



U.S. Department
of Transportation
**Federal Highway
Administration**

Oregon Division

September 18, 2012

530 Center Street NE, Suite 420
Salem, Oregon 97301
503-399-5749
503-399-5838 (fax)
www.fhwa.dot.gov/ordiv

In Reply Refer To:
HDA-OR
File:
972.000

Mr. Matthew Garrett
Director
Oregon Department of Transportation
355 Capitol Street NE
Salem, OR 97301

Dear Mr. Garrett:

In accordance with the provision of 49 CFR §26.45, we have reviewed the overall FY 2013 Disadvantaged Business Enterprise (DBE) goal mid-cycle adjustment submitted by the Oregon Department of Transportation (ODOT). ODOT submitted an overall goal of 16.95% for 2013, of which 5.45% will be attained through race and gender conscious means and 11.50% will be attained through race and gender neutral means. Our review considers the description of the data and methodology used in arriving at your overall goal, the base figure calculation and evidence supporting the calculation, and the public participation process used to develop the goal.

After reviewing this information, we have determined that the goal setting methodology you have chosen is consistent with the requirements of 49 CFR §26.45 and that you have followed the requirements for public participation in establishing your overall goal as set forth in 49 CFR §26.45(g). Further, we grant approval of the portions of your overall goal that you expect to meet through race neutral and race conscious means. The projection is subject to modification during the fiscal year(s) in accordance with 49 CFR §26.51. The basis for our approval and conditions are set forth more fully in the enclosed decision document.

As a reminder, the State is required to submit a separate overall DBE goal for programs funded by the Federal Transit Administration (FTA) and the Federal Aviation Administration (FAA), based upon the goal setting approach outlined in the State's DBE program. The State should contact the regional FTA and FAA offices for further guidance and assistance on these matters.

In addition, the State has made significant changes to its DBE program since FHWA's last approval, dated November 2010. FHWA regulations require that ODOT submit a written explanation of the changes along with revisions to ODOT's DBE program document to the Division office for approval. In your DBE Program documentation, please include:

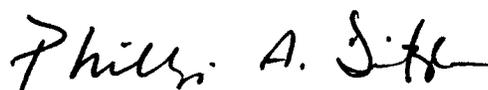
- An updated DBE Program Plan conforming to the revised DBE Rule, Federal Register Volume 76, Number 19, dated January 28, 2011.

- A description of the system in place to track Architecture & Engineering subcontracting data.

The remainder of the State's program has not been changed and contains the appropriate elements required under 49 CFR §26. The State may continue to operate under its current approved plan with the understanding that the items listed above must be submitted to FHWA within 90 days of receipt of this letter. Failure to comply may result in a finding of non-compliance.

I commend the Oregon Department of Transportation's efforts to remove barriers to the participation of DBE's in transportation contracts.

Sincerely,



Phillip A. Ditzler
Division Administrator

Enclosure – Approval Explanation for DBE Mid-Cycle Goal Setting Methodology Adjustment

**EXPLANATION FOR APPROVAL OF
OREGON DEPARTMENT OF TRANSPORTATION (ODOT)
DISADVANTGED BUSINESS ENTERPRISE (DBE) PROGRAM
MID-CYCLE ADJUSTMENT TO GOAL SETTING METHODOLOGY
FOR FISCAL YEAR 2013**

This document sets forth the Federal Highway Administration's (FHWA) reasons for approving the ODOT DBE mid-cycle adjustment to its goal setting methodology for FY 2013 based on the completion of an updated disparity study conducted by MGT of America, Inc. (MGT) in August 2011. ODOT proposes a 16.95% overall goal, of which 5.45% will be attained through race and gender conscious means and 11.50% will be attained through race and gender neutral means. ODOT is expected to make a good faith effort to meet its overall goal. The next scheduled DBE goal submission by ODOT will be due to FHWA on August 1, 2013.

SUMMARY OF ODOT AND FHWA REVIEW AND COORDINATION

On October 25, 2011, ODOT submitted to FHWA its revised Overall DBE Goal Calculation Report proposing a 9% goal, of which 5% was race conscious and 4% race neutral, for FY 2012 through 2013.

In response to concerns raised by FHWA, consideration of public comments, and further review of the 2011 Disparity Study, ODOT submitted a revised methodology. The revised overall goal proposed was 16.95%, a 7.95% increase from that previously submitted. The revised goal calculation addressed two issues: 1) In addition to certified DBEs, ODOT's revised methodology now considered potential DBE firms; and 2) A double counting error was corrected.

GOAL SETTING METHODOLOGY 49 CFR §26.45(b)

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

A. STEP ONE - DETERMINATION OF BASE FIGURE 49 CFR §26.45(c)(3)

Under the regulations, the State must begin the process by determining the base figure for the relative availability of DBEs.

Method Selected

- ODOT's method for establishing the base figure for the relative availability of DBEs follows the method suggested by 49 CFR §26.45(c)(3), which is the use of data from a Disparity Study. This option provides that a recipient may use a percentage figure derived from data in a valid, applicable disparity study to determine the base figure for the relative availability of DBEs. This method is acceptable, because it provides ODOT with a comprehensive analysis and most accurate use of current available data on DBE activity.

