Arkansas State Highway and Transportation Department

Disadvantaged Business Enterprise (DBE) Participation Goal on Federally-Assisted Highway Projects

for

Federal Fiscal Years 2014-2016

Prepared by:

Programs and Contracts Division

In compliance with:

Title 49 Part 26 of the Code of Federal Regulations (49 CFR 26)

Date:

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INTRODUCTION

This report complies with the Disadvantaged Business Enterprise (DBE) rule in Title 49 Code of Federal Regulations Part 26 (49 CFR 26) and details the Arkansas State Highway and Transportation Department's process for setting the Federal Fiscal Years (FFYs) 2014-2016 overall goal for DBE participation in federally assisted highway projects.

49 CFR 26 requires that this goal be submitted for review by the Federal Highway Administration (FHWA). This submission must include 1) a description of the methodology used to establish the goal, including the base figure and the evidence with which it was calculated, and the evidence relied on for any adjustments; and 2) a projection of the portions of the overall goal expected to be met through race/gender-neutral and race/gender-conscious measures, respectively; and should include 3) a summary listing of the relevant available evidence of disparity and, where applicable, an explanation of why that evidence was not used to adjust the base figure.

NOTICE OF NONDISCRIMIATION

The Arkansas State Highway and Transportation Department (Department) complies with all civil rights provisions of federal statutes and related authorities that prohibited discrimination in programs and activities receiving federal financial assistance. Therefore, the Department does not discriminate on the basis of race, sex, color, age, national origin, religion or disability, in the admission, access to and treatment in the Department's programs and activities, as well as the Department's hiring or employment practices. Complaints of alleged discrimination and inquiries regarding the Department's nondiscrimination policies may be directed to Joanna P. McFadden., Section Head - EEO/DBE (ADA/504/Title VI Coordinator), P. O. Box 2261, Little Rock, AR 72203, (501) 569-2298, (Voice/TTY 711), or the following email address: Joanna.Mcfadden@arkansashighways.com.

This notice is available from the ADA/504/Title VI Coordinator in large print, on audiotape and in Braille.

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SUMMARY

Proposed DBE Goal for Federal Fiscal Year 2014-2016

The Arkansas State Highway and Transportation Department (AHTD) proposes the following goal for participation by DBEs on federally assisted contracts for FFYs 2014-2016:

Race/Gender – Neutral	**-**	**2.44%**
Race/Gender – Conscious	**-**	**5.93%**
Total DBE Goal	**-**	**8.37%**

Public Participation Process

Prior to being made available for public comment, a preliminary version of this report was distributed to the DBE Advisory Committee for their review and comments. The DBE Advisory Committee consists of representatives from the AHTD, non-DBE contractors, AHTD's certified DBE contractors, and the Arkansas - Mississippi Minority Business Council. A DBE Advisory Committee meeting was held June 4, 2013 to discuss the goal and the methodology used to calculate the goal.

All 211 AHTD Certified DBEs were notified by letter that this report is available and will be provided a copy upon request.

The report was forwarded to minority interest groups with an offer to meet and discuss the proposed goal and rationale used to develop the goal.

The Department published a notice in either English or Spanish as appropriate announcing the proposed overall goal in the Arkansas Democrat-Gazette and in available minority focused and trade association publications (El Latino and Hola! Arkansas). The notice informed the public that the proposed goal and its rationale is available for inspection for 30 days following the date of the notice on the Department's website (www.arkansashighways.com) or during normal business hours at the Department's Central Offices, and that written comments will be accepted for 45 days from the date of the notice.

A Public Meeting was held on July 11, 2013 to present the proposed overall goal report.

DESCRIPTION OF METHODOLOGY

In general, the methodology used to calculate the AHTD's FFYs 2014-2016 DBE Goal was based on the United States Department of Transportation Office of Small and Disadvantaged Business Utilization's "Tips for Goal-Setting in the DBE Program" (Appendix A) utilizing information from the data sources presented in Appendix B.

