

FEDERAL FISCAL YEAR 2010 DBE GOAL for FHWA

An Overall Annual Disadvantaged Business Enterprise Goal has been developed for Disadvantaged Business Enterprise (DBE) participation in the Oregon Department of Transportation (ODOT) Federal Fiscal Year (FFY) 2010 federally assisted contracts. The goal was developed in compliance with federal regulations set forth in 49 CFR Part 26, Participation by Disadvantaged Business Enterprises in U.S. Department of Transportation (DOT) Programs. The goal identifies the relative availability of DBEs based on evidence of ready, willing and able DBEs in relationship to all comparable businesses which are known to be available to compete for ODOT's USDOT assisted contracts. The overall annual goal reflects ODOT's determination of the level of DBE participation that would be expected absent the effects of discrimination. The currently approved ODOT DBE Program Document was approved in 2000, but a revised document was submitted in December 2007. The calculations for the FFY 2010 Annual Goal are the same as for the revised FFY 2008 and FFY 2009 Annual Goal submitted at the same time, since the same data was used.

FFY 2010 GOAL DETERMINATION

ODOT has determined that the annual goal for FFY 2010 is 11.5 percent, based on the lists used by the consultant, MGT of America, for the 2007 Availability and Disparity Study, and adjusted to reflect current availability.

ODOT proposes a total of 1 percent race-conscious and 10.5 percent race-neutral goals for FFY 2010, based on the fact that the statewide availability was 4.88 percent African American or Asian American owned for DBEs in the 2007 Disparity Study¹, and the total Region 1 spending (Prime and sub) was 15.5 percent² of total ODOT spending ($0.0488 \times 0.155 = 0.0076$, rounded up to 1 percent). The race-conscious goal will be applied to African-American and Asian-American DBE firms for construction contracts only. No project-specific goals would be set for Native American, Hispanic American or non-minority Women owned DBE firms, and all participation by those firms would be considered race- and gender-neutral.

STEP ONE – DETERMINING THE BASE FIGURE

USDOT Goal-Setting Requirements

In setting the overall annual goal for the Oregon Department of Transportation (ODOT), the USDOT requires that the goal setting process begin with a base figure for the relative availability of DBEs. The overall goal must be based on demonstrable evidence of the availability of ready,

¹ 2007 Availability and Disparity Study Exhibit 4-12

² 2007 Availability and Disparity Study Exhibits 4-2 and 4-16

willing, and able DBEs relative to all businesses ready, willing, and able to participate on USDOT-assisted contracts. In particular, recipients must follow the USDOT's two-step methodology for goal setting to determine the level of DBE participation they expect absent the effect of discrimination:

- **Step 1** – Compute base figure for relative availability of ready, willing, and able DBEs
- **Step 2** – Adjust the base figure to make it as precise as possible utilizing the guidelines established in 49 CFR Part 26.45 and the goal-setting tips published by the USDOT's Office of Small and Disadvantaged Business Utilization (OSDBU)

ODOT is also required to project the portions of the overall goal it expects to be met through race-neutral and race-conscious measures, respectively (see 49 CFR Part 26.51). Additionally, recipients must provide for public participation in the establishment of their overall goal as well as specify the relevant market area used for the calculation.

Accordingly, ODOT determined the State of Oregon to be the relevant market area for highway construction and design services. This determination is based upon the market area analysis contained in MGT's 2007 Disparity Study. Once the State of Oregon was identified as the relevant market area, further analyses were performed only on data and contracting opportunities pertinent to firms expected to participate in the market area.

The ODOT Office of Civil Rights' database and tracking system, Civil Rights Compliance Tracking (CRCT), did not previously have the ability to track DBE utilization in non-construction contracts, nor has any other ODOT data system. The Agency is aware of this and has taken steps to correct the situation by implementing changes to reporting procedures and creating a computerized link between databases that will allow the system to download Personal and Professional Service Contract (PSK) data in the same way it is able to collect construction contracting information from the Trns*Port database. This new system is in the final testing phase, therefore data was not available for inclusion to goal setting calculations. In addition, the request ODOT submitted for the waiver which was granted by US DOT in September 2008, did not include any non-construction contracting. Since the 2007 Disparity Study has not been updated at this point, and did not thoroughly evaluate PSK contracting even though there was some indication that contracting disparities exist, there is insufficient data to provide a balanced review of non-construction contracting. The 2010 Annual Goal calculation will only consider construction contracting.

