ensure no discrimination is occurring, the contractor will:

- Conduct periodic inspections of project sites to ensure that working conditions and employee facilities do not indicate discriminatory treatment of project site personnel;
- Periodically evaluate the spread of wages paid within each classification to determine any evidence of discriminatory wage practices;
- Periodically review selected personnel actions in depth to determine whether there is evidence of discrimination. Where evidence is found, the contractor will promptly take corrective action. If the review indicates that the discrimination may extend beyond the actions reviewed, such corrective action shall include all affected persons;
- Promptly investigate all complaints of alleged discrimination, attempt to resolve such complaints, and take appropriate corrective action within a reasonable time. If the investigation indicates that the discrimination may affect persons other than the complainant, such corrective action shall include such other persons. Upon completion of each investigation, the contractor will inform every complainant of all of his avenues of appeal.

6. Training and Promotion

The contractor will assist in locating, qualifying, and increasing the skills of minority and women employees and applicants for employment.

Consistent with the contractor's work force requirements and as permissible under Federal and State regulations, the contractor shall make full use of training programs, *i.e.*, apprenticeship, and on-the-job training programs for the geographical area of contract performance. In the event a Training Special Provision is included in the contract, refer to the specific contract requirements.

In addition, the contractor will

- Advise employees and applicants for employment of available training programs and necessary qualifications;
- Periodically review the training and promotion potential of minority and women employees and encourage eligible employees to apply.

7. Unions

If the contractor relies upon unions as a source of employees, the contractor will use best efforts to obtain the cooperation of such unions to increase opportunities and refer minority and women applicants.

The contractor will use best efforts to incorporate an EEO clause into each union agreement so the union will be contractually bound to refer applicants without regard

to age, marital status, sex, race, creed, national origin, color, mental or physical disability, religion or genetic information.

The contractor must obtain information about the referral practices and policies of the union.

If the union is unable to provide the contractor with a reasonable flow of minority and women referrals, the contractor will, through independent recruitment efforts, fill the employment vacancies in accordance with the recruitment procedures contained in this section. The USDOL has held that it shall be no excuse that the union with which the contractor has a collective bargaining agreement providing for exclusive referral failed to refer minority employees. In the event the union fails to cooperate, the contractor will immediately notify MDT.

8. Subcontracting

The contractor shall not discriminate on the grounds of age, marital status, sex, race, creed, national origin, color, mental or physical disability, religion or genetic information in the selection and retention of subcontractors, including procurement of materials and leases of equipment.

The contractor shall notify all potential subcontractors and suppliers of their EEO obligations under this section.

Disadvantaged Business Enterprises (DBE) (see Section 4 - Disadvantaged Business Enterprise), shall have equal opportunity to compete for and perform subcontracts awarded by the prime contractor. The contractor will use their best efforts to solicit bids from and to utilize DBE subcontractors or subcontractors with meaningful minority and female representation among their employees. Contractors shall obtain lists of DBE construction firms from MDT list located at http://www3.mdt.mt.gov:7782/mttp/c/mttp/c.tpk0002.contractor_init.

D. RECORDS AND REPORTS

The contractor will keep records necessary to determine compliance with the contractor's EEO obligations. The records kept by the contractor will indicate:

- The number of employees on the project identified by gender and ethnicity in each work classification on the project;
- The progress and efforts made with unions to increase employment opportunities for minorities and females;
- The progress and efforts made in locating, hiring, training, qualifying, and upgrading minority and female employees; and
- The progress and efforts made in securing the services of minority contractors or subcontractors with meaningful minority and female representation among their employees.

All records must be retained for a period of three years following completion of the contract work and shall be available at reasonable times and places for inspection by authorized representatives of MDT and FHWA.

The contractors will submit an annual report to MDT each July indicating all employees currently engaged in each work classification required by the contract work. This information is to be reported on Form PR 1391 located at http://www.mdt.mt.gov/publications/docs/forms/dbe/annualeeo_1391.pdf.

If on-the-job training is being required by a "Training Special Provision", the contractor will be required to furnish MDT with form 7-A located at <http://www.mdt.mt.gov/publications/docs/forms/dbe/eo7a.pdf>.

E. MDT ENGINEERING PROJECT MANAGER (EPM) REQUIREMENTS

The MDT EPM will ensure that contract required EEO provisions have been met in the same manner as any other contractually required item. Final determination of contract compliance rests with the CRB. EPM's will inform the CRB of specific problems they may observe or encounter on the project site.

The EPM must inspect each prime and each subcontractor's bulletin board at least once a month. Date and problem notations must be made in the EPM diary.

An EEO Bulletin Board Checklist is available at: <http://www.mdt.mt.gov/publications/forms.shtml#eoo>

When it is not possible for CRB staff to attend a preconstruction conference, it is the District Construction Engineer's responsibility to assure EEO contract provisions are presented at the conference and included in the minutes.

F. COMPLIANCE REVIEWS

MDT conducts project specific compliance reviews. When selecting contractors for review, MDT considers the following factors:

- Contractors working on a significant number of contracts in areas with high minority and female labor forces;
- Those with the greatest potential for employment and contracting opportunities;
- Those having special training provisions, promotion opportunities, and apprenticeships;
- Those with questionable employment and contracting practices; and
- Those that have been the subject of a significant number of complaints.

Reviews will be done prior to or during peak employment, as well as during various phases of the project with employment and training activities. Once selected for a review, the contractor will be notified at least two weeks in advance of the scheduled visit.

MDT will request preliminary information that may include but is not limited to the following:

- The most recent certified payroll broken down by race, gender, national origin and job classifications of all employees;
- Copies of any current collective bargaining agreements;
- Copies of all executed purchase orders and subcontracts;
- A list of all recruitment sources utilized;
- Information on any past, present, or pending Federal or State action against the contractor pertaining to its employment, training or contracting practices;
- A list of new hires, rehires, promotions or firings during the previous six (6) months broken down by race, gender and job classification;
- A list of all firms including minority and female owned firms contacted as possible subcontractors, material suppliers, and those selected; and,
- Any other necessary documents or statements requested by MDT for review prior to the actual on-site visit.

The compliance review will include the following:

1. Review of Documentation (Desk Audit)

After receipt of the required information from the contractor, MDT will conduct a desk audit. This will assist in determining inconsistencies, possible problem areas or concerns and identify what additional specific data and information will be required during the on-site verification. A contractor who does not cooperate or whose material is non-responsive to the request may be found in non-compliance.

MDT will conduct a comprehensive analysis of the contractor's workforce to determine if there is reasonable representation and utilization of minorities and women in the contractor's workforce. This will be done by comparing the contractor's workforce to the relevant labor market data.

To determine relevant labor market data, MDT will utilize current and accurate statistical information available from all data sources including but not limited to, Census Department, State Employment Agencies, and other local job service offices.

In addition, MDT will review the contractor's:

- personnel actions to include hirings, rehiring, promotions, and terminations to ensure decisions are consistent and not race or gender based
- relationship with referral sources for recruiting minorities and women
- personnel policies and procedures
- pending or completed internal, EEOC, or Montana HRB complaints

2. Physical Tour

MDT shall conduct a physical tour of the employment site(s) to determine that:

- EEO posters, policies and notices are displayed in conspicuous and accessible places in a legible fashion;
- Within 30 days of reporting to duty, all supervisory personnel have been educated and understand the contractor's EEO program;
- The employee referral source system is being implemented;
- Reported employment data is accurate;
- Facilities are provided on a non-segregated basis;
- Meetings or other methods of communication have been used to disseminate the EEO policy particularly to new employees; and
- Employees are aware of their right to file complaints of discrimination.

3. Conduct Interviews

The on-site verification will include interviews conducted with the Contractor's EEO Officer, supervisory personnel and a representative (diverse) number of employees in the major job classifications. MDT will also interview at least one minority, one non-minority, and one female in each trade, classification, or occupation, if available. Other MDT personnel on the project may be interviewed, including the Engineering Project Manager.

Interviews with employees will include open-ended questions about patterns in equipment assignments, wage rates, non-segregated facilities, layoff and recall practices, and other terms and conditions of employment.

Upon completion of the interviews, MDT should have sufficient information to determine:

- Whether in the face of under-representation, underutilization, the contractor, through good faith efforts, aggressively tried to reach parity in each job classification;
- Whether there is evidence of discrimination in employment or conditions of employment;
- Whether there are segregated facilities;
- Whether there is evidence of discrimination in awards of subcontracts or material purchases;
- What action the contractor is taking to meet the contractual requirement to provide equal employment opportunity;
- Whether the actions taken by the contractor are acceptable; (Could they reasonably be expected to result in increased utilization of minorities and females?)
- Whether there is impartiality in treatment of minorities and females;
- Whether affirmative action measures are isolated or continuing?
- Whether the contractor's efforts have produced results?

4. Exit Conference

Upon conclusion of the on-site review, CRB will conduct an exit conference. The following topics shall be discussed:

- Any preliminary findings that, if not corrected immediately or not corrected by the adoption of an acceptable Voluntary Corrective Action Plan (VCAP), would necessitate a determination of noncompliance;
- The process and time in which the contractor shall be informed of the final determination (15 days following the onsite verification and interviews); and
- Any other matters that are best resolved before concluding the onsite portion of the review.

VCAP's may also be negotiated at the exit conference. However, acceptance of a VCAP at the exit conference does not preclude a determination of noncompliance, particularly if deficiencies not addressed by the plan are uncovered during the final analysis and report writing.

5. Show Cause Procedures

A contractor is in non-compliance when there is evidence to determine that the contractor failed to effectively implement the nondiscrimination EEO requirements. For example, non-compliance may be found when a contractor discriminated in its terms or conditions of employment, maintained segregated facilities, discriminated in subcontracting opportunities, or failed to exert good faith efforts to provide equal opportunity. In the event compliance cannot be immediately obtained, efforts to bring the contractor in compliance must be initiated through the issuance of a show cause notice.

A show cause notice will be issued by CRB when a determination of non-compliance is made based upon the findings of a compliance review which verifies the existence of discrimination.

The show cause notice will state the following:

- Whether the contractor's efforts have produced results;
- Notify the contractor of the determination of non-compliance;
- Provide the basis for the determination of non-compliance;
- Notify the contractor of the obligation to show cause within 30 days why formal proceedings should not be instituted;
- Schedule (date, time and place) for a compliance conference to be held (approximately 15 days from the contractor's receipt of the notice);

- Advise the contractor where the conference will be held to receive and discuss the acceptability of any proposed corrective action plan (CAP) and/or correction of deficiencies; and,
- Advise the contractor of the availability and willingness of CRB to conciliate within the time limits of the show cause notice.

