

### 3. DBE GOAL DEVELOPMENT

#### 3.1 Overall Annual DBE Goal

As a recipient of US Department of Transportation (USDOT) financial assistance, and per 49 CFR Part 26, the Oregon Department of Transportation (ODOT) is required to set an overall goal for Disadvantaged DBE participation in USDOT assisted contracts. Unless indicated by a valid disparity study and USDOT-approved waiver, the overall goal will not be subdivided into group specific goals, or be established as a quota system.

ODOT OCR will establish an overall annual goal on a triennial basis for the participation of DBEs in all budgeted contracts utilizing Federal-aid highway funds. ODOT OCR will establish a separate overall annual goal on a triennial basis for the participation of DBEs in all budgeted contracts utilizing Federal Transit Authority (FTA) funds. The overall annual goals will be expressed as a percentage of the total amount of Federal-aid funds the Department anticipates spending in the fiscal year.

ODOT's overall goal is based on demonstrable evidence of ready, willing and able DBEs available to participate on USDOT assisted contracts. To the maximum extent feasible, ODOT intends to meet the established goals through the race- and gender-neutral measures described in Section 4.3 of ODOT's DBE Program Plan. Where race- and gender-neutral measures are inadequate to meet an overall goal, ODOT will establish contract-specific goals for particular projects with subcontracting opportunities (race- and gender-conscious method) as provided under a current, valid waiver from USDOT.

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).

See, USDOT publication [Tips for Goal-Setting in the DBE Program](http://www.dot.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise) at:

<http://www.dot.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>

A. Establishing Base Figure - Determining Relative DBE Availability

For FHWA-funded contracts and grants, ODOT will use a percentage figure derived from a valid, applicable disparity study to determine the base figure of DBE relative availability in accordance with option (3) under 49 CFR 26.45(c) to determine DBE relative availability.

Beginning in 2007, and again in 2011 and 2013 ODOT hired a consultant to conduct a disparity study, a disparity study update, and DBE availability update respectively to analyze data on DBE, minority-owned, and women-owned business availability, utilization, and disparity in FHWA-assisted contracting data.. See each study on the OCR [DBE Program – Disparity Studies](#) webpage for a detailed description of the data collection and management processes.

For FTA-funded contracts and grants, ODOT will use the OMWESB DBE Directory and census reports.

B. Adjustment to Base Figure

ODOT will consider any reasonable adjustment to the base figure based on demonstrable evidence indicating that the availability of DBEs for USDOT assisted contracts for the fiscal year may be higher or lower than the base figure indicates, past performance, verifiable barriers to success, adjustments indicated by studies (including disparity and availability studies), and any other relevant factors which can be supported with data. At a minimum, the OCR will analyze the results of ODOT's efforts to contract with DBEs for the most recent five federal fiscal years, any available and relevant disparity studies (to the extent that they are not accounted for in the base figure), and any available and relevant results of efforts by other DOTs or similar agencies to contract with DBEs.

C. Race-neutral Analysis

Once the overall annual goal is proposed, the OCR will analyze and project the maximum feasible portion of that goal that can be achieved by using race-neutral methods. Where the projected portion of the goal using race-neutral methods is less than the overall annual goal, the remaining portion will be achieved by establishing contract goals for particular projects that have subcontracting opportunities. This analysis is a review of past contracting history with information including, but not limited to:

- (1) DBE participation as prime contractors on USDOT assisted contracts;
- (2) DBE participation on projects where no DBE goals have been established;
- (3) DBE Participation on prime contracts exceeding contract goals;
- (4) DBE participation on projects as non-committed DBE subcontractors.

OCR will monitor and adjust the use of contract-specific goals in accordance with 49 CFR Part 26.51 (f). When projecting the percentage of the overall annual goal to be achieved through establishing contract-specific goals, OCR will analyze the actual achievement of the overall annual goal through race-neutral methods in the current and previous five years. When establishing contract-specific goals during the current fiscal year, the OCR shall analyze the progress towards achieving the overall annual goal and increase or reduce the use of contract-specific goals accordingly. ODOT will adjust the ratio of race- and gender-conscious and race- and gender-neutral methods to comply with court

decisions, legal challenges and guidance from USDOT, FHWA, or FTA as applicable.