ODOT reviewed the alternatives for establishing a base figure listed in 49 CFR Part 26.45, and selected the 2007 MGT Disparity Study as the approach for ODOT's FFY 2010 goal setting. Since ODOT has not conducted a new Disparity Study in this time frame, we will continue to use the data from the 2007 Study.

NOTE: ODOT is projecting goals for highway construction only; therefore, there is no weighting for A&E versus construction.

Highway Construction - Step 1

1. The MGT 2007 disparity study used MWBE bidders to estimate availability.
 - a. Both the 2007 ODOT Disparity Study and ODOT DBE Goal Submissions have used bidders as a source of availability.
 - b. 2007 ODOT Disparity Study Included certified and non certified MWBEs
 - c. 2007 ODOT Disparity Study Aggregate availability over the study period
2. 2007 ODOT Disparity Study separated availability into primes and subs
 - a. 29.5 percent of available subcontractors³
 - b. 19.1 percent of available prime contractors⁴
 - c. Prime-retained dollars were 63.4 percent of total dollars paid to prime contractors over the study period. Prime retained dollars are prime contract dollars after subcontractor dollars are subtracted from payment to the prime; in other words subcontractors received 36.4 percent of contract dollars.⁵
 - d. When these weights are used this results in a weighted construction goal of **22.9** percent $[(19.1\%*63.6\%)+(29.5\%*36.4\%)]$.

STEP TWO – ADJUSTING THE BASE FIGURE

Highway Construction - Step 2

Adjust the data for DBEs for median utilization and current availability

1. Based on the 2007 ODOT Disparity Study the median prime utilization for DBEs was **4.63** percent, much lower than the estimated MW/DBE prime contractor bidder availability⁶
 - a. DBEs primarily won small prime contracts
 - b. For example, DBE won only 3.44 percent of the dollar value of prime contracts in excess of \$5 million⁷.
2. The median utilization for DBEs was **38.06** percent during the 2007 ODOT Disparity Study, 8.56 percent more than the subcontractor bidder availability.
3. Further adjustments
 - a. The list of all Prime bidders used in the 2007 Disparity Study was reviewed, and only 2 DBE bidders on the list were not also included in the subcontractor list. Of the 214 entries on the list, only 2, or 0.9 percent, were DBEs unique to the Prime contracting bidders list.
 - b. The subcontractor bidders list used in the 2007 Disparity Study contained 922 entries. A random sample of 20% of those entries (a total of 185 firms) was compared to the Oregon Secretary of State's Corporation Division database, and it

³ 2007 Availability and Disparity Study Exhibit 4-12

⁴ 2007 Availability and Disparity Study Exhibit 4-11

⁵ Subcontracting dollars from 2007 Availability and Disparity Study Exhibit 4-8, and total dollars from Exhibit 4-2

⁶ 2007 Availability and Disparity Study Exhibit 4-2

⁷ 2007 Availability and Disparity Study Exhibit 4-7

was determined that 21.6 percent of those firms (40 firms) were no longer in business or were not eligible to do business in Oregon. Applying the results of the sample to the entire list, the resulting number is 723 subcontractors. Of the 270 DBE firms on the list, a total of 52 DBE firms were no longer viable. This would leave 218 DBE firms out of 723 total subcontractors, or an availability of 30.1 percent.

4. Recalculating the DBE goal using the new Prime and sub availability this results in a weighted construction goal of **11.5 percent** $[(0.9\%*63.6\%)+(30.1\%*36.4\%)=11.5\%]$.

In addition, consideration was given to other factors listed below, but they were rejected from inclusion in the calculations for the reasons stated.

1. Limited capacity of certified DBE firms – There is insufficient data at this time to accurately quantify the capacity of the DBE firms. ODOT has commissioned a Capacity Analysis with the anticipation that the study will provide additional information so that we may more accurately analyze the effects of capacity for future goal calculations.
2. Ability of DBE firms to travel to project sites – A survey was sent to 154 certified African American, Asian Pacific and Subcontinent Asian DBE firms to determine their willingness to travel to projects. Only 13 Construction firms responded, and only 9 stated that they would travel statewide for contracts on ODOT projects.

