

# MONTANA DEPARTMENT OF TRANSPORTATION



*Montana Department of Transportation*





## TABLE OF CONTENTS

<b>CHAPTER 1 - PROGRAM ADMINISTRATION.....</b>	<b>3</b>
1.1 HISTORY & OVERVIEW.....	3
1.2 AUTHORITY.....	4
1.3 POLICY STATEMENT .....	4
1.4 PROGRAM OBJECTIVES .....	4
1.5 PROGRAM ASSURANCES .....	5
1.6 CONTRACT ASSURANCES .....	5
1.7 MINORITY & WOMEN CONTROLLED BANKS.....	6
<b>CHAPTER 2 – DBE GOALS .....</b>	<b>7</b>
2.1 GOAL METHODOLOGY .....	7
2.2 PROJECT SPECIFIC GOALS.....	8
2.3 BIDDING PROCEDURES.....	9
2.4 GOOD FAITH EFFORTS .....	11
<b>CHAPTER 3 - DBE PARTICIPATION .....</b>	<b>14</b>
3.1 RESPONSIBILITIES:.....	14
3.2 PROMPT PAYMENT .....	15
3.3 COMMERCIALLY USEFUL FUNCTION (CUF).....	16
3.4 OVERCONCENTRATION .....	19
3.5 SUBSTITUTION .....	20
3.6 INVESTIGATIVE SUSPENSION .....	20
3.7 SANCTIONS .....	21
<b>CHAPTER 4 - DBE CERTIFICATION .....</b>	<b>23</b>
4.1 ELIGIBILITY REQUIREMENTS.....	23
4.1.1 - Eligibility Standards.....	23
4.1.2 - Business Size .....	23
4.1.3 - Ownership.....	24
4.1.4 - Control .....	25

<b>4.2</b>	<b>APPLICATION PROCESS</b>	<b>26</b>
<b>4.3</b>	<b>UNIFIED CERTIFICATION PROGRAM</b>	<b>27</b>
<b>4.4</b>	<b>OUT-OF-STATE FIRMS</b>	<b>28</b>
<b>4.5</b>	<b>ANNUAL ELIGIBILITY UPDATES</b>	<b>29</b>
<b>4.6</b>	<b>CHANGES EFFECTING CERTIFICATION</b>	<b>29</b>
<b>4.7</b>	<b>DENIAL/REMOVAL OF CERTIFICATION</b>	<b>29</b>
<b>4.8</b>	<b>SBA CERTIFIED FIRMS</b>	<b>30</b>
<b>4.9</b>	<b>JOINT VENTURE</b>	<b>30</b>
<b>4.10</b>	<b>THIRD PARTY CHALLENGES</b>	<b>30</b>
<b>4.11</b>	<b>HEARINGS</b>	<b>32</b>
4.11.1	MDT-initiated ineligibility proceedings	32
4.11.2	Informal Hearing	32
4.11.3	Grounds for decision	32
4.11.4	Notice of decision	33
4.11.5	Status of firm during proceeding	33
4.11.6	Effects of removal of eligibility	33
4.11.7	Other Hearings	34
4.11.8	Appeal	34
<b>CHAPTER 5</b>	<b>- DBE SUPPORTIVE SERVICES</b>	<b>35</b>
<b>5.1</b>	<b>TECHNICAL ASSISTANCE</b>	<b>35</b>
<b>5.2</b>	<b>DBE DIRECTORY</b>	<b>35</b>
<b>5.3</b>	<b>DBE NEWSLETTER</b>	<b>35</b>
<b>CHAPTER 6</b>	<b>- GLOSSARY OF TERMS</b>	<b>36</b>

# CHAPTER ONE - PROGRAM ADMINISTRATION

The Montana Department of Transportation (MDT) Civil Rights Bureau (CRB) has the responsibility of administering the MDT DBE Program. The Civil Rights Bureau Chief, as the DBE Liaison Officer (DBELO), has direct, independent access to the Department Director and also supervises the DBE Program. The day-to-day operation of the MDT DBE Program is delegated to the DBE Program Manager (DBEPM).

The DBELO and DBEPM can be contacted at the following address:

DBE Liaison Officer/Program Manager  
Montana Department of Transportation  
Civil Rights Bureau  
PO Box 201001  
Helena, MT 59620-1001

(406) 444-6331 (voice)  
(406) 444-7696 (TTY)  
(406) 444-7685 (fax)

## 1.1 HISTORY & OVERVIEW

When Congress enacted the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), it directed that a percentage of federal-aid highway funds be expended with small disadvantaged business firms. The Intermodal Surface Transportation Efficiency Act (ISTEA) directs that not less than 10 percent of the amounts authorized shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals. Legal notices were published in the five major and two minority newspapers in Montana stating MDT's intent of using a ten percent annual DBE goal. Interested parties were instructed to contact the MDT Civil Rights Bureau for additional information.

The Transportation Efficiency Act for the 21<sup>st</sup> Century (TEA 21) was enacted by Congress and signed by the President on June 9, 1998. TEA 21 implemented new regulations for the FHWA DBE Program as administered by MDT.

Under the Federal-aid transportation program, the U.S. Department of Transportation (USDOT) through the Federal Highway Administration (FHWA) makes funds available to MDT to assist in statewide transportation construction and improvement programs. The role of FHWA is program monitoring and technical assistance.

## **1.2 AUTHORITY**

The initial purpose and authority for the MDT DBE Program is 49 Code of Federal Regulations (CFR) Part 26 (49 CFR §26). The program is not; however, limited to those regulations. The program includes requirements and procedures not included in 49 CFR §26, but which MDT considers necessary and reasonable to further the overall program. Also, MDT will refer to and consider USDOT decisions in implementing the program and interpreting the CFRs. The program has been developed pursuant to 60-2-111; 60-2-201(4); 60-3-101; 18-2-101; 18-2-313; and 2-4-102(2)(a)(iv) Montana Code Annotated (MCA), for all USDOT-assisted contracts.

## **1.3 POLICY STATEMENT**

To support to the fullest extent possible, the participation of businesses that are owned, controlled and operated by socially and economically disadvantaged individuals in USDOT-assisted contracts awarded and/or administered by MDT. Further, MDT will not discriminate on the basis of race, color, creed, national origin, sex, disability, age, marital status, or political belief in the administration of this program.

To create a level-playing field, MDT will ensure that all certified DBEs have the maximum opportunity to participate in the performance of USDOT-assisted contracts, proposals, purchase orders, and subcontracts. MDT will take appropriate measures to ensure subrecipients, contractors, consultants, subcontractors, and vendors do not discriminate on the basis of race, color, creed, national origin, sex, disability, age, marital status or political belief.