- The 2011 Disparity Study update, conducted by MGT, covered a three-year period from FY 2008 through FY 2010. Note: the study did not consider Portland's 2009 Disparity Study. However, ODOT considered the Portland Study to determine whether an adjustment would be needed in step two.
- With the collaboration of ODOT's staff, stakeholders, and other relevant data sources, MGT obtained electronic procurement data for the following business categories and contract role: Construction (prime and subcontracting), Architecture & Engineering (prime and subcontracting), Professional Services (prime contracting), Trades Services (prime contracting), and Goods and Supplies (prime contracting). At the time of the study, ODOT's Civil Rights office did not track Architecture and Engineering subcontractor participation data. In order to address this issue, ODOT sent out a survey resulting in 711 Architecture and Engineering sub consultants.

Relevant Market

- ODOT determined that the State of Oregon is its relevant geographic market area for its DBE Program. ODOT based its determination on data from the 2011 Disparity Study. Based on ODOT's calculation, 90.8% of firms are doing business with ODOT are located in the State of Oregon.
- ODOT applied MGT's availability data to determine the base figure for the relative availability of DBEs and potential DBEs by using the availability data for minority and women owned businesses determined to be ready, willing, and able to compete compared to all firms ready, willing, and able. ODOT weighted the availability and Federal dollars spent for all categories at the prime/sub level.

Business Category	Availability (primes & subs)		Weight (% spent in Category)		Weighted Availability	x 100 = %
Construction	0.1722	x	0.7438	=	0.128083	12.81%
A&E	0.1798	x	0.1896	=	0.034090	3.41%
Professional Services	0.1807	x	0.03	=	0.005421	0.54%
Trade Services	0.1224	x	0.013	=	0.001592	0.16%
Goods & Supplies	0.0145	x	0.0236	=	0.000343	0.03%
Total					0.169529	16.95%

Construction

Availability (primes & subs)

M/WBE Prime Contractors = 13.11% (see Exhibit 4-48)

M/WBE Subcontractors = 22.9% (see Exhibit 5-28)

Total Federal Dollars Awarded for Prime contractors = \$1,293,443,968 (see Exhibit 4-3)

Total Federal Dollars Awarded for Subcontractors = \$546,163,865 (see Exhibit 5-1)

Sub – retained dollars = (\$546,163,865 / \$1,293,443,968) = 42%

Prime – retained dollars = (100% - 42%) = 58%

Weighted construction availability for primes and subs = (58%x13.11%) + (42%x22.9%) = 17.2% or 0.1722

Weight (% spent in category)

Federal Dollars Spent in Construction = \$1,349,447,308 (see Exhibit 4-0)
Total Federal Dollars Spent for all business categories = \$1,814,214,816 (see Exhibit 4-0)
 $Weight = (\$1,349,447,308 / \$1,814,214,816) = 0.7438$
Weighted availability = 12.81%

Architecture & Engineering

Availability (primes & subs)

M/WBE Prime Contractors = 17.87% (see Exhibit 4-48)
M/WBE Subcontractors = 18.7% (see Exhibit 5-28)
Total Federal Dollars Awarded for Prime contractors = \$317,887,311 (see Exhibit 4-12)
Total Federal Dollars Awarded for Subcontractors = \$42,609,592.54 (see Exhibit 5-16)
Sub – retained dollars = $(\$42,609,592.54 / \$317,887,311) = 13\%$
Prime – retained dollars = $(100\% - 13\%) = 87\%$
 $Weighted\ construction\ availability\ for\ primes\ and\ subs = (87\% \times 17.87\%) + (13\% \times 18.7\%) = 17.98\% \text{ or } 0.1798$

Weight (% spent in category)

Federal Dollars Spent = \$343,930,706.12 (see Exhibit 4-0)
Total Federal Dollars Spent for all business categories = \$1,814,214,816 (see Exhibit 4-0)
 $Weight = (\$343,930,706.12 / \$1,814,214,816) = 0.1896$
Weighted availability = 3.41%

Professional Services

Availability (primes)

M/WBE Prime Contractors = 18.07% or 0.1807 (see Exhibit 4-48)

Weight (% spent in category)

Federal Dollars Spent = \$54,408,507.65 (see Exhibit 4-0)
Total Federal Dollars Spent for all business categories = \$1,814,214,816 (see Exhibit 4-0)
 $Weight = (\$54,408,507.65 / \$1,814,214,816) = 0.03$
Weighted availability = .54%

Trade Services

Availability (primes)

M/WBE Prime Contractors = 12.24% or 0.1224 (see Exhibit 4-48)

Weight (% spent in category)

Federal Dollars Spent = \$23,561,976.80 (see Exhibit 4-0)
Total Federal Dollars Spent for all business categories = \$1,814,214,816 (see Exhibit 4-0)
 $Weight = (\$23,561,976.80 / \$1,814,214,816) = 0.013$
Weighted availability = .16%

Good & Supplies

Availability (primes)

M/WBE Prime Contractors = 1.45% or 0.0145 (see Exhibit 4-48)

Weight (% spent in category)

Federal Dollars Spent = \$42,866,317.50 (see Exhibit 4-0)

Total Federal Dollars Spent for all business categories = \$1,814,214,816 (see Exhibit 4-0)

$Weight = (\$42,866,317.50 / \$1,814,214,816) = 0.0236$

Weighted availability = 0.03%

The sum of weighted availability for all business categories results in 16.95%, which is ODOT's Step 1 base figure.

