

## **NOTICE OF AIRPORT DBE GOALS**

The City of Bismarck (Bismarck Airport) as a sponsor for Federal Aviation Administration Grants, has established the following goal:

FY 2016-2018 Overall

Construction/Professional Services Goal  
(49 CFR Part 26)

Goal: 1.00% The Bismarck Airport plans to achieve 0.0% by race neutral participation and 1.00% by race conscious methods (Contract Goals).

The purposed goal and its rational will be available on the airport website, <http://bismarckairport.com/>, and in person Monday-Friday from 8:00am to 5:00pm at the Airport Administration Office, 2301 University Drive, Building #17, Suite 225B, Bismarck, ND 58504. Comments will be accepted 45 days after this notice is published (April 17, 2015-June 1, 2015).

/s/ Timothy J. Thorsen

Timothy J. Thorsen

Airport Operations Manager

Disadvantaged Business Enterprise

Liaison Officer

4/17 - 20782313

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Timothy J. Thorsen

Airport Operations Manager

Disadvantaged Business Enterprise Liaison Officer



April 17, 2015

To Whom It May Concern

Re: Proposed FY 2016-2018 Airport Construction/Professional Services DBE Goal (49 CFR PART 26)

Dear Sir or Ma'am:

The purpose of this letter is to invite comments from interested parties about the Bismarck Airport's purposed FY 2016-2018 Construction/Professional Services DBE goal.

The Bismarck Airport has adopted a method directed by the United States Department of Transportation (US DOT) to establish overall goals. Using this methodology, the Bismarck Airport will attempt to achieve an overall goal of 1.00% for FY 2016-2018.

Our previous 3-year goal that was submitted to the Federal Aviation Administration (FAA) for FY 2013-2015 was 1.2% overall DBE participation. 0.0% of the goal was expected to be achieved by race-neutral participation. Analysis of bids from FY 2005-2012 showed that 0.0% was actually achieved by race neutral participation. That trend continued for FY 2013-2015. Therefore we expected 1.2% to be achieved by race-conscious methods. For FY 2013 and 2014, we achieved DBE participation of 1.09% and 1.08% respectively.

On March, 18, 2015, the Bismarck Airport sent letters to contractors, DBE firms, and several other entities asking for comments regarding a DBE Goal of 2.01% for FY 2016-2018. As a result of the comments and recommendations received from that consultation, the Bismarck Airport lowered its DBE goal to 1.00%.

During FY 2016-2018 Bismarck Airport expects to be awarded approximately \$80,450,000 in federally assisted projects. As a result Bismarck Airport has tentatively established the following goal for FY 2016-2018:

- Overall goal: 1.00%
- Portion of goal achieved by race neutral participation: 0.0%
- Portion of goal achieved by race-conscious methods (contract goals): 1.00%

Following this consultation, we will adjust our goal to reflect any comments or recommendations that are received, and will submit our goal to the Federal Aviation Administration (FAA). The purposed goal and its rational will be available on the airport website, <http://bismarckairport.com/>, and in person at the Airport Administration Office following publication of the notice. Bismarck Airport will accept comments on the goal for 45 days from the date of the notice.

I would appreciate your comments whether e-mail, written, telephonic, or in person by June 1, 2015. My e-mail address is [tthorsen@bismarcknd.gov](mailto:tthorsen@bismarcknd.gov). Our office phone number is (701) 355-1808. I look forward to your comments.

Sincerely,

Timothy J. Thorsen  
Airport Operations Manager/DBE Liaison Officer

Enclosure:  
DBE Overall Goal Setting Methodology

**Overall Goals (26.45)**

**Amount of Goal**

Airport's overall goal for FY 2016-2018 is the following:

- 1.00% of the federal financial assistance we will expend in DOT-assisted contracts.

During FY 2016-2018 Bismarck Airport expects to let \$80,450,000 in Federal Grant assisted projects, this means that we have set a goal of spending \$804,500 with DBE's in FY 2016-2018. Bismarck Airport competes for bidders with other state airports and with highway related work.

**Method**

**Step One:** The North Dakota Department of Transportation (ND DOT) determined the availability of DBEs from information supplied by all bidders on prime contracts and subcontracts from April 1, 2010 to March 30, 2011. This information was used to determine the pool of ready, willing, and able DBEs and non-DBEs. There were a total of 351 bidders: 309 non-DBEs and 42 DBEs (see chart below). A total of 20 consultants bid on consulting projects. A weighted average was developed by determining what percent non-DBES and DBEs did on both the prime contracting and subcontracting work. **This calculation establishes a base figure of 7.93% for Step One.**

	<b>Prime Bidders</b>	<b>Subcontractors or Suppliers</b>	<b>Consultants</b>	<b>Total</b>
DBE	6	36	1	43
NON-DBE	102	207	19	328
<b>TOTAL</b>	<b>108</b>	<b>243</b>	<b>20</b>	<b>371</b>

	<b>Dollars</b>	<b>%</b>
Prime	\$373,359,629.00	72.29%
Subcontract	\$133,073,313.00	25.77%
Consultant	\$10,043,163.00	1.94%
<b>Total</b>	<b>\$516,476,105.00</b>	<b>100.00%</b>

	<b>DBE/NON-DBE</b>	<b>% DBE</b>	<b>Weight</b>	<b>% DBE Weighted</b>
Prime	6/108	5.56%	0.7229	4.01%
Subcontract	36/243	14.81%	0.2577	3.82%
Consultant	1/20	5.00%	0.0194	0.10%
<b>Step One Figure</b>				<b>7.93%</b>

**Step Two:** Step Two is used to adjust the Step One figure, based on factors of past DBE participation in airport projects, barrier of entry resulting from a lack of interest, and factors raised by consultation with the public.

