

Nevada State's FY 2011 DBE Goal Setting Methodology

This document sets forth the methodology used to determine the Nevada Department of Transportation's (NDOT) Disadvantaged Business Enterprise (DBE) goal of 5.9 percent, and the portions of the goal to be attained by race/gender-neutral and race/gender conscious means for FY 2011.

Goal Setting Methodology as defined in CFR 26.45

The regulations require recipients to set overall goals based on demonstrative evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on DOT-assisted contracts.

To assist in determining relevant availability, NDOT commissioned BBC Research and Consulting (BBC), a nationally recognized economic consulting firm, to conduct a disparity study (Study). The Study was completed in 2007. The Study provides a statistical analysis of DBE availability and examines whether or not there were disparities between the utilization and availability of minority and women-owned firms in Nevada transportation construction and engineering contracts. The Study provides sound and detailed information to help NDOT meet the requirements of 49 CFR Part 26 and addresses the remedial purpose of the DBE Program.

The following provides the goal setting methodology NDOT used to arrive at its goal. (A more detailed description is provided in the Study, which was previously provided to FHWA and is available at www.nevadadbe.com).

Step 1 - Base Figure as defined in CFR 26.45(c) – DBEs Only

To examine relative availability of DBEs, BBC contacted firms on NDOT's bidders list and firms doing business in Nevada that performed work relevant to NDOT transportation construction and engineering.

Geographic market area. BBC contacted firms in Nevada because 87 percent of the dollars going to prime contractors or subcontractors on NDOT transportation construction and engineering projects from 2002 through 2006 went to firms with locations in Nevada (see Section II, Page 2 of the Study).

Availability survey. BBC attempted to contact each business establishment in Nevada that was listed in the Dun & Bradstreet (D&B) directory for types of work potentially related to transportation construction and engineering. The BBC study team obtained completed surveys from 2,183 business establishments. Of these business establishments, 664 were for-profit firms reporting that they performed work related to transportation construction, maintenance or design; were qualified and interested in performing transportation-related work for NDOT in the future; had attempted to obtain this work in the past (in the public or private sector); and reported ownership status (race/ethnicity/gender). Section II and Appendix C of the Study explain the availability survey.

Relative number of minority- and women-owned firms. Among the firms meeting the above criteria, 162 (24 percent) reported that they were minority- or women-owned — a simple “head count” statistic for DBE availability.

Dollar-weighted availability. BBC calculated the base figure by performing a “dollar-weighted” analysis of DBE availability, as summarized below and described in detail in Section II, Pages 8 through 10 and in Appendix D of the Study.

To examine dollar-weighted DBE availability, BBC conducted a statistical analysis of thousands of federally-assisted NDOT prime contracts and subcontracts from October 1999 through 2006. For each contract element (prime contract and subcontract), BBC estimated the number of minority- and woman-owned firms and the total number of firms surveyed that were available for that work based on:

- Specialization of work;
- Prime contract versus subcontract role;
- Location of work;
- Size of contract or subcontract element; and
- Contract date.

As described in the Study, BBC then weighted the relative availability of minority- and women-owned firms for each contract element by the dollars for that element. After this dollar-weighting across all of the federally-assisted contracts and subcontracts, relative availability of minority- and women-owned firms was 14.6 percent.

Revised base figure. The 14.6 percent dollar-weighted availability statistic pertains to all minority- and women-owned firms whether or not they were certified as DBEs. However, some of the largest minority- and women-owned firms might exceed the gross revenue or net worth limits for DBE certification. Therefore, the Study developed a revised base figure that included only those minority- and women-owned firms appearing to be below the financial limits for DBE certification.

BBC identified construction-related firms in the availability analysis that reported 2005 gross revenue of more than \$10 million and engineering-related firms with 2005 gross revenue of more than \$5 million (these size categories from the Availability Survey most closely match U.S. Small Business Administration size thresholds for these disciplines and also account for the fact that firms above these revenue limits are more likely to exceed the net worth limit of \$750,000 than firms below these revenue limits).

Twenty of the minority- and women-owned firms included in the availability analysis exceeded these revenues limits. Not counting these 20 firms as DBEs reduced the availability statistic by about 9 percentage points. The revised base figure is 5.9 percent. This statistic represents utilization expected for firms that (a) are certified as DBEs and would meet

certification guidelines in the future, or (b) could potentially be certified as DBEs. None of the firms excluded from the revised base figure were currently certified as DBEs.

