

# NEVADA DEPARTMENT OF TRANSPORTATION

## DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM PROPOSED THREE-YEAR OVERALL GOAL & METHODOLOGY FOR FEDERAL FISCAL YEARS 2023 THROUGH 2025

Pursuant to the requirements of Title 49 Code of Federal Regulations, Part 26 of the United States Department of Transportation (U.S. DOT), Nevada Department of Transportation ("NDOT"), as a designated recipient of Federal funds from the Federal Highway Administration (FHWA), must comply with the Disadvantaged Business Enterprise (DBE) goal setting provisions for Federally assisted contracts.

To comply with 49 CFR § 26.45, the Nevada Department of Transportation (NDOT) established an overall DBE goal based on the availability of ready, willing and able DBEs relative to the availability of all ready, willing and able firms within the Nevada highway construction industry. NDOT set an overall goal of 9.9% of which it expects to meet 2.6% through race neutral means (median of last 5 years) and 7.3% through race conscious means.

In accordance with 49 Code of Federal regulations (CFR) Part 26, the United States Department of Transportation's (USDOT's) "Tips for Goal-Setting," and other official USDOT guidance, NDOT based its initial 2023 -2025 goal and methodology on information collected from the 2021 NDOT Disparity Study, the U.S. Census Bureau's County Business Patterns, and the Nevada Unified Certification Program directory.

NDOT commissioned Colette Holt & Associates (CHA) to conduct a disparity study related to the agency's implementation of the Federal DBE Program. CHA completed the study in late 2021 (referred to herein as the 2021 NDOT Disparity Study). Based substantially on study results, federal guidance, and relevant case law, NDOT proposes a new three-year overall DBE goal for FFYs 2023 through 2025. To determine its new overall DBE goal, NDOT closely followed federal regulations including the two-step goal-setting methodology set forth in 49 CFR Section 26.45.

### **Step 1. Determining a Base Figure – 49 CFR Section 26.45(c)**

NDOT began the process of determining its new overall DBE goal by establishing a base figure. Consistent with USDOT guidance, NDOT established a base figure based on data from a *custom census* availability analysis that CHA conducted as part of the 2021 NDOT Disparity Study. For the purposes of establishing a base figure, the availability analysis was limited to the availability of *potential DBEs*—minority- and woman-owned businesses that are currently DBE-certified or appear that they could be DBE-certified based on revenue requirements described in 49 CFR Section 26.65 for FHWA-funded prime contracts and subcontracts that NDOT awarded from October 1, 2017 through September 30, 2021 (referred to herein as the study period).<sup>1, 2</sup> NDOT

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<sup>1</sup> Consistent with USDOT guidance, NDOT considers any contract with at least \$1 of FHWA funding as an "FHWA-funded contract" and includes the total value of the contract in its pool of total FHWA-funded contracting dollars.

<sup>2</sup> CHA defined woman-owned businesses specifically as *non-Hispanic white woman-owned businesses*. CHA grouped minority woman-owned businesses with their corresponding minority groups (e.g., grouping Black American woman-owned businesses with all other Black American-owned businesses).

has determined that the mix of the types and sizes of transportation contracts that it anticipates awarding in FFYs 2023 through 2025 will be similar to the mix of types and sizes of transportation contracts that were included in the study period.

**Methodology for the availability analysis.** The availability analysis focused on specific work areas related to the types of FHWA-funded contracts that NDOT awarded during the study period. CHA identified specific subindustries for inclusion in the availability analysis and identified the geographic market areas in which NDOT awarded the vast majority of corresponding contract dollars (i.e., the relevant geographic market area). CHA based its determination of the relevant geographic market area on NDOT's contracting and vendor data, and, more specifically, on information about where the contractors that participated in NDOT prime contracts and subcontracts during the study period were located. The analysis indicated that 93 percent of NDOT's construction; professional services; and goods and support services contracting dollars during the study period went to businesses with locations in Nevada, indicating that Nevada should be considered the relevant geographic market area for the study.

