

# CHAPTER 1.

## Introduction

The federal government requires state and local governments to operate the Federal Disadvantaged Business Enterprise (DBE) Program if they receive U.S. Department of Transportation (USDOT) funds for transportation projects. The Oregon Department of Transportation (ODOT) has operated some version of the Federal DBE Program for many years.

Most of the USDOT funds that ODOT receives are for highway-related work from the Federal Highway Administration (FHWA), which is the focus of the 2016 Disparity Study.<sup>1</sup> ODOT must set an overall goal for participation of DBEs in its FHWA-funded contracts, expressed as the percentage of contract dollars that ODOT would expect to go to DBEs absent the effects of discrimination. ODOT's next three-year overall DBE goal will begin October 1, 2016.

ODOT retained Keen Independent Research LLC (Keen Independent) to conduct the 2016 Disparity Study. This report is a draft and will be augmented based on further public input. ODOT is using information from this draft report to propose a three-year overall DBE goal for FHWA-funded contracts and to propose the measures it will use to meet that goal, which can be found at [www.ODOTDBEstudy.org](http://www.ODOTDBEstudy.org). ODOT is seeking public comment on the 2016 Disparity Study draft report and its proposed overall DBE goal through April 30, 2016. Information on the above website and provided at the end of this chapter identify ways that anyone can comment on the draft report and the proposed DBE goal.

The balance of Chapter 1:

- A. Introduces the study team;
- B. Provides background on the Federal DBE Program;
- C. Describes Oregon's MWESB Program and other programs;
- D. Discusses previous disparity analyses regarding ODOT contracts;
- E. Outlines the analyses in the 2016 Disparity Study and describes where results appear in the report;
- F. Summarizes the public participation process in the 2016 Disparity Study; and
- G. Provides information about the public comment process for the draft report and ODOT's proposed DBE goal, including five public meetings to be held in April 2016.

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<sup>1</sup> ODOT also receives a relatively small amount of funds from the Federal Transit Administration (FTA) and separately sets an overall DBE goal for those contracts. The Oregon Department of Aviation operates the Federal DBE Program for Federal Aviation Administration (FAA) funding that the State of Oregon receives.

## A. Study Team

David Keen, Principal of Keen Independent, directed this study. He has led similar studies for more than 90 public agencies throughout the country, including a number of state departments of transportation. Keith Wiener from Holland & Knight provided the legal framework for this study. Mr. Wiener has extensive experience with disparity studies as well, and has worked with Mr. Keen in this field since the early 1990s. Mr. Keen and Mr. Wiener have helped public agencies successfully defend DBE and minority business enterprise programs in court.

As shown in Figure 1-1, JLA Public Involvement, Benetti Partners and Donaldson Enterprises performed in-depth interviews and outreach as part of the study. Merina & Company conducted onsite contract data collection at ODOT offices. Customer Research International (CRI) performed telephone surveys with business owners and managers that identified firms available for ODOT contracts. These five team members are minority- and/or women-owned firms.

Keen Independent worked closely with ODOT staff, including senior leadership, throughout the study.

Figure 1-1.  
2016 Disparity Study team

Firm	Location	Team Leader	Responsibilities
Keen Independent Research LLC, prime consultant	Denver CO Wickenburg, AZ	David Keen Principal	All study phases
Holland & Knight LLP (H&K)	Atlanta, GA	Keith Wiener Partner	Legal framework
JLA Public Involvement, Inc.	Portland, OR	Stacy Thomas Sr. Project Manager	In-depth interviews, public outreach
Benetti Partners LLC	Portland, OR	Juanita Walton Principal	In-depth interviews
Donaldson Enterprises Consulting	Washougal, WA	Suzanne Donaldson Principal	In-depth interviews
Customer Research International (CRI)	San Marcos, TX	Sanjay Vrudhula President	Availability telephone interviews
Merina & Company LLP	West Linn, OR	Kamala Austin Partner	Data collection

## B. Federal DBE Program

ODOT has been operating some version of a Federal DBE Program since the 1980s. After enactment of the Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21) in 1998, USDOT established a new Federal DBE Program to be operated by state and local agencies receiving USDOT funds. USDOT recently revised the Federal DBE Program in 2011 and again in 2014.

Federal regulations located at Title 49 Code of Federal Regulations (CFR) Part 26 direct how state and local governments must operate the Federal DBE Program.<sup>2</sup> If necessary, the Program allows state and local agencies to use DBE contract goals, which ODOT currently sets on certain FHWA-funded contracts. When awarding those contracts, ODOT considers whether or not a bidder or proposer meets the DBE goal set for a contract or has shown adequate good faith efforts to do so.