The Bismarck Airport believes that an adjustment based on past DBE participation is warranted. Our history of DBE achievement was:

Year	Percentage Achieved
1990	0.70%
1991	0.20%
1992	1.40%
1993	No Projects (0%)
1994	3.90%
1995	0.00%
1996	8.80%
1997	9.60%
1998	No Projects (0%)
1999	5.00%
2000	1.69%
2001	1.12%
2002	1.04%
2003	0.19%
2004	2.21%
2005	0.00%
2006	0.54%
2007	5.32%
2008	3.36%
2009	0.36%
2010	2.40%
2011	0.65%
2012	0.00%
2013	1.09%
2014	1.08%

According to the US DOT’s *“Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program”* Paragraph III Subpart A Number 5, an adjustment based upon past participation can be made if we feel that it is warranted. Paragraph III Subpart A Number 5 describes a method for adjusting the Step One figure to reflect past participation by averaging the Step One figure by the median value of past participation. The median is the middle number in any group of numbers, in this case the middle percentage of our historical achievement. To obtain the median, the percentage achieved was arranged in order from the lowest percentage to the highest percentage, as shown below:

<b>Reordered Participation</b>
0.00%
0.00%
0.00%
0.00%
0.00%
0.19%
0.20%
0.36%
0.54%
0.65%
0.70%
1.04%
1.08%
1.09%
1.12%
1.40%
1.69%
2.21%
2.40%
3.36%
3.90%
5.00%
5.32%
8.80%
9.60%

To find the median, you take one value away from each end of the spectrum, until you are left with one or two values. In this case, there is only one value left. **The median of past participation is 1.08%.**

The base figure of 7.93% was averaged with the median of past participation, which is 1.08%. This yielded an adjusted figure of **4.51%.**

We believe that there is a Barrier to Entry, based on comments made by Mr. Kuchenski's (Capital Construction) in August 2004, "DBE's are often small. As a result, smaller, less risk, less difficult projects have more interest from DBE's." This comment remains valid in 2015. We estimate this lack of interest to be 2.5%. As such, the past participation figure of 4.51% was adjusted by an additional 2.5% to yield a figure of **2.01%.**

We estimated in meeting our adjusted overall goal of 2.01%, we would obtain 0.0% from race neutral participation and 2.01% through race conscious measure (see Breakout

Paragraph). The goal was adjusted further downward to 1.00% as a result of industry/DBE firm consultation (see Consultation Paragraph).

### **Process**

The Bismarck Airport must submit its 3-year overall goal to the Federal Aviation Administration (FAA) by August 1, 2015 for FY 2016-2018.

Before establishing the overall goal, Bismarck Airport will consult with ND DOT and then use the current listing of minority contract associations in the DBE roster (Minority Contractors Association of ND and Minority Association of Contractors) to obtain information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBE's, and the Bismarck Airport's efforts to establish a level playing field for the participation of DBE's.

Following this consultation, we will publish a notice of the proposed overall goal, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at Airport Administration Office, in the commercial terminal, 2301 University Drive, Building #17, Bismarck, ND 58504 and on the airport website, and informing the public that Bismarck Airport will accept comments on the goals for 45 days from the date of notice. The notice will include addresses to which comments may be sent and addresses (including offices and web sites) where the proposal may be reviewed. Following the public notice period, the final goal will be submitted to the FAA.

### **Consultations:**

On March 15, 2015, 44 separate letters requesting comments were sent to: contractors, DBE contractors, and the North Dakota Department of Transportation (NDDOT) Civil Rights Division (Bismarck Airport's Unified Certification Program (UCP)). In addition, letters were sent to those bodies on a Tribal and Out-of-State DBE Contacts provided by the NDDOT Civil Rights Division (other states' DBE Program managers and specialists, minority contractors associations, and several Tribal Rights Employment Offices (Turtle Mountain Band of Chippewa, Three Affiliated Tribes, Spirit Lake Nation, and Standing Rock Sioux Tribe)).

On March 23, 2015, Brad Ballweber, Vice President and Treasurer of Northern Improvement Company (NIC), provided comments. NIC has completed the great majority of FAA funded projects at Bismarck Airport since 2002. NIC's comments have consistently recommended that race conscious goals that are above 2% are too high. NIC's March 23<sup>rd</sup> comments were the same: "Northern Improvement Company will continue to do our best to procure quotes from DBE contractors through 'good faith' efforts. The number of DBE certified contractors willing to quote FAA projects is very limited. Based on past DBE participation, it will be difficult to achieve an overall DBE participation goal of 2.01% for FY 2016-2018."

In an email from April 6, 2015, Scott Ezola, Director of Project Management for JBT Aerotech provided some comments on his company's experience with DBE goals. "When it comes to JBT, we usually struggle with DBE goals because the bulk of our contract value is the manufacturing portion in our Utah shop which is a skilled work force without the option to bring on new people to help meet the goal. It seems the only potential offering we have for DBE participation is the site work which is usually a very small percentage of the contract value. Our preference would be to keep the total DBE goals less than 2% if possible."

In a letter also dated April 6, 2015, Tom Neigum, Project Manager for KLJ, the Bismarck Airport's Engineering Consultant, provided some additional comments based on KLJ's experience as the Airport's consultant. "As your engineering consultant, KLJ attempts to utilize DBE professional services when possible. In KLJ's 5-year selection with the Bismarck Airport, which began in November of 2013, KLJ proposed to utilize the DBE firm MABU to assist with items they specialize in. We regret to inform you that MABU is no longer a DBE. As such, meeting any DBE goal will not be achieved with our proposed DBE partner. We continue to look for opportunities to partner with DBE firms, but it is very challenging. In summary, the DBE goal shown will be difficult to obtain. We recommend that the goal be lowered if at all possible to allow construction and professional services firms the ability to meet the goal."