CRB is required to attempt conciliation with the contractor throughout the show cause time period. Conciliation and negotiation efforts shall be directed toward correcting contractor program deficiencies and initiating corrective action which will maintain and assure equal opportunity.

6. Compliance Factors

Based on information obtained through the compliance review CRB shall determine the contractor's compliance or non-compliance with contractual provisions.

Note: Neither MDT nor FHWA have authority to enforce the Executive Order (EO) 11246, as amended, the Department of Labor (DOL) regulations, set forth in 41 CFR Part 60 and its required EEO contract provisions (i.e., Employment Goals for Women and Minorities) when conducting EEO compliance reviews.

The OFCCP is the only agency with the authority to conduct reviews under E.O.11246, although the OFCCP may direct cooperation by Federal agencies and their recipients, sub-recipients and contractors in the event a contract is found in non-compliance with the E.O.

The following are factors CRB will consider during the compliance review.

Good Faith Efforts

Where there is evidence of discrimination or a failure to provide EEO, Federal and federally assisted contractors must take affirmative action toward minorities and women in all terms and conditions of employment. A contractor will have met its obligation if there is adequate documented evidence that it made good faith effort to achieve this goal.

The list below is a set of "Good Faith Efforts" criteria established in FHWA's regulatory requirements that may be used by CRB to determine if a contractor met the "Good Faith Efforts" standard.

- Contractors EEO Policy
- Dissemination of the EEO Policy
- Authority and Responsibility of the EEO Officer
- Periodic EEO Meetings

- Notices/posters on bulletin board
- Advertising as an “EEO Employer”
- Recruitment: Systematic and direct recruitment efforts with sources representing minorities and women
- Educating all new supervisors within 30 days of reporting to duty
- Encourage present employees to refer minorities and women
- Evaluates the spread of wages to determine whether discrimination exists
- Investigates all complaints
- Assist in locating, qualifying, and increasing skills of minorities and women
- Fully uses training programs and advises employee and applications of opportunities
- Minorities and women exist in contractor’s training program
- Adequacy of contractor’s records and reports

Selection of Subcontractors

Contractors are required to ensure nondiscrimination in the selection and retention of subcontractors. CRB will review the process the contractor utilized to select and retain subcontractors on the project. Based on the information provided, CRB will determine whether the process is in compliance with the contract provisions.

The contractor should provide a list of subcontractors and identify which are DBE’s, if any. An additional review of the DBE’s “commercially useful function” (CUF) report will be conducted. If any irregularities are found, these will be reported to MDT’s DBE Program Manager.

Unions

When CRB conducts a compliance review of a union contractor, the contractor must provide the name of the involved unions, their local numbers, the types of referral agreement and training programs in effect on the project.

If the collective bargaining agreement contains an exclusive referral process for hiring, the contractor must ensure that the union representative is referring minority and female employees. If the union referral practices prevent the contractors from meeting the EEO requirements of the contract, they must contact MDT/CRB immediately.

Other Recruiting Sources

During the compliance review the contractor must be able demonstrate the utilization of minority organizations and other recruiting sources that would provide minority and women applicants and employees. These efforts may be considered good-faith efforts if they were results oriented. In the absence of reasonable representation in any craft, the

contractor must be able to prove it requested referrals of minorities and women (i.e., records of telephone requests, including dates and times, persons talked with, and for which crafts minorities and women were requested).

All efforts reported by the contractor to contact recruiting sources will be verified by CRB. If a contractor utilizes recruitment letters for hiring, they should be specific. For example, recruitment letters should specify the positions for which referrals are sought, the number of employees needed, position requirements, estimated dates, who to contact, wage/salary range, and other information sufficient to elicit interest and references of potential employees. Form letters without specific information will not be considered good-faith efforts.

Contractor's Employment Practices

The terms and conditions of employment practiced by the contractor will be reviewed by CRB. The contractor will be provided the opportunity to demonstrate whether there is adequate representation of minorities and women throughout the life of the contract.

The contractor's home office employment practices are also subject to review when it is clear that hiring opportunities exist. If the home office employment practices are reviewed, this should be clearly stated in the review report and statements as why it was included. To assess whether adequate representation exists, the relevant Civilian Labor Force (CLF) information in a reasonable recruitment area surrounding the project(s) should be reviewed.

Information regarding the civilian labor force can be found at <http://www.census.gov/eo2000/index.html>. The comparable data should include the total number of employees who have worked for the contractor during the review period (or the current construction season). The review period is from the start of construction in the area until the most recent available information pertaining to employment within the scope of the review (established in the letter notifying the contractor of the review).

The contractor must supply information on new hires, rehires, name requests, and recalls for the entire review period.

While it is the contractor's prerogative to select who will be hired, recalled, or rehired, it is also the contractor's responsibility to ensure equal employment opportunity for minorities and women. The contractor's must provide employment data summarized

and analyzed based upon work hour information for each occupation, craft, and job classification for the review period (to determine consistency of work performed) and the ethnicity and gender of each employee.

This data will be compared to the CLF. When the rate of representation by occupation, craft, and job classification is less than that of the existing relevant CLF, the contractor must demonstrate what good faith efforts were employed when hiring opportunities were present.

CRB will also compare the work hours for minorities/non-minorities and men/women to ensure work hours are uniformed and equal. The analysis of work hours can also be used when reviewing certified payrolls. A random sampling of payroll records will be reviewed to verify work hours and wages claimed.

Training Special Provisions

The contractor must furnish evidence of their systematic and direct trainee recruitment efforts. CRB will review the evidence to determine if the contractor is in compliance with the contract's training special provisions.

The contractor must report the number of trainees by race/ethnicity, sex, occupation, craft and job classification, and the number of training hours received. These will include assignments as required in the provision of the contract and the contractor's own trainees.

Trainees will be interviewed by CRB to determine:

- they know they are reported as trainees and are in fact receiving training;
- the training hours involved substantial assignments which advanced their level of capability towards the journey-level;
- the trainee has been provided a copy of the Training Program; and,
- whether wages paid are consistent with the level of training received, skills demonstrated, and time in the program.

CRB will compare the number training hours reimbursed to hours of service reported and the quality/effectiveness of training received. The persons responsible for providing training to apprentices/trainees should be interviewed, as well as trainees, to determine whether any differences in perspectives warrant more intense scrutiny. If a trainee is not receiving substantive training and the contractor has been reimbursed for providing training, remedial action will be taken.

Other Compliance Factors

The following is a list of other compliance factors that will be considered during the review. These are examples of technical compliance factors that a contractor should have the ability to immediately correct. They would be considered minor deficiencies as long as the contractor takes immediate action to correct.

- Are required posters conspicuously displayed?
Notices and posters setting forth the contractor's EEO policy including the poster "EEO Is The Law" should be displayed on bulletin boards in areas readily accessible to employees and applicants (23 CFR 230, Appendix A).
- Have required written notices been sent to unions?
Contractors' signatory to contractor-union agreements are required to use their best efforts to incorporate an EEO clause into each union agreement (23 CFR 230, Subpart A, Appendix A). The contractor will notify the union(s) of its commitment to EEO. During the review, CRB will examine the contractor's bargaining agreements when necessary, i.e., if the contractor indicates the union does not refer minorities and women when requested, review written notices the contractor has sent to the unions and when they were sent, and obtain copies when this information is used to determine level of good faith efforts.
- Are recruiting publications used to show "An Equal Opportunity Employer?"
While many contractors do not publicly advertise employment opportunities, they include the above phrase on their letterhead to recruitment sources. Where contractors do advertise, copies of their advertisements will be reviewed to verify that the term is included.
- What is the role and responsibility of the EEO Officer?
The contractor's EEO Officer must have sufficient authority and responsibility to speak for and act on behalf of the contractor.
- Are publications advertising vacancies circulated in minority communities?
If contractors are advertising employment opportunities, they should advertise in minority news media or publications that are circulated in minority communities. Contractors cannot demonstrate sufficient good faith efforts if they advertise for jobs but they elect not to use minority news media or publications and minorities have limited opportunities to respond to targeted advertisements.
- Has certification regarding use of non-segregated facilities been made, and are such facilities provided on a non-segregated basis?

- Are prescribed Equal Employment Opportunity clauses included in all applicable purchase orders, subcontracts, and collective bargaining agreements?
CRB should review a random sample of subcontracts and purchase orders (\$10,000 or more) to ensure these agreements include the EEO clauses, as prescribed by Title 23.
- Do interviews of randomly selected or targeted employees reflect problems within the purview of applicable CR Statutes or regulations?

Wage and Labor Compliance

At the preconstruction conference, the contractor is reminded of several requirements in the Federal-Aid Contract. One of these requirements is the submittal of payrolls from all contractors and sub-contractors working on projects that exceed \$2,000.00, per **FHWA Form 1273, Section V**. There are forms that are linked to the submittal of payrolls. These forms are:

- Schedule of Prevailing Wage Rates (General Wage Decision or Wage Table)
- Wage and Hour Record – FDOT Form 700-10-69 (which includes the Weekly Statement of Compliance and payroll reporting)
- Employee Interview Report Labor/EEO Compliance-Form 700-010-63
- Notification of Non-Compliance-Form 700-010-59
- Additional Wage Rate Classification Request- Form 700-010-07

The Schedule of Prevailing Wage Rates is included in the contract. The initial review of the payrolls will be done by the EPM. Following that review, payrolls are forwarded to CRB for final approval. CRB may conduct a separate review of the payrolls, to include:

- Review of the percentage of minority employees
- Review of the percentage of female employees
- Subcontractor payrolls reviewed for percentage of M/F Employees

6. Corrective Action Plans (CAP)

Contractors found in noncompliance must immediately take corrective action to address all identified deficiencies. If the contractor cannot correct the cited deficiencies **within 30 days**, the contractor must submit a CAP. The written CAP must specify a clear action plan with time limits for the contractor to complete actions to correct the cited deficiencies and the submission of progress reports to CRB.

The CAP the contractor submits must be sufficient to bring about compliance (correct deficiencies) to be approved. When an acceptable CAP is agreed upon, the contractor

will be sent a show cause notice rescission letter finding the contractor in compliance contingent upon effective implementation of the CAP.

When a contractor operating under an acceptable CAP carries out the provisions of the CAP but the actions do not result in the necessary corrective actions, the CAP must be immediately amended through negotiations. If the contractor refuses to amend the CAP, MDT can implement its contract administration procedures to obtain compliance. Consistent with standard options, MDT may declare the contractor a non-responsible bidder (debarment), reduce its bid ceiling, cancel or suspend all or any part of the contract, withhold progress payments, or assess reasonable liquidated damages.

When an acceptable CAP is not agreed upon or the contractor does not otherwise show cause as required, MDT must proceed with formal administrative sanctions as called for under its contract administration procedures. MDT must take the necessary administrative action it would use if the contractor failed to perform in any other contract specification.