B. STEP TWO - ADJUSTMENTS 49 CFR §26.45(d)

Once a base figure has been calculated, the State must examine all of the evidence available in its jurisdiction to determine if an adjustment is needed to the base figure to arrive at the overall goal. The idea is to identify the level of DBE participation one would expect, absent the effects of current and past discrimination. ODOT considered the following information to determine if an adjustment would be needed:

Past DBE Participation

- The median is 12.40%, which is less than the base figure determined in step one.
- Although the base figure in step one is higher than previous DBE participation in FY 2011, ODOT achieved 15.1% in DBE commitments and awards.
- Based on the points mentioned above, ODOT determined no adjustment to the base figure is warranted.

ANNUAL DBE PARTICIPATION	
FY	PERCENTAGE
2007	10.60%
2008	13.60%
2009	12.40%
2010	9.60%
2011	15.10%
Median	12.40%

City of Portland's 2009 Disparity Study

- ODOT considered the findings associated with this study; however, Portland's construction opportunities include more vertical construction whereas ODOT's are primarily in horizontal construction. Therefore, the Study was not deemed relevant to a step two adjustment and the statewide DBE goal.

Credit, Financing, and other Barriers

- ODOT referenced the City of Portland's 2009 Disparity Study finding on statistical data that shows disparity in access to credit and financing and provides analysis that indicates disparity negatively impacts minority owned firms. ODOT pointed out that there were no formal complaints, claims or lawsuits alleging

discrimination in bonding or financing. However, in an effort to improve bonding within the DBE community, ODOT is currently coordinating a six-week Bonding Education Program with various stakeholders to help promote DBEs. Based on this information, ODOT determined that the FY 2013 goal would not be adjusted based on credit and financing, and other barriers to DBEs doing business with ODOT.

For these reasons, ODOT did not make a step two adjustment.

C. RACE AND GENDER NEUTRAL AND CONSCIOUS MEASURES

In accordance with 49 CFR §26.51, ODOT has evaluated race and gender neutral and conscious measures. ODOT anticipates that it can achieve 5.45% of its DBE participation through race and gender conscious means and 11.50% will be attained through race and gender neutral means.

- ODOT determined the race-neutral and conscious split by applying the race and gender neutral achievement FY 2008–2012 data from the Uniform Report of DBE Commitments/Awards and Payments.
- The median race and gender neutral achievement for the current and previous four years is 11.50%. The overall goal of 16.95% less the median race and gender neutral participation of 11.50% equals 5.45%. Thus, ODOT projects it will meet 11.50% of its overall goal through race and gender neutral means and 5.45% by setting race and gender conscious contract goals on select construction and A&E contracts.

FY	Race Neutral Utilization
2008	11.50%
2009	11.76%
2010	7.97%
2011	13.15%
2012	10.74%
Median	11.50%

- On August 20, 2012, the U.S. DOT approved ODOT’s request to modify the DBE Program waiver granted on September 9, 2008, to reflect the results of the 2011 Disparity Study. Construction contracting race conscious measures are limited to the following groups: African American and Subcontinent Asian Americans. For Architecture and Engineering, race and gender conscious measures apply to the following groups: African American, Subcontinent Asian American, Native American, Hispanic American, and non–minority women.

Race neutral measures used by ODOT to meet its overall goal

- ODOT offers small business quarterly trainings, attends outreach events, provides supportive services and communicates with the sub and prime contractor community about ODOT's DBE policy statement.

D. PUBLIC PARTICIPATION 49 CFR §26.45(g), §26.15(b)(1)

The regulation requires that the State must provide for public participation when establishing its overall goal.

ODOT undertook the following stakeholder involvement efforts:

DBE Goal and 2011 Disparity Study

- On June 17, 2011, ODOT hosted a Small Business Information and Certification workshop at which MGT provided an update on the Disparity Study. Based on the sign-in sheets, 80 people were in attendance. Those in attendance included people from the contracting community and minority business advocacy groups.
- On September 22 and 23, 2011, ODOT hosted two public meetings to discuss the results of the 2011 Disparity Study. Based on the sign-in sheets for both meetings, 55 people were in attendance, including representatives of the contracting community and minority business advocacy groups. Although a summary of comments was not provided in ODOT's originally proposed FY 2012-2013 goal submittal, in June 2012 ODOT summarized the public's comments from the hearings related to the waiver, which includes verbal and written comments that also applied to the goal methodology calculation. In response, ODOT informed the public that the goal calculation methodology was being reviewed by FHWA.
- On January 20, 2012, the National Association of Minority Contractors – Oregon (NAMC-O) submitted a formal letter to ODOT expressing their concerns with the methodology used to develop the originally proposed FY 2012-2013 goal, among other issues related to the administration of the program. ODOT responded to the NAMC-O letter on January 26, 2012.
- ODOT advertised its initial DBE goal of 9% in the following Oregon newspapers including minority-focused publications:
 - The Bulletin
 - El Latino de Hoy
 - The Register Guard
 - The Observer
 - Mail Tribune
 - The Daily Journal of Commerce
 - The Oregonian
 - Salem Statesman Journal
 - Asian Reporter
 - Portland Observer