Step One: Development of the Base Goal

In Step One of the goal setting process the relative availability (percentage) of DBEs in Arkansas to perform contracts (both prime and sub) scheduled for FFYs 2014-2016 is determined. In simplest terms, this percentage, or base goal, can be calculated as follows:

$$\text{Step One Base Goal} = \frac{\text{Ready, Willing and Able DBEs}}{\text{All Firms Ready, Willing and Able (DBEs and non-DBEs)}}$$

To further refine this percentage, weighting was applied using both the percentage of work to be done and the availability of DBEs to perform each work category. See Appendices C and D for a detailed description of methods used to calculate the percentages used to weight the base goal.

Example -

REMOVAL & DISPOSAL (INCLUDING CLEARING & GRUBBING)

Percent Removal & Disposal and Clearing & Grubbing Work of the Total FFYs 2014-2016 Construction Program = 2.15%
Estimated Percentage of Ready, Willing and Able firms available to do Removal & Disposal and Clearing & Grubbing Work:

DBEs	=	45
DBEs and Non-DBEs	=	1020

2.15% x (45/1020) = 2.15% x 4.41% = 0.09%

EARTHWORK

Percent Earthwork of the Total FFYs 2014-2016 Construction Program = 13.02%
Estimated Percentage of Ready, Willing and Able firms to do Earthwork:

DBEs	=	58
DBEs and Non-DBEs	=	1238

13.02% x (58/1238) = 13.02% x 4.68% = 0.61%

Total DBE participation in **REMOVAL & DISPOSAL (INCLUDING CLEARING AND GRUBBING) PLUS EARTHWORK:**

0.09% + 0.61% = 0.70%

This same methodology was applied to each of the 13 work categories anticipated for FFYs 2014-2016 (Table 1, Step One Base Goal Calculations). The weighted Step One Base Goal was calculated to be 8.20%.

Table 1 – Step One Base Goal Calculations

ARKANSAS STATE HIGHWAY AND TRANSPORTATION DEPARTMENT

FEDERAL FISCAL YEAR 2014 - 2016

DBE GOAL CALCULATION

WORK CATEGORY	PERCENT OF 2014 - 2016 FEDERAL AID CONSTRUCTION PROGRAM	PERCENT READY, WILLING AND ABLE DBES	STEP ONE BASE GOAL
	A	B	A x B
REMOVAL & DISPOSAL (INCL CL & GR)	2.15%	4.41%	0.09%
EARTHWORK	13.02%	4.68%	0.61%
HAULING	1.91%	15.18%	0.29%
PAVING (ACHM & CONCRETE)	27.71%	6.84%	1.90%
MISC CONCRETE	5.10%	19.11%	0.98%
TRAFFIC CONTROL	3.92%	26.27%	1.03%
EROSION CONTROL	1.93%	29.03%	0.56%
SIGNALS/ELECTRICAL	0.71%	4.18%	0.03%
STRUCTURES	29.29%	6.52%	1.91%
MATERIAL SUPPLIER	5.72%	3.77%	0.22%
MISCELLANEOUS	2.70%	11.04%	0.30%
PRIME CONTRACTOR ACTIVITIES (FIELD OFFICE, MOBILIZATION, CONSTRUCTION CONTROL)	5.27%	3.89%	0.21%
PROFESSIONAL SERVICES	0.52%	13.76%	0.07%
TOTALS	100%	STEP ONE BASE GOAL =	**8.20%**

Step Two: Adjustments

In Step Two of the calculation process, the Step One Base Goal is adjusted to make it as precise as possible. The factors considered in making adjustments include past participation and evidence from disparity studies, as well as any other data available that would help to measure the percent of DBE participation in the absence of discrimination.

Past Participation

The median DBE participation for FFYs 2003 through 2012 is presented below:

Table 2 –DBE Median Participation (FFY 2003-2012)

STEP 2 ADJUSTMENTS		
FFY YEAR	**DBE ANNUAL GOALS**	**ACTUAL ANNUAL PARTICIPATION**
2003	8.0%	8.73%
2004	8.0%	8.42%
2005	8.0%	8.09%
2006	8.4%	7.67%
2007	8.0%	8.54%
2008	7.8%	8.67%
2009	7.8%	8.54%
2010	8.5%	7.65%
2011	8.7%	8.76%
2012	8.7%	9.21%
MEDIAN		**8.54%**

Disparity Studies and Other Evidence of Discrimination

There were no available disparity studies performed within the market area in the last 16 years.