7. Follow-up Reviews

Follow-up reviews need to be conducted for those contractors where the initial review resulted in a finding of noncompliance and a show cause notice was issued.

A follow-up review should be conducted on the contractor's work force and on other practices found in non-compliance at the earliest reasonable opportunity. Follow-up reviews will be done prior to or during peak employment and may not occur until the next construction season.

If the follow-up review determines the contractor has not implemented the CAP or VCAP in accordance with its written commitments, and the opportunity existed to do so, then the contractor must be found in non-compliance. MDT will impose appropriate remedies pursuant to MDT's contract administration procedures. Remedies may typically include: declare the contractor a non-responsible bidder (debarment), reduce its bid ceiling, cancel or suspend all or any part of the contract, withhold progress payments, or assess reasonable liquidated damages.

8. The Hearings Process

When such procedures as show cause issuance and conciliation conferences have been unsuccessful, MDT will immediately notify FHWA and recommend that USDOT obtain approval from the Office of Federal Contract Compliance Programs (OFCCP) for a formal hearing. MDT will notify the contractor of this action. MDT will submit copies of all pertinent documents to USDOT.

In instances where requests for formal hearings are pending OFCCP approval, the contractor may be declared a non-responsible bidder (debarment) and MDT will refrain from entering into any contracts or contract modifications.

9. In Compliance

A contractor is found **IN COMPLIANCE** when there is sufficient information, data and evidence obtained during the compliance review to determine that the EEO requirements have been effectively implemented with respect to all terms and conditions of employment, in the provisions of subcontracting opportunities in a nondiscriminatory manner on the contractor's projects, and meeting DBE (see Section 4, Disadvantaged Business Enterprise), On the Job Training (OJT) (see Section 3, On-the-Job Training), Indian Preference goals, where appropriate.

G. CIVIL RIGHTS BUREAU REQUIREMENTS

The functions of the EEO Contract Compliance Section include but are not limited to:

- providing technical assistance to field personnel, contractors and referral sources;
- providing clarification relative to federal directives and regulations;
- analyzing and evaluating contractor EEO posture;
- scheduling and conducting compliance reviews;
- approving requests for and monitoring of training programs submitted by contractors;
- participating in preconstruction conferences; and
- conducting informal field inspections.

H. FILING A COMPLAINT

If an employee believes they have been discriminated against, they can file a complaint under the contractor's complaint procedure. If the complaint cannot be resolved at the contractor level, the complainant or respondent (contractor) may request that the CRB investigate the complaint. The CRB will conduct its investigation and make recommendations to both parties within thirty (30) days after being asked to do so. The complainant will be advised of his/her other avenues of complaint or appeal which are:

- **Montana Human Rights Bureau**
P.O. Box 1728
Helena, MT 59624-1728
1-800- 542-0807, FAX: 406-444-2798, 406-444-2884
- **U. S. Equal Employment Opportunity Commission (EEOC)**
Seattle Field Office-Federal Office Building
909 First Avenue, Suite 400
Seattle, WA 98104-1061
1-800-669-4000; FAX: 206-220-6911; TTY: 1-800-669-6820

- **State or Federal Courts**

Complaints must be filed with the preceding agencies/courts within 180 days.

I. COMPLIANCE

Contractors who fail to comply with EEO requirements may be subject to remedial action by MDT. The CRB may, at any time, visit the worksite, interview employees, and conduct investigations when necessary to determine if the program has been followed properly.

J. DEFINITIONS

Contractor means, any person, corporation, partnership, or unincorporated association that holds a FHWA direct or federally assisted construction contract or subcontract regardless of tier.

Days will mean calendar days.

Discrimination refers to any act or inaction, whether intentional or unintentional, in any program or activity of a Federal Aid recipient, sub-recipient, or contractor that results in disparate treatment or impact, or perpetuating the effects of prior discrimination based on age, marital status, sex, race, national origin, color, disability, creed, religion or genetic information.

Equal Employment Opportunity is the absence of partiality or distinction in employment treatment and contractor selection, so that the rights of all persons to compete and perform work, and be employed, trained and advanced on the basis of merit, ability and capability is maintained.

EEO Requirements is a general term used throughout this guide to denote all civil rights-based contract provisions relative to nondiscrimination in selection and retention of subcontractors, materials suppliers or vendors, equal employment opportunity, training, DBE contracting opportunities, or Indian preference (where appropriate).

Good Faith Efforts are the affirmative action measures implemented to meet the established intent and objectives of the equal opportunity provisions of the contract.

Terms and Conditions of Employment - all aspects of the employment relationship between an employee and his or her employer including, but not limited to:

- recruitment;
- hiring;
- tool and equipment assignments;
- optional or forced over time;
- compensation;
- fringe benefits;
- leave policies;
- job placement;
- physical environment;
- work-related rules;
- work assignments;
- training and education;
- opportunities to serve on committees and decision making bodies;
- opportunities for promotion; and
- maintenance of a nondiscriminatory working environment.

Utilization – for Contract compliance purposes, having minorities and/or women accumulating work hours in a particular occupation, craft, and job classification or receiving contracts that would be reasonably expected based on their availability.

Section 2



Labor Compliance

SECTION 2 – LABOR COMPLIANCE

A. DEFINITION

The Davis Bacon and Related Acts (DBRA) and the Copeland Anti-Kickback Act apply to contractors and subcontractors performing on federally funded or assisted contracts in excess of \$2,000 for the construction, alteration, or repair (including painting and decorating) of public buildings or public works. The Act requires all contractors and subcontractors to pay no less than locally prevailing wages and fringe benefits for corresponding work on similar projects in the area.

B. PURPOSE

The purpose of the DBRA is to preserve local wage standards and promote local employment. The Copeland Anti-Kickback Act ensures that the employees are not being forced to give up any wages or fringe benefits they are entitled.

C. LABOR COMPLIANCE

All contracts financed in whole or in part by Federal funds have the *Required Contract Provisions for Federal-aid Construction Contracts (FHWA-1273)* included in the contract documents. These provisions require that all laborers and mechanics employed at the site of work and that perform part of the contract work be paid the prevailing wage rates and fringe benefit rates as established by the U.S. Department of Labor (USDOL). Laborers and mechanics are defined as those whose duties are manual or physical in nature (e.g. workers who use tools or who are performing the work of a trade).

The contract provisions are based on:

- Davis-Bacon Act - payment of prevailing wage rates as determined by the USDOL to all laborers and mechanics on Federal government contracts. 29 CFR 1,3,5 & 7
- Copeland Anti-Kickback Act – makes it a Federal offense for anyone to require a laborer or mechanic to kickback their wages. The Act also requires submittal of weekly certified payroll reports.
- Contract Work Hours and Safety Standards Act - time and one-half pay for overtime hours, i.e. over 40 hours in any work week.
- Federal-Aid Construction Contracts - 23 CFR 633 Subpart A
- Fair Labor Standards Act (FLSA) - 29 CFR 778

D. CERTIFIED PAYROLL REQUIREMENTS

Laborers and mechanics must be paid unconditionally and without subsequent deduction or rebate on any account. Contractors or subcontractors may use form WH 347 provided by USDOL. All information on this form must be included on the contractor's certified payroll. The form WH-347 is available in a fillable form at the Montana Department of Transportation (MDT) website: <http://www.mdt.mt.gov/publications/docs/forms/contracting/wh347.pdf>

As required by USDOL, certified payroll records submittals must contain the following information:

- The employee's full name and unique identifying number (i.e. employee identification number or last 4-digits of the employee's social security number). All records, no matter the Contractor or subcontractor, shall be made available upon the request of USDOL and/or MDT.
- The employee's classification code (if any) and the corresponding classification from the wage decision.
- The employee's hourly wage rate, and fringe benefit rate and where applicable, the overtime hourly rate. Fringe benefits may be paid in cash; into bona fide plans; or a combination of funds and programs and must be paid on an hourly basis. Bona fide fringe benefit plans must:
 - Reasonably be anticipated to provide benefits
 - Represent a commitment that can be legally enforced
 - Be carried out under a financially responsible plan or program
 - Be communicated in writing to the affected employees.
- The daily and weekly hours worked in each classification, including actual overtime hours worked.
- Gross wages earned for the week, on project and off site. This is the amount recorded on the employee's pay stub for the full week.
- Itemized deductions include taxes, any benefits paid for through payroll deductions, garnishments (if applicable) and any other deductions made. There must be sufficient detail included on the payroll or the certificate of compliance to verify each deduction is allowable. If an employee has voluntary deductions, an authorization for that deduction must be signed by the employee on company letterhead and provided on the first payroll the deduction appears.
- Net wages include all wages paid to the worker for the week, whether project related or for private or other government work. This amount must match the check issued to the employee for the week. Cancelled checks may be requested.

Names of owners, superintendents and non-working foremen must appear on the payrolls only when working on site. The days and hours on the project should be recorded but the rate of pay is not required. However, should MDT or the USDOL determine that the salaried employee does not meet the criteria for exemption; back wages will be required of the employer.

Each contractor payroll must be numbered. Consecutive numbering should be maintained for the prime contractor and for each subcontractor (or sub-subcontractor) that is working on the project and stay consecutive for the life of the project. If a prime or subcontractor does not work on a project during any given week, a payroll is not required and the next payroll submitted should remain in sequence.

If the prime contractor or any of the subcontractors are union employers, a copy of the wage and benefit schedule from the union contract must be provided. In addition, authorization for all allowable deductions must be attached to the first payroll.

E. FRINGE BENEFIT PAYMENTS

The minimum rates for fringe benefits are shown in the Wage Decision (WD) or as established through the additional classification (conformance) process. Employers may make payment of the required benefits in the following manner:

- To an established program approved by the USDOL. Generally, an employee accepts this method of payment of fringe benefits as a condition of employment.
- Programs such as health insurance, life insurance, retirement accounts, savings accounts, etc., where the employee is enrolled in the program and designates beneficiaries. Acceptance of this method of payment of fringe benefits is based upon the employee authorizing his/her employer to enter the employee in these programs.
- A direct payment of cash to the employee.
- Any combination of the above.

The contractor must check the appropriate box on the compliance statement on the reverse side of the certified payroll (WH-347). If fringe benefits are paid to approved plans, funds or programs, box (a) must be checked. If fringe benefits are paid in cash, box (b) must be checked. (Note: When fringes are paid in cash, they must be included in the gross amount earned upon which allowable deductions are made.) If there is a combination of fringe benefit payment, i.e., some to a plan and some in cash, both box (a) and box (b) must be checked with exceptions explained under (c). If any portion of the fringe benefits are paid to an approved plan, the name and address of that plan must be included in the remarks section.