As a result of the comments and recommendations from Mr. Ballweber, Mr. Ezola, and Mr. Neigum, the Bismarck Airport believes that lowering the overall DBE goal is justified. We have decided to further lower our goal by 1.01% to **1.00%**. This number reflects the comments and recommendations received as part of the consultation period, and also our actual DBE achievement in recent years.

The 45 day public comment period began April 17, 2015 when a public notice requesting comments was published in the Bismarck Tribune.

### **Breakout of Estimated Race-Neutral and Race-Conscious Participation**

The Bismarck Airport will meet the maximum feasible portion of its overall goal by using race-neutral means of facilitating DBE participation. The Bismarck Airport uses the following race-neutral means to increase DBE participation:

1. Advertise program goals.
2. Encouraging prime contractors to subcontract portions of work they would otherwise perform with their own forces.
3. Providing engineer consultant technical assistance and other service to fill out bids.
4. Ensuring prime contractors have lists of potential DBE subcontractors.
5. Inform prime contractors of past DBE participants.

6. Ensuring prime contractors have address and web page for ND DOT DBE directory.
7. Utilize engineer consultant to administer and monitor compliance.

We estimate that, in meeting our overall goal of 1.00%, we will obtain 0.0% from race-neutral participation and 1.00% through race-conscious measures.

The following is a summary of the basis of our estimated breakout of race-neutral and race-conscious DBE participation:

The Bismarck Airport used strictly race-neutral means of DBE participation in FY 2000, those contracts resulted in 1.69% DBE participation. In 2001, we used an overall goal of 1.7% through race-neutral means and 4.2% race-conscious means. That contract resulted in 1.12%. For FY 2002 Bismarck Airport used strictly race conscious means resulting in 1.04%. For FY 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, and 2014 Bismarck Airport used strictly race conscious means resulting in 0.19%, 2.21%, 0%, 0.54%, 5.32 %, 3.36%, 0.36%, 2.4%, 0.65%, 0%, 1.09%, and 1.08% respectively. For FY 2016-2018, we believe that our previous experience justify that our goal of 1.00% can only be accomplished by use of race conscious means.

We will adjust the estimated breakout of race-neutral and race-conscious participation as needed to reflect actual DBE participation (see 26.51 (f)) and we will track and report race-neutral and race-conscious participation separately. For reporting purposes, race-neutral DBE participation includes, but is not necessarily limited to, the following: DBE participation through a prime contract a DBE obtains through customary competitive procurement procedures; DBE participation through a subcontract on a prime contract that does not carry a DBE goal; DBE participation on a prime contract exceeding a contract goal; and DBE participation through a subcontract from a prime contractor that did not consider a firm's DBE status in making the award.

### **Contract Goals (26.51)**

The Bismarck Airport will use contract goals to meet any portion of the overall goal the Bismarck Airport does not project being able to meet using race-neutral means. Contract goals are established so that, over the period to which the overall goal applies, they will cumulatively result in meeting any portion of our overall goal that is not projected to be met through the use of race-neutral means.

We will establish contract goals only on those DOT assisted contracts that have subcontracting possibilities. We need not establish a contract goal on every such contract, the size of contract goals will be adapted to the circumstances of each such contract (e.g., type and location of work, availability of DBE's to perform the particular type of work).

We will express our contract goals as a percentage of the total amount of the DOT assisted contract.

# Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program

## Introduction

A number of DOT recipients have requested that we develop additional written guidance on goal-setting and on how to determine what portion of their goal should be race/gender-neutral and what portion should be race/gender-conscious. This document is intended as a response to these requests. It incorporates the experience and best practices culled by DOT officials and recipients over the first year of implementation of the goal-setting portions of the new DBE rule (49 CFR Part 26). This is not intended to represent an exhaustive list of techniques for goal-setting. As always, one hallmark of the new DBE rule is flexibility and therefore we will, and you should, continue to be on the lookout for new and innovative goal-setting processes. Nor is this an exhaustive explication of all of the subjects related to goal-setting covered in the rule. This document is intended only to provide you with some additional guidance as you set goals. It should always be used in conjunction with the rule itself and other relevant, previously issued guidance such as the Questions and Answers About 49 CFR Part 26, found at <http://osdbu.dot.gov>.

The General Counsel of the Department of Transportation has reviewed this document and has approved it as consistent with the language and intent of 49 C.F.R. part 26.

## I. In General

As we have stressed before, it is extremely important to include all of your calculations and assumptions in your submission. In other words, you must "show your work." When you submit your overall goals (and the race/gender-neutral and race/gender-conscious portions of your goals), it is important that we can follow your thinking process. Set out explicitly what your data sources were, what assumptions you made, how you calculated each step of the process, etc. Along these lines, you should make sure that your goal submission contains a clear description of your public participation process, a good summary of the comments received during that process and a summary of what if any changes were made based on those comments. Without this information, it is difficult for anyone to evaluate the actual goal you have selected. Goal submissions that are not accompanied by a written explanation of how the goal was derived will be sent back for additional explanation.