NDOT considers 5.9 percent to be the appropriate base figure for the overall annual goal for DBE participation on federally-assisted contracts.

NDOT is updating the information related in the disparity study by conducting a follow-up disparity study in 2010/11.

Consideration of Possible Step 2 Adjustments as Defined in CFR 26.45(d)

NDOT examined additional information to determine if a step 2 adjustment to the base figure was needed. This information included the following:

- The current capacity of DBEs to perform work in DOT-assisted contracts, as measured by the volume of work DBEs have performed in recent years;
- Evidence from disparity studies, to the extent it is not already accounted for in NDOT's base figure; and
- Evidence from related fields that affect the opportunities for DBEs to form, grow and compete including statistical disparities in the ability of DBEs to get the financing, bonding and insurance required to participate in the Federal DBE Program; and data on employment, self-employment, education, training and union apprenticeship programs, to the extent the information relates to the opportunities for DBEs to perform in the program.

Current capacity. DBEs were awarded 4.0 percent of prime and subcontract dollars based on BBC's analysis of NDOT's federally-funded contracts from 2002 through September 2005 (the most recent period with DBE contract goals). This demonstrated participation is lower than the base figure of 5.9 percent. Analysis of DBE participation can be found in Section IV of the Study (Figure IV-4), and in supporting appendices to the Study.

NDOT's three most recent annual Uniform Report of DBE Awards/Commitments, which incorporates the dates of October 1, 2008 through March 31, 2010 accounts for fiscal years 2009 and 2010, shows an attainment of 3.14 percent DBE participation.

NDOT included this information when considering a possible step 2 adjustment.

Information from Disparity Study, including evidence from related fields. The BBC Study reviewed quantitative and qualitative information concerning conditions within the Nevada transportation construction and engineering marketplace, including evidence from related fields that affect the opportunities for DBEs to form, grow and compete. Section III of the Study summarizes these results. Supporting appendices to the Study provide these quantitative and qualitative analyses.

BBC was able to quantify the impact on the base figure for several of the factors considered. However, neither the Disparity Study nor NDOT quantified how every factor would

affect the base figure. Additional information on the impact of the two factors that could be readily quantified is presented below.

Barriers to business ownership and formation. Instead of 5.9 percent dollar-weighted availability for the base figure analysis, NDOT would have a figure of 8.4 percent if there were no disparities in the rates of business ownership among African Americans, Hispanic Americans and women working in the Nevada construction industry. Figure H-3 in Appendix H of the Disparity Study examines disparities in business ownership identified for African Americans, Hispanic Americans and women after controlling for education, age and other characteristics of people working in the construction industry in 2000. Discussion of the business ownership analysis begins on Page 1 and ends on Page 6 of Appendix H. This possible adjustment to the base figure would bring the rates of business ownership for African Americans, Hispanic Americans and women working in construction in Nevada up to levels expected if they owned businesses at the rate of non-Hispanic whites and men after controlling for other personal characteristics such as age and education.

NDOT includes the evidence of disparities in business ownership when considering a possible step 2 adjustment.

Other factors. The analyses presented above pertain to factors that are readily quantifiable. Precise changes to the base figure due to potential barriers such as access to capital or bonding could not be estimated at this time.

Even without quantification of impact on the base figure, NDOT did review and consider other information presented in the Study pertinent to a step 2 adjustment (see Section III of the Study and supporting appendices for a discussion of these other factors). For example, after accounting for certain neutral influences, firms owned by minorities remain significantly more likely to have their loans denied than other firms (see Study Appendix H). In-depth interviews with business owners and trade association leaders suggested that bonding was a barrier to performing NDOT work (see Study Appendix I).

Overall assessment of possible step 2 adjustment. Given all of the information available to NDOT, NDOT has chosen not to make a step 2 adjustment for the FY 2011 annual DBE goal. The base figure of 5.9 percent is substantially higher than the DBE participation NDOT achieved on past federally-assisted contracts even when it was setting DBE contract goals (4.0 percent from 2002 through September 2005). The base figure is also substantially above recent statistics on DBE performance on federally-funded contracts (3.14 percent for the federal fiscal year beginning October 1, 2008 through March 31, 2010). An adjustment is not warranted given information on the capacity of currently certified DBEs to perform NDOT work.