The MDT Civil Rights Bureau (CRB) will require contractors; both prime and subcontractors, to provide evidence that fringe benefits have been paid. Evidence shall consist of copies of canceled checks and/or trust fund reports. If fringe benefits are paid to a bona fide fund, the employee must be able to have access to that fund. It is the contractor's responsibility to provide information to the employee on how to access the fund. It is also the contractors' responsibility to provide CRB with proof the fund is bona fide.

If fringe benefits are paid directly to the employee, the payment should be easy to distinguish on the certified payroll.

F. DAVIS-BACON WAGE RATE

Wages on federal projects are determined by federal Wage Decisions (WD). The wage rates shown in the contract are the rates to be paid for the duration of the project. The term "Davis-Bacon wage rate" means the straight time hourly rate and zone pay if applicable. (See zone pay section below.)

G. OVERTIME

All hours worked in excess of 40 hours a week on federal-aid project(s) must be paid to the worker at one and a half times the Davis-Bacon base wage rate. Fringe benefit amounts are never calculated at one a one-half time when overtime is calculated. Zone pay must be included when calculating overtime.

H. SHIFTING

When a portion of wages are deducted from an employee's Davis-Bacon wage rate and added to the fringe benefit rate, this process is known as "shifting." Under the provisions of § 5.31, 29 CFR any amount of money may be shifted from wages to fringes. Regardless of the amount of money shifted from wages to fringes or vice versa, the wage/fringe package can be no less than the total which is published in the contract. Overtime **must** be paid on the wage outlined in the wage decision, which includes the appropriate zone pay, as listed in the contract, not on the wage after shifting.

When a contractor utilizes the shifting process, a letter of explanation or, if applicable, a copy of the collective bargaining agreement must be provided with the first payroll that the shifting occurs on.

When shifting, the base hourly rate of pay may not drop below the Federal minimum wage.

I. ZONE PAY

The WD may indicate different rates depending on established zones and work classifications (see contract specific wage decision). Zone determination is based on the physical location of the site of work. If the physical location of the project is located in two zones, the higher zone rate applies unless each zone can be verified by MDT.

K. STATEMENT OF COMPLIANCE

Each payroll is to be accompanied by a statement of compliance signed by an authorized agent of the contractor who has knowledge of the facts represented to be true. The Statement of Compliance verifies the payrolls are correct and complete, that the wage rates are not less than those required by the contract wage decision, and that the classifications for each laborer or mechanic conforms with the work performed. The form can be found at:

<http://www.mdt.mt.gov/publications/docs/forms/contracting/wh347.pdf> (page 2).

L. SUPPLEMENTAL PAYROLLS

If there is an error in the payment of wages and/or fringe benefits, a supplemental certified payroll must be furnished as proof that restitution has been made. A supplemental payroll should indicate only the amount paid to the employee as restitution of wages due, **not the entire** amount paid to the employee for the week which the underpayment occurred.

Additional proof of payment, photo copies of both sides of the adjustment check, or a signed receipt from the employee, may be requested.

Supplemental payrolls must identify the week the correction applies to and indicate that it is a supplemental payroll. For instance if you are correcting payroll number 5, the supplemental should be submitted as 5a.

Supplemental certified payrolls may also be requested when such problems as lack of classification, improper identification (no identifying number for the employee), or omitted employees occur.

M. RECORDS AVAILABILITY

The contractor shall make their payroll records available for inspection by authorized representatives of MDT, Federal Highway Administration (FHWA) and/or the USDOL when requested to do so.

N. NEW CLASSIFICATIONS

When a contractor believes a new classification is necessary, the contractor must complete a General Services Administration (GSA) Standard Form SF1444 and submit it to the MDT CRB. The CRB will forward the request to the USDOL for approval. The following criteria should be used to determine if a new classification is warranted.

- The work to be performed by the classification is not performed within an existing classification.
- The classification is utilized in the area by the construction industry.
- The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the determination in other categories.

The form is available at:

http://www.mdt.mt.gov/publications/docs/forms/dbe/additional_classification.pdf

O. LABOR COMPLAINTS

Complaints may be filed with the MDT CRB whenever a contractor's employee believes the proper wages or fringe benefits have not been paid. Complaint inquiries arise whenever there is reason to believe that violations exist. Sources of complaint inquiries include CRB review of the certified payrolls, employees, their representatives, competing employers or other interested parties. Complaints are treated with confidentiality. Complaints must be submitted in writing by use of MDT Form LC-2

http://www.mdt.mt.gov/publications/docs/forms/contracting/labor_complaint.pdf .

CRB investigates to determine if there is evidence to substantiate or refute the complaint. At the conclusion of the investigation, if the allegations have been substantiated, a demand is made for resolution and compensation. If the complaint is disproved, it is dismissed.

The CRB's investigative procedures will include, but are not limited to, the following:

- Review data submitted by or requested from the contractor;
- Personal interviews with all parties to the complaint;
- Personal interviews with knowledgeable parties, i.e., MDT Engineering Project Managers contractor payroll personnel;
- Analyze and evaluate information, make determinations and recommendations to resolve the issue; and
- Provide a report of investigation to Federal Highway Administration (FHWA).

P. SPOT CHECK INTERVIEWS (LC-1)

Mandatory spot check interviews are conducted by the Engineering Project Manager (EPM) or appropriate designee once during each month the prime contractor or subcontractor is on the project site. Form LC-1 must be completed and can be found at:

http://www.mdt.mt.gov/other/civilrights/external/lc_spotcheck.pdf .

The EPM must select a random number of contractor employees who are representative of each craft on the project site to interview. When the second spot check interview is conducted, a different group of contractor employees should be selected. Interview at least a third of the contractor's personnel during each spot check interview.

If the contractor's work force is comprised of four persons or less, the initial spot check interview should be comprised of all employees. Follow-up spot check interviews are not required unless the composition of the work force changes or if MDT suspects problems.

When each spot check interview has been accomplished, the LC-1 must be compared to the payroll with the same week ending date. All persons interviewed should be on that payroll and should have been paid for the work they were performing while being interviewed. If the employees on the LC-1 are not on the payroll for the corresponding week, the contractor must be notified and a supplemental payroll requested. The LC-1 must be attached to the payroll and forwarded to the CRB.

Q. MONITORING

CRB is responsible for assuring all certified payrolls are checked and to ensure that the number of workers shown, correct wages, the classifications, and the hours worked appear reasonable.

CRB will perform a detailed review of the first full payroll of every construction project ensuring compliance with Davis-Bacon and related acts. CRB may also conduct a detailed review at least once on every project for each contractor and subcontractor. This review shall include requesting copies of check stubs or cancelled checks from contractors to ensure the certified payroll submitted is accurate. If full compliance is shown, payrolls may then be checked through the weekly overview. Further detailed checks are at the CRB's discretion.

R. REPORTING

On Federally funded projects, the prime contractor and all subcontractors are required to maintain and submit weekly certified payrolls. Subcontractor payrolls are to be submitted to the contractor for review prior to submittal to MDT. MDT requires two copies of the certified payroll to be submitted to the Engineering Project Manager (EPM) for all construction projects.

Certified payrolls shall be delivered to the EPM within seven days of the weekly payroll pay period end date. The EPM is required to retain a copy for their records and forward a copy to the CRB. Contractors are responsible for ensuring subcontractor compliance. If a subcontractor fails to pay the required wages, the Contractor will be held responsible for the payment of those wages.

Payrolls and basic records shall be maintained by the contractor and each subcontractor during the course of the work and preserved for a period of three years from the date of completion of the contract.

S. COMPLIANCE

Contractors' who fail to comply with DBRA may be subject to remedial action by MDT. The CRB may at any time, visit the worksite, interview employees, and conduct investigations when necessary to determine if the program has been followed properly.

A contractor may be subject to further review if a contractor is selected for a full compliance review in any given year. (See Section 1 – Equal Employment Opportunity, F. Compliance Reviews.)

T. DEFINITIONS

Subcontractor

The prime contractor is responsible for any subcontractor's adherence to labor compliance regulations. *MDT has no contract with the subcontractors and will resolve all labor compliance matters with the prime contractor.* This can result in the prime contractor being responsible for restitution of wages due for the violation of one of the subcontractors. Required labor provisions (Form FHWA 1273) as well as wage rates must be physically attached to each subcontract.

Employees Working in More Than One Classification

When an employee works in excess of 20% of the time in more than one work classification, they must be paid the appropriate wage rates for the time worked. However, the contractor may pay the higher of the two rates on all hours if desired.

Site of Work (CFR 29 Pt. 5 Subpt. A 5.2L(1))

Site of work means:

- *The primary site of the work.* The physical place or places where the construction called for in the contract will remain when work on it is completed; and
- *The secondary site of the work, if any.* Any other site where a significant portion of the building or work is constructed, provided that such site is; (a) Located in the United States; and (b) Established specifically for the performance of the contract or project.

In addition, site of work includes any fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc., provided:

- They are dedicated exclusively, or nearly so, to performance of the contract or project; and
- They are adjacent or virtually adjacent to the “primary site of the work” or the “secondary site of the work” as defined above.

Site of work does not include permanent home offices, branch plant establishments, fabrication plants, or tool yards of a Contractor or subcontractor whose locations and continuance in operation are determined wholly without regard to a particular Federal contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, yards, etc., of a commercial or material supplier which are established by a supplier of materials for the project before opening of bids and not on the Project site, are not included in the “site of the work.” Such permanent, previously established facilities are not a part of the “site of the work” even if the operations for a period of time may be dedicated exclusively or nearly so, to the performance of a contract.

Owner/Operators

This exemption only applies to hauling trucks (includes water trucks and distributor trucks). It does not apply to other equipment such as dozers, backhoes, motor graders, etc. If the truck operator is the registered owner, the payroll entry will only show the individual's name and the designation "owner-operator." If anyone other than the registered owner is operating the truck, that person would be considered an employee and must be paid the appropriate wage rate designated in the contract. Sponsors, relatives and children of registered owners must be paid at the proper Davis-Bacon wage rate. See "de minimis" or 20% rule for additional assistance.

Truck Drivers

Truck Drivers are covered by Davis-Bacon in the following circumstances:

- Drivers of a contractor or subcontractor for time spent working on the site of the work. See "site of work" definition.
- Drivers of a contractor or subcontractor for time spent loading and/or unloading materials and supplies on the site of the work, if such time is not de minimis. See "de minimis or 20% rule" definition.
- Truck drivers transporting materials or supplies between a facility that is deemed part of the site of the work and the actual construction site.
- Truck drivers transporting portions(s) of the building or work between a site established specifically for the performance of the contract or project where a significant portion of such building or work is constructed and the physical place(s) where the building or work called for in the contract(s) will remain. See "Site of work" for additional information.