## **1.4 PROGRAM OBJECTIVES**

- 1) To ensure nondiscrimination in the award and administration of USDOT-assisted contracts in MDT's highway, transit and airport financial assistance programs.
- 2) To create a level playing field in which DBEs can compete fairly for federal assisted contracts.
- 3) To ensure the MDT DBE Program is narrowly tailored in accordance with applicable state and federal laws.
- 4) To ensure that only firms that fully meet the eligibility standards are permitted to participate as DBEs.
- 5) To help remove barriers to the participation of DBEs in federal assisted contracts.
- 6) To assist the development of firms that can compete successfully in the marketplace outside the DBE Program.

- 7) To provide appropriate flexibility to recipients of federal financial assistance in establishing and providing opportunities for DBEs to compete in the marketplace with firms who are not DBEs.

## **1.5 PROGRAM ASSURANCES**

Each financial assistance agreement, contract, or memorandum of understanding that MDT signs with a DOT operating administration or primary recipient will include the following statement:

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

Any person who believes that MDT has failed to comply with its obligations under 49 CFR Part 26 may file a written complaint with USDOT-Office of Civil Rights. If a person desires to file a complaint, they must do so no later than 180 days after the date of the alleged violation or the date on which they learn of a continuing course of conduct in violation of this part. In response to a written request, the Office of Civil Rights may extend the time for filing in the interest of justice, specifying in writing the reason for so doing. The Office of Civil Rights may protect the confidentiality of the party submitting the complaint as provided in 49 CFR Part 26.109(b). Complaints under this part are limited to allegations of violation of the provisions of 49 CFR Part 26. Complaints may be sent to:

Department of Transportation  
Office of Civil Rights  
400 – 7<sup>th</sup> Street SW, Room 2401  
Washington, D.C. 20590

## **1.6 CONTRACT ASSURANCES**

All federal-assisted contracts awarded and/or administered by MDT will contain the following specifications of Attachment C.

## **1.7 MINORITY & WOMEN CONTROLLED BANKS**

MDT will investigate the extent of services offered by banks owned and controlled by socially and economically disadvantaged individuals in Montana by contacting the Department of Commerce's Financial Division annually to determine if such banks exist. MDT will provide contractors and other interested individuals with a list of all such banks.

## CHAPTER 2 – DBE GOALS

### 2.1 GOAL METHODOLOGY

MDT will determine an overall fiscal year DBE Goal to create a level playing field in which DBEs can compete fairly for USDOT-assisted contracts.

MDT will calculate the goal using the criteria outlined in 49 CFR Part 26.45. The determination will be based on a level of DBE participation relative to all businesses that are ready, willing and able to participate on USDOT-assisted contracts, and reflect a level of participation that MDT would expect in absence of discrimination. The Goal Setting Process is based on the following steps:

2.1.1) Primary Business Activity Codes or Standard Industry Classification codes based on the North American Industry Classification System (NAICS) are selected which correspond to the services used by MDT.

2.1.2) The list of Business Activity Codes will be compared to information contained in the MDT DBE Bidder's List.

All firms bidding on prime contracts and bidding or quoting subcontracts on DOT-assisted projects will provide the MDT CRB with the following information annually:

- Firm name;
- Firm address;
- Firm's status as a DBE or non-DBE;
- The age of the firm;
- The annual gross receipts of the firm; and
- The firm's Primary Business Activity Code.

2.1.3) The Business Activity Codes are separated into one of the following categories: Prime Contractor; Subcontractor; or Consultant. These categories are indicative of the type of work that is traditionally accomplished by the Prime, Sub and Consultant Contractors. These categories will then be assigned an appropriate percentage based on the amount of expected work in the upcoming construction season.

2.1.4) In each category, the total number of certified DBEs will be divided by the total number of firms. This figure is then applied to the applicable percentage of the category. By totaling all categories, a DBE base figure is determined. According to 49 CFR §26.45(c), this is considered as Step 1.

2.1.5) Once a base figure has been established, MDT will examine all evidence available to determine what adjustment, if any is needed to the base figure in order to arrive at our overall goal. Evidence that must be considered includes:

The current capacity of DBEs to perform work in USDOT-assisted contract contracts, as measured by the volume of work DBEs have performed in recent years.

a) Evidence from disparity studies conducted within MDT jurisdiction.

Other evidence that may be considered when making an adjustment to the base figure is:

- Statistical disparities in the ability of DBEs to get the financing, bonding, and insurance required to participate in the federal-aid highway program.
- Data on employment, self-employment, education, training, and union apprenticeship programs, to the extent that data can be related to the opportunities for DBEs to perform in the federal-aid highway program.

According to the 49 CFR §26.45(d), this is considered as Step 2.

- Once MDT has determined a percentage figure in accordance with the steps outlined above, the overall goal will be expressed as a percentage of all Federal-aid highway funds that MDT will expend in FHWA-assisted contracts; FTA-assisted contracts; and FAA-assisted contracts in the forthcoming fiscal year.
- When MDT has determined an overall goal, an allowance will be made for public participation. This participation will include, but not be limited to:
  - a) Consultation with minority, women's and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs and MDT efforts to establish a level playing field for the participation of DBEs.
  - b) A published notice announcing the proposed overall goal, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at the MDT CRB office for 30 days following the date of the notice, and informing the public that MDT and USDOT will accept comments on the goals for a period of 45 days from the date of the notice.

## **2.2 PROJECT SPECIFIC GOALS**

If it becomes necessary to set project specific goals, the goals are set by MDT goal setting committees. In those instances when local agencies are responsible for administering USDOT-assisted contracts, i.e. CTEP, CMAQ, etc., the local agency will be included in the goal setting process. In instances when projects are located within the exterior boundaries of an Indian reservation, the TERO Officer 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.

For ease in administering the Program, the project goal is indicated as a percentage of the total dollar value of the USDOT-assisted contract. Achievement 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 Substitution of DBEs).

Other factors considered when establishing project goals:

- 1) The availability of certified DBEs who are ready, willing and able to perform the work identified in the contract
- 2) The size of the projects
- 3) The type of work specified for the projects that has been historically subcontracted in accordance with MDT specification and procedures and
- 4) Over concentration of DBEs in specified work areas

If a contract goal has been established, all firms bidding as a prime contractor must complete and submit the DBE Schedule of Participation. The Schedule will be used to determine if the prime bidder has complied with the DBE goal requirements. All DBEs used on the Schedule to meet DBE goal requirements must be certified prior to the day of bid letting for their work performance to be included towards goal achievement. In the event the apparent low prime bidder does not meet the project specific goals, a determination of Good Faith Efforts will be made. (See Good Faith Efforts).

## **2.3 BIDDING PROCEDURES**

To be eligible for award of an USDOT-assisted contract, the bidder 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 Montana Department of Transportation's (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.