## II. Step One

The most important thing to remember about Step One of the goal setting process is that you are attempting to come up with a measurement of the actual relative availability of DBEs to perform the types of contracts (both prime and sub) that you intend to let. To say this another way, you are trying to determine what percentage DBEs (or firms that could be certified as DBEs) represent of all firms that are ready, willing, and able to compete for DOT-assisted contracting. This percentage is calculated by dividing the number of DBEs ready, willing, and able to bid for the types of work you will fund this year, by the number of all firms (DBEs and non-DBEs) ready, willing, and able to bid for the types of work you will fund this year. That is, the number of DBEs will be in the numerator, and the number of all firms (DBEs and non-DBEs) will be in the denominator. This is true regardless of the type of data you are employing to measure the relative availability (e.g., bidders list, census data and DBE directory, disparity study, alternate method, etc.) In other words, whatever data is used, the ratio would be:

$$\text{Step One Base Figure} = \frac{\text{Ready, willing, and able DBEs}}{\text{All firms ready, willing, and able (including DBEs and non-DBEs)}}$$

To give a more specific example, if your work for the year involves both heavy construction and trucking, then: where there are 44 DBEs in heavy construction and 14 in trucking, and 300 firms (DBEs and non-DBEs together) in heavy construction and 150 firms (DBEs and non-DBEs together) in trucking, the ratio would look like this:

$$\frac{\begin{array}{l} 44 \text{ DBEs in heavy construction} \\ + 14 \text{ DBEs in trucking} \end{array}}{\begin{array}{l} 300 \text{ firms in heavy construction} \\ + 150 \text{ firms in trucking} \end{array}} = \frac{58}{450} = 12.8\%$$

The following points will assist you in calculating this percentage:

**A. It is Not Acceptable to Use Past Participation as Your Step One Base Figure.** This Step One Base Figure must not be simply a restatement of your past history of participation. Instead, it must represent an attempt to measure the availability of firms that are ready, willing, and able to compete, not just those who have won contracts in the past. For example, assume that after performing the calculations above, you come up with a Step One Base Figure of 12%. Assume also that in the past you have achieved 20% DBE participation. You may not simply substitute 20% for your Step One Base Figure. The appropriate method for the consideration of past participation is discussed below in the portions of this guidance dealing with Step Two of the goal setting process.

**B. Use the Most Refined Data Available.** When using census and other data organized by SIC codes or the NAICS codes (which will eventually replace the SIC system), try to use the most refined data available. This will help you to focus more precisely on the firms with which you or your prime contractors will actually be doing business and help you to avoid overestimating the number of firms in either the numerator or the denominator. For both SIC and NAICS, the data become more refined in the codes with higher numbers of digits. You should take steps to filter out businesses that are not relevant to your calculations where possible. For instance, if you are using a bidders list, and you are aware that some of the firms on that list do not perform the type of work you will contract out, then exclude those firms from your calculation. If you are interested in further information on the NAICS system, you may want to visit the Census Bureau website [www.census.gov](http://www.census.gov) and look under the header for business, and find the link for the NAICS system.

**C. Look to Relevant Data Sources to Supplement Your DBE Directory.** You should do everything you can to ensure that your goal setting process truly reflects the actual availability of ready, willing, and able DBEs in your local market area. Toward this end, if you are using your DBE Directory and census data in goal setting and you are concerned that your DBE Directory does not accurately reflect the number of potential DBEs in your area, you should seriously consider supplementing the number of firms in your DBE Directory for the purposes of goal-setting. This is especially important because the census data represent all firms in your area whether or not they are ready, willing and able to perform DOT-assisted contracts. If you do not take extra steps to ensure your list of DBEs and potential DBEs is accurate, you may seriously underestimate the actual relative availability of DBEs. You may do this by carefully examining lists of other DBEs and MBE/WBEs (Minority Business Enterprises/Women Business Enterprises) from other sources, such as other state or local transportation agencies (if the contracting opportunities are comparable), to determine whether they contain firms which should be considered ready, willing, and able DBEs. You should also examine your own data bases such as vendor data bases, bidders lists, pre-bid or pre-proposal conference attendance lists and outreach session attendance lists to determine whether these sources might reveal firms that should be included in your list of ready, willing, and able DBEs. Of course, you must be

careful not to double count firms by including them on your list more than once. You also must remember that you are checking these other sources for the purpose of goal setting only. In order to actually be included in your DBE Directory, an otherwise eligible firm must take the additional steps of going through the certification process.

**D. Explain How You Determined Your Local Market Area.** Remember, the local market area is not necessarily the same as the political jurisdiction in which you are geographically located. Instead, your local market area is the area in which the substantial majority of the contractors and subcontractors with which you do business are located and the area in which you spend the substantial majority of your contracting dollars. It is important that you specify in your submission how you determined the boundaries of your local market area.

**E. Ensure That Your Percentage Reflects an "Apples to Apples" Calculation.** Whenever you are calculating ratios, make absolutely certain that the DBE firms in the numerator and denominator are as similar as possible to the DBEs and non-DBE firms in the denominator. For instance, if you include DBEs that do trucking in the numerator, make sure to include DBEs and non-DBEs that do trucking in the denominator. Likewise if you are using a bidders list, make certain that you use it for both your numerator and your denominator. In other words, if you are limiting your denominator to only those firms who have actually provided bids or quotes on past contracting opportunities, then be certain that your numerator is similarly limited to only those DBEs that have actually provided bids or quotes in the past. Finally, if you are using a bidders list, remember that it must include all DBE and non-DBE bidders and quoters whether they are prime or subcontractors and whether or not they were actually awarded a contract or a subcontract.