STEP TWO CALCULATIONS

MEDIAN DBE PARTICIPATION (2008-2012)		**8.54%**	
STEP ONE BASE GOAL (2014-2016)		**8.20%**	
	Total	**16.74%**	÷ 2

AVERAGE **8.37%**

Race/Gender-Neutral and Race/Gender-Conscious Determination

The next step is to forecast the race/gender-neutral and race/gender-conscious portion of the Step Two Adjusted Goal. As stated in 49 CFR Section 26.51, the maximum feasible portion of the overall goal must be met by using race/gender-neutral means of facilitating DBE participation. Race/gender-neutral participation includes: 1) DBEs who win prime contracts through customary competitive procurement procedures; 2) DBEs who are awarded subcontracts on prime contracts that do not carry a DBE goal; and 3) DBEs who are awarded subcontracts in excess of the stated DBE project goal.

The following considerations were made when determining the race/gender-neutral and race/gender-conscious component of the goal setting process:

Amount Overall Goals were Exceeded in the Past

As shown in Table 2, DBE Median Participation FFYs 2003-2012, Arkansas exceeded all but the 2006 and 2010 goals.

Past Race/Gender-Neutral Participation by DBEs on a Project Basis

The following table summarizes the past participation by DBE prime contractors and by DBE subcontractors on contracts without goals and in excess of project goals.

Table 3 – Race/Gender-Neutral DBE Participation

RACE NEUTRAL CALCULATION			
	Race/Gender-Neutral DBE	**Federal Aid Program**	**Race/Gender-Neutral %**
	(x $1.0 million)	(x $1.0 million)	
2003	10.0	360.0	2.78%
2004	13.7	430.8	3.19%
2005	13.1	304.2	4.30%
2006	4.8	395.2	1.22%
2007	8.7	296.6	2.93%
2008	4.4	235.3	1.88%
2009	7.0	455.3	1.53%
2010	5.0	461.7	1.08%
2011	10.3	491.6	2.10%
2012	20.4	471.3	4.34%
		MEDIAN	**2.44%**

Race/Gender-Neutral and Race/Gender-Conscious Goal Split

The following summarizes the information used to determine AHTD's Overall DBE Goal for FFYs 2014-2016:

A) Step One: Base Goal	-	8.20%
B) Step Two: Adjusted Goal	-	8.37%
C) 2003-2012 Median for Actual Race/Gender-Neutral Participation	-	2.44%

Given the above:

Neutral Goal	=	C	=	2.44%	=	2.44%
Conscious Goal	=	B – C	=	8.37% - 2.44%	=	5.93%

Total DBE Goal for FFYs 2014-2016 **8.37%**

Race/Gender-Neutral and Race/Gender-Conscious Goal Split Monitoring

Actual DBE participation will be monitored to determine if corrections to the race/gender-neutral and race/gender-conscious goal split are needed to achieve the overall goal of 8.37%. If, during the course of the year, it is determined that the overall goal of 8.37% will be exceeded, the Department will reduce or eliminate the use of contract goals to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal. If it is determined that the Department will fall short of the overall goal of 8.37%, then appropriate modifications will be made to the race-neutral and/or race-conscious measures in an effort to meet the overall goal.

APPENDICES

A - U.S. Dept. of Transportation's Tips for Goal-Setting in the DBE Program

B - Local Market Area and Data Sources

C - Work Category Percentages in the 2014-2016 Federal-aid Const Program

D - Ready, Willing and Able Contractors

E - Written Comments Received and Actions Taken

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

The following guidance can be found at http://www.osdbu.dot.gov/dbeprogram/tips.cfm

The General Counsel of the Department of Transportation has reviewed these goal-setting tips and approved them as consistent with the language and intent of 49 CFR Part 26. This guidance therefore represent the institutional position of the Department of Transportation. These tips on goal-setting provide guidance and information for compliance with the provisions under 49 CFR part 26, pertaining to the implementation of the Department's disadvantaged business enterprise program. Like all guidance material, these tips on goal-setting are not, in themselves, legally binding or mandatory, and do not constitute regulations. They are issued to provide an acceptable means, but not the only means, of compliance with Part 26. While these tips on goal-setting are not mandatory, they are derived from extensive DOT, recipient, and contractor experience and input concerning the determination of compliance with Part 26.