**Overview of availability surveys.** The study team developed a database of potentially available businesses through surveys with local business establishments within relevant subindustries. The study team conducted surveys with business owners and managers to identify businesses that are potentially available for NDOT's FHWA-funded prime contracts and subcontracts. CHA began the survey process by collecting information about business establishments from Hoovers listings. CHA collected information about all business establishments listed under work codes that were most related to the FHWA-funded contracts that NDOT awarded during the study period.

**Information collected in availability surveys.** The study team conducted surveys with the owners or managers of business establishments. Survey questions covered many topics about each organization including:

- Status as a private business (as opposed to a public agency or nonprofit organization);
- Status as a subsidiary or branch of another company;
- Primary lines of work;
- Qualifications and interest in performing work for NDOT or other local government agencies;
- Qualifications and interest in performing work as a prime contractor or as a subcontractor;
- Ability to work in specific geographic regions of Nevada;
- Largest prime contract or subcontract bid on or performed in the previous five years;
- Year of establishment; and
- Race/ethnicity and gender of ownership.

Information about businesses that completed surveys was entered into an availability database that served as a basis for the availability analysis.

**Considering businesses as potentially available.** CHA considered businesses to be potentially available for NDOT's FHWA-funded prime contracts or subcontracts if they reported possessing the following characteristics:

- a. Being a private business (as opposed to a nonprofit organization);
- b. Having performed work relevant to NDOT FHWA-funded contracting;
- c. Having bid on or performed public or private sector prime contracts or subcontracts in Nevada in the past five years; and
- d. Being qualified for and interested in work for NDOT and other local government agencies.

CHA also considered the following information to determine if businesses were potentially available for specific contracts that NDOT awarded during the study period:

- e. The ability to work in specific regions of Nevada;
- f. The largest contract bid on or performed in the past (to inform an assessment of *relative capacity*); and
- g. The year the business was established.

**Steps to calculating availability.** As part of the availability analysis, CHA collected and analyzed relevant information to develop availability estimates to help NDOT set its overall DBE goal.

Only a subset of businesses in the availability database were considered potentially available for any particular prime contract or subcontract (referred to collectively as *contract elements*). CHA identified the specific characteristics of each prime contract and subcontract that the study team examined as part of the disparity study and then, for the purposes of helping NDOT establish a base figure, took the following steps to calculate the availability of potential DBEs for each contract element:

1. For each contract element, the study team identified businesses in the availability database that reported that they:
  - Are qualified and interested in performing transportation-related work in that particular role for that specific type of work (based on 6-digit NAICS codes) for NDOT or other local government agencies;
  - Are able to serve customers in that geographic location;
  - Have bid on or performed work of that size; and
  - Were in business in the year that NDOT awarded the contract.
2. The study team then counted the number of potential DBEs (by race/ethnicity and gender) relative to all businesses in the availability database that met the specified criteria.
3. The study team translated the numeric availability of potential DBEs for the contract element into percentage availability.

The availability analysis shows that potential DBEs could be considered available for 12.1 percent of NDOT’s FHWA-funded prime contracts and subcontracts. Thus, NDOT considers **12.1% as its base figure**.

**Figure 1. Availability components of the base figure (based on availability of potential DBEs for FHWA-funded transportation contracts)**

Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
1.9%	2.2%	0.7%	0.4%	7.0%	12.1 %	87.9%	100.0%

Note: Numbers rounded to nearest tenth of 1 percent. Numbers may not add to totals due to rounding.

Source: 2021 NDOT Disparity Study, Table 1-3.