2.3.1 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 (Good Faith Efforts are outlined in the DBE Program).

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.

- 2.3.2 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.
- 2.3.3 The BIDDER'S LIST will be used to gather information for use in determining appropriate DBE goals for upcoming fiscal years. 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.
- 2.3.4 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 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."
- 2.3.5 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 potential DBE firms, seek out, and utilize DBE contractors.
- 2.3.6 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.
- 2.3.7 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.
- 2.3.8 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.

## **2.4 GOOD FAITH EFFORTS**

- 1) To determine whether a bidder whose bid has failed to meet DBE contract goals (when a project goal has been established) may be awarded the contract, MDT must decide, within 48 hours of the bid opening, whether the efforts made to obtain DBE participation were "Good Faith Efforts". Efforts that are merely pro forma are not good faith efforts, even if they are sincerely motivated, if, given all relevant circumstances, they could not reasonably be expected to produce a level of DBE participation sufficient to meet the goals. It is the bidder's responsibility to:
  - Document that it has obtained enough DBE participation to meet the goal; or
  - Document that it made adequate good faith efforts to meet the goal, even though it did not obtain enough participation to do so.

The following list includes, but is not limited to, the types of efforts MDT may consider in determining good faith efforts:

- a) Whether the contractor attended any pre-solicitation or pre-bid meetings that were scheduled by MDT to inform DBEs of contracting and subcontracting opportunities
- b) Whether the contractor advertised in general circulation, trade association, and minority focus media concerning the subcontracting opportunities
- c) Whether the contractor provided written notice to a reasonable number of specific DBEs that their interest in the contract was being solicited, in sufficient time to allow the DBEs to participate effectively
- d) Whether the contractor followed up initial solicitations of interest by contacting DBEs to determine if the DBEs were interested
- e) Whether the contractor selected portions of the work to be performed by DBEs in order to increase the likelihood of meeting the DBE goal
- f) Whether the contractor provided interested DBEs with adequate information about the plans, specifications and requirements of the contract

- g) Whether the contractor negotiated in good faith with interested DBEs, not rejected DBEs as unqualified without sound reasons based on a thorough investigation of their capabilities
  - h) Whether the contractor made efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance required by MDT or the contractor
  - i) Whether the contractor effectively used the services of available minority community organizations: minority contractors groups, local, state, and Federal minority business assistance offices, and other organizations that provide assistance in the recruitment placement of DBEs
- 2) For each Federal-aid project that contains a DBE goal, the bidder/offeror is responsible for obtaining enough DBE participation to meet (or exceed) the goal and submit that information on the DBE Schedule of Participation (SOP) in the bid package. In the instance where the apparent low bidder has failed to meet (or exceed) the project goal, the Department must review the efforts of the bidder and determine if they were in fact "Good Faith Efforts". In order to make that determination in a fair and equitable process, the following procedure will be utilized:
- a) All bidders that fail to meet the project specific goal are required to submit their summary of Good Faith Efforts within 48 hours or 2 working days of the scheduled bid opening.
  - b) Starting with the apparent low bidder, the bidder's summary will be reviewed for compliance with the MDT DBE Program and 49 CFR §26 by a panel of three (3) MDT staff members, chaired by the DBE Liaison Officer. (The two additional panel members will not be from the Civil Rights Bureau; however, they will be familiar with the DBE program).
  - c) The DBE Program Manager will be available to assist the panel on matters specific to the MDT DBE Program and corresponding regulations and appendices; however, will not be a voting member of the panel.
  - d) The MCA Executive Director will be invited to observe the proceedings of the DBE Panel and offered an opportunity to speak; however, will not be a voting member of the panel.
  - e) The MDT DBE Panel will be prepared to convene at 1:00PM on the 2<sup>nd</sup> working day after the bid opening.
  - f) If the MDT DBE Panel determines that an apparent low bidder has failed to meet the goal, but MADE A GOOD FAITH EFFORT to do so, then the apparent low bidder has fulfilled the DBE requirements.
  - g) If the MDT DBE Panel determines that an apparent low bidder has failed to meet the goal and FAILED TO SHOW GOOD FAITH EFFORTS, the bidder will be provided a written decision that same day.

- h) As provided in the MDT DBE Program and 49 CFR §26, the bidder has a right to Administrative Reconsideration. Within 48 hours (or two working days) of the Good Faith Efforts determination, the bidder must provide written documentation concerning whether it met the goal or why the efforts of the bidder should be considered in good faith. The procedures for doing so will be included in the MDT DBE Panel's written decision.
- i) The MDT Human Resources Administrator, will be the Administrative Reconsideration official.
- j) MDT Legal Staff will be available to assist the Administrative Reconsideration Official on matters pertaining to the MDT DBE Program and corresponding regulations and appendices.
- k) The bidder will have an opportunity to meet in person with the Administrative Reconsideration Official to discuss the issue. Within 2 working days of the meeting, the apparent low bidder will be provided a final decision in writing. The result of the reconsideration process is not administratively appealable to USDOT.
- l) Once the status of the apparent low bidder has been determined to be final, either through the DBE Panel or Reconsideration Official, one of the following steps will apply:
  - If the apparent low bidder has met the criteria for good faith efforts, they have met the DBE requirements.

If the apparent low bidder has not met the criteria for good faith efforts, they cannot be awarded the contract and the review of DBE requirements will continue to the next apparent low bidder.

## **CHAPTER 3 – DBE PARTICIPATION**

### **3.1 RESPONSIBILITIES:**

3.1.1) DBEs will be monitored following contract award on all Federal-aid projects regardless of DBE goals. Reviews may be conducted at the project site and/or at the DBE's office as deemed advisable by MDT. Project site monitoring may include, but will not be limited to:

- a) Determination of the DBE providing a Commercially Useful Function pursuant to this Program and normal industry practice;
- b) DBE's work pertaining to contracted work items;
- c) Interviewing the DBE workforce;
- d) Determining supervisory control of DBE workforce, i.e. DBE Supervisor/DBE workers;
- e) Equipment used by DBE (rented, leased or owned);
- f) Employee-sharing;
- g) If the DBE is following Program guidelines;
- h) Any work item on the DBE's contract that is being completed by a workforce or equipment other than the DBE's;
- i) Completion of the CUF monitoring report by either the EPM or designated person.

3.1.2) Office monitoring may include, but will not be limited to:

- a) Review of office/warehouse space lease or rental agreements;
- b) Review of equipment rental/lease agreements;
- c) Accounts receivable;
- d) Accounts payable;
- e) Canceled checks;
- f) Payrolls.