It is important to note that neither BBC nor NDOT attempted to quantitatively examine how one factor in the step 2 analyses might “offset” another factor. An overall assessment was made considering all factors.

Means NDOT will use to Meet the Overall Annual DBE Goal (49 CFR 26.51) As outlined in CFR 26.51(a), NDOT must meet the maximum feasible portion of its overall goal by using race-neutral means of facilitating DBE participation. In response to the Ninth Circuit Court of Appeals decision in *Western States Paving v. WSDOT*, NDOT instituted a solely neutral program in October 2005. The Federal Highway Administration in a letter dated May 5, 2010, directed the NDOT to return to a race conscious DBE goal program. They have deemed NDOT's race-neutral efforts ineffective and have indicated that without reinstating the race conscious DBE program they may take punitive action against NDOT. Given the information over the last three semi-annual reporting periods NDOT has determined that the race conscious DBE goal will be 2.9 percent. The race-neutral DBE goal is 3 percent for a total overall DBE goal of 5.9 percent.

NDOT considered several factors while evaluating whether to continue a solely neutral program. The BBC Study identified some disparities between utilization and availability of particular groups of minority- or women-owned firms for particular sets of NDOT contracts, even with DBE contract goals. The combined statistical and qualitative information in the Study may give rise to an inference of discrimination against some groups of minority- and women-owned firms. However, NDOT considered additional information when determining whether or not to continue implementing a solely race- and gender-neutral program for Fiscal Year 2011. NDOT is going to conduct a follow-up study.

On Section X, Page 3 of the Study, BBC recommended that NDOT consider the following information in determining whether any portion of the overall annual goal for the next fiscal year should be achieved through race- or gender-conscious means.

1. NDOT has implemented some of the types of neutral remedies suggested in the Federal DBE Program but not others. Although NDOT has attempted to meet the DBE goal of 5.9 percent through race neutral means the goal has not been met. Meetings with industry prime contractors indicate without DBE goals specified on contracts the only factor they consider is low bid.
2. Many of the barriers reported by minority- and women-owned firms suggest that NDOT should implement further neutral measures such as:
 - Better outreach and communication;
 - Additional technical assistance to small businesses and DBEs;
 - Redesigning contractor and consultant selection practices;
 - Bonding and other assistance to small businesses and DBEs; and
 - Possible redesign of the state's local preference programs to assist local small businesses.
3. NDOT's past implementation of the Federal DBE Program did not bring utilization of minority- and women-owned firms on federally-funded contracts to the level expected based on relative availability of MBE/WBEs for this work. In

fact, utilization of minority- and women-owned firms was higher after suspension of the program. However, the utilization of certified DBE firms declined when the contract specific race conscious goals were eliminated.

4. Additional actions to improve data collection, tracking and reporting are necessary to be able to fully measure success of neutral measures in opening opportunities for minority- and women-owned firms.

NDOT will continue to implement the types of neutral remedies suggested in 49 CFR Section 26.51(b). The Study recommended multiple tiers of assistance depending upon the age, size, line of work and other business factors to make assistance most useful for firms in different stages of development. The Study urged NDOT to do more to increase utilization of emerging and more developed minority- and women-owned firms, including those that are too large to be DBE-certified or otherwise have not sought DBE certification.

NDOT needs additional metrics to evaluate current and future success, including careful tracking of minority- and women-owned firms (not just DBE participation) in both federally-funded and state-funded contracts.

NDOT must also begin tracking of DBEs (and all minority- and women-owned firms) on federally-assisted contracts awarded by local agencies to be in compliance with Federal DBE Program guidelines. NDOT's reports on DBE participation do not currently include federally-assisted grants to local agencies that are administered through NDOT.

In summary, the NDOT has begun implementing a race conscious DBE program after being required to do so by the FHWA. As required by Title 49 Code of Federal Regulations Part 26.51, NDOT has chosen to focus on achieving the maximum feasible portion of its overall annual DBE goal through neutral means for Fiscal Year 2011.