The Federal DBE Program also applies to cities, towns, counties, transportation authorities, tribal governments and other jurisdictions that receive USDOT funds as a subrecipient of ODOT. When agencies such as TriMet and the Port of Portland directly receive USDOT funds, they are responsible for determining overall DBE goals and how they will implement the Federal DBE Program.

**Key Program elements.** The Federal DBE Program includes the following elements.

**Setting an overall goal for DBE participation.** Every three years, ODOT must develop an overall annual goal for DBE participation in its USDOT-funded contracts. The Federal DBE Program sets forth the steps an agency must follow in establishing its goal, including development of a “base figure” and consideration of possible “step 2” adjustments to the goal.<sup>3</sup> For FHWA-funded contracts for the federal fiscal year (FFY) ending September 30, 2016, ODOT has a 13.10 percent overall DBE goal.

ODOT’s overall goal for DBE participation is aspirational. An agency’s failure to meet an annual DBE goal does not automatically cause any USDOT penalties unless that agency fails to administer the DBE Program in good faith. However, if an agency does not meet its overall DBE goal, federal regulations require it to analyze the reasons for any shortfall and develop a corrective action plan to meet the goal in the next fiscal year.<sup>4</sup>

**Establishing the portion of the overall DBE goal to be met through neutral means.** The Federal DBE Program allow for state and local governments to operate the program without the use or with limited use of race- or gender-based measures such as DBE contract goals. According to program regulations 49 CFR Section 26.51, a state or local agency must meet the maximum feasible portion of its overall goal for DBE participation through “race-neutral means.”

Race-neutral program measures include removing barriers to participation and promoting use of small businesses. The Federal DBE Program requires agencies such as ODOT to develop programs to assist small businesses.<sup>5</sup> For example, small business preference programs, including reserving contracts on which only small businesses can bid, are allowable under the Federal DBE Program.

If an agency can meet its goal solely through race-neutral means, it must not use race-conscious program elements. The Federal DBE Program requires that an agency project the portion of its overall DBE goal that it will meet through neutral measures and the portion, if any, to be met through race-conscious measures such as DBE contract goals. USDOT has outlined a number of

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<sup>2</sup> 49 CFR Part 26 [http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr26\\_main\\_02.tpl](http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr26_main_02.tpl).

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

<sup>4</sup> 49 CFR Section 26.47.

<sup>5</sup> 49 CFR Section 26.39.

factors for an agency to consider when making that determination.<sup>6</sup> Some state DOTs and other agencies operate a 100 percent race- and gender-neutral program and do not apply DBE contract goals. Other state DOTs project that they will meet their overall DBE goal through a combination of race-neutral and race-conscious measures.

The 2016 Disparity Study provides information for ODOT to make this projection (Chapter 10).

**Determining whether all racial/ethnic/gender groups will be eligible for race- or gender-conscious elements of the Federal DBE Program.** To be certified as a DBE, the firm's owner must be both socially and economically disadvantaged. Under the Federal DBE Program, the following racial, ethnic and gender groups can be presumed to be socially disadvantaged:

- Black Americans (or "African Americans" in this study);
- Hispanic Americans;
- Native Americans;
- Asian-Pacific Americans;
- Subcontinent Asian Americans; and
- Women of any race or ethnicity.

To be economically disadvantaged, a company must be below an overall revenue limit and an industry-specific limit, and its firm owner(s) must be below personal net worth limits.<sup>7</sup> White male-owned firms and other ethnicities not listed above can also meet the federal certification requirements and be certified as DBEs if they demonstrate that they are both socially and economically disadvantaged, as described in 49 CFR Part 26.67(d).

ODOT's current operation of the Program limits participation in the contract goals program to:

- DBEs owned by African Americans and Subcontinent Asian Americans on construction contracts; and
- All DBEs except those owned by Asian-Pacific Americans on engineering-related contracts.

Only DBEs in the above groups can count toward meeting an assigned DBE contract goal. Any DBE can currently participate in other aspects of the Federal DBE Program. ODOT counts utilization of other DBEs toward its overall DBE goal.

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<sup>6</sup> See Chapter 10 of this report for an in-depth discussion of these factors.

<sup>7</sup> 49 CFR 26 Subpart D provides certification requirements. There is a gross receipts limit (currently not more than a \$23.98 million annual three-year average revenue, and lower limits for certain lines of business) and a personal net worth limit (currently \$1.32 million excluding equity in the business and primary personal residence) that firms and firm owners must fall below to be able to be certified as a DBE. <http://www.ecfr.gov/cgi-bin/text-idx?SID=5423bdfc26e2255aef5fb43e3f450a13&node=49:1.0.1.1.20.4&rgn=div6>. Under 49 CFR Section 26.67(b), a certifying agency may consider other factors to determine if an individual is able to accumulate substantial wealth, in which certification is denied (annual gross income of the owner and whether the fair market value of the owner's assets exceed \$6 million are two such factors that may be considered).