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.

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:

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

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 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-preposal 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:

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

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

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-Reutral 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.

Appendix B – Local Market Area and Data Sources

The local market area is defined as the area the substantial majority of contracting dollars are spent and the area in which the substantial majority of the contractors and subcontractors are located. Since AHTD funds are spent statewide, it is determined that AHTD's local market area is the entire state of Arkansas. Also the majority of highway contractors are located in the state (266 are in-state contractors and 214 have out-of-state addresses). This determination was based on the location of projects scheduled for FFYs 2014-2016 and the location of firms that are prequalified as primes or certified as DBEs with AHTD as of May 8, 2013.

The following data sources were used in calculating the FFYs 2014-2016 DBE goal.

- ✓ AHTD's Ready Willing and Able Bidders List
- ✓ AHTD's List of Active Engineering Consultants
- ✓ AHTD's List of Federally Assisted Projects Scheduled for FFYs 2014-2016
- ✓ AHTD's Low Bid Tabulations of Contract Items from April 1, 2010 through March 31, 2013
- ✓ AHTD's DBE Participation Reports from Prior Years

Appendix C - Work Category Percentages in the 2014-2016 Federal-aid Construction Program

Projects in the 2014-2016 Federal-aid Construction Program were grouped into the following project types:

1. New Location
2. Grading and Structures
3. Major Widening
4. Reconstruction/Rehabilitation
5. Passing Lanes
6. Interchanges
7. Bridges and Approaches
8. Base and Surfacing
9. Signals
10. County Road Roadway Projects
11. County Road Bridge Projects
12. Professional Services

With the exception of Professional Services, a database of low bid contract items on federally assisted projects let to contract from April 1, 2010 through March 31, 2013 was developed identifying project type. Within each project type, all of the work items associated with the work categories listed below were summed.

1. Removal & Disposal (Including Clearing & Grubbing)
2. Earthwork
3. Hauling
4. Paving (ACHM & Concrete)
5. Miscellaneous Concrete
6. Traffic Control
7. Erosion Control
8. Signal/Electrical
9. Structures
10. Material Supplier
11. Miscellaneous
12. Prime Contractor Activities (Field Office, Mobilization, Construction Control)

For example, work items for Clearing, Grubbing, R&D of Curbs, etc., were summed to provide a total cost for the Removal & Disposal category related to each project type (see Example Calculation 1, Column 3). A percentage of each work category associated with each project type was calculated (see Example Calculation 1, Column 4).

Example Calculation 1

1	2	3	4
Project Type (See above List - 1 thru 11)	Total Cost for Projects Evaluated (A)	Total Cost for Work Category – 1 R&D (incl Clear & Grub) (B)	Percentage of Work Category – Grading & Drainage in Project Type (B/A)
3. Major Widening	$370,177,927	$7,702,157	2.08%
4. Reconstruction	$ 195,407,588	$ 7,994,997	4.09%

As shown below in Example Calculation 2, the work category percentage associated with each project type was applied to the estimated cost for each Federal-aid project scheduled for FFYs 2014-2016.

Example Calculation 2

1	2	3	4	5
Project Number Scheduled FFYs 2011-2013	Project Type	Total Estimated Cost (A)	Percentage for Work Category – 1 R&D (incl Clear & Grub) (B)	Estimated Amount of Work Category – 1 R&D (incl Clear & Grub) (AxB)
0X0426	Major Widening	9,500,000	2.08%	197,600
0X0330	Major Widening	11,500,000	2.08%	239,200
0X0199	Reconstruction/Rehab	3,790,000	4.09%	155,011
0X0118	Reconstruction/Rehab	5,620,000	4.09%	229,858

Finally, the grand total of each work category was divided by the grand total of federally assisted projects to provide the percent of each work category in the FFYs 2014-2016 Federal Construction Program. See Example Calculation 3 and Table 1, Step One Base Goal Calculations.