## Step 2. Determining if an Adjustment is Needed – 49 CFR Section 26.45(d)

After establishing the base figure, NDOT considered relevant information to determine whether any adjustment was needed to the base figure to determine the overall DBE goal and to make it as precise as possible. In considering an adjustment to the base figure, NDOT evaluated information about:

- Current capacity of DBEs to perform work on USDOT-assisted contracting as measured by the volume of work DBEs have performed in recent years;
- Information related to employment, self-employment, education, training, and unions;
- Any disparities in the ability of DBEs to get financing, bonding, and insurance; and
- Other relevant data.<sup>3</sup>

**Current capacity of DBEs to perform work on USDOT-assisted contracting as measured by the volume of work DBEs have performed in recent years.** USDOT’s “Tips for Goal-Setting” suggests that agencies should examine data on past DBE participation in their USDOT-funded contracts in recent years. USDOT further suggests that agencies should choose the median level of annual DBE participation for those years as the measure of past participation:

*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 outlier (abnormally high or abnormally low) past participation percentages.<sup>4</sup>*

Figure 2 represents past DBE participation based on NDOT’s Uniform Reports of DBE Awards or Commitments and Payments as reported to FHWA. According to the Uniform Reports, median DBE participation on FHWA-funded contracts from FFYs 2017 through 2021 was 7.75 percent.

<sup>3</sup> 49 CFR Section 26.45.

<sup>4</sup> Section III (A)(5)(c) in USDOT’s “Tips for Goal-Setting in the Federal Disadvantaged Enterprise (DBE) Program.” <http://www.osdbu.dot.gov/DBEProgram/tips.cfm>

**Figure 2.**  
**Past certified DBE participation in FHWA-funded contracts, FFY 17-21**

Year	Total	RN	RC
2021	8.22%	2.61%	5.61%
2020	8.14%	3.70%	4.44%
2019	5.26%	2.01%	3.25%
2018	5.87%	2.63%	3.24%
2017	7.75%	2.77%	4.98%

Source:  
 Commitments/Awards reported on NDOT’s Uniform Reports of DBE Awards/Commitments and Payments.<sup>5</sup>

The information about past DBE participation supports a downward adjustment to NDOT’s base figure. If NDOT were to use the approach that USDOT outlined in “Tips for Goals Setting” based on Uniform Reports of DBE Awards/Commitments and Payments, the overall goal would be the average of the 12.1 percent base figure and the 7.75 percent median past DBE participation, yielding a potential overall DBE goal of 9.9 percent.

12.1%	+	7.75%	=	19.85%
19.85%	÷	2	=	9.9%

**Information related to employment, self-employment, education, training, and unions.** CHA’s analyses indicate that there are barriers that certain minority groups and women face related to human capital, financial capital, and business ownership in the Nevada contracting industry. Such barriers may decrease the availability of minority- and woman-owned businesses to obtain and perform the FHWA-funded contracts that NDOT awards, which supports an upward adjustment to NDOT’s base figure.

**Any disparities in the ability of DBEs to get financing, bonding, and insurance.** CHA’s analysis of access to financing, bonding, and insurance also revealed quantitative and qualitative evidence that minorities, women, and minority- and woman-owned businesses in Nevada do not have the same access to those business inputs as non-Hispanic white men and businesses owned by non-Hispanic white men. Any barriers to obtaining financing, bonding, and insurance might limit opportunities for minorities and women to successfully form and operate businesses in the Nevada contracting marketplace. Any barriers that minority- and woman-owned businesses face in obtaining financing, bonding, and insurance would also place those businesses at a disadvantage in competing for NDOT’s FHWA-funded prime contracts and subcontracts. Thus, information from the disparity study about financing, bonding, and insurance also supports an upward adjustment to NDOT’s base figure.

**Other relevant data.** The Federal DBE Program suggests that federal funding recipients also examine “other factors” when determining whether to make any adjustments to their base figures.<sup>6</sup>

<sup>5</sup> Consistent with FHWA guidance the most recent five-year time period has been used in the 2017-2021 overall goal methodology. Use of the most current contracting information will ensure the overall goal is narrowly tailored to the most recent economic conditions within the GMA.

<sup>6</sup> 49 CFR Section 26.45.

**Current capacity of DBEs to perform work on USDOT-assisted contracting as measured by current DBE climate.** NDOT has determined that an additional upward adjustment is not feasible due to the following issue.