The 2016 Disparity Study includes information for ODOT to consider in evaluating whether any, all, or just some of the DBE groups should be eligible for the contract goals element of the Program (if ODOT chooses to continue to use DBE contract goals).

### **Past court challenges to the Federal DBE Program and to state and local agency**

**implementation of the Program.** Although agencies are required to operate the Federal DBE Program in order to receive USDOT funds, different groups have challenged program operation in court.

- A number of courts have held the Federal DBE Program to be constitutional, as discussed in Chapter 2 and Appendix B of this report.
- State transportation departments in California, Illinois, Minnesota, Montana and Nebraska successfully defended their operation of the Federal DBE Program, as have certain local government agencies. In 2005, the Washington State Department of Transportation was not able to successfully defend its operation of the Federal DBE Program. (See Chapter 2 and Appendix B.)

The Ninth Circuit Court of Appeals examined the methodology and results of the disparity study David Keen directed for the California Department of Transportation (Caltrans) in *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation*. As discussed in more detail in Chapter 2 and Appendix B, the Ninth Circuit favorably reviewed the methodology and the quantitative and qualitative information provided in the disparity study and determined that the information justified Caltrans' operation of the Federal DBE Program. Keen Independent's methodology in ODOT's 2016 Disparity Study is very similar to what the court favorably reviewed in the Caltrans case.

### **C. Oregon MWESB Program and Other Programs**

ODOT participates in other programs beyond the Federal DBE Program. These include:

- **State MBE/WBE Policy.** The State of Oregon has a policy of supporting Oregon's minority business enterprises and woman business enterprises. Eleven Oregon state agencies including ODOT set aspirational targets for MBE/WBE procurement contracts valued at \$150,000 or less that might be performed by MBEs/WBEs. In addition to aspirational targets, the State implements other initiatives to improve opportunities for certified business enterprises, address race- and gender-based discrimination and ensure state funds are used to foster an inclusive business climate.
- **Emerging Small Business Program.** The State of Oregon and several local governments operate an Emerging Small Business Program that reserves certain contracting opportunities for ESB bidders. Under the Program, qualified small businesses compete against other small companies for identified small contracts.
- **Small Contracting Program.** ODOT operates a Small Contracting Program that streamlines bidding or proposing on small architectural, engineering and land surveying contracts, small construction contracts and other small purchases. Any company may register to participate in the program.

- **Other small business support.** ODOT supports small businesses through other programs such as the Oregon Small Business Initiative and the Project Specific Mentor-Protégé Program.

Chapter 11 of the report assesses opportunities to expand efforts to encourage participation of small businesses in ODOT contracts.

#### **D. Previous Disparity Analyses Regarding ODOT Contracts**

The USDOT recommends that agencies such as ODOT conduct disparity studies to develop the information needed to effectively implement the Program. ODOT completed full disparity studies in 2007 and 2011, and an availability update in 2013. MGT of American, Inc. prepared each of those studies.<sup>8</sup>

ODOT used results of the studies prepared by MGT when determining how to implement the Federal DBE Program for past years, including its request to FHWA for a “waiver” in which only certain racial, ethnic and gender groups of DBEs would participate in the DBE contract goals program.

- ODOT first applied for a waiver in January 2008 based on the results of the 2007 study prepared by MGT.
- It applied for a new DBE Program Waiver in 2012 for years 2013 through 2015 based on the results of the 2011 study prepared by MGT.

Under the waiver, only some DBE groups can participate in meeting a DBE contract goal ODOT sets for its FHWA-funded construction and engineering-related contracts.<sup>9</sup>

The 2016 Disparity Study examines participation of minority- and women-owned firms in ODOT contracts from October 2010 through September 2014. Keen Independent and ODOT chose this study period so that the utilization analysis would begin where the 2011 study ended (contracts awarded through September 2010). The 2016 Study also includes certain enhancements to the disparity study methodology compared to what was employed in ODOT’s previous studies, in accordance with the more recent 2013 Ninth Circuit review of Mr. Keen’s methodology for a Caltrans disparity study.

#### **E. Analyses Performed in the 2016 Disparity Study and Location of Results**

Figure 1-2 on the following page outlines the chapters in the 2016 Disparity Study.

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<sup>8</sup> [http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/Pages/dbe\\_disp\\_avail\\_stud.aspx](http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/Pages/dbe_disp