B. Public Participation

The ODOT Office of Civil Rights utilizes an annual Outreach Events Calendar which is comprised of key chambers of commerce, community, and professional organizations that are involved with small firms. ODOT attended the various meetings, marketplace events, trade shows and conferences listed on the Calendar throughout the past year and encouraged public comments on the DBE annual goal and the goal setting methodology. The major events for small businesses were the OAME Trade Show (5/7/09), the Hispanic Metro Chamber of Commerce Tradeshow (5/28/09) and the MED Week Trade Show and Luncheon (9/30/08). Other small business events were monthly Contractor and A & E meetings at OAME, the ACEC/ODOT Conference (4/21/09), and the Latino Business & Workforce Development Conference (11/1/08). ODOT/OCR staff are available for conversations and comments by phone and e-mail. No written comments regarding the DBE goal setting methodology were received; however goals were a topic of discussion at various meetings during the year. Additional meetings included:

- ODOT Civil Rights and Region 1 staff met with members of NAMCO on January 13, 2009, February 11, 2009, April 14, 2009, and June 24, 2009, to discuss DBE goals and contracting, and explore areas for collaboration in increasing DBE participation on ODOT projects.
- ODOT and consultant Mason Tillman & Associates held three public meetings in Region 1 as part of the Capacity Analysis study, one each in Multnomah, Clackamas and Washington Counties. The primary focus of the meetings was to

- ODOT Civil Rights and Region 1 Area Manager presented before the Asian American Commission to inform the Commission on the importance of encouraging Asian Americans to maintain certifications and avail themselves of training opportunities offered by ODOT and the ongoing Capacity Analysis. The Commission is a direct link to the Legislature and expressed interest being kept apprised of ODOT's progress in supporting Asian American small firms.
- Met with NAYA on March 25, 2009, to discuss continued cooperative efforts at providing business and workforce opportunities for the Native American community.
- On October 16, 2008, ODOT launched the Workforce and Small Business Leadership Team (WSBLT), a group of upper and middle managers and technical experts, whose purpose is to integrate Civil Rights Programs throughout the daily operations of the agency.
- A Public Meeting was held on July 23, 2009, from 10 am to 12 pm, in Salem, Oregon, at the ODOT Materials Lab. The purpose of the meeting was to give interested parties and stakeholders an opportunity to provide information and comments on the proposed FFY 2010 DBE Annual Goal.

The ODOT Office of Civil Rights published legal notice of this proposed annual goal for FFY 2010 and this report on its website. Legal notices soliciting comments were published between June 26, and June 30, 2009, in the following general circulation media: The Bend Bulletin; The LaGrande Observer; The Medford Mail Tribune; The Portland Daily Journal of Commerce; The Portland Oregonian; The Salem Statesman Journal; The Asian Reporter; and, The Portland Observer. Comments will be accepted by ODOT for 45-days after the publishing date.

On February 27, 2009, ODOT received a letter of protest regarding the rejection of a bid which listed a certified DBE firm not owned by African American, Asian Pacific or Subcontinent Asian individuals. Since the project had a race-conscious goal the bidder was required to include firms meeting the criteria set out in the waiver approved by US DOT. The letter was from the owner of a DBE firm who is Native American and alleged that the ODOT race-conscious project goal is discriminatory.

BREAKOUT of ESTIMATED RACE/GENDER-NEUTRAL and RACE/GENDER-CONSCIOUS PARTICIPATION

The USDOT regulations require that the maximum feasible portion of the DBE Overall Annual Goal of 11.5 percent be met by using race neutral methods. Included in the race/gender-neutral analysis is a consideration of: 1) The amount of dollars awarded to DBE firms as prime contracts; 2) Dollars awarded to DBE firms as non-committed DBEs on projects where goals were assigned, and; 3) Dollars awarded to DBE firms on projects where goals were not assigned.

Due to recent guidance issued by the USDOT, its Federal Highway Administration and Federal Transit Administration as a result of the decision of the 9th US Circuit Court in the Western States Paving Co., Inc. v. Washington State Department of Transportation, the State of Oregon had an entirely race- and gender-neutral DBE Program from April 19, 2006, until September 9, 2008. On October 31, 2007, MGT of America, Inc., completed a statewide disparity study of ODOT contracting and delivered the final report showing findings. The study includes both statistical and anecdotal information for the entire state and for each ODOT Region individually. The study concluded that for some of the presumptive groups (Native American, Hispanic American and non-Minority Women) there is no significant disparity in contracting, but Black American and Asian American DBE firms are underutilized in ODOT construction subcontracting when compared to availability during the life of the study. Prime contracts and personal and professional services and goods were not considered due to lack of availability or insufficient data.