Modification to ODOT's DBE Program Waiver

ODOT held two public hearings on the proposed waiver modifications, on April 26, 2012 in Portland, and on April 30, 2012 in Salem. Audio recordings, sign-in sheets, presentation materials and a summary of the public participation process and comments and ODOT responses were provided to FHWA. Based on the sign-in sheets for both meetings, forty-four people representing DBE Firms, Prime Contractors, ODOT, FHWA, and MBE, WBE, and ESB firms were in attendance. ODOT published notices and e-

mailed save-the-date announcements regarding the public hearings to the following stakeholders and industry organizations:

- Governor's Advocate
- National Association of Minority Contractors – Oregon (NAMC-O)
- Oregon Association of Minority Entrepreneurs (OAME)
- African American Chamber of Commerce
- Hispanic Chamber of Commerce
- Native American Chamber of Commerce
- Women in Construction
- Asian Pacific Chamber of Commerce
- American Council of Engineering Companies (ACEC) of Oregon
- Association of General Contractors (AGC) of Oregon
- Associated Builders & Contractors (ABC) – Pacific Northwest
- Directory of Certified Firms

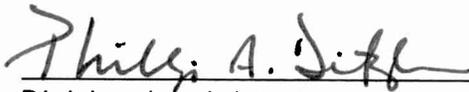
ODOT provided a formal response to the advocacy groups that provided written comments.

CONCLUSION

For the above reasons, FHWA approves the ODOT FY 2013 adjusted DBE Goal Setting Methodology, with conditions.

FHWA acknowledges that the regulations provide for flexibility in establishing and implementing the state's DBE goal setting methodology. However, it is FHWA's responsibility to ensure the description of the data and methodology used in arriving at the State's overall goal and public participation activities meet the spirit and the letter of the rules. It is FHWA's position that ODOT must address the conditions listed below to fully meet the intent of the DBE goal setting requirement. The conditions are:

- An updated DBE Program Plan conforming to the revised DBE Rule, Federal Register Volume 76, Number 19, dated January 28, 2011.
- A description of the system in place to track Architecture & Engineering subcontracting data.



Division Administrator

SEPTEMBER 18, 2012
Date

FEDERAL FISCAL YEAR 2013 DBE GOAL

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) 2013 federally assisted contracts. The goal was developed in compliance with federal regulations set forth at 49 CFR Part 26, Participation by Disadvantaged Business Enterprises in U.S. Department of Transportation (USDOT) Programs. The goal identifies the relative availability of DBEs based on demonstrable 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 staff's determination of the level of DBE participation that would be expected absent the effects of discrimination.

FFY 2013 Goal Determination

After thoroughly reviewing the DBE Goal Calculation Report for FFYs 2012 – 2013¹ with FHWA, considering public comments, and further reviewing the 2011 ODOT Disparity Study Update availability results, ODOT submits this revised goal calculation report upon the request of FHWA.

ODOT proposes to make the goal revision applicable to the third year² of the three-year period of FFYs 2011 - 2013, since there are only three full months remaining in FFY 2012. ODOT has determined the overall goal for FFY 2013 should be 16.95%, based on calculations using availability data from the 2011 ODOT Disparity Study Update. ODOT proposes 5.45% of the overall goal to be achieved through race- and gender-conscious means and 11.50% to be achieved through race- and gender-neutral means for FFY 2013.

ODOT proposes to meet the race- and gender-conscious portion of the overall goal through the setting of DBE contract goals on select construction and Architecture, Engineering and related services (A&E) contracts for DBE presumptive groups that experienced substantial underutilization during the disparity study period. The results of the 2011 Disparity Study Update indicate the following:

Construction Contracting:

Race-conscious contract goals should apply to:

- Black American-owned DBE firms, and
- Subcontinent Asian American-owned DBE firms

A&E Contracting:

Race- and gender-conscious contract goals should apply to:

- Black American-owned DBE firms,
- Subcontinent Asian American-owned DBE firms,
- Native American-owned DBE firms,
- Hispanic American-owned DBE firms, and
- Non-minority women-owned DBE firms

¹ Submitted to FHWA for review on October 25, 2011.

² Federal fiscal year 2013 is October 1, 2012 - September 30, 2013 making this goal effective on October 1, 2012.

All participation by DBEs other than those firms listed above, and all DBE participation achieved over the amount required to meet contract-specific goals will be considered race- and gender-neutral participation. ODOT expects the majority of the overall goal to be met through participation on construction contracts and another substantial portion on A&E contracts. On average, approximately 75% of FHWA funding goes to construction versus 20% percent for A&E services. These percentages should be roughly commensurate in the dollar volume of DBE participation on construction versus A&E contracts to meet the overall annual goal.

USDOT Goal-Setting Requirements

In setting the overall annual goal for 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, 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 effects of discrimination:

- **Step 1** – Compute the base figure using data from one of the of the following options set out in 49 CFR 26.45(c) to determine relative availability: (1) DBE directories and census reports, (2) bidders list, (3) disparity study, (4) the goal of another DOT, or (5) other alternatives.
- **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.