Although NDOT has 742 certified DBEs, with 197 of those having the ability conduct work on transportation-related projects, only 93 of the 197 have conducted work on transportation-related projects in the past five years.

**Outreach.** Information collected through outreach with minority- and woman-owned businesses can be an important source of information about the current capacity of DBEs to perform work on future federally-funded projects. Other local governments have a DBE program consultant that conducts outreach services to assist minority- and woman-owned businesses that wish to become DBE certified. The consultant also works to encourage DBE-certified businesses to participate in state contracting.

**Success of businesses.** There is quantitative evidence that certain groups of minority- and woman-owned businesses are less successful than businesses owned by non-Hispanic white men and face greater barriers in the marketplace, even after accounting for race- and gender-neutral factors. There is also qualitative evidence of barriers to the success of minority- and woman-owned businesses. Some of that information suggests that discrimination on the basis of race/ethnicity and gender adversely affects minority- and woman-owned businesses in the local contracting industry.

**Potentially available business refinement.** NDOT obtained the full list of potentially available businesses developed by the study team to identify businesses that are potentially available for NDOT's FHWA-funded prime contracts and subcontracts. NDOT determined that due to the wide range of business services, the list required further investigation and refinement before their status as potentially available businesses on NDOT's FHWA-funded prime contracts and subcontracts could be determined. NDOT contacted and researched businesses on the list and determined that refinement of the list was warranted. NDOT was supplied a list of firms that were identified as potentially available for NDOT's FHWA-funded prime contracts and subcontracts by the study team. NDOT excluded businesses that are already DBE certified through the Nevada Unified Certification Program, businesses that were determined as not meeting the regulatory requirements for certification (business size, gender, ethnicity), firms that are no longer open for business, and firms that may conduct business within the scope of "other local government agencies" (as explained below), but do not conduct business within the scope of NDOT's FHWA-funded prime contracts and subcontracts (food establishments, retail stores unrelated to construction, such as medical marijuana dispensaries, and firms that conduct work only on residential, commercial, or vertical construction). This left very few potentially available businesses which still need follow-up or have been identified as true potential DBEs.

**Evidence from disparity studies conducted within the jurisdiction.** USDOT suggests that federal funding recipients also examine evidence from disparity studies conducted within their jurisdictions when determining whether to make adjustments to their base figures. Other agencies' contracts differ substantially in terms of size and type from the FHWA-funded contracts that NDOT awarded during the study period. Therefore, the results from other

disparity studies are of limited use to NDOT in determining whether to make an adjustment to its base figure.

**Adjustment.** NDOT has considered information relevant to a potential adjustment and proposes to make a downward adjustment to its base figure. NDOT believes that it is important to consider the various information that is relevant to making an adjustment. Some information supports an upward adjustment to the base figure whereas other information supports a downward adjustment. NDOT believes that the weight of the evidence supports making a downward step-2 adjustment. The volume of NDOT work DBEs have performed in recent years on FHWA-funded contracts provides support for a downward adjustment to the base figure. Following the recommendation in USDOT’s “Tips for Goal-Setting”, NDOT will make a downward adjustment to its base figure by averaging the base figure (12.1%) by past DBE participation on FHWA-funded contracts during the study period (7.75 %). Based on that calculation, NDOT proposes an overall DBE goal of **9.9 percent** for FFYs 2023 through 2025.

### **Race-/Gender-Neutral and Race-/Gender-Conscious Split – 49 CFR Section 26.51 (c)**

In accordance with federal regulations and USDOT guidance, NDOT will attempt to meet the maximum feasible portion of its proposed 9.9% overall DBE goal by using race- and gender-neutral measures. NDOT used the median race neutral participation over the past 5 fiscal years 2.6%.