**F. Wherever Possible, Use Weighting.** Weighting can help ensure that your Step One Base Figure is as accurate as possible. While weighting is not required by the rule, it will make your goal calculation more accurate. For instance, if 90% of your contract dollars will be spent on heavy construction and 10% on trucking, you should weight your calculation of the relative availability of firms by the same percentages. In other words:

$$\left[ .9 \left( \frac{\# \text{heavy construction DBEs}}{\# \text{heavy construction firms}} \right) + .1 \left( \frac{\# \text{trucking DBEs}}{\# \text{all trucking firms}} \right) \right] \times 100 = \text{Step One Base Figure, weighted by type of work to be performed}$$

If you were using the number of firms in the example presented in the opening paragraph of this section, the equation you would use would be:

$$\left[ .9 \left( \frac{44 \text{ heavy construction DBEs}}{300 \text{ heavy construction firms}} \right) + .1 \left( \frac{14 \text{ trucking DBEs}}{150 \text{ trucking firms}} \right) \right] \times 100 = \left[ .9 \left( \frac{44}{300} \right) + .1 \left( \frac{14}{150} \right) \right] \times 100 =$$

$$\left[ .9(.1467) + .1(.0933) \right] \times 100 = \left[ .1320 + .0093 \right] \times 100 = 14.13$$

In this example, therefore, your Step One Base Figure would be 14.13%. Of course, in your actual goal setting process you will likely have many more than just two categories of contractors. Keep in mind the comments in paragraph "B" above and remember that it is preferable to break down your work into the most refined categories of contractors available and then perform your weighting calculations for each of those categories.

**G. Address the Effects of Decertifications in Step One.** If you have, or will imminently, decertify a firm (e.g., for exceeding the Personal Net Worth (PNW) cap, or for other reasons) you should address the decertification of that firm in Step One of the process by excluding the firm from the numerator of the ratio, but not from the denominator. Likewise, if you know that a firm (DBE or non-DBE) has gone out of business or is no longer bidding for DOT-assisted contracts, then that firm should be excluded from both the numerator and the denominator of your ratio. Remember: in the vast majority of cases it is not appropriate to make adjustments based on the number of firms that

have been decertified because of PNW or other reasons in Step Two of the goal setting process. Instead these adjustments should be made in Step One.

**H. Do Not Make Adjustments Based Solely on Changes in the Amount of Federal Assistance You Expect to Receive.** It is never appropriate to adjust your measurements of relative DBE availability, either in Step One or in Step Two, solely because the size of your contracting program will change in the next fiscal year. For example, if you assume that non-DBEs will be able to expand to compete for a large influx of new program dollars, you should make the same assumption about DBEs, absent specific evidence to the contrary. Of course, if the type of work for which you expect to contract changes dramatically, this may impact your goal regardless of changes in the level of funding you receive.

**I. Feel Free to Suggest Other Ways to Calculate Availability.** It is important to remember that the examples listed in the rule are just that - examples. You may propose alternative methods of calculating Step One; just make sure that any such alternative operates to measure the actual relative availability of DBEs.

### III. Step Two

Step Two of the goal setting calculation process is intended to adjust your Step One Base Figure to make it as precise as possible. Under the rule, you must consider all evidence available in your jurisdiction to determine whether such an adjustment is necessary. In this context, there are several factors you must consider in making your Step Two adjustments if there are relevant and reliable data available. These factors include:

- past participation (the volume of work DBEs have performed in recent years) or other measure of demonstrated capacity;
- evidence from disparity studies conducted in your market area (including relevant studies commissioned by other contracting agencies in your market area);
- statistical disparities in the ability of DBEs to get financing, bonding and insurance;
- data on employment, self-employment, education and training, union apprenticeship programs; and
- any other data that would help to better measure the percentage of work that DBEs would be likely to obtain in the absence of discrimination.

Remember: while you must consider making adjustments to the base figure for all of the factors listed here, you are not required to make such an adjustment. If the evidence does not suggest such an adjustment is necessary, then no adjustment should be made. Moreover, if the evidence suggests that an adjustment is warranted, it is critically important to ensure that there is a rational relationship between the data you are using to make the adjustment and the actual numerical adjustment made. A clear explanation of which information sources you considered, how you made your Step Two adjustment - or why you determined that no adjustment was warranted - is a very important part of your overall submission.

#### A. Adjustments Based on Past Participation

A number of questions have arisen with respect to Step Two adjustments based on past participation. Below, we address the questions we have heard most frequently.

**1. What if, in the past, you were in noncompliance with the DBE regulations such that past levels of DBE participation present either an unfairly high or unfairly low picture of DBE capacity?** If, in the past, your DBE program was implemented in noncompliance with the regulations in place at the time, it may be inappropriate to make adjustments for past participation. If the noncompliance resulted in DBEs receiving either an unfairly high or unfairly low percentage of contracts, you should not make an adjustment for past participation based on any year in which the program was administered in noncompliance.

**2. What if the Step One Base Figure and past participation figure are very similar?** If your records suggest levels of past participation very similar to the number you calculated in Step One, then it is not necessary to make any adjustment for past participation. For instance, assume that your Step One Base Figure is 21% and your past participation figure is 22.4%. In that case, you do not need to make an adjustment for past participation. Nevertheless, you must explicitly state that the reason you are not making an adjustment for past participation is that your past participation has been very similar to your Step One Base Figure.

**3. Are decertifications ever relevant in Step Two?** As stated in Part II above, it is almost never appropriate to consider the decertification of DBEs in the Step Two adjustment process. There is one exception, however. Decertifications may constitute a reason not to make an adjustment based on past participation where the newly decertified firms account for all, or the overwhelming majority, of past DBE participation and you have good reason to believe that other DBE firms will not be ready, willing, and able to participate in the contracts you intend to let. For example, assume that your Step One Base Figure calculations establish that there are 15 DBE firms that perform the type of work for which you expect to contract this year and that two of those firms will imminently be decertified. Then, as stated above, you must exclude those two firms from the numerator of the ratio established in Step One. In addition, if those two firms were responsible for all or the overwhelming majority of your past participation, and there are no DBE firms poised to do similar types and volume of work, you should seriously consider not making an upward adjustment based on past participation or reducing the upward adjustment to reflect the fact that the firms in question are no longer available DBEs.