3.1.3) The Engineering Project Manager will immediately notify the Civil Rights Bureau DBE Program Manager in any of the following situations:

- a) Any significant reduction of DBE contract items or quantities;
- b) Any DBE work being completed by the prime contractor or others;
- c) Failure by the DBE to perform or complete any contracted item;
- d) Any employee sharing between the DBE and the prime or other contractor;
- e) Any other event that would not be considered "normal industry practice" pertaining to the DBE.

## **3.2 PROMPT PAYMENT**

49 CFR §26.29 requires MDT to establish, as part of our DBE Program, a prompt payment provision, which includes the prompt return of retainage payments.

- 3.2.1) Progress Payment: The prime contractor shall pay the subcontractor within seven (7) working days of receipt of payment from MDT as provided by 28-2-2103 MCA 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.

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 with their monthly estimate request. If the affected firm is a DBE, a copy must be forwarded to the MDT CRB – DBE Program Manager.

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 withholds payment from a subcontractor without a bona fide reason or without providing prompt written documentation to the Engineering Project Manager, sanctions may be imposed on the prime. If it is determined that the prime is withholding payment without good cause, interest will accrue on the unpaid amount owed to the subcontractor(s). If a prime contractor needs to delay a subcontractor's payment for a reason that the prime feels is justified; the prime must inform the EPM in writing before delaying the payment. An "approval" of good cause for a delay in payment (which is required by 49 CFR §26.29) affects only the relationship of the prime contractor and MDT, and cannot affect the Montana statute between the prime and the subcontractor or the accrual of interest. The effect of such an approval by MDT is only that the prime contractor is not violating the project's specifications. If interest accrues on the amount due the subcontractor, the prime is responsible for including that total amount to the subcontractor at the time of payment.

Prime contractors are required to submit monthly records of all subcontractor payments to the DBE Program Manager. The subcontractor payment report is available online at [www.mdt.mt.gov](http://www.mdt.mt.gov) , click on the DBE logo and look for forms.

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.

It is the DBE's responsibility to inform MDT DBE Program Manager of any violation of the prompt payment provisions, and no threats may be made or retaliation may be taken by a prime against a DBE that makes an accurate report of such violations. This provision applies to all tiers of subcontractors.

- 3.2.2) Retainage: All prime contractors will return retainage payments to subcontractors upon satisfactory completion of work performed in accordance with MDT and contract specifications. This provision applies to all tiers of subcontracting.

When a subcontractor has satisfactorily completed all work items within their subcontract (e.g., supply and/or install material according to specifications, provide all required payrolls and applicable material certifications, etc.), it is the subcontractor's responsibility to provide the prime contractor with proof of completion.

Once proof of completion has been received, the prime contractor must provide for the prompt return of retainage to the subcontractor within 30 days of the request. If the prime contractor believes that the subcontract is not satisfactorily completed, the prime contractor must notify the Engineering Project Manager in writing prior to delaying any payment due the subcontractor. If the affected contractor is a DBE, the Project Manager must forward a copy to the MDT CRB – DBE Program Manager. The Engineering Project Manager will resolve disputes over satisfactory completion.

### **3.3. COMMERCIALLY USEFUL FUNCTION (CUF)**

- 3.3.1) In general, expenditures to a DBE contractor will only be counted towards a DBE goal when it has been determined that the DBE is performing a commercially useful function on the contract.

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 using the DBE's own work force. 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, and paying for the materials itself. To determine whether a DBE is performing a commercially useful function, MDT will evaluate (Attachment E):

- a) The amount of work subcontracted;
- b) The resources and work force used by the DBE;
- c) Industry practices;

- d) Whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing;
- e) The DBE credit claimed for its performance of the work; and
- f) Other relevant factors.

3.3.2) A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, MDT will examine similar transactions, particularly those in which DBEs do not participate.

The following list, while not all inclusive, outlines the type of situations which may indicate a DBE is not performing a commercially useful function:

- a) The work the DBE has been contracted to perform on the project involves work outside the known experience or capability, and that the DBE has not been certified to perform.
- b) The DBE provides little or no supervision of the work on the project, or supervision is by personnel associated with the prime contractor, another business, or other personnel not under the DBEs control.
- c) Personnel normally employed by the prime contractor, another business perform the DBE's work, or the DBE's work force is not under its control and direction.
- d) Part or all of the work contracted to be performed by a DBE is performed by a prime contractor or another business, whether by a second tier subcontract or other form of agreement.
- e) A substantial portion or all of the equipment used by the DBE to perform the work belongs to the prime or another contractor and no formal lease/rental agreement exist.
- f) Materials or supplies needed to perform the DBE's work are delivered to, billed to, or paid for by the prime or by another business.
- g) The DBE further subcontracts or otherwise assigns any of its work to another business.
- h) The DBE is working without a contract approved by MDT.
- i) A DBE prime contractor subcontracts more than 60% of its contract.
- j) The arrangement between the prime and the DBE artificially inflates DBE participation or erodes the ownership, control and independence of the DBE.

3.3.3) When determining whether or not a DBE trucking firm is performing a commercially useful function, the following factors will apply:

- a) The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on the contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.
- b) The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.
- c) The DBE received credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
- d) The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.
- e) The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE does not receive credit for the total value of the transportation services provided by the lessee, since these services are not provided by a DBE.
  - For purposes of this program, a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and/or identification of the DBE.

When DBE trucking firms are utilizing owner/operator trucks, the number of owner/operator trucks may not exceed any limitations on subletting or reassigning the work specified in the Standard Specifications and contract provisions. The operator must be carried on the DBE's payroll in accordance with MDT policy and procedures. For an owner/operator to be credited towards goal, the contractor or subcontractor must provide a valid signed and dated agreement that includes the following information:

- Owner/Operator's name;
- Social Security Number;
- Copy of the vehicle registration;
- Current vehicle license number;
- Truck number (where applicable); and

- Method of payment (hour, ton, or load).

3.3.4) For purposes of this program, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.

To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.

A firm may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business, if the firm both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.

Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this program.

In any instance, MDT's determination on commercially useful function matters is subject to review by FHWA; however, are not administratively appealable to USDOT.

### **3.4. OVERCONCENTRATION**

49 CFR §26.33 states that if MDT determines that DBE firms are so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work, MDT must devise appropriate measures to address this overconcentration.

If an overconcentration in a certain type of work exists, that work item will not be considered when establishing project DBE goals. Participation in the affected types of work will not be counted towards achievement on project DBE goals; however, that achievement will be counted towards the overall MDT DBE goal.

In order to determine if an overconcentration exists, MDT will compare the number of ready, willing, and able DBE firms to the number of ready, willing and able non-DBE firms in a certain type of work. Once identified, MDT will obtain approval from FHWA of the determination of overconcentration and the corrective actions used to alleviate the effects of the overconcentration.