ODOT submitted a waiver request to FHWA on March 7, 2008. Additional information was requested on March 19, 2008, and a response was sent to FHWA on April 7, 2008. On May 2, 2008, during a phone conference between ODOT and FHWA, it was agreed that ODOT would reengage MGT to do an analysis comparing the methodology used in the Disparity Study with that used by ODOT in calculating the 2009 Annual DBE Goal. The final report was received from MGT on May 12, 2008⁸. On September 9, 2008, US DOT approved ODOT's request for a waiver, which allows the Agency to subdivide the overall annual DBE goal and set race-conscious project-specific goals for African American, Asian Pacific and Subcontinent Asian DBE firms only. ODOT proposes a total of 1 percent race-conscious and 10.5 percent race-neutral goals for FFY 2009, based on the fact that the statewide availability was 4.88 percent African American or Asian American owned for DBEs in the 2007 Disparity Study, and the total Region 1 spending (Prime and sub) was 15.5 percent of total ODOT spending ($0.0488 \times 0.155 = 0.0076$, rounded up to 1 percent). The race-conscious goal will be applied to African-American and Asian-American DBE firms only. No project-specific goals would be set for Native American, Hispanic American or non-minority Women owned DBE firms, and all participation by those firms would be considered race- and gender-neutral. The ODOT will continue to closely monitor DBE participation for all presumptive groups to identify any trends indicating an increase or decrease in utilization.

The only previous Disparity Study of record conducted in Oregon was completed in May 1996, and was limited in scope. The 1996 study has not been considered in the annual DBE goal setting

⁸ A copy of the MGT supplemental study report is attached.

because it: a) only applied to the Portland Metro area, b) is over 10 years old, c) was conducted with minority-owned and women-owned firms who did not necessarily meet the criteria for certification as DBE, d) was primarily focused on contracting not associated with road and highway construction, and e) contained very little anecdotal information. In a legal opinion issued by Hardy Myers, Oregon Attorney General, ODOT was advised not to take any actions based on the 1996 Study.

To encourage race- and gender-neutral utilization, the ODOT will continue current efforts, and work to develop new strategies. DBE utilization will continue to be tracked as race-neutral participation where specific goals do not apply. ODOT will provide supportive services to DBEs, which may include technical support, training, qualified expense reimbursements, resource information, and other identified support, as funding allows. ODOT currently does not receive any federal funds for supportive services. The ODOT participates in outreach and networking events to communicate contracting information to firms, and is working on several projects to help all businesses to identify contracting opportunities. A new mentor/protégé program in collaboration with the Port of Portland is in the start-up phase. The ODOT continues to enforce its prompt payment provisions and processes. The ODOT will consider other race-neutral methods of increasing DBE utilization as they are identified.

IMPACT of ARRA '09 FUNDING

Since the Annual DBE Goal is a percentage of federal funds, and all federally-funded projects are managed in the same way, DBE firms should receive a proportionate amount of ARRA funds. The race-conscious portion of the annual goal is small enough that the DBE firms covered under the waiver should have sufficient capacity to participate in 1 percent of the total federal-aid contracts, and there are enough DBE firms whose use would be entirely race-neutral to account for the remaining 10.5 percent of the annual goal. As stated in the official guidance issued by the U.S. Department of Transportation on January 26, 2009, "The Department believes that modifications to overall goals will be needed rarely, if at all, to deal with administration of recovery package funds." ODOT concurs with that analysis, and therefore will not make any adjustments to the annual goal based on the increased contracting resulting from ARRA funds.

STATUS of DISPARITY STUDY

ODOT expects to reengage MGT of America in late calendar year 2010 to update and supplement the 2007 Disparity Study. The timeframe allows ODOT to collect two full years of race-conscious measures under the waiver from US DOT, and should provide at least one full year of non-construction contracting, so that there can be supportable evaluations of those areas, in addition to updating the construction contracting information which was previously studied.

Waiver of Prohibition on the Use of Group Specific Goals - §26.15

A portion of the overall goal will be met using race-conscious measures. As indicated by the Disparity Study results, ODOT has received a waiver to implement race-conscious goals of limited application to Black American, Subcontinent Asian American and Asian Pacific American owned DBE firms.