**Figure 2 Race Neutral/Race Conscious Split**

<b>Goal Portion</b>	<b>Allocation %</b>
Race Neutral	2.6%
Race Conscious	7.3%
<b>Overall DBE Goal</b>	<b>9.9%</b>

Figure 2 presents NDOT’s proposed race- and gender-neutral and race- and gender-conscious split for its overall DBE goal. NDOT uses myriad race- and gender-neutral measures to encourage DBE participation on contracts, and will continue using them through FFY 2025. Based on that information, NDOT projects that it will meet 7.3% of its proposed DBE goal for FFYs 2023 through 2025 through race- and gender-conscious measures (i.e., DBE contract goals). NDOT projects that it will meet the remainder of its proposed 9.9% overall DBE goal—2.6%—through the use of race- and gender-neutral measures.

### **DBE Groups Eligible for Race- and Gender-Conscious Measures – 49 CFR Section 26.15**

Several seminal court cases have indicated that, in order to implement the Federal DBE Program in a narrowly tailored manner, agencies should limit the use of race- and gender-conscious program measures to those minority groups “that have actually suffered discrimination” within

its transportation contracting industry.<sup>7, 8</sup> Moreover, USDOT official guidance states that “even when discrimination is present in a state, a program is narrowly tailored only if its application is limited to those specific groups that have actually suffered discrimination or its effects.”<sup>9</sup> As provided in 49 CFR Part 26, such guidance is “valid, and express[es] the official positions and views of the Department of Transportation ... .”<sup>10</sup>

As part of the 2021 NDOT Disparity Study, CHA assessed whether there were any disparities between the participation and availability of minority- and woman-owned businesses on NDOT contracts. The study showed substantial disparities for nearly all minority- and woman-owned business groups across different sets of contracts and particularly on contracts to which race- and gender-conscious measures did not apply. Therefore, based on all available information including disparity analysis results from the 2021 NDOT Disparity Study, NDOT proposes that the following relevant groups will be considered eligible to participate in the race- and gender-conscious measures that will be part of the agency’s implementation of the Federal DBE Program:

- Black American-owned businesses
- Hispanic American-owned businesses;
- Asian-Pacific American-owned businesses;
- Subcontinent Asian American-owned businesses;
- Native American-owned businesses; and
- Non-Hispanic white woman-owned businesses.<sup>11</sup>

## **Public Participation – 49 CFR Section 26.45(g)**

Public participation is a key component of NDOT’s process for setting its overall DBE goal. NDOT has met with organizations that work with contractors and DBEs to request comments on this DBE goal.

NDOT completed the public posting, and open meeting portion of the public participation process in the following ways.

NDOT consulted with the highway construction contracting community on the proposed Triennial DBE goal on January 24, 2022. There were general concerns and comment to the

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<sup>7</sup> *AGC, San Diego Chapter v. California DOT*, 713 F.3d 1187, 1191, 1199, 2013 WL 1607239 (9th Cir. April 16, 2013)

<sup>8</sup> *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 997-98 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006)

<sup>9</sup> United States Department of Transportation Official Questions and Answers (Q&A’s) Disadvantaged Business Enterprise Program Regulation (49 CFR 26), <http://www.dot.gov/osdbu/disadvantaged-business-enterprise/official-questions-and-answers-26>

<sup>10</sup> 49 CFR Section 26.9

<sup>11</sup> Courts have found that a substantial disparity index for white woman-owned businesses may raise an inference of discrimination sufficient to support inclusion of all women in a recipient’s DBE program. See *AGC, San Diego Chapter v. California DOT*, 713 F.3d 1187, 1195, 1198 (9th Cir. 2013).



proposed goal with regard to the goal increasing when they are already struggling to meet the current lower goal.

The 2023-2025 Triennial Goal Methodology has been posted to NDOT's [website](#) and the public meeting was held on June 22, 2022 at 2:30PM at the following locations:

NDOT District I – Las Vegas – Located at: 123 E. Washington Avenue Las Vegas, NV, 89101.

With a virtual option to any interested stakeholder.

NDOT received no feedback, comments, or concerns on the proposed Triennial DBE Goal.