In establishing this goal, ODOT is also required to do the following:

- Provide for public participation in the establishment of the overall goal;
- Specify the relevant market area used for the calculation;
- 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).

Public Participation

Public meetings and quarterly training workshops are hosted by ODOT throughout the year, and Civil Rights staff attend a variety of organization events, pre-bid or pre-construction meetings and training events each month. Overall goals and project-specific goals are frequent topics. Because the 2011 Disparity Study Update has a significant impact on the goals, meetings to discuss the study included questions and comments on goal-setting. Meetings were held on June 17, 2011, to update the public on the progress of the study, and on September 22 and 23, 2011, to present the results.

On November 8, 2011, ODOT published notice of the proposed waiver modification and the original, revised DBE Goal Calculation Report for FFYs 2012 – 2013. The notice was published across the state in the following trade, minority, and general circulation publications: Bend Bulletin, El Latino de Hoy, Eugene Register Guard, La Grande Observer, Medford Mail Tribune, Portland Daily Journal of Commerce, Portland Oregonian, Salem Statesman Journal, Asian

Reporter, and Portland Observer. The notice sought public comment on the proposed amendments to the waiver based on disparity study findings and on the proposed 9% overall goal, of which 5% would be race- and gender-conscious and 4% race- and gender neutral.

In addition, ODOT held two public hearings on the proposed waiver modifications, one on April 26, 2012 in Portland and another on April 30, 2012 in Salem. A variety of stakeholders attended the two hearings, including DBEs and other small, minority- or women-owned firms, prime contractors and consultants, several ODOT staff, and an FHWA staff member. ODOT published notices in advance of the public hearings in the same industry, trade, and general circulation papers the goal and waiver notices were published. ODOT also sent out e-mail “save-the-date” and “reminder” announcements regarding the public hearings to the following stakeholders and industry organizations: Governor’s Advocate, National Association of Minority Contractors – Oregon (NAMC-O), Oregon Association of Minority Entrepreneurs (OAME), African American Chamber of Commerce, Hispanic Chamber of Commerce, Native American Chamber of Commerce, Women in Construction, Asian Pacific Chamber of Commerce, American Council of Engineering Companies (ACEC) of Oregon, Association of General Contractors (AGC) of Oregon, Associated Builders & Contractors (ABC) – Pacific Northwest, and those certified DBE and M/WBE firms that provided an email address in the Directory of Certified Firms.

The Office of Civil Rights Manager opened the hearings. The DBE Program Manager presented power point slides about the waiver modification request to USDOT and specifically explained that Pacific Asian American DBE firms would no longer be eligible to meet race-conscious contract goals. After the first public hearing, the power point presentation was posted on the Office of Civil Rights home page. A period for public comment was provided at each hearing. While the stated purpose of the meeting was to focus on the waiver, many of the comments touched on the disparity study and the DBE program generally.

ODOT also received several written comments before, during, and within a couple of days after the hearings. Three of the written comments were fairly in-depth, two of which were formal comments from minority business advocacy organizations. The other written comments were provided by an A&E industry stakeholder. All three written comments expressed concerns over the methodologies used in the goal calculation and impacts the race-conscious portion may have on DBEs. One written comment indicated that discrimination against African American firms is extreme and egregious enough to justify contract set-asides for African American DBE firms only. One comment supported an expansion of supportive services to all DBE and small business firms. One comment expressed concern that the goal calculation does not take into account contracting capacity and that the base figure did not support such a high goal.

ODOT provided formal written responses to the advocacy groups that provided formal written comments. ODOT also responded that the comments would be considered by ODOT and FHWA as we continue to work with FHWA on the waiver request and goal calculation approval processes.

After discussion with FHWA, consideration of public comments, and upon further review of the submitted goal calculation and the disparity study data, ODOT determined the agency would more directly utilize the relative availability data set out in the study as permitted under 49 CRF 26.45(c) to calculate the overall goal. Unlike the goal calculation report submitted to FHWA on

October 25, 2011, the revised disparity study availability analysis takes into account potential DBEs and represents a more refined approach to analyzing availability. ODOT also determined it would further refine the data by weighting the availability data by business category and again at the prime and subcontractor participation level within each business category, which should help address concerns about contractor capacity.

STEP ONE – DETERMINING THE BASE FIGURE

A. Source of Data

In 2011, ODOT contracted with MGT of America, Inc. to provide a [Disparity Study Update](#) on DBE, minority-owned, and women-owned business availability, utilization, and disparity in contracting data. After considering the options under 49 CFR 26.45(c), and since ODOT has updated disparity study data that is applicable to ODOT contracting activities, and this data represents the most refined data available, the agency determined it would use option (3) under 49 CFR 26.45(c) to determine DBE relative availability. This option provides that a recipient may use a percentage figure derived from a valid, applicable disparity study to determine the base figure of DBE relative availability.