**4. What if the types of contracts that you will let this year are very different from the types of contracts that you have let in the past?** If the types of projects you are letting this year are very different from the types of projects let in recent years, you should not assume that your past rates of DBE participation are an accurate reflection of DBE capacity in the type of work you will perform this year. In this scenario, you should seriously consider not making an adjustment for past participation.

**5. If you feel that an adjustment for past participation is necessary, how should you calculate the adjustment?** If you feel that an adjustment based upon past participation is warranted, and you cannot determine any more precise way to make the adjustment, you may average the figure you obtained in Step One with a figure which represents your past participation. In utilizing this method, you will obtain a more precise outcome if you are able to include a number of years' worth of past participation.

**a. Determining the Median Past Participation.** The first step in adjusting your Step One Base Figure for past participation is to determine your "median" past participation percentages. Your goal setting process will be more accurate if you use the median (instead of the average or mean) of your past participation to make your adjustment because the process of determining the median excludes all outliers (abnormally high or abnormally low) past participation percentages. The following principles will help you calculate your median past participation percentage:

- i. The median is the middle number in any group of numbers.
- ii. The best way to determine the median is to first arrange the values in a list from low to high. For example, the numbers 3, 6, and 1 arranged from low to high is: 1, 3, 6.
- iii. If you have an odd number of values from which to determine the median, just take the number which falls in the middle. For example, 3 is the median of 1, 3, and 6.
- iv. If you have an even number of values, then you should average the two numbers which fall in the middle. For example, if you have the numbers 1, 3, 6 and 8, the median would be the average of 3 and 6 or 4.5.
- v. If you only have two numbers, simply average those two numbers together.

**b. Adjusting the Step One Base Figure with the Median Past Participation.** With these principles in mind, you may calculate your median past participation percentage and use that figure to adjust your Step One Base Figure by taking the average of your median past participation figure and your Step One Base Figure. It is important that past participation not be given disproportionate weight and therefore, you should not simply average your Step One Base

Figure with a whole list of past years' participation. Instead, you should average the Step One Base Figure with the median of your past years' participation rates.

**c. Example.** An example may be helpful. Assume that your past participation for the past four years has been 18%, 15%, 12% and 11% and that your Step One analysis resulted in a Step One Base Figure of 9%. In order to obtain a Step One Base Figure adjusted for past participation, you must do the following:

- i. First, arrange your past participation values in order from low to high: 11%, 12%, 15%, 18%.
- ii. Then take the middle percentage to obtain your median past participation percentage. If, as here, there are an even number of percentages the median is derived averaging the middle two values (12% and 15%). Obtain the average of 12% and 15% by adding them together and dividing by 2. In other words:  $12\% + 15\% = 27\%$ ,  $27\%$  divided by 2 equals 13.5%. Therefore, 13.5% is your median past participation percentage.
- iii. Finally, obtain a Step One Base Figure adjusted for past participation by taking the average of the Step One Base Figure and the median past participation. This average is obtained by adding together the Step One Base Figure (9%) and the median past participation percentage (13.5%) and dividing by 2. In other words,  $9\% + 13.5\% = 22.5\%$  divided by 2 = 11.25%. Therefore, 11.25% is your Step One Base Figure adjusted for past participation.

**6. May you use only one year's worth of past participation to make an adjustment?** In most cases, your result will be more accurate if you use the median of several years to make your past participation adjustment. However, if you feel that your goal will be more accurate if you use only one year's worth of past participation you may do so as long as you fully explain your rationale. There is one caveat: if you use only one year's worth of past participation it must be a year in which your goals were set in compliance with Part 26.

**7. Must you consider making an adjustment for past participation even if the result of the adjustment might be to decrease the overall goal?** What if the adjustment will increase the overall goal? Yes, you must consider the advisability of making adjustments based on past participation regardless of whether or not the adjustment would result in increasing or decreasing the base figure derived in Step One.

**8. Must you consider making an adjustment for past participation if this is the first time you have ever had a DBE program?** No, an adjustment for past participation is not required if you are developing a DBE program for the first time and do not have any statistics on past DBE participation. Of course, if you do have statistics on past DBE participation you should consider making an adjustment.

## **B. Other Factors in Step Two**

With respect to the other Step Two factors outlined in the rule, we have heard a number of questions. The following questions and answers may be of assistance to you as you consider Step Two of the goal setting process:

**1. What additional sources of information should be considered in Step Two?** In determining whether or not your base figure should be adjusted to account for the effects of past discrimination, you should consider consulting with the following organizations and institutions to determine whether they can direct you to information about past discrimination in public contracting; discrimination in private contracting; discrimination in credit, bonding or insurance; data on employment, self-employment, training or union apprenticeship programs; and/or data on firm formation:

- a. organizations serving or representing DBEs, minority-owned or women-owned businesses;
- b. state or local offices of procurement;
- c. federal, state or local offices responsible for enforcing civil rights laws;
- d. state or local offices responsible for minority or women's affairs;
- e. state or local offices dealing with business affairs, commerce or small businesses;
- f. state or local offices dealing with the oversight of banks and other credit institutions (sometimes this is the state

treasurer's office);

g. state or local labor offices; local labor organizations; institutions of higher education within your state;

h. your state's Office of the Attorney General (for information about lawsuits related to contracting or obtaining credit or bonding.)