Example Calculation 3

1	2	3
Total of All FFYs 2014-2016 Federal Aid Projects (A)	Total for All Work Category – 1 R&D (incl Clear & Grub) (B)	Estimated Percentage of Total (B/A)
$ 1,925,826,859	$ 41,440,094	2.15%

Appendix D - Ready, Willing and Able Contractors

49 CFR Sec 26.11 (c) (1)

(c) You must create and maintain a bidders list.

(1) The purpose of this list is to provide you as accurate data as possible about the universe of DBE and non-DBE contractors who seek work on your Federally-assisted contracts for use in helping you set your overall goals.

A bidders list has been developed using the following two sources of information.

- Information submitted on the form shown in Example 1 of this Appendix.
- Subcontracts submitted by the Prime Contractor

This list was used to calculate a percentage of DBEs in the universe of contractors available to do specific work categories in Arkansas as shown in Table 4.

This list was developed based on those DBEs and non-DBEs available to do specific work at the project level. A bidders list was compiled for each federally assisted project let to contract from April 1, 2010 through March 31, 2013. All projects were then added together for this period to calculate an overall percent of DBE availability. This level of detail provides an added dimension to estimate capacity.

Table 4 – DBE Availability Calculations

BIDDER'S LIST - SUMMARY					
TYPE WORK CODE	WORK CATEGORY	TOTAL NON-DBE	TOTAL DBE	TOTAL UNIVERSE OF CONTRACTORS	PERCENT DBE
		A	B	A+B	B/(A+B)
1	REMOVAL & DISPOSAL (INCL CL & GRUB)	975	45	1020	4.41%
2	EARTHWORK	1180	58	1238	4.68%
3	HAULING	978	175	1153	15.18%
4	PAVING (ACHM & CONCRETE)	1239	91	1330	6.84%
5	MISCELLANEOUS CONCRETE	1151	272	1423	19.11%
6	TRAFFIC CONTROL	1291	460	1751	26.27%
7	EROSION CONTROL	1034	423	1457	29.03%
8	SIGNALS/ELECTRICAL	1054	46	1100	4.18%
9	STRUCTURES	1578	110	1688	6.52%
10	MATERIAL SUPPLIER	1098	43	1141	3.77%
11	MISCELLANEOUS (INCLUDES FENCING)	1426	177	1603	11.04%
	PRIME ACTIVITIES[(1)]	889	36	925	3.89%
	PROFFESSIONAL SERVICES	401	64	465	13.76%

EXAMPLE 1

Rev. 7/12/04
Rev. 5/25/06
Rev. 7/12/07

ARKANSAS STATE HIGHWAY AND TRANSPORTATION DEPARTMENT

BIDDERS LIST

JOB NUMBER «LCONTID» LETTING DATE «DateLetStr»

JOB NAME «CDESCR»

CONTRACTOR _____

➔ ***ENTER THE WORK CODES TO BE PERFORMED BY THE PRIME CONTRACTOR*** _____

The Department is required by 49 CFR 26.11, to create and maintain a master bidder's list of all firms attempting to participate on federally assisted projects. Therefore, the Contractor should provide the names and addresses of all subcontractors, truckers or material suppliers that bid or provided quotes on any item on the project, regardless of whether or not the quotes were used in preparing the proposal. DBE contractors should be indicated by placing an X in the box preceding the firm's name. The general type of work to be performed, i.e., (01) removal and disposal items (including clearing and grubbing), (02) earthwork (including drainage items), (03) hauling, (04) paving (PCCP or ACHM), (05) miscellaneous concrete, (06) traffic control, (07) erosion control, (08) signals/electrical, (09) structures (includes steel suppliers), (10) material (aggregate) supplier (11) miscellaneous *items should be shown*.

DBE	FIRM NAME ADDRESS	TYPE OF WORK (Enter Code)