MGT collected electronic procurement data from ODOT for the three year study period (FFYs 2008 – 2010) in the following business categories: Construction prime- and sub-contracting; Architecture and Engineering-related services (A&E) prime- and sub-contracting; Professional Services prime-contracting; Trade Services prime-contracting; and Goods and Supplies prime-contracting. MGT analyzed the following sources of data: (1) From ODOT Office of Civil Rights: construction prime- and sub-contract award and payment information, prime- and sub-bidders lists, and bidding information; and (2) From the ODOT Purchasing and Contract Management System database: architecture and engineering, professional services, trades services, and goods and supplies information. MGT also collected a list of Oregon certified vendors, including certified DBEs. Section 4.4 of the Study includes a more detailed description of MGT's data collection and management processes.

B. Relevant Market

ODOT determined the State of Oregon to be the relevant market area for highway construction and A&E services. This determination is based upon the market area analysis in the 2011 Disparity Study Update in Section 4.5 and expenditure information in Exhibits 4-0, 4-2, 4-11, 4-21, 4-30, and 4-40 of the study. Overall, the disparity study shows ODOT expends a substantial majority (90.8%)³ of contracting dollars within the state, particularly in the construction (93.25%) and A&E (92.43%) contracting business categories, in which ODOT expends the majority of its prime contract dollars (\$1,693,378,014.00 out of \$1,814,214,816.00, or 93.33% total).

C. Determination of Relative Availability

To initially calculate the overall DBE Goal for FFY 2013, ODOT determined the base figure for the relative availability of DBEs and potential DBEs by using the availability data for minority-

³ The 90.8% figure was determined by taking the cumulative percent MGT identified as having been spent in Oregon and multiplying that figure by the weight for each business category and totaling all categories. See *infra*, fn. 11 for weight information.

and women-owned businesses determined to be ready, willing, and able to compete by MGT of America in the 2011 Disparity Study Update. The study aggregates availability over the study period. It does not provide a single relative availability figure for primes and subs in all business categories, nor does it provide a single availability figure for primes and subs in each business category. Rather, the study provides availability data expressed as a percentage figure in each business category and further breaks the data down by prime- and sub-contract levels in the construction and A&E business categories.⁴

While the study data assumes all primes are available to contract as subs, it does not likewise assume all subs are available to contract as primes. Thus, to calculate overall prime and sub availability and the Step 1 base figure, ODOT first determined the combined prime and sub availability for construction and A&E business categories, and then weighted availability in each business category based on the percentage of dollars expended in each business category over the study period.

Combined Prime and Sub availability for Construction and A&E Business Categories

The 2011 ODOT Disparity Study Update separated availability into primes and subs in both the Construction and A&E business categories.

Construction Contracting

- **13.11% Prime Contractor** availability⁵
- **22.9% Subcontractor** availability⁶
Prime-retained dollars in the relevant market were **58%** of total dollars paid to prime contractors over the study period. Prime retained dollars were figured by dividing the amount paid to subcontractors by the amount paid to primes, resulting in **42% sub-retained dollars** and subtracting that amount from 100%.⁷
- When these weights are used, this results in a weighted construction availability of 17.2%, or $[(58\% \times 13.11\%) + (42\% \times 22.9\%)] = 17.22\%$.

A&E Contracting

- **17.87% Prime Contractor** availability⁸
- **18.7% Subcontractor** availability⁹
- **Prime-retained dollars** in the relevant market were **87%** of total dollars paid to prime contractors over the study period. Prime retained dollars were figured by dividing the amount paid to subcontractors by the amount paid to primes, resulting in **13% sub-retained dollars** and subtracting that amount from 100%.¹⁰
- When these weights are used this results in a weighted A&E availability of 17.98%, or $[(87\% \times 17.87\%) + (13\% \times 18.7\%)] = 17.98\%$.

⁴ 2011 ODOT Disparity Study Update, Exhibits 4-48 (prime-level availability in all business categories) and 5-28 (sub-level availability in construction and A&E business categories).

⁵ Id., Exhibit 4-48.

⁶ Id., Exhibit 5-28.

⁷ Id., Exhibits 5-1 and 4-3: $\text{Sub } \$546,163,865 \div \text{Prime } \$1,293,443,968 = 0.42225$ (42%), and $100\% - 42\% = 58\%$.

⁸ Id., Exhibit 4-48.

⁹ Id., Exhibit 5-28.

¹⁰ Id., Exhibits 5-16 and 4-12: $\text{Sub } \$42,609,593 \div \text{Prime } \$317,887,311 = .1340$ (13%), and $100\% - 13\% = 87\%$.

Weighted Availability by Business Category

ODOT determined the weight to apply to each business category by determining the percentage of dollars expended in each business category at the prime level. The “weight” percentage figures were calculated by dividing the dollars expended at the prime level in each business category by the total expended in all business categories at the prime level.¹¹ We then weighted availability by business category as follows:

Business Category	Availability (*primes & subs)		Weight (% spent in Category)		Weighted Availability	x 100 = % (to nearest 100 th)
Construction*	0.1722	x	0.7438	=	0.128083	12.81%
A&E*	0.1798	x	0.1896	=	0.034090	3.41%
Professional Services	0.1807	x	0.03	=	0.005421	.54%
Trade Services	0.1224	x	0.013	=	0.001592	.16%
Goods & Supplies	0.0145	x	0.0236	=	0.000343	.03%
Totals					0.169529	16.95%

Step 1 Base Figure = 16.95%

STEP TWO – ADJUSTING THE BASE FIGURE

The regulations require that after the base figure is calculated, ODOT must consider available evidence to determine if the figure should be adjusted higher or lower than the base figure. In determining whether to adjust the base figure, ODOT considered past DBE participation for the last five complete federal fiscal years, any available and relevant disparity studies (to the extent that they are not accounted for in the base figure), projected federal aid project levels, certification volume, and financial barriers affecting DBEs.