If you choose to make adjustments to your base figure based upon any of this evidence of past discrimination, be certain that there is a clear and rational relationship between the evidence and the adjustment. This is often very difficult to do and depends entirely on the type of evidence you discover. You may want to contact a consultant or local institution of higher education (departments of economics or statistics) to assist you in making these types of adjustments. Whether or not you make an adjustment based on a particular piece of evidence, make certain that you include a description of all of the evidence you considered with your submission.

**2. What are "disparity studies" and why must I consider them?** There is absolutely no requirement under the rule that you conduct your own disparity study. Nevertheless, if one has been conducted for your market area, you should consider the data the study contains. Many different types of studies have been referred to as "disparity studies," and the term is used broadly in the regulation to mean any type of study designed to investigate the existence of discrimination in contracting. Some disparity studies consist entirely of complex and lengthy statistical analyses. Some focus less on statistics and more on the collection and organization of anecdotal evidence of discrimination. Both types of studies should be considered in Step Two. Disparity studies vary widely in content and quality. Despite this, all or part of a disparity study relating to your local market area may provide a rich source of information for your goal setting process. If you are unsure about whether or not a disparity study relevant to your goal setting process has been conducted anywhere in your market area, consult with state and local offices of procurement and local government agencies responsible for enforcing civil rights laws and ask them if they know of any such studies. Remember, you may find relevant information in studies commissioned by other contracting agencies in your market area so be sure to examine any such studies for relevance to your goal setting process. If you choose to make an adjustment based upon a disparity study, you must carefully explain precisely what the disparity study evidence was and why the adjustment is warranted. In most cases it will be best to submit the disparity study (or all of the relevant portions of the study) with your proposed goal. If you obtain a disparity study conducted in your market area but, upon reading it, you determine that it is not relevant to your program or it is not reliable, you should not make adjustments based on the study. In this case, simply state your reason for not making the adjustment in your submission.

**3. If you have reliable information about the characteristics of the firms available in your local market area, should you use those characteristics to make adjustments in Step Two?** If you have accurate information about the characteristics of all the firms that are available to perform work for you such as their size, age, or past experience, you should consider making adjustments to your Step One Base Figure to account for any impact these factors might have on the capacity of firms to perform contracts for you. Of course, you will increasingly have information about some of these factors as you compile a bidders list in accordance with section 26.11. Again, it is important that any such adjustments be made with respect to both DBEs and non-DBEs in your market area. These types of adjustments usually involve quite difficult calculations and will likely involve using regression analysis. If you want to conduct these types of adjustments and do not have the in-house capacity to do so, you must obtain the expertise necessary to make the adjustments correctly. You may want to consider obtaining assistance from a consultant or local institution of higher education (e.g., departments of economics or statistics).

**4. What if there is no additional information available related to your goal setting process?** If no disparity studies have been conducted in your market area, be sure to state that in your submission to your operating administration. Likewise, if you are unable to find the other types of evidence or data relative to Step Two, make certain you state this in your goal submission.

#### **IV. Calculating the Race/Gender-Neutral and Race/Gender-Conscious Split:**

The race/gender-neutral and race/gender-conscious division of the goal is an exceedingly important component of the goal-setting process. As is stated in section 26.51, you must meet the maximum feasible portion of your overall goal by using race/gender-neutral means of facilitating DBE participation. You must also carefully explain why you

projected that you could achieve the level of race/gender-neutral participation you propose and the specific reasoning and data that support your conclusion. Many of you have asked for assistance in determining what factors to consider in projecting the portion of your overall goal that you will be able to meet through race/gender neutral means. The following considerations may be helpful:

**A. Consider the Amount by Which You Exceeded Your Goals in the Past.** The amount by which you exceeded your overall goals in past years can be a useful tool in helping you project the race/gender-neutral participation you can expect in the future. For example, suppose that your past year's goal was 20%, but you obtained 30% DBE participation. The 10% difference between goal and achievement represents participation that went beyond what you told contractors they should do in order to meet the 20% goal. This 10% participation, then, was not made necessary by race/gender-conscious provisions of your program. It may be reasonable for you to assume, as you make your projected split between race/gender-neutral and race/gender-conscious measures for next year, that contractors will again be able to achieve 10% participation over and above the race/gender-conscious portion of your overall goal. If your overall goal were again 20%, this could be evidence supporting a decision for projecting 10% race/gender-neutral and 10% race/gender-conscious split for the coming year.

Your projected split will probably be more accurate if you use past participation data from more than one year. As noted in point #5 under "Adjustments Based on Past Participation," it is advisable to calculate the median of the past years' participation. For example, if your goal was 20% in each of the past three years, and your achievements were 21%, 22%, and 30%, the median amount by which you exceeded your goal was 2% (i.e., the median of 1%, 2% and 10%). You could then use this figure as evidence supporting a projection of 2% race/gender-neutral participation for the coming year. If you do use only one year's past participation for this purpose, be sure that the year you use was one in which you set your goal under the new Part 26 regulations.

**B. Consider Past Participation by DBE Prime Contractors.** If you obtained any of your past participation through the use of DBE primes, then those attainments should be considered race/gender-neutral and can be used as a basis for estimating a similar level of race/gender-neutral participation in the next program year. For instance, assume that your goal for last year was 20% and your achievement was 20%. If a portion of that 20% resulted from the participation of DBE primes - and thus from race/gender-neutral means - then it may be appropriate to assume that you will be able to achieve similar results through the race/gender-neutral participation of DBE primes in the future. Of course, in this instance it is especially important to ensure that you are comparing similar types of contracts. For example, if last year's participation by DBE primes occurred in a type of contracting in which there are many DBE primes, and this year you intend to do all of your work in industries in which there are few DBE primes, then it would be inappropriate to assume that you will replicate similar levels of participation by DBE primes.