### **3.5. SUBSTITUTION**

If a DBE is unable to perform all or any part of their contract due to default, over extension, or other reasons, the prime contractor must submit a written request to the DBE Program Manager via the Engineering Project Manager explaining why any substitution is required.

The written request must include:

- 1) A signed request from the DBE requesting relief from all or part of its contract with specific reasons. The DBE's failure or refusal to submit the request will not authorize the prime contractor to unreasonably delay or fail to submit the substitution request. MDT may consider the request without a DBE's request for relief;
- 2) The reasons why a DBE needs to be replaced including any supporting documentation or evidence in addition to what Good Faith Efforts were used by the prime contractor to identify another DBE; and
- 3) A list of DBE substitutes available and willing to replace the effected DBE.

The request may be reviewed by the Engineering Project Manager and forwarded to the DBE Program Manager who will make the final determination. The prime will be notified in writing of the decision. The decision is final with no right of appeal, formal or informal.

The prime contractor and the DBE may be allowed to substitute contract work items not previously contracted to DBEs. If this is requested, the prime contractor must make an attempt to contract the same or similar amount of work to another DBE.

If a contractor eliminates, reduces or attempts to eliminate or reduce a DBE's performance, without the consent of MDT, the Department and/or FHWA may impose sanctions.

### **3.6. INVESTIGATIVE SUSPENSION**

Investigative suspension may occur on certified firms for many reasons including, but not limited to:

- 1) Non-compliance with the DBE program and/or other federal or state programs or laws;
- 2) Non-submittal of requested information;
- 3) Non-performance of a commercially useful function; or
- 4) Non-payment of subcontractors/suppliers.

Suspension will be at the discretion of the DBE Liaison Officer (DBELO) and will be limited to the time necessary to conduct any needed investigation into potential violations and the time needed for any administrative hearing resulting from the investigation. Suspension will be accomplished by mailing a suspension letter to the DBE, specifying the reasons for the suspension. A suspension pending an investigation is not administratively appealable. However, the DBE may submit a written request to the Chief of the Civil Rights Bureau within 30 days of the suspension, requesting an informal meeting to discuss the reasons for the suspension and to offer any evidence or documentation. If the DBELO finds that the evidence or documentation submitted in the opposition raises a genuine dispute over facts material to the suspension, the suspension may be lifted.

During the period of suspension, the DBE is not permitted to advertise as an active DBE or obtain new contracts/subcontracts as a DBE, and must advise any inquiring firms that it is not eligible to count towards DBE participation in any USDOT-assisted contract awarded after the suspension. Suspension does not affect the firm's ability to continue on a project that has already been awarded.

Suspension of certification will be immediate in those cases where a DBE files for bankruptcy. Suspension will begin on the date the bankruptcy is filed and continue until an investigation by the CRB has been completed. No credit towards DBE goals will be given for the use of a suspended DBE on any project unless and until otherwise notified by CRB.

### **3.7. SANCTIONS**

Actions by a contractor, subcontractor or DBE for which sanctions may be imposed include, but are not limited to:

- 1) When a DBE fails to satisfy the requirements for certification by means of false, fraudulent or deceitful statements or other serious lack of business integrity or honesty.
- 2) When the DBE acts as a "front" in order to meet contract goals or other DBE program requirements.
- 3) The DBE's failure to perform the portion of the contract it obligated to perform in the bid documents.
- 4) The DBE's lack of control over its operations, when performing contracted work.
- 5) A prime or other subcontractor performing some or all of the work contracted or committed to being completed by a DBE.
- 6) The prime's failing to issue a subcontract to its scheduled DBEs or failing to provide a copy of the signed subcontract.

- 7) A prime's failure to honor a signed subcontract with a DBE.
  - 8) Failure of the prime contractor to provide written notification of a DBE violation to the CRB. It is the prime contractor's responsibility to monitor all DBE work performance. If the DBE does not perform the work specified in the contract, or if another contractor performs work contracted to a DBE (excluding substitution), it is the prime contractor's responsibility to immediately notify the CRB.
4. Failure of a prime or subcontractor to pay their respective subcontractors in accordance with prompt payment/retainage provisions in this Program, applicable state law, and CFRs.

The above actions may result in the following sanctions:

**FIRST OFFENSE:** Suspension from participation on all MDT projects in the next regularly scheduled bid opening. And, the offender must submit a formal statement outlining the efforts of the company to prevent recurrence.

**SECOND OFFENSE:** Suspension from participating on all MDT projects in the next four regularly scheduled bid openings.

**THIRD OFFENSE:** Recommendations for suspension from bidding or participating on all MDT projects for up to one full year or debarment will be forwarded by the Civil Rights Bureau Chief.

Failure to fulfill DBE contract requirements by prime contractors or DBEs will result in sanctions imposed by MDT. The severity of the sanctions will depend on the seriousness of the violation, whether it is a repetition, and the firm's prior history of DBE Program violations.

MDT may take enforcement action under 49 CFR §31, Program Fraud Civil remedies, against any participant in the DBE Program whose conduct is subject to such action.

In addition to the above, MDT may initiate suspension or debarment proceedings against any person or firm violating the DBE Program under ARM 18.3.101 et seq. Because violations of the DBE Program are contractual violations, MDT personnel can suspend project work under Articles 105.01 and/or 105.09 of the Standard Specifications when violation are observed or discovered.

# CHAPTER 4 – DBE CERTIFICATION

## 4.1 ELIGIBILITY REQUIREMENTS

In determining whether to certify a firm as eligible to participate as a DBE, MDT will apply the standards of 49 CFR §26.61 (Certification Standards).

The firm seeking certification has the burden of demonstrating, by a preponderance of the evidence, that it meets the requirements of 49 CFR §26.61 concerning group membership or individual disadvantage, business size, ownership and control.

### 4.1.1 - Eligibility Standards

Eligibility standards include, but are not limited to, the following:

- 1) Minority group membership. MDT must reputably presume that citizens of the United States who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. Each applicant must submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

Each individual owner of an applicant firm, whose ownership and control are relied upon for DBE certification, must submit a signed notarized statement of personal net worth, with supporting documentation.

If an eligible individual has a personal net worth of \$750,000 or more, that individual is not considered socially and economically disadvantaged for purposes of this program. When determining personal net worth, the individual must exclude any equity in their primary residence or any ownership equity in the applicant firm. Marital assets will be counted at 50% unless otherwise designated in writing.

### 4.1.2 - Business Size

To be an eligible DBE, a firm (including its affiliates) must be an existing small business, for profit, as defined by SBA standards. MDT will apply business size standards found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in USDOT-assisted contract contracts.

A firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average gross receipts, as defined by SBA regulations, over the firm's previous three fiscal years, in excess of \$22.41 million. The Secretary of Transportation may adjust this amount for inflation from time to time.

### 4.1.3 - Ownership

To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.

- a) In the case of a corporation, such individuals must own at least 51 percent of each class of voting stock outstanding, and 51 percent of the aggregate of all stock outstanding.
- b) In the case of a partnership, socially and economically disadvantaged individuals must own 51 percent of each class of partnership interest. Such ownership must be reflected in the firm's partnership agreement.
- c) In the case of a limited liability company, socially and economically disadvantaged individuals must own at least 51 percent of each class of member interest.
- d) The firm's ownership by socially and economically disadvantaged individuals must be real, substantial and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.
- e) All securities that constitute ownership of a firm must be held directly by disadvantaged persons.
- f) The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire ownership interests must be real and substantial.
- g) The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership:

The owner's expertise must be:

- In a specialized field;
  - Of outstanding quality;
  - In areas critical to the firm's operations;
  - Indispensable to the firm's potential success;
  - Specific to the type of work the firm performs;
  - Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm; and
  - The individual whose expertise is relied upon must have a significant financial investment in the firm.
- h) All interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, will not be considered as being held by the socially and economically disadvantaged individual. Ownership received as an inheritance or as the result of a final property settlement or court order in a divorce or legal separation is

permissible; however, no terms or conditions may exist in the agreement or divorce decree that are inconsistent with the regulations.

#### **4.1.4 - Control**

Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.

In determining whether a potential DBE is an independent business, relationships with non-DBEs in the areas of personnel, facilities, equipment, financial and/or bonding support and other resources will be scrutinized.

A DBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter, provisions, by-laws, provisions, contracts or any other formal or informal device.

The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy, and operations.

Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not; however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

If state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of the type must possess the required license or credential.

In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities.

Where a firm was formerly owned and/or controlled by a non-disadvantaged individual and the ownership and/or control were transferred to a socially and economically disadvantaged individual, and the non-disadvantaged individual remains involved with the firm in any capacity, the disadvantaged individual now owning the firm must demonstrate by clear and convincing evidence that:

- a) The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
- b) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who formerly owned and/or controlled the firm.

In determining whether its socially and economically disadvantaged owners control a firm, MDT will consider whether the firm owns equipment necessary to perform its work.

Certification will only be granted to a firm for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm.

A business operating under a franchise or license agreement may be certified if it meets the standards in 49 CFR §26 and the franchiser or licensor is not affiliated with the franchisee or licensee.

In order for a partnership to be controlled by socially and economically disadvantaged individuals, any non-disadvantaged partners must not have the power, without the specific permission of the eligible partners, to contractually bind the partnership or subject the partnership to contract or tort liability.

## **4.2. APPLICATION PROCESS**

All firms wishing to participate as a DBE in federally-assisted contracts awarded and/or administered by MDT must be certified prior to the bid opening for that project. All firms requesting certification are required to complete an MDT DBE Application for Certification (Attachment G). To request an application package, an applicant must contact the following:

Montana Department of Transportation  
DBE Program  
PO Box 201001  
Helena, MT 59620-1001  
(406) 444-6331 (Voice)  
(406) 444-7696 (TTY)  
(406) 444-7685 (Fax)

MDT reviews applications for initial certification in the date order received. Once all information pertaining to the application has been received, MDT will review the application as a whole and make a determination within 90 days. Applicants should retain a copy of their completed application for their records. Submitted applications and documentation becomes the property of the Montana Department of Transportation.

Following an analysis of the completed application that appears to meet all eligibility requirements, an on-site interview will be conducted to further determine that the firm is currently owned, controlled, and operated by a socially and economically disadvantaged individual. On-site interviews may be conducted in the applicant firm's place of business, job sites, by telephone, or with companies or firms that conduct business with the applicant firm.

Information provided by a firm in the application process is considered confidential for the purposes of this program. It may be provided to a third party only with the written consent of the individual to whom the information pertains. If a certification appeal is filed with USDOT; USDOT will request a complete copy of the administrative record, including all information considered to be confidential. If a firm fails to provide, or refuses to provide required information to allow MDT to make a determination for certification, that firm will have been deemed to be uncooperative and may be denied certification.

Once certified, a firm remains certified for a period of at least three years unless and until the firm's certification has been removed through the procedure outline in 49 CFR §26.87. DBEs will not be required to reapply for certification as a condition of continuing to participate in the program during this three-year period, unless the factual basis on which the certification was made, changes.

#### **4.3. UNIFIED CERTIFICATION PROGRAM**

In accordance with 49 CFR §26.81(b), the Montana Department of Transportation will assume the responsibilities as the Unified Certification Program (UCP) Lead Agency for Montana. As the UCP Lead Agency, MDT will make all certification decisions on behalf of all DOT (FHWA, FTA, and FAA) recipients in the state of Montana with respect to participation in the USDOT DBE Program.

MDT will ensure that:

- 1) As the UCP Lead Agency, MDT will follow all certification procedures outlined in 49 CFR §26, subparts D and E;
- 2) As the UCP Lead Agency, MDT will cooperate fully with oversight, review, and monitoring activities of USDOT and its operating administrations; and
- 3) As the UCP Lead Agency, MDT will implement DOT directives and guidance concerning certification matters.

Certification decisions by MDT will be binding on all DOT recipients in the state and shall provide “one-stop shopping” to applicants for certification, such that an applicant is required to apply only once for a DBE certification that will be honored by all recipients in the state.

MDT will carry out all obligations with respect to certification and nondiscrimination and ensure that recipients that are party to the UCP establish the same nondiscrimination obligations in their respective DBE Programs.

All certifications by MDT shall be pre-certifications; i.e., certifications that have been made final before the due date for bids or offers on a contract on which a firm seeks to participate as a DBE.

As the UCP Lead Agency, MDT is not required to process an application for certification from a firm having its principal place of business outside the state if the firm is not certified by the UCP in the state in which it maintains its principal place of business.

As the UCP Lead Agency, MDT will maintain a unified DBE directory containing, for all firms certified by MDT, the information required by 49 CFR §26.31. The DBE directory is available at the following website:

<http://www.mdt.state.mt.us/civilrights>

In order to be a party to the UCP, each recipient must complete, sign and forward the agreement in Attachment H to the following address:

Montana Department of Transportation  
DBE Program UCP  
PO Box 201001  
Helena, MT 59620-1001

#### **4.4. OUT-OF-STATE FIRMS**

Out of state applicants must be currently certified in their home state. A current onsite interview conducted by the certifying agency will be requested for all out of state applicants, after the completed application has been received.

Physical on-site interviews and/or job site reviews by MDT may be conducted. If a physical on-site interview is not possible, a telephonic interview may be conducted prior to a final determination.