A. Past Participation:

ODOT researched the DBE participation on federal-aid contracts executed in the FFYs 2007 through 2011. This data is taken from the DBE commitments/awards section in ODOT’s annual Uniform Report of DBE Commitments/Awards and Payments submitted to FHWA.

ANNUAL DBE PARTICIPATION	
FFY	PERCENTAGE
2007	10.60%
2008	13.60%
2009	12.40%
2010	9.60%
2011	15.10%
Median	12.40%

¹¹ See Id., Exhibit 4-0. The total amount expended at the prime level in all business categories combined was \$1,814,214,816. Thus, for Construction $\$1,349,447,308 \div \$1,814,214,816 = 0.7438$, for A&E $\$343,930,706 \div \$1,814,214,816 = 0.1896$, for Prof. Services $\$54,408,508 \div \$1,814,214,816 = 0.03$, for Trade Services $\$23,561,977 \div \$1,814,214,816 = 0.013$, and for Goods & Supplies $\$42,866,318 \div \$1,814,214,816 = 0.0236$.

Because the Overall Goal calculated in Step 1 above is significantly higher than the participation during the past five full FFYs, ODOT considered making a downward adjustment by averaging the 2007 – 2011 median achievement of 12.40% with the base figure as follows:

$$\frac{\text{Base Goal calculated in Step 1} + \text{Median achievement past 5 years}}{\text{Divide by 2}} = \text{Goal}$$

Or, $16.95\% + 12.4\% = 29.35\%$, and $29.35\% \div 2 = 14.67\%$. However, in FFY 2011, ODOT saw 15.1% DBE achievement in commitments and awards, which shows that the contracting community has the ability to achieve higher than median past participation levels. With continued race- and gender-conscious measures on select construction and A&E contracts the agency should be able to achieve an un-adjusted goal of 16.95%. Furthermore, to make a downward adjustment to the base figure based on past participation could “fix” disparity into the calculation. Rather, setting the goal at the availability levels set out in the study should help increase availability and build DBE capacity due to increased opportunity. For these reasons, ODOT will not make a downward adjustment to the goal based on past participation.

B. Other Disparity Study Information

ODOT reviewed and considered the [City of Portland’s 2009 Disparity Study](#). The Portland study found disparities in construction contracting with the City and the Portland Development Commission. The study found that City programs that encouraged MBE and WBE utilization were generally successful, but there were disparities in contracting when no race- or gender-conscious measures were in place. The study also included statistical data and disparity findings that access to credit, financing, and other barriers affect MBE and WBE business opportunities, impacting business growth and capacity.

While Portland is in ODOT’s relevant market area and there is likely cross-over in DBE firm availability in both construction and A&E contracting, ODOT’s contracting opportunities are primarily in horizontal construction, while Portland’s contracting opportunities include more vertical construction. This could impact the availability analysis. Moreover, it would be difficult to quantify how Portland’s study findings should affect ODOT’s DBE goal. Thus, ODOT will not make an adjustment to its DBE goal on the basis of Portland’s study.

C. Projected Federal Aid Share Projects: FFYs 2010 - 2013

To project the value of contracts expected to be let during FFYs 2011, 2012 and 2013, we used ODOT’s Draft 2010 – 2013 Statewide Transportation Improvement Program (STIP) document. The document forecasts FHWA federal-aid dollars for ODOT projects valued at \$951,600,000 for construction and non-construction contracting.

The location of projects scheduled to be let was also taken into consideration. The majority of those projects are located within ODOT’s Region 1 or 2, and a moderate number in Region 3 which, geographically, is the western half of the state, from the Cascade Range to the Pacific Ocean and from the Oregon-Washington border in the north to the Oregon-California border in the south. An analysis of the certified DBEs that perform highway construction or A&E and related services work shows that over 80% of the available population resides in the same

geographic area. Based on this information, any adjustment to the overall goal would not be based on project location.

With respect to subcontractors, suppliers and service providers, the capacity is clearly there for them to participate in a meaningful manner. Gross receipt information supplied by most commonly utilized DBE firms shows that they have the capacity to perform a proportionate amount of the projected work.¹²

D. DBE Certification Volume

During FFYs 2009 through 2011, the number of certified DBEs has fluctuated up and down, increasing from 462 on October 1, 2008 to 513 on September 30, 2009, but then decreasing again to 480 on September 26, 2011. As of June 20, 2012, the total number of certified DBE firms has again increased to 540. Considering the uncertainty of DBE certification numbers fluctuating up and down, and that the availability data in the 2011 Disparity Study Update already accounts for potential DBEs, the FFY 2013 goal will not be adjusted based on certification volume. However, if the upward trend continues, ODOT will consider making an upward adjustment in future reports.