Truck drivers are not covered in the following instances:

- Material delivery truck drivers while off "the site of the work."
- Drivers of a contractor or subcontractor traveling between a Davis-Bacon job and a commercial supply facility while they are off the "site of the work."
- Truck drivers whose time spent on the site of the work is "de minimis", such as only a few minutes at a time merely to pick up or drop off materials or supplies.

"de minimis" or 20% rule

- If an employee works 20% or more of their hours in a work week on a Davis Bacon covered jobsite and in a Davis Bacon classification, those hours shall be paid at that classification's wage rate.
- An example would be John Smith works a 40 hour week. 9 of those hours were as a Laborer Group 2 and 31 hours driving his own heavy hauling truck delivering materials. His 9 hours or 22.5% of his work week would be paid at the Davis Bacon wage of Laborer Group 2.

Fringe Benefits

In addition to the Davis-Bacon wage rate, fringe benefits must be paid:

- to a "bona fide" trust fund, or,
- to the employee, or,
- to a combination of 1 & 2 above.

Guards and Watchmen

Guards and watchmen who serve in no other capacity are not covered under the Davis-Bacon Act; however, they are covered by the Contract Work Hours Standards Act. Therefore, they must receive time and a half for work over 40 hours a week. The straight-time hourly rate must be at least the current minimum wage rate under the Fair Labor Standards Act.

On-site Equipment Repair

The USDOL has ruled that employees of outside firms who repair tires or equipment at the site of the project are covered by the contract labor provisions if they perform a substantial amount of work at the contract site. Generally, work which exceeds 20 percent of the employee's time is considered substantial.

Working Foreman

If a supervisor performs laborer or mechanic work on a regular or substantial portion of the time, the supervisor is subject to Davis-Bacon wages. Generally, work which exceeds 20 percent of the employee's time is considered substantial.

The supervisor's name must appear on the payroll just as any on-site personnel appear on the payroll even if just supervising. Hours spent supervising and salary need not be displayed on the certified payroll.

Apprentices

- Apprentices can be employed only under a registered program.
- Contractors or subcontractors must submit written evidence of registration to the Engineering Project Manager (EPM) (apprenticeship agreement or statement of registration). Apprentices will be paid the rate established by the apprenticeship program.
- Employees classified as apprentices who are not registered must be paid the prevailing wage rates published on the basis of the classification of work they actually performed.
- A copy of the apprentice papers must be attached to the first payroll on which the name of the apprentice appears.

Gravel Testers

Gravel testers performing work on or adjacent to the project site are exempt from Davis-Bacon wages. Submission of payrolls for gravel testers is not required.

Surveyors

Surveyors are exempt from Davis-Bacon wage rates. Submission of payrolls for surveyors is not required.

Montana Labor Management Association

Montana Labor Management Association (MLMA) is a joint labor-management group that audits projects for compliance with collective bargaining agreements. MLMA may not view payrolls on the project site. To review payrolls MLMA must make a written request to CRB.

Section 3



On the Job Training

SECTION 3 – ON-THE-JOB TRAINING PROGRAM

A. DEFINITION

The On-The-Job Training (OJT) program was established to provide meaningful training opportunities for minorities, women, and disadvantaged persons on federal aid highway projects. Minorities, women and disadvantaged individuals continue to be under-represented in the highway construction industry and therefore, targeted recruitment is necessary in order to achieve a more equal and diverse workforce.

B. PURPOSE

The purpose of the OJT program is to develop minority, women, and disadvantaged persons to full journey-level employment through on the job training. Although it is not required that 100% of the trainees are minorities, women or disadvantaged persons, it is preferred. Those skilled crafts in which individual groups are underrepresented should have a majority of the training positions filled with minorities, women, and disadvantaged persons.

Underrepresentation is determined on a case-by-case basis and considers the Contractor's current workforce, the diversity of that workforce and the availability of minorities, women disadvantaged persons as it relates to the contractor's workforce.

C. SETTING PROJECT SPECIFIC TRAINEE GOALS

The OJT program requires that Montana Department of Transportation (MDT) establish an annual overall training goal. When selecting projects to meet the training goal, MDT considers the following:

- Availability of minorities, women and disadvantaged persons;
- Potential for effective training;
- Duration of the contract;
- Dollar value of the contract;
- Total normal workforce that the average bidder could be expected to use;
- Geographic location;
- Type of work;
- Need for additional journey people in the area;
- Recognition of the suggested minimum goal;
- Satisfactory ratio of trainees to journey people expected on the contractor's workforce (between 1:10 and 1:14).

If the project is located on a reservation, the number of trainees will be negotiated before the project is let. MDT Civil Rights Bureau (CRB) will contact the Tribal Equal Rights Office (TERO) to determine the number and classification of the trainees.

Once the overall goal has been established, CRB submits the information to Federal Highway Administration (FHWA) for approval.

The CRB maintains a statewide referral list providing contractors with names of organizations that train, dispatch and place minority, female, and disadvantaged persons in highway construction employment. An updated version of this list can be located at http://www.mdt.mt.gov/publications/docs/brochures/dbe_eeo/referral_list.pdf

D. TRAINING PROGRAM APPROVAL

When a contract requires a trainee(s), the contractor must submit a proposed training program to the Engineering Project Manager (EPM) for the project. The EPM must review the proposed training program to determine if it is feasible for the project. Criteria the EPM will consider include:

- Is the type of work going to be available on the site?
- Is the proposed length of time reasonable for the length of time the project is going to be under construction?

The EPM must submit a recommendation for approval or non-approval with the proposed training program to CRB. If the EPM rejects the program, they must include justification for doing so. Upon approval by CRB, the EPM will be notified in writing.

Once the training program has been selected and approved, no changes may be made to the program without CRB approval. Under no circumstances should on-site construction work begin prior to the submittal of the training program for approval by CRB.

E. TRAINEE WAGES

Trainees who participate in an approved training program may be paid the following percentages of the appropriate Davis Bacon rate as specified in the contract:

- 60% of the rate for the first half of the training period
- 75% of the rate for the third quarter of the training period
- 90% of the rate of the last quarter of the training period

F. SELECTING THE TRAINEE

In accordance with FHWA 1273, the contractor will be expected to demonstrate how recruitment and selection procedures were used to meet the intent of the training program, which is to provide training to minorities, women, and disadvantaged persons. Once the selection of the trainee is completed, the trainee must be informed of:

- The type of training they will be receiving and given a copy of the training program;
- Who his/her trainer is and how to contact the trainer when questions or other problems arise;
- Appropriate Davis Bacon wage schedule;
- Any union obligations;
- What shift hours will be worked.

Placement should occur as soon as the approved training program work begins on the project site. When the trainee is placed on the project, the EPM must notify the Civil Rights Bureau in writing within seven calendar days of the placement including the name and the date the trainee began work.

If the trainee terminates before program completion, the contractor must continue to fill the position until a trainee completes the training program as required in the contractor's special provisions.

G. MONITORING THE TRAINEE

The trainee must receive training in their assigned classification (or classifications if a combined training outline has been created) to be considered in compliance with the program. The EPM or their designee must ensure that legitimate training is occurring and the trainee's work is consistent with the approved training program.

CRB monitors the overall MDT trainee program and performs on-site or telephone interviews with trainees at any time.

Trainees should receive a certificate of completion upon successful completion of the program with a copy provided to CRB.

H. REPORTING

Contractors must provide EEO Monthly 7a training reports to the EPM by the 10th of the following month. This report is located at <http://www.mdt.mt.gov/publications/docs/forms/dbe/eeo7a.pdf>.

The required report allows the contractor to rate the progress of the trainee, note the hours spent in training and the duties that were performed.

Once the report is submitted by the contractor, the EPM must compare the hours to the payrolls and their daily entries from observation to ensure the hours claimed are reimbursable and legitimate training has occurred. The EPM must sign the 7a training report confirming the information is accurate and submit the signed original by the 15th of the following month to be reviewed by CRB.

I. COMPLIANCE

Failure to comply with an approved training program may be subject to remedial action by MDT. The CRB may at any time, visit the worksite, interview trainees and conduct further investigation necessary to determine if the training program has been followed properly.

Training programs are subject to further review if a contractor is selected for a full compliance review in any given year. (See Section 1 – Equal Employment Opportunity, F. Compliance Reviews.)

Section 4



Disadvantaged Business
Enterprise

SECTION 4 - DISADVANTAGED BUSINESS ENTERPRISE

A. DEFINITION

Disadvantaged Business Enterprise (DBE) program is a federal program that supports, to the fullest extent possible, the participation of businesses that are owned, controlled and operated by socially and economically disadvantaged individuals in Federally assisted contracts awarded and/or administered by Montana Department of Transportation (MDT).

B. PURPOSE

To create a level-playing field, MDT will ensure that all certified DBEs have the maximum opportunity to participate in the performance of Federally assisted contracts, proposals, purchase orders, and subcontracts. MDT will take appropriate measures to ensure sub recipients, contractors, consultants, subcontractors, and vendors do not discriminate in the selection of subcontractors on any basis protected by Federal or State law.

C. CONTRACTOR REQUIREMENTS

1. *Bidding*

Contractors must execute and submit as part of its bid, the DBE requirements as outlined in the electronic bidding system. Contract award may be conditioned upon satisfaction of the MDT requirements as set forth in the Department's DBE Program. The DBE schedule of participation will be used to determine whether the bidder has complied with the DBE goals of the project.

Where a numerical goal greater than 0% (zero percent) has been assigned, those bids that do not contain a schedule or contain a blank schedule, may be considered non-responsive and rejected. In any case where the apparent low bidder does not comply with the assigned project goal, a determination will be made within 4 hours of the bid opening, based upon the good faith efforts of the bidder (Good Faith Efforts are outlined below).

Where a numerical goal of 0% (zero percent) has been assigned to the project, bidders are encouraged to utilize the Schedule to indicate a commitment to using a DBE for a portion of the work in the project. A project specific goal of 0% does not mean that MDT doesn't have an overall DBE goal, MDT must achieve or make good effort to achieve an annual DBE goal that is approved by the Federal Highway Administration (FHWA).

DBEs not certified by MDT prior to the date the bids are opened will not be considered in determining whether the bid has complied with the goals.

Each firm, bidding on prime contracts and bidding or quoting subcontracts on federally-assisted projects must submit a completed Bidder's List within 48 hours of the bid

opening. If the prime contractor has not received any bid or sub-quote information, the prime bidder must indicate none on the Bidder's List. The bidder's list will be used to gather information for use in determining appropriate DBE goals for upcoming fiscal years.

In accordance with 49 CFR §26.13(b) which states, "Each contract that MDT signs with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance:

"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 Department of Transportation (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."

The prime contractor agrees to use MDT certified DBEs in the award of subcontracts to the fullest extent consistent with the performance of the contract. Under this certification, the bidder agrees to maintain records to document all contacts and specific efforts made to identify, seek out, and utilize DBE contractors.