In cases where an Availability and Disparity Study has provided evidence that some, but not all, presumptive groups should be included in race- and gender-conscious goals, ODOT will request a waiver from USDOT to allow the goals to be applied only to those groups identified as having a substantial or significant disparity in contracting.

#### D. Public Participation and Outreach Efforts

In establishing overall DBE goals, ODOT will provide for public participation. This will include: Public Notices published in trade and minority circulars; notices posted on the ODOT OCR website; public meetings; and, announcements and discussion at organizational and industry meetings.

Prior to finalizing the Overall Goals Analysis Report, ODOT will notify USDOT recipients, and other USDOT grantees, minority, women, and general contractors groups, community organizations, or other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and ODOT's efforts to establish a level playing field for the participation of DBEs, of the proposed goal.

ODOT will publish a notice announcing its proposed overall goal and the race-neutral/race-conscious breakout, informing the public that ODOT's Overall Goals Analysis Report is available for inspection during normal business hours at the Office of Civil Rights for a period of thirty (30) days, and that ODOT and the USDOT will accept comments on the proposed goals for forty-five (45) days from the date of the notice. The notice will be distributed in general circulation media, local minority-focused media, and trade association publications.

In conjunction with ODOT's activities to meet its overall DBE goals, ODOT conducts various public participation and outreach activities designed to broaden awareness of ODOT's Office of Civil Rights Program for Contracts. The measures described in 49 CFR 26.51, focusing on race-neutral means will be actively pursued; ODOT also encourages its contractors to make similar outreach efforts to include DBE participation in subcontracting opportunities. ODOT will continue to organize and offer training programs for to help businesses meet DBE eligibility requirements, to familiarize potential contractors with procurement procedures and requirements, and to otherwise develop effective programs to further DBE participation in ODOT's contracting activities.

#### E. Goal Submissions

- (1) The three-year overall goal report will be submitted to the appropriate operating authority (FHWA or FTA), for review on August 1 of the relevant year. The goal is published on the [ODOT Civil Rights DBE Resource Documents](#) page.
- (2) A description of the methodology used to establish the goal, including the Base Figure, and the supporting data from which it was calculated, with any adjustment, will be included.
- (3) A projection of the portions of the overall goal which will be met by race- and gender-neutral means and basis for that projection will be included.
- (4) The overall goal for ODOT Transit activities will be submitted to FTA every three years by August 1. This goal is based on non-vehicle monies

only and is specific to agencies which receive greater than \$250,000 from ODOT Transit.

#### F. Transit Vehicle Manufacturers Certification

The Department shall require any transit vehicle manufacturers to certify that they have established an overall annual DBE participation goal that has been approved by FTA before they can bid on any Authority contracts. Expenditures for FTA-assisted transit vehicle procurements are not included in the funding base to which the overall goal for other FTA-assisted contract expenditures apply.

### 3.2 Contract-Specific Goals

#### A. Contract Goal Setting

DBE participation goals may be assigned on Federal-aid highway (construction and professional services) projects that have subcontracting possibilities. Unless prohibited, contract goals will be established to meet any portion of the overall goal not met by using race-neutral means (49 CFR §26.51(d)). Contract goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals, unless verified data (for example, through a disparity study) supports the need to more narrowly tailor the goals for specific groups, and a waiver has been approved by USDOT.

In May 2005, the U.S. Ninth Circuit Court ruled that a state department of transportation could not establish a race- and gender-conscious DBE program without evidence showing that discrimination and inequity in contracting opportunities in that state's transportation industry had occurred. Consequently, ODOT hired a consultant to conduct a disparity study in 2007 and an update in 2011. Based on the results of these studies, ODOT sought and obtained a waiver from the requirement of 49 CFR §26.51(d) from the USDOT to allow ODOT to assign contract goals only for those DBE groups shown to have experienced substantial disparities in contracting with ODOT. For current information, see the ODOT Office of Civil Rights [DBE Program Waiver](#) page.