**C. Consider Past Participation by DBE Subcontractors on Contracts Without Goals.** If you obtained any of your past participation through the use of DBE subcontractors on contracts without DBE goals, then those attainments should be considered race/gender-neutral and can be used as a basis for estimating a similar level of race/gender-neutral participation in the next program year. For instance, assume that your goal for last year was 20% and your achievement was 20%. If a portion of that 20% resulted from the participation of DBE subcontractors on contracts without goals - and thus from race/gender-neutral means - then it may be appropriate to assume that you will be able to achieve similar results in the future. Again, it is extremely important to ensure that you are comparing similar types of contracts. For example, if last year's participation by DBE primes occurred in a type of contracting in which there are many DBE subcontractors, and this year you intend to do all of your work in industries in which there are few DBE subcontractors, then it would be inappropriate to assume that you will replicate similar levels of participation by DBE subcontractors.

**D. Consider MBE/WBE/DBE Participation Pursuant to Race/Gender-Neutral State or Local Programs.** An excellent source of information about how much DBE participation is likely in the absence of race/gender-conscious measures may be found in similar state or local transportation construction projects that do not use any race/gender-conscious measures at all. For example, if projects funded with purely state/local funds involve no race/gender-conscious measures aimed at increasing the participation of DBEs and these projects achieve a median rate of 8%

DBE participation, then you may project that you will achieve 8% DBE participation in your contracting without race/gender-conscious DBE goals. As above, your projection will be more accurate if you use the median of a number of past years.

**E. Consider Concrete Plans to Implement New Race-Neutral Methods.** If you have instituted new and comprehensive mechanisms aimed at obtaining additional DBE participation through race/gender-neutral means, these efforts might provide the basis for estimating a greater level of race/gender-neutral participation for the upcoming year. The key here is that any such efforts used to justify race/gender-neutral participation in the upcoming fiscal year must be:

1. new,
2. ready for immediate implementation,
3. described in detail, and
4. likely to result in additional DBE participation.

Evidence might include the establishment of a new, comprehensive mentor-protégée program aimed at providing assistance to small businesses; a detailed plan to break up larger projects into smaller subparts for which small businesses and DBEs will be more likely to be able to compete; or the institution of aggressive new efforts to provide bonding and credit to small companies, including DBEs, that have been unable to obtain it in the past.

**F. Consider Past History of Inability to Achieve Goals.** In determining how much of your goal you should meet through race/gender-neutral means, another factor to consider is a past history of inability to meet goals. If you have relied exclusively on race/gender-conscious measures in the past to meet your overall goals, but have not been able to achieve them, this may justify relying exclusively on race/gender-conscious means to meet your goal for the upcoming year. There are some caveats with respect to this particular factor in determining whether or not you will be likely to achieve a level playing field through race/gender-neutral means. If the goal you have set under Part 26 is significantly lower than your past goals, then your inability to meet your past goals is not a good justification for a completely race/gender-conscious goal under the new rule. However, if your goal under Part 23 was 20% and you only achieved 15% using entirely race/gender-conscious measures, that would be justification for using entirely race/gender-conscious measures only if your goal under the new Part 26 is approximately 20% or higher. This does not mean that you are prohibited from proposing to use race/gender-neutral means to meet all or part of your goal. However, if you have a history of being unable to achieve reasonable goals in the past, you will have to demonstrate some additional evidence for your contention that race/gender-neutral means will suffice to meet your goals in the future. Such evidence might include the establishment of a new, comprehensive mentor-protégée program aimed at providing assistance to small businesses or the institution of aggressive new efforts to provide bonding and credit to small companies that have been unable to obtain it in the past.

**G. Avoid Double-Counting.** It is important to note that some of the types of evidence for race/gender-neutral and race/gender-conscious projections outlined above cannot be used at the same time or it will result in overestimating past race/gender-neutral achievements. For instance, if you both exceeded your goals and used DBE primes in the same year - and thus the DBE primes contributed to you exceeding your goals - then you must be certain not to double count the extent to which the participation of DBE primes provides a basis for a race/gender-neutral projection in the next year. If you exceeded your goal by 10% and at the same time DBE primes accounted for 5% of your total DBE participation, then the total race/gender-neutral participation value for that year would be 10%, not 15%.

**H. Monitor DBE Participation to Determine Whether You Need to Adjust Your Use of Race/Gender-Conscious Measures.** Of course, once you have projected how much of your goal can be achieved through race/gender-neutral means, it will become critically important for you to monitor DBE participation during the year to determine whether your projections were on target. Your projections are just that: projections. By monitoring actual DBE participation you will be able to determine what, if any, midyear corrections are needed in your mix of race/gender-conscious and race/gender-neutral measures used to achieve your goals. Remember: you must meet as

much of your goal as possible through race/gender-neutral means. Therefore, if it appears that part way through the fiscal year that you are on track to exceed your goals, you should ratchet back your use of race/gender-conscious goals. Likewise, if you are using all, or mostly, race/gender-neutral measures and it appears that you will not meet your goal, you should consider instituting some race/gender-conscious measures or, at a minimum, more aggressively implementing your race/gender-neutral measures.

## **V. Contact Us If You Need Further Assistance**

Finally, as always, your operating administration is here to help. We understand that the new goal setting process can seem daunting at first, but we also know that you are up to the task. Never hesitate to call early and often for assistance while you are working on your goals. We will do everything we can to help you level the playing field and ensure an equal opportunity for all firms to play a role in building and maintaining our nation's transportation infrastructure.

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