2. DBE Substitution

Substitution of DBEs or dollar amounts shown on the Schedule will not be permitted prior to the award of the contract. If it is determined that the scheduled DBE is unable to perform due to default, over extension, suspension, decertification or other reasons, the prime contractor agrees to replace the DBE subcontractor in accordance with the substitution process outlined in the MDT DBE Program Guide located at http://www.mdt.mt.gov/publications/docs/manuals/dbe_prog.pdf.

3. DBE Goal Achievement

DBE goal achievement or participation will be determined and counted towards the goal when each DBE executes, performs and is paid for each work item specified in their subcontract and in accordance with the MDT DBE Program.

The following criteria will be used when determining the amount of achievement towards DBE goals:

- a) **Manufacturer, 100% of the cost:** A certified DBE that produces goods from raw materials or substantially alters goods before resale.
- b) **Supplier/Regular Dealer, 60% of the cost:** A certified DBE that maintains and furnishes a supply of the goods involved for the purposes of resale to the general public.

- c) **Jobber/Broker, 100% of the fee:** The DBE's normal fee received over the cost of any goods, equipment or services supplied to the project.
- d) **Contractor/Subcontractor, 100%:** Work performed using the DBE's own equipment and/or personnel.

4. Prompt Payment

Upon receipt of payment from MDT, the prime contractor shall pay each subcontractor the full amount due in accordance with the subcontract for work satisfactorily performed or materials provided in accordance with that subcontract as provided by 28-2-2103 MCA.

The requirements of the statute, the CFRs, and this Program apply to all subcontractors and suppliers, not merely those that are DBEs. For example, if work performed by any subcontractor is included in the Department's progress payment to the prime, the prime is required (by CFR, Montana Statute and this DBE Program) to pay the subcontractor for that work within seven (7) days of the prime's receipt of that progress payment.

If the prime contractor has a bona fide reason for not making payment to a subcontractor, written documentation must be provided to the Engineering Project Manager (EPM) with their monthly estimate request. If the affected firm is a DBE, a copy must be forwarded to the MDT CRB – DBE Program Manager.

If the prime withholds payment from a subcontractor without a bona fide reason as stated in 28-2-2103 MCA, sanctions may be imposed on the prime.

Prime contractors are required to maintain records of payment to DBEs for three years following the completion of the project. These records will be made available for inspection upon request to any authorized representative of MDT or USDOT. Interim audits of contract payments may be performed. The audit may review payments to all subcontractors.

5. Subcontractor payments

Per the contract, prime contractors are required to submit all subcontractor payments to the Civil Rights Bureau (CRB) upon payment to the subcontractor. Payments must be reported within 30 days of the payment. These can be remitted by mail, email or by using the following link:

http://www.mdt.mt.gov/publications/docs/forms/contracting/contract_payments.pdf .

D. GOOD FAITH EFFORTS

When a contract goal has been established, a bidder must, in order to be responsible and/or responsive, make good faith efforts to meet the DBE goal. MDT must decide within 48 hours of the bid opening, whether the efforts made to obtain DBE participation were "Good Faith Efforts" (GFE).

MDT will make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. MDT will consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made. The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Cursory efforts are not considered good faith efforts to meet the DBE contract requirements. MDT's determination of good faith efforts is a judgment call dependent on the information received from the bidder.

The following is a list of types of actions that MDT will consider as part of the bidder's good faith efforts to obtain DBE participation. This list includes, but is not limited to:

- Soliciting DBEs through all reasonable and available means within sufficient time to allow the DBEs to respond. This includes attendance at pre-bid meetings, advertising and/or written notices, and requests for bid through MDT website <http://www.mdt.mt.gov/business/contracting/civil/quotereg.shtml> . The bidder must take appropriate steps to follow up initial solicitations.
- Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.
- Negotiating in good faith with interested DBEs. 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.
- 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. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is unreasonable.
- Rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.
- Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.
- Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

- Effectively using the services of available minority/women community organizations; minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

Evidence of GFE includes documentation of names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.

In determining whether a bidder has made good faith efforts, MDT may take into account the performance of other bidders in meeting the contract. For example, when the apparent successful bidder fails to meet the contract goal, but other bidders meet it, MDT may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, MDT may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts.

If the bidder has attempted to make good faith efforts and does not receive DBE participation at or above the project goal, the bidder may request a DBE Program Waiver for that project. The form may be obtained from the MDT website and must be completed and submitted within 48 hours of the bid opening.

E. GOAL SETTING

MDT is required to set an annual DBE goal that must be approved by FHWA. This goal can be obtained by utilizing either a race-neutral (FHWA annual overall goal) or race-conscious (project specific) program. The Goal Setting process is based on several factors including, but not limited to: the bidder's list, past participation, disparity studies, North American Industry Classification System (NAICS) codes of DBEs, ready, willing and able DBEs, capacity of DBEs, consultation with minority and women's groups, and consultation with Montana Contractor's Association (MCA). MDT will calculate the goal using the criteria outlined in 49 CFR Part 26.45.

1. Race-Conscious (Project Specific Goals)

In instances when a project has specific goals, the goals are set by MDT goal setting committees. When local agencies are responsible for administering Federal Aid contracts, i.e. Community Transportation Enhancement Projects (CTEP), Congestion Mitigation and Air Quality (CMAQ), etc., they will be included in the goal setting process. If a project is located on or near an Indian reservation, the Tribal Equal Rights Officer (TERO) will be included in the goal setting process.

All federal aid projects, contracts, proposals, and/or purchase orders are closely reviewed to identify the potential of DBE participation. MDT sets project goals based

upon the potential for subcontracting and the known or anticipated availability of MDT certified DBEs.

Contractors must achieve the project goal or provide documentation of GFE made in an effort to meet the goal. Attainment of each project goal will not occur until the DBE(s) identified on the Schedule of Participation have successfully performed the contracted work items in accordance with MDT Standard Specification and the MDT Program. In the event a DBE cannot perform the contracted work, the prime contractor will be required to replace that DBE with another certified DBE. (See C.2. DBE Substitution).

2. Race Neutral Goals

In the absence of project specific goals MDT is required to operate a race-neutral DBE program. Project specific goals will not be set, however, MDT is still required to meet the overall annual goal or demonstrate GFE to meet the overall annual goal as approved by FHWA.

F. COMMERCIALY USEFUL FUNCTION (CUF) REPORT

A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself.

To determine whether a DBE is performing a commercially useful function, the EPM will submit a CUF report for each DBE on every project and submit the report to the DBE Program Manager for review. If the CUF determines that the DBE is not performing a commercially useful function, the DBEs work will not be counted in the DBE participation figures. The report should be completed when at least 50% of the DBE's work is finished. The CUF report can be found at: http://www.mdt.mt.gov/publications/docs/forms/dbe/dbe_cuf.pdf

G. COMPLIANCE

Contractors' who fail to comply with the DBE program may be subject to remedial action by MDT. The CRB may at any time, visit the worksite, interview employees, and conduct investigations when necessary to determine if the program has been followed properly.

H. DEFINITIONS

CFR means the Code of Federal Regulations pertaining to the administration of the USDOT DBE Program.

Contract means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and to buyer to pay for them. Purchase orders are included in this definition.

Commercially Useful Function a function that a DBE is responsible for in the execution of its contract

Department (The Department) refers to the Montana Department of Transportation (MDT).

Disadvantaged Business Enterprise (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.

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

Good Faith Efforts means efforts to achieve a DBE goal or other requirement of 49 CFR part 26, which, by their scope, intensity, and appropriateness to be objective, can reasonably be expected to fulfill a goal.

Indian Tribe means any Indian tribe, band, nation or other organized group or community of Indians, 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.

Level Playing Field means the amount of DBE contracting expected in the absence of discrimination and the effects of past discrimination.

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 DBE firm; or the individual's equity in their primary place of residence.

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 program, race-neutral includes gender-neutrality.

USDOT (DOT) refers to the United States Department of Transportation.

Section 5



Title VI

Section 5 - TITLE VI

A. DEFINITION

Title VI of the Civil Rights Act of 1964 provides that no person in the United States shall on the grounds of race, color, or national origin be discriminated against under any program or activity receiving Federal financial assistance. Federal Transit Administration (FTA) protects race, color and national origin only. The Federal Aid Highway Act of 1973 (23 U.S.C. 324) added “sex” as a protected status in all Federal Highway Administration (FHWA) activities. The Airport and Airway Improvement Act of 1982 (49 U.S.C. § 47123) added “sex” and “creed” as protected status in all Federal Aviation Administration (FAA) activities.

Title VI was amended by the Civil Rights Restoration Act of 1987 (P.L. 100-259), effective March 22, 1988, which added section 606, expanding the definition of the terms “programs or activities” to include all of the operations of an educational institution, governmental entity, or private employer that receives federal funds. These programs or activities may be either within MDT (“internal”) or in MDT staff’s dealings with the public (“external”).

Title VI also requires:

- Each agency project be monitored to ensure no “disproportionately high and adverse human health or environmental effects” on minorities or low income populations under Executive Order 12898; and
- “meaningful access” to persons with Limited English Proficiency (LEP) under Executive Order 13166.

See MDT Interpreter’s List at

<http://mdtinfo.mdt.mt.gov/other/civilrights/external/interpreters-list.pdf>.

The Title VI Program also refers, where appropriate, to other Federal civil rights statutes. The State of Montana forbids discrimination in many areas through its Constitution, codes and rules.

B. PURPOSE

It is the policy of Montana Department of Transportation (MDT) to ensure compliance with Title VI of the Civil Rights Act of 1964 and all related statutes or regulations in all programs and activities.

MDT assures that no person shall, as provided by Federal and State civil rights laws, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity. MDT further ensures every effort will be made to ensure non-discrimination in all programs and activities, whether those programs and activities are federally funded or not.

MDT is required to file assurances with Federal Highway Administration (whenever a significant change in agency management occurs) and with Federal Transit Administration (annually) that it will comply with Title VI requirements or be liable for sanction.

The MDT Director has delegated the authority to administer and monitor the Title VI Program as promulgated under Title VI of the Civil Rights Act of 1964 and any subsequent legislation to the Civil Rights Bureau (CRB) Chief. The Title VI Coordinator will provide technical assistance on an agency-wide basis.

C. TITLE VI COMPLIANCE

MDT has adopted an “interdisciplinary approach” to Title VI activities. This means Title VI activities are delegated by the CRB to the appropriate District / Division program managers. The CRB charges them with the responsibility to develop and implement procedures and guides to adequately monitor their programs. In turn, the CRB conducts periodic compliance reviews to assure implementation is adequate.