For ODOT's FHWA-funded construction contracts and architecture and engineering and related services (A&E) contracts, prior to solicitation of bids, all proposed projects are reviewed by the OCR to identify work that could be performed by DBEs. The procedure and criteria used in assigning project goals include:

- (1) Project location, size, duration, and dollar value.
- (2) The nature of project, (type of work and potential scheduling and coordination work).
- (3) Availability of certified DBE firms within a reasonable distance from the project location that perform items identified capable of being subcontracted.
- (4) Any other relevant criteria, including court decisions and DBE Program Waivers or directives from USDOT.

OCR assigns the goal and forwards it to the appropriate unit (construction specifications or procurement office) or local public agency for inclusion in the project plans and specifications as applicable.

For FTA-funded grants and contracts, ODOT has an entirely race- and gender-neutral DBE program. No contract goals will be assigned.

B. Aspirational Targets

DBE Aspirational Target participation evaluations have been performed in the past, but will no longer be included for federal-aid projects. No other race- or gender conscious aspirational targets will be set for small business participation on projects with federal funding.

C. Design-Build

When projects are let using the Design-Build method and when federal monies are utilized, the original RFQ and RFP will specify that there will be a DBE goal. The exact goal will be determined in the final stage of the selection process as the scope of work becomes clearer. The design and construction phases of the project will be evaluated separately.

D. Construction Management General Contractor (CM/GC)

CM/GC projects will be evaluated in the same manner as Design-Build.

### 3.3 Counting DBE Participation towards Meeting Annual Goals

DBE participation is credited using the following procedures (see Section 7.2, Reporting to USDOT for information on DBE participation reporting):

A. Work Actually Performed

Only the work actually performed by a DBE, (according to section 4.1.C.) will be counted toward the DBE goal. Only the type of work in which the DBE is certified, will be counted as long as the DBE performs a Commercially Useful Function (CUF). The cost of supplies and materials obtained by the DBE, or equipment leased (except from prime contractor or its affiliate), may also be counted.

B. DBE Subcontracts to non-DBE

Work that a DBE subcontracts to a non-DBE firm does not count towards the DBE goal, with the exception of trucking firms leasing additional trucks in compliance with the one-for-one rule. Expenditures may only be counted if the DBE is performing a CUF. A DBE shall perform at least thirty percent of the total cost of its contract with its own work force.

C. Materials & Supplies

If materials or supplies are obtained from a DBE manufacturer, one hundred percent of the cost will be counted. If the materials and supplies are purchased from a DBE regular dealer, sixty percent of the cost will be counted. If services are brokered, or materials or supplies are purchased from a broker, only the brokerage fee will be credited.

D. Achievement

DBE achievement will not be counted toward the overall goal until the DBE has been paid. OCR will track race-conscious DBE participation separately from race-neutral DBE participation. All DBE participation achieved on projects with no contract-specific goal and all participation over the amount required to meet contract-specific goals will be considered race-neutral participation. Additionally, OCR will not count the portion of DBE participation that is achieved after a DBE has been decertified during the performance of a contract.

### **3.4 Counting DBE Participation to Meet Annual Goals of Sub-recipients**

#### **A. Sub-recipients Adopting the ODOT Program Plan**

Credit shall be authorized or deducted per the requirements of Section 3.3 regardless of whether or not the ODOT or the Sub-recipient is the contracting agency. Certified Local Public Agency sub-recipients of Federal-aid highway program funds are required to submit bid, award, payment, and compliance reports to ODOT OCR in accordance with the civil rights section of the [Local Agency Guidelines \(LAG\) Manual](#). ODOT shall include in its semi-annual reports to FHWA the status of sub-recipient DBE participation activities falling within this category (see Section 7.2, Reporting to USDOT).

FTA recipients shall be required to report semiannually demonstrating their goal attainment to-date in a manner consistent with the requirements of 49 CFR 26 reporting requirements.

#### **B. Sub-recipients with an ODOT Approved Program Plan**

As per FHWA guidance, no sub-recipients of Federal-aid highway funds fall into this category. Recipients of FTA funds shall be required to report semiannually demonstrating their goal attainment to-date in a manner consistent with the requirements of 49 CFR 26 reporting requirements. Sub-recipients shall authorize or deduct credit for work performed by DBEs per the requirements of 3.3 above regardless of whether they or ODOT is the contracting agency.