NDOT achieved 3.14 percent DBE utilization for October 1, 2008 through March 30, 2010, with no race and gender-conscious means in place and without having fully implemented its neutral program components. It is prudent to attempt to more fully implement the neutral program and evaluate results, using more comprehensive data than is currently available.

Neutral program components. NDOT proposes to continue race- and gender-neutral efforts in combination with a FHWA imposed race conscious program. Within the next fiscal year, NDOT intends to initiate a follow-up disparity study to evaluate the effectiveness of its implementation of the Federal DBE Program since the time the last disparity study was completed in 2007. This new information may cause NDOT to propose changes in how it implements the Federal DBE Program after the results of the study are complete.

NDOT's race-neutral program components include the following:

- Solicitations – CFR 26.51(b)(1) – NDOT continues to advertise solicitation notices in minority publications. NDOT also maintain lists of interested parties to receive contract information which includes items, quantities, schedules, specifications and other related information. The NDOT has a draft of our sub-

recipient review procedures in review. We expect to provide that document to the FHWA in the very near future.

- Supportive Services CFR 26.51(b)(2), (3), (5) and (7) – NDOT currently provides supportive services to DBEs and other small businesses through a contract with a consultant to be chosen. This program will be funded by FHWA’s DBE Supportive Services Program funding. Services provided include soliciting potential DBE companies; classes regarding all aspects of a construction contracting, and targeting prime contractors that are bidding on NDOT contracts. This assistance will also include assistance obtaining bonding and financing; improving business management, recordkeeping, financial and accounting capabilities; and other support. Additional assistance may be necessary.
- Outreach and Networking CFR 26.51(b)(4), (8) and (9) – NDOT participates in numerous outreach activities aimed at minority- and women-owned businesses. NDOT has partnered with other state, local and federal agencies; and is working with organizations such as the Nevada Minority Business Development Council in an effort to promote the DBE Program, the Small Business Administration (SBA), and the Associated General Contractors
- Complaint Procedures CRF 26.51(b) – NDOT has procedures in place for processing complaints of discrimination with regards to the operation of the DBE Program and allegations made against contractors doing business with NDOT. This will ensure prompt, uniform, and fair responses to allegations of unlawful conduct.
- Prompt Payment CFR 26.51(b) – NDOT’s contract specifications and the *Nevada Revised Statutes* (NRS) include a prompt payment clause. NDOT monitors subcontractor payments on a monthly basis on all NDOT contracts. All prime contractors are informed of the requirements for prompt payment. NDOT is currently working with the industry to modify the prompt payment policy.
- Monitoring of NDOT Contracts CFR 26.51(a) and (b)(6) – NDOT has taken affirmative steps to increase the level of subcontractor monitoring on its contracts. These increased efforts will allow NDOT to more effectively identify the economic and social status of subcontractors. The process that NDOT will use to monitor the DBE program is currently being discussed and designed.

NDOT is in the process of developing other new program components, including expanded outreach efforts, increased monitoring of professional service agreements and state-funded contracts. NDOT is currently considering several options that will assist us in this effort. NDOT is making headway in increasing DBE participation on our federally-funded projects.

Additionally, NDOT is investigating ways to increase its ability to monitor and capture DBE participation by sub-recipients. All of these race-neutral measures will enhance NDOT’s ability to assist DBE firms in getting federally-funded work. As described above, NDOT continues to implement an aggressive race-neutral program and is in the process of strengthening certain program elements.

Public Participation as described in 49 CFR 26.45(g)

The regulation requires that NDOT provide for public participation when establishing its overall goal. The following summarizes NDOT's public participation, which meets the requirements of the regulations:

- A proposed DBE goal was published in all of the newspapers in the state including minority-focused publications. Included in these published notices were the dates, locations and times of three public meetings held throughout Nevada. These locations included Las Vegas, Reno and Elko, Nevada.
- The published notices included addresses where comments could be sent.
- The new DBE goal and the Disparity Study were made available electronically on the www.nevadadbe.com website and in print form.
- The notices were run for three weeks in all of the newspapers in the state. These included minority focused newspapers. NDOT conducted the public meetings to offer opportunities to all parties interested in making comments, including DBE contractors, non-DBE contractors, practitioners, and community organizations. The public meetings provided a forum for any interested party to voice comments, concerns and questions.