Civil Right Bureau (CRB) responsibilities include:

- Receiving, investigating, and promptly resolving Title VI complaints;
- Training local program staff about Title VI requirements;
- Developing and disseminating Title VI information to the general public;
- Reviewing sub-recipients for Title VI compliance in federal aid activities;
- Identifying and eliminating discrimination in MDT programs and projects;
- Working with local agencies to promptly resolve deficiency status in Title VI through voluntary means, if possible;
- If MDT distributes federal-aid funds to another governmental entity, MDT will include Title VI language in all written agreements and will monitor for compliance. See at http://mdtinfo.mdt.mt.gov/civilrights/docs/title_vi.pdf.

1. Internal Title VI Requirements

Examples of specific prohibited discriminatory practices include, but are not limited to:

- Denial to an individual of any service, financial aid, or other benefit provided under the program;
- Distinctions in the quality, quantity, or manner in which the benefit is provided;
- Segregation or separate treatment in any part of the program, service or activity;
- Restriction in the enjoyment of any advantages, privileges, or other benefits provided to others;
- Different standards or requirements for participation;
- Methods of administration which, directly or through contractual relationships, would defeat or substantially impair the accomplishment of effective nondiscrimination.

CRB Title VI responsibilities include, but are not limited to:

- Reviewing program areas for Title VI compliance;
- Continuously reviewing special emphasis program areas;
- Reviewing MDT program directives for Title VI compliance training State program staff about Title VI requirements;
- Reporting to FTA and FHWA about the status of Title VI at MDT;
- Maintaining updated Title VI plans for both FHWA and FTA;
- Disseminating Title VI information to the general public;
- Conducting reviews of MDT programs and recipients;
- Identifying and eliminating discrimination;
- Promptly resolving deficiency status through voluntary means, if possible.

Title VI representative responsibilities include, but are not limited to:

- As necessary, working with consultants to ensure all public meetings and hearings have Title VI pamphlets and a public meeting form will be completed by consultant or MDT staff present at meeting/hearing and submitted to the Coordinator
 - (For purposes of this requirement, a “public meeting” is any meeting or hearing for which there is an open invitation (via news release, paid advertising and/or letter of invitation) to the general public (not just contractors) to attend for the purpose of informing the public and/or soliciting input from the public.) See at http://mdtinfo.mdt.mt.gov/other/civilrights/external/title_vi_public_hearing_form.docx or http://mdtinfo.mdt.mt.gov/other/civilrights/external/title_vi_public_hearing_form.pdf
- Completing and submitting a Title VI Periodic Report every four months. See at http://mdtinfo.mdt.mt.gov/other/civilrights/internal/title_vi_pr.docx
- Reporting all written Title VI complaints immediately to the Coordinator. See complaint form at <http://mdtinfo.mdt.mt.gov/civilrights/docs/vicomplaint.pdf>.
- Seeking opportunities to train staff/public on Title VI and notifying Coordinator.
- Attending a Title VI Representative meeting once every four months.
- Ensuring current Title VI pamphlets are available at all MDT public meetings and hearings. Pamphlets are also available at all MDT locations. See at http://www.mdt.mt.gov/publications/docs/brochures/dbe_eeo/titlevi_pamphlet.pdf.
- Monitoring Division activities for potential Title VI impact and consult with MDT Title VI Coordinator as necessary.

2. External Title VI Requirements

Division/Unit/ District Title VI Representative responsibilities include, but are not limited to:

- Seek opportunities to train public on Title VI and notify Coordinator.
- As necessary, work with consultants to ensure all public meetings and hearings have Title VI pamphlets and a public meeting form will be completed by consultant or MDT staff present at meeting/hearing and submitted to the Coordinator.

D. TITLE VI COMPLAINT PROCEDURES

This section outlines the Title VI complaint procedures related to providing programs, services, and benefits. However, it does not deny the complainant the right to file formal complaints with the Montana Human Rights Bureau, Equal Employment Opportunity Commission, FHWA, FTA, FAA, or to seek private counsel for complaints alleging discrimination, intimidation or retaliation of any kind that is prohibited by law.

Any person believing they have been subjected to discrimination as noted below may file a written complaint with the MDT CRB. Complainants also have the right to file a written complaint directly to the appropriate federal agency. Federal and State law requires complaints be filed within 180 calendar days of the last alleged incident.

- For FHWA, complaints may be based on race, color, national origin, sex or low income status;
- For FTA, complaints may be based on race, color, national origin, or low income status;
- For FAA, complaints may be based on race, color, national origin, sex, creed, or low income status.

Within five working days of receipt of a written Title VI complaint the CRB Chief will notify the MDT Director of the complaint.

- FHWA-related complaints received directly by MDT and not by FHWA will be investigated by CRB.
- FHWA-related complaints received by FHWA will be investigated by FHWA unless delegated to CRB for investigation.
- All FAA- or FTA- related complaints against MDT will be investigated by CRB.
- All Title VI complaints against State sub-recipients, regardless of which federal agency is involved, will be investigated by CRB.

Within five working days of receipt of a complaint against a State sub-recipient, an investigation by the CRB will begin. The Division Title VI Representative may participate in the investigation.

A written investigation report will be prepared by the investigator. The report shall include a narrative description of the incident, identification of persons interviewed, findings and recommendations for disposition.

The CRB Chief will review the report. A copy of the report will be provided to the complainant and the respondent. Each will have five working days from receipt of the report to respond. If either party responds negatively or has additional information to provide, an informal meeting will be arranged by the CRB Chief. If neither party responds, the report will be forwarded to the MDT Director for final internal action.

The investigation report with recommendations and corrective actions taken will be forwarded within 60 days of the date the complaint was received by MDT to the FHWA Division office, the FTA Regional office, or the FAA Regional office as appropriate, the complainant and the respondent.

Complainants will be advised of their appeal rights to the appropriate federal agency.

E. FREQUENTLY ASKED QUESTIONS

What is discrimination under Title VI?

That **act** (action or inaction), whether intentional or unintentional, through which a person in the United States solely because of their race, color, national origin is subjected to **disparate [unequal] treatment or impact**, in any program or activity receiving Federal financial assistance from FHWA under 23 USC.

What is FHWA's Title VI program?

It is not limited to prohibitions of Title VI of the Civil Rights Act of 1964. FHWA includes other civil rights provisions of Federal statutes and related authorities (e.g. age, marital status, sex, race, creed, national origin, color, mental or physical disability, religion or genetic information) that prohibit discrimination in programs and activities receiving Federal financial assistance (23 CFR 200.5(p)).

Other Nondiscrimination authorities include: The 1970 Uniform Act (42 USC 4601); Section 504 of the 1973 Rehabilitation Act (29 USC 790); The 1973 Federal-aid Highway Act (23 USC 324); The 1975 Age Discrimination Act (42 USC 6101); Implementing Regulations (49 CFR 21 & 23 CFR 200); Executive Order 12898 on Environmental Justice (EJ); Executive Order 13166 on Limited English Proficiency (LEP)

What is "compliance"?

That satisfactory condition existing when a recipient has effectively implemented all of the Title VI requirements or can demonstrate that every good faith effort toward achieving this end has been made. (FHWA 23 CFR 200.5 "Definitions")

What enforcement is allowed for compliance?

If there appears to be a failure or threatened failure to comply with this part, and if the noncompliance or threatened noncompliance cannot be corrected by **informal means**, compliance with this part may be effected by the suspension or termination of or refusal to

grant or to continue Federal financial assistance or by any other means authorized by law. (USDOT 49 CFR 21.13(a)).

Recipients placed in a deficiency status shall be given a reasonable time, not to exceed 90 days after receipt of the deficiency letter, to **voluntarily** correct deficiencies. (FHWA 23 CFR 200.11(c)).

When FTA has determined that a recipient or sub recipient is in noncompliance with Title VI, it will transmit a letter of finding to the grantee that describes FTA's determination and requests that the grantee **voluntarily** take corrective action(s) that FTA deems necessary and appropriate. (FTA Circular 4702.1A Chap. X(1)(b) (5/13/07)).

Is there only one MDT Title VI Plan?

No. Both FHWA and FTA require separate Title VI plans. These are accessible, respectively, at http://www.mdt.mt.gov/business/contracting/docs/civil/fhwa_title_vi_plan.pdf and http://www.mdt.mt.gov/business/contracting/docs/civil/fta_title_vi_plan.pdf.

What are some Title VI issues affecting Right of Way?

Title VI considerations arise in appraisals and appraisal reviews; negotiations; acquisition; relocation assistance and payments; and property management. Title VI pamphlets are routinely included in a right of way packets given to members of the public. For further information, contact the Title VI Coordinator or Right of Way Title VI Representative.

What are some Title VI issues affecting Planning? Federally funded projects in metropolitan areas must attain mobility, access, and community goals. Public concerns and views must be considered in the decision making process. Plans must be tailored to meet local conditions. Planning must ensure involvement of the transportation disadvantaged.

What are some Title VI issues affecting public involvement and participation?

Public involvement is sought at the planning stage to forestall future problems. Early, continuous, and appropriate community outreach and feedback to the community during the process accommodate community input. There must be recognition of specific and prominent community issues and circumstances, availability of mechanisms for eliciting and soliciting minority involvement, availability of and accessibility to information, multiple mechanisms for involving the public, and accessibility of process

Title VI requires, but is not limited to:

- consideration of citizen input;
- equitable provision of transportation facilities and services;
- coordination with Indian tribal governments;
- off-setting impacts across investments;
- open participation in contracting for key studies & activities;
- reviews for compliance & verification;

- disseminating information to MDT stakeholders , local governments, public, etc.;
- communicating through public meetings, hearings, media interviews and appearances;
- Presentations;
- notices in newspapers, newsletters, MDT inter & intra networks, etc.;
- establishing relationships with other media outlets and sources;
- developing videos for public meetings, hearings and other presentations, etc.

What type of documentation is required for Title VI issues?

Project files should include documentation of community profile; ethnic and racial composition; income, age, and sex distribution; and availability of and accessibility to transportation services.

What are some Title VI issues affecting project development?

This is the phase that continues where project planning ends. This phase includes consideration of alternatives & examination of social, economic and environmental (SEE) effects and analysis and preparation of National Environmental Policy Act (NEPA) documentation with FHWA assistance. The process must be open and collaborative with decision making based on public interest. Any degree of analysis must be based on potential impacts. Identification of beneficial and adverse impacts with equitable mitigation of SEE impacts is required.

What is “Limited English Proficiency” (LEP)? This is a person who does not speak English as their primary language and has limited ability to read, speak, write or understand English. Failure to provide LEP person services or meaningful access to services [may] constitute national origin discrimination (*Lau v. Nichols, 1974*)

What is the role of MDT in administering Title VI?