Applicants who are certified DBEs in other states shall include copies of their certifications for all states where they are certified. Copies of current on-site interviews will be requested from the certifying agencies and will be reviewed prior to

a final determination. Each state has their own certification process, which applicants must complete. Certification by another state does not guarantee certification by MDT.

#### **4.5. ANNUAL ELIGIBILITY UPDATES**

Each year, prior to the DBEs certification anniversary, each DBE must inform MDT, in writing, of the firm's ability to meet size, disadvantaged status, ownership, or control requirements of the eligibility standards, or any material change in the information provided in the original application. Changes in management responsibilities among members of a limited liability company are covered by this requirement. In addition to the notice, all supporting documentation must be provided as well.

The annual notice must take the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or of an unsworn declaration executed under penalty of perjury of the laws of the United States. This annual notice must affirm whether or not there have been any material changes in the firm's ability to meet size, disadvantaged status, ownership, or control requirements of the eligibility standards or any material change in the information provided in the original application.

If a DBE fails to provide this affidavit in a timely manner, they will have been deemed to fail to cooperate under 49 CFR §26.109(c).

#### **4.6. CHANGES EFFECTING CERTIFICATION**

Certified DBEs maintain the responsibility to notify MDT CRB of any changes in the firm's ability to meet the eligibility requirements of 49 CFR §26. When changes occur, the DBE (or applicant) must notify MDT CRB within 10 days of the change. Failure to notify MDT CRB may result in denial of certification, decertification, or sanctions.

#### **4.7. DENIAL/REMOVAL OF CERTIFICATION**

- 4.7.1 Denial of Initial Certification: If the DBE Program Manager denies an application for DBE certification, the applicant will be given written notice of the decision. The notice will include a statement of the reasons for denial referencing the evidence provided and the reference in the regulations supporting the decision. The applicant may not reapply for certification for a period of six months.

An applicant's sole route of appeal for a denial of initial certification by the Civil Rights Bureau is to USDOT under the provisions of 49 CFR §26.89. Appeals must be filed, in writing, to the following address, no later than ninety (90) days after the date of MDT's decision. (MDT's decision remains in effect through any appeal unless stayed or reversed by USDOT):

Department of Transportation  
Office of Civil Rights  
400 – 7<sup>th</sup> Street, SW, Room 2401  
Washington, DC 20590-0003

- 4.7.2 Removal of Certification Eligibility: In order for MDT to remove the eligibility of a currently certified DBE, the Department will follow the procedures as outlined in “Informal Hearings.

#### **4.8 SBA CERTIFIED FIRMS**

Firms that have been determined by SBA to be owned and controlled by one or more socially and economically disadvantaged individual(s) under the SBA 8(A) program may be certified as a DBE. These applicants must follow the same procedures as all DBE applicants, and meet the same criteria as all DBE applicants. SBA certified firms must provide proof of certification in addition to their application.

#### **4.9 JOINT VENTURE**

The application for a joint venture is completed on a project-by-project basis and must be submitted and approved prior to the bid opening for the affected project. A joint venture is eligible to perform contract work for DBE credit only if it meets the eligibility requirements of the regulations. The joint venture must maximize the contracting opportunities for DBE firms. DBE credit for the joint venture will equal the amount of satisfactory DBE participation.

#### **4.10 THIRD PARTY CHALLENGES**

A third party may challenge a DBE’s performance, control, or eligibility (including social and economic disadvantaged status of an individual), if the challenged party is a certified DBE or is seeking certification as a DBE. A challenge must be made in writing to the following:

DBE Program Manager  
Montana Department of Transportation  
PO Box 201001  
Helena, MT 59620-1001

MDT will not accept or consider anonymous complaints or allegations that a firm is ineligible.

The challenge must be made by a sworn statement specifying the alleged reasons why the firm is ineligible and claims that are known by the personal knowledge or experience of the challenger, and which claims are suspected or believed. The challenger must include all areas of its challenge, all known supporting facts, and all

available information applicable to the challenge. The confidentiality of the identity of complainants shall be kept confidential as provided in 49 CFR §26.109 and to the extent permissible under Montana State Law.

The DBE Program Manager will determine on the basis of the information provided if there is reasonable cause to believe the challenge. If there is no reasonable cause to believe the challenge is correct and adequate, the challenger will be informed in writing, thus terminating the proceedings. The sole route of appeal for the challenger is to the USDOT at the following address:

Department of Transportation  
Office of Civil Rights  
400 – 7<sup>th</sup> Street SW, Room 2401  
Washington, D.C. 20590

If there is reasonable cause to believe the challenge, MDT will conduct an investigation. The challenged party will be notified in writing that its DBE status has been challenged and the grounds alleged. The notice will direct the DBE to provide, within thirty (30) days, all information deemed necessary to permit an evaluation of its status concerning the challenge. If the DBE does not provide the information within the required time, an evaluation will be made based on available information. It may be presumed that the allegations are correct and a final decision will be rendered.

If the DBE provides the requested information, the information will be evaluated and a proposed determination will be issued to both parties in writing. The parties will have an opportunity for an informal meeting within twenty (20) days of the proposed determination, at which time they can respond to the proposed determination in writing, person or both. This will not be an administrative hearing. The informal meeting will be held at the Civil Rights Bureau office in Helena, and will be limited to no more than 45 minutes per side.

Following the informal meeting, a final decision will be determined. The decision will be sent in writing within 14 days of the decision. In making the determination, the standards set forth in 49 CFR §26, subpart E will be used in addition to other relevant criteria.

During the pendency of a third party challenge and prior to a final MDT decision, the DBE's certification (if already certified) will remain in effect, unless otherwise suspended. If the firm is not yet certified, it will not gain certification until after the final MDT decision, assuming the final decision is favorable and the firm meets all eligibility requirements.

If the decision is that the firm is ineligible for continued certification or has violated the Program, the opportunity for an administrative hearing will be provided to a firm already certified. A decision adverse to a non-DBE is final, and the sole route of appeal is to USDOT.

## **4.11 HEARINGS**

### **4.11.1 - MDT-initiated ineligibility proceedings**

If, based on notification by the firm of a change in its circumstances or other information that comes to MDT's attention, it is determined that there is reasonable cause to believe that a currently certified firm is ineligible, MDT will give written notice to the firm that it proposes to find the firm ineligible, stating the reasons for the proposed determination. Those reasons will reference the evidence in MDT's record on which each reason is based.

USDOT may also direct MDT to initiate a proceeding to remove a firm's certification.

In either case, MDT will then commence and prosecute a proceeding to remove the firm's eligibility, using the following procedure. (If, rather than merely removing DBE eligibility, it is considered preferable to seek debarment of the firm, MDT will follow the process set forth in 18.3.101 *et seq*, A.R.M.)