E. Access to Credit, Financing, and Other Barriers

During the previous fiscal year, there were no formal complaints, claims, or lawsuits filed with ODOT Office of Civil Rights alleging discrimination or disparity in bonding or financing.

The ODOT 2011 Disparity Study Update provided anecdotal information indicating that access to credit, financing, and bonding capacity are barriers that affect the ability of DBEs to form, grow, and compete. The City of Portland 2009 Disparity Study also included statistical data that shows disparity in access to credit and financing and provides analysis that indicates this disparity negatively impacts minority-owned firms. However, it is difficult to quantify how the findings in either disparity study should affect ODOT overall DBE goal. Thus, the FFY 2013 goal will not be adjusted based on access to credit and financing and other barriers to DBEs doing business with ODOT.

However, ODOT is actively pursuing supportive service options that will assist DBEs and other small businesses to gain access to financing and building bonding capacity. ODOT is currently leading an initiative with the USDOT – Northwest Small Business Transportation Resource Center, the Governor’s office, other agencies, prime contractors and the Oregon Association of Minority Entrepreneurs to bring both a Short Term Lending Program and a Bonding Education Program to Oregon for interested small businesses seeking state and local transportation construction contracting opportunities.

¹² Mason Tillman Associates, [State of Oregon Department of Transportation Contracting Capacity Analysis-- Region 1, June 2009](#), p. 1-2.

FFY 2013 Goal Determination

Taking the above information into consideration, ODOT has established a 16.95% DBE Goal for FFY 2013. This goal is based on the availability of ready, willing, and able firms based on the 2011 ODOT Disparity Study Update (Step 1), with no adjustments for past performance or other considerations (Step 2).

Breakout of Estimated Race/Gender-Neutral and Race/Gender-Conscious Participation

The USDOT regulations require that the maximum feasible portion of the DBE Overall Goal be met by using race neutral methods.

Due to guidance issued by the USDOT and the Federal Highway Administration as a result of the decision of the 9th US Circuit Court in the case of *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 disparity findings. The study included 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 was no significant disparity in construction contracting, but Black American and Asian American DBE firms (Subcontinent Asian and Asian Pacific together) were underutilized in ODOT construction contracting when compared to availability during the life of the study. Personal and professional services and goods were not considered due to lack of available or insufficient data.

ODOT submitted a waiver request to FHWA on March 7, 2008. On September 9, 2008, the Secretary of Transportation signed a waiver allowing ODOT to set race-conscious goals for Black American and Asian American DBE firms only.

The 2011 Disparity Study Update indicates that there has been a significant increase in contracting for Asian Pacific American-owned DBE firms in construction and that this presumptive group should no longer be included in race-conscious goals. ODOT proposes to set project-specific goals on construction contracts for Black American- and Subcontinent Asian American-owned DBE firms, and contract-specific goals in A&E for Black American-, Subcontinent Asian American-, Hispanic American-, Native American-, and non-minority female-owned DBE firms. On October 25, 2011, the agency submitted a request for an amendment to the current waiver from USDOT to allow modification of current practices and permit the race- and gender-conscious goals proposed in this report.

In projecting the maximum portion of the overall goal the agency expects to achieve through race- and gender-neutral means, ODOT analyzed the actual achievement of the overall annual goal through race- and gender-neutral methods in the current and previous four years. This data calculated from the DBE commitments/awards section in ODOT's annual Uniform Report of DBE Commitments/Awards and Payments submitted to FHWA. Where the projected portion of the goal using race- and gender-neutral methods is less than the overall annual goal, the

remaining portion is expected to be achieved by establishing contract goals for particular projects that have subcontracting opportunities.

FFY	Race Neutral Utilization
2008	11.50%
2009	11.76%
2010	7.97%
2011	13.15%
2012*	10.74%
Median RN Utilization	11.50%

* 2012 figure based on DBE commitment and award data for the period 10/01/2011 to 05/31/2012.

The median race- and gender-neutral achievement for the current and previous four years is 11.50%. The overall goal of 16.95% less the median race- and gender-neutral participation of 11.50% equals 5.45%. Thus, ODOT projects it will meet 11.50% of its overall goal through race- and gender-neutral means and 5.45% by setting race- and gender-conscious contract goals on select construction and A&E contracts.

Summary

As in past years, ODOT will continue to advise prospective contractors for new contracts on areas of possible subcontracting and of the availability of ready, willing and able subcontractors, including DBE firms, to perform such work. ODOT will also continue to carefully monitor its progress during the course of the year and will reduce race- and gender-conscious goals if race- and gender-neutral methods appear to achieve the overall annual DBE participation goal for FFY 2013. No project-specific goals will be set for Native American, Hispanic American, Asian Pacific or non-minority Women owned DBE firms in construction, and all participation by those firms will be considered race- and gender-neutral. No race-conscious goals will be set for Asian Pacific Americans on Architecture, Engineering or A&E-related services contracts, and all participation by those firms will be considered race- and gender-neutral. ODOT will continue to closely monitor DBE participation for all presumptive groups to identify any trends indicating an increase or decrease in utilization. In addition to monitoring goals performance, the agency will continue seeking new and innovative ways to provide supportive services geared toward growing small business firms, including DBEs.