As a Federal-aid recipient, MDT is required to **develop procedures and mechanisms** to ensure nondiscrimination in all its programs, activities and services, whether Federally-funded or not. Efforts to prevent discrimination must address, but not be limited to, the program's impact upon:

- access;
- benefits;
- participation;
- treatment;
- services;
- contracting opportunities;
- training opportunities;
- investigation of complaints;
- allocation of funds;
- prioritization of projects; and
- the functions of planning, project development, design, right-of-way acquisition, construction, research, and other department activities that affect individual members of the public.

What are some Title VI issues affecting construction?

Title VI construction issues may occur principally in the areas of:

- plan preparation, specifications & estimates;
- letters of authorization to proceed;
- advertising for bids;
- contract awards;
- subcontract approvals;
- implementation of mitigation measures;
- final inspection and acceptance;
- incorporation of contract provisions;
- monitoring/inspection of work by State;
- impact mitigation;
- prequalification, bonding, and licensing requirements;
- approval of subcontracts;
- approval of plan changes and supplemental agreements; and
- assessment of sanctions.

What are some Title VI issues affecting research?

Title VI issues in research may occur in proposal/problem statement solicitation; selection of researchers; and outreach.

What are some Title VI issues affecting administration and accounting?

Title VI issues in administration and accounting may occur in equitable and consistent application of procedures for related functions; procurement of bids; contract provisions; administration of audits; and frequency and nature of equipment and materials disposal.

What are some Title VI issues regarding Human Resources?

Title VI issues in Human Resources may occur in:

- employee & employment related activities;
- recruitment, staffing and salary plans;
- payroll and position classifications;
- personnel policies and benefits;
- training;
- diversity and targeted recruitment;
- salary disparity and equal pay;
- application and dissemination of personnel policies and benefits;
- accessibility and dissemination of training opportunities;
- training and ADA requirements;
- Title VI training to employees; and
- grants and internship opportunities to Minority Institutions of Higher Education (MIHE's).

What are some Title VI issues regarding Information Services Division (ISD)?

Title VI issues in ISD may occur in:

- technology-related activities;
- information systems and network and PC support;
- telecommunications & electronic equipment;
- information processing & technology training;
- desktop publishing, web development & e-business;
- records management;
- photography;
- building security;
- printing and mailing;
- review boards, committees and teams;
- provision of services without regard to Title VI protected categories;
- diversity in the boards, teams & committees;
- uniform procedures in deployment of pilots;
- providing IT-related trainings;
- use of MIHEs in IT-related activities;
- efforts to integrate processes in other program areas and disciplines;
- accessibility of web sites & ADA compliance; and
- IT and the development of demographic profiles

What are some Title VI issues regarding legal?

Title VI issues in legal may occur in:

- pre-litigation issues;
- contract development, negotiation, drafting and administration assistance;
- review of non-construction and construction-related contract documents;
- risk management;
- legislation and administrative rulemaking;
- composition of the legal division;
- provision of legal services and advice consistently with same/similar quality without regard to Title VI protected categories;
- required provisions and Title VI verbiage in contracts.

What are some Title VI issues regarding the motor pool?

Title VI issues may occur in the areas of:

- managing, operating, maintaining, purchasing and disposing of state licensed motor vehicles;
- managing all insurance programs and alcohol and controlled substance testing for all state and university system CDL drivers;
- making state vehicles accessible and available to all employees;
- standard procedures for acquiring and disposing of state vehicles;
- nondiscriminatory administration of alcohol and controlled substance testing;

- diversified staff that manages the insurance programs and administer tests;
- tests provided in languages other than English;
- testing facilities accessible statewide; and
- defensive driving course trainings conducted in a non-discriminatory fashion?

What are Title VI issues regarding District offices?

Title VI issues may occur in the areas of:

- providing additional information for press releases;
- conducting bridge inspections; completing inventories of billboards & signs;
- working with public on encroachments, driveway permits;
- Adopt-a-Highway program;
- working with counties on harmful and unpleasant weed program, and interstate haying program;
- additional information on all press releases;
- a consistent process for inspecting bridges;
- non-discriminatory inventories and other activities with the public;
- non-discriminatory snow removals, anti-icing, mowing, maintenance of drainage facilities, seal coating, etc.;
- fair, competitive and consistent execution of construction contracts for reconstruction and rehabilitation of major highways and bridges;
- non-discriminatory selection and retention of [prime] contractors;
- non-discriminatory selection and retention of second and third tier subcontractors by prime and other contractors;
- non-discriminatory employment practices of the state, contractors and subcontractors associated with Federal-aid projects and programs;
- Prompt and consistent payment of contractors and subcontractors; and
- equitable and nondiscriminatory monitoring of DBEs.

Section 6



Americans with
Disabilities Act

SECTION 6 – AMERICANS WITH DISABILITIES ACT

A. DEFINITION

Section 504 of the Rehabilitation Act of 1973, as amended, 29 USC 792 (“Section 504”), prohibits discrimination on the basis of disability in any program or activity receiving Federal financial assistance. Section 504 confers primary responsibility for enforcement of its provisions on those Federal agencies extending financial assistance to the program or activity.

B. PURPOSE

It is the policy of Montana Department of Transportation (MDT) to ensure that no qualified individual with a disability shall, solely on the basis of their disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any of its programs, services, or activities as provided by Section 504. MDT further assures that every effort will be made to provide nondiscrimination in all of its programs and activities regardless of the funding source, including Federal Transit Authority (FTA), Federal Aviation Authority (FAA), Federal Highway Administration (FHWA), and state funds.

C. AMERICAN’S WITH DISABILITIES ACT (ADA) COMPLIANCE

MDT’s ADA Coordinator responsibilities include the following:

- Receiving, investigating, and promptly resolving ADA complaints;
- Training local program staff and contractors about ADA requirements;
- Developing and disseminating ADA information to the general public;
- Reviewing sub-recipients for ADA compliance in federal aid activities;
- Identifying and eliminating discrimination in MDT programs and projects;
- If MDT distributes federal-aid funds to another governmental entity, MDT will include Title VI language in all written agreements and will monitor for compliance. See at http://mdtinfo.mdt.mt.gov/civilrights/docs/title_vi.pdf

D. DESIGN

MDT designers utilize the FHWA guide Designing Sidewalks and Trails for Access, Accessible Rights-of-Way: A Design Guide, and MDT’s standard detailed drawings, Section 608 Concrete Sidewalks. See the links below.

http://www.mdt.mt.gov/business/contracting/detailed_drawings.shtml

<http://www.access-board.gov/prowac/guide/PROWGuide.htm>

<HTTP://WWW.FHWA.DOT.GOV/ENVIRONMENT/SIDEWALKS/INDEX.HTM>

<HTTP://WWW.FHWA.DOT.GOV/ENVIRONMENT/SIDEWALK2/INDEX.HTM>

E. PEDESTRIAN FACILITIES

Contractors should work to meet accessibility requirements throughout the project delivery process. Issues surrounding pedestrian accessibility should be addressed at the earliest stage possible to reduce or prevent conflicts with other right-of-way, planning, environmental, and design considerations. This could include the acquisition of right-of-way and use of special plan details for specific locations to remove barriers. Projects requiring pedestrian accessibility include projects for new construction and projects altering existing street and highway facilities. Public Rights of Way Accessibility Guidelines (PROWAG) and Americans with Disabilities Act Accessibility Guidelines (ADAAG) are the design standards used by MDT.

F. NEW CONSTRUCTION

All projects for new construction that provide pedestrian facilities must incorporate accessible pedestrian features to the maximum extent technically feasible, without regard to cost. The development process should ensure accessibility requirements are incorporated in the project. Additional information can be found at <http://www.access-board.gov/prowac/draft.pdf>.

G. ALTERATIONS

Alterations are changes to a facility in the public right-of-way that affect or could affect access, circulation, or use by persons with disabilities, e.g., reconstruction, major rehabilitation, structural resurfacing, widening, signal installation, pedestrian signal installation, and projects of similar scale and effect.

Alterations shall incorporate accessibility improvements into existing pedestrian facilities to the extent that those improvements are in the scope of the project and are technically feasible, without regard to cost. Projects altering the usability of the roadway must incorporate accessible pedestrian improvements at the same time as the alterations to the roadway occur.

More information regarding alterations can be found at:

<http://www.access-board.gov/prowac/alterations/guide.htm>.

H. MAINTENANCE

Maintenance activities are not considered alterations. Therefore, maintenance projects do not require simultaneous improvements to pedestrian accessibility under the ADA and Section 504. The FHWA has determined that maintenance activities include actions that are intended to preserve the system, retard future deterioration, and maintain the functional condition of the roadway without increasing the structural capacity. Maintenance activities include, but are not limited to, thin surface overlays (nonstructural), joint repair, pavement patching (filling

potholes), shoulder repair, signing, striping, minor signal upgrades, and repairs to drainage systems.

As part of maintenance operations, public agencies' standards and practices must ensure that the day-to-day operations keep the path of travel open and usable for persons with disabilities, throughout the year. This includes snow and debris removal, maintenance of pedestrian traffic in work zones, and correction of other disruptions. Identified accessibility needs should be noted and incorporated into the transition plan.

I. TECHNICAL FEASIBILITY AND COST

ADAAG contains a provision relating to “technical infeasibility”, applicable only in alterations. This exception does not apply to new construction. The provision is as follows:

Technical Infeasibility means, with respect to an alteration of an existing building or a facility, that it has little likelihood of being accomplished because existing structural conditions would require removing or altering a load-bearing member which is an essential part of the structural frame; or because other existing physical or site constraints prohibit modification or addition of elements, spaces, or features which are in full and strict compliance with the minimum requirements for new construction and which are necessary to provide accessibility.

In alteration work, if compliance with the ADA is technically infeasible, the alteration shall provide accessibility to the maximum extent feasible. Any elements or features of the building or facility that are being altered and can be made accessible shall be made accessible within the scope of the alteration.

J. BUILDINGS

The link below contains scoping and technical requirements for accessibility to buildings and facilities by individuals with disabilities under the Americans with Disabilities Act (ADA) of 1990. These scoping and technical requirements are to be applied during the design, construction, and alteration of buildings and facilities covered by titles II and III of the ADA to the extent required by regulations issued by Federal agencies, under the ADA.

<http://www.access-board.gov/adaag/html/adaag.htm>

K. REASONABLE ACCOMMODATION REQUESTS

Individuals who believe they have access barriers can make a request for improvements to the MDT ADA Coordinator by contacting (406) 444-6331, TTY (800) 335-7592, or Montana Relay at 711.

L. COMPLIANCE

Contractors who fail to comply with ADA may be subject to remedial action by MDT. The Civil Rights Bureau (CRB) may at any time, visit the worksite, interview employees, and conduct investigations when necessary to determine if the program has been followed properly.