### **4.11.2 - Informal Hearing**

When MDT notifies a firm that there is reasonable cause to remove its eligibility, MDT will give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified. In that proceeding, MDT bears the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards. The Chief of the MDT Civil Rights Bureau will conduct the hearing.

MDT will maintain a record of the process, including a verbatim record of an administrative hearing. If there is an appeal to USDOT under 49 CFR §26.89, MDT will provide a transcript of the hearing to USDOT and, on request, to the firm. MDT will retain the original record of the hearing. MDT will charge the firm for any cost of copying the record, if one is requested by the firm.

The firm may choose to present information and/or arguments in writing, without attending the hearing. In such a situation, MDT's burden of proof remains the same.

### **4.11.3 - Grounds for decision**

A decision to remove eligibility of a firm will be based on one or more of the following:

- a) Changes in the firm's circumstances since its certification that render it unable to meet the eligibility standards;

- b) Information or evidence not made available to MDT at the time the firm was certified;
- c) Information that was concealed or misrepresented by the firm in the certification action and process. This specifically includes a firm's failure to timely provide information requested by MDT, as is required by 49 CFR §26.73(c), §26.83(i)(3), §26.83(j) and §26.109(c);
- d) A change in USDOT's certification standards or requirements since the firm was certified; or
- e) A documented finding that MDT's earlier determination to certify the firm was factually erroneous.

#### **4.11.4 - Notice of decision**

MDT's decision, including the reasons therefore, will be provided to the firm in writing, with specific reference to the evidence in the record supporting each reason for the decision. The notice will inform the firm of the consequences of the decision and the availability of appeal to USDOT under 49 CFR §26.89. In the event the proceeding was initiated by a third-party complaint, MDT will send a copy of the notice to that complainant.

#### **4.11.5 - Status of firm during proceeding**

A firm remains an eligible DBE during any proceeding to remove its eligibility, until the date of a decision to remove its eligibility.

#### **4.11.6 - Effects of removal of eligibility**

If a firm's eligibility is removed, the following rules apply, in accordance with 49 CFR §26.87(i):

If a prime contractor has made a commitment to use the ineligible firm, or MDT has made a commitment to using the firm as a DBE prime, but a subcontract or contract has not been executed before MDT issues the decertification notice provided for above, the ineligible firm does not count toward the contract goal or overall goal. The prime contractor will be directed to meet the contract goal with an eligible DBE firm or demonstrate that it has made a good faith effort to do so.

If a prime has executed a subcontract with the firm before the firm is notified of its ineligibility, the prime may continue to use the firm on the contract and may continue to receive credit toward any DBE goal for the firm's work, counting toward its contract goal.

#### **4.11.7 - Other Hearings**

If, based on information that comes to MDT's attention, it is determined that there is reasonable cause to believe that a firm (DBE or non-DBE) has violated the MDT DBE Program, MDT will give written notice to the firm that it proposes to impose sanctions, stating the reasons for the proposal. Those reasons will reference the evidence in MDT's record on which each reason is based.

When MDT notifies a firm (whether DBE or non-DBE) that there is reasonable cause to impose sanctions for violations of the MDT DBE Program (including requirements of the CFRs), MDT will give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to impose sanctions in person and provide information and arguments why it should not have sanctions imposed against it. In the proceeding, MDT bears the burden of proving, by a preponderance of the evidence, that the firm has violated the Program. The Chief of the MDT Civil Rights Bureau will conduct the hearing.

MDT will maintain a record of the process, including a verbatim record of the hearing. The firm may choose to present information and/or arguments in writing, without attending the hearing. In such a situation, MDT's burden of proof remains the same.

#### **4.11.8 - Appeal**

Appeal from the decision must be made in writing to the MDT Director, and received by the Director's office within ten calendar days of the date of written decision. The appeal will not be for a *de novo* hearing. The Director will review the documents in the administrative record and listen to the tape of the hearing, and issue a decision within thirty calendar days of the date of receipt of the written notice of appeal.

## **CHAPTER 5 – DBE SUPPORTIVE SERVICES**

### **5.1 TECHNICAL ASSISTANCE**

The Supportive Services Coordinator works directly with individual DBE companies to provide technical and training assistance specific to that company's needs. Annual workshops are scheduled to provide training on such topics as contracting, bidding and estimating, marketing, and other topics relevant to operating a business and government contracting. DBE Companies have the opportunity to access on-line training courses. A training and business development reimbursement program is available to DBE companies that provides financial assistance for business expenses, such as training, marketing, etc.

### **5.2 DBE DIRECTORY**

The MDT Civil Rights Bureau will publish and disseminate a DBE Directory annually. The Directory is available on the Internet at the following address: [www.mdt.state.mt.us](http://www.mdt.state.mt.us). Printed or disk copies as well as alternate accessible formats are available on request. Revision and updates are accomplished weekly.

The MDT DBE Directory is not intended to be a comprehensive business resource manual. The DBE Directory is a list of certified firms providing basic information on the capabilities and points of contact. The Directory provides the name of the firm, complete mailing address, phone, and the types of work that the firm is certified to perform.

### **5.3 DBE NEWSLETTER**

MDT's DBE Supportive Services Coordinator distributes a monthly newsletter for all MDT certified DBEs and Montana TBIC and TERO offices. The newsletter is also provided to the MDT contracting community via e-mail. The newsletter is also posted to the DBE SS web site for easy access and is available to other individuals, firms, and agencies upon request. The newsletter informs business owners about resources available to assist their business, MDT news and procedures, contracting opportunities, etc.

## CHAPTER 6 – GLOSSARY OF TERMS

- 1) **Affiliation** has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR §121.
- 2) **Alaska Native** means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian, Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaskan Native if their father or mother is regarded as an Alaskan Native.
- 3) **CFR** means the Code of Federal Regulations pertaining to the administration of the USDOT DBE Program.
- 4) **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.
- 5) **Department** (The Department) refers to the Montana Department of Transportation (MDT).
- 6) **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.
- 7) **USDOT-assisted contract** means any contract between MDT and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.
- 8) **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.
- 9) **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.
- 10) **Level Playing Field** means the amount of DBE contracting expected in the absence of discrimination and the effects of past discrimination.

- 11) **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.
- 12) **Race-conscious** measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.
- 13) **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.
- 14) **USDOT** (DOT) refers to the United States Department of Transportation.

The Montana Department of Transportation attempts to provide accommodations for any known disability that may interfere with a person participating in any service, program or activity of the Department. Alternative accessible formats of this document will be provided upon request. For more information, please call (406) 444-6331 (voice) or (406) 444-7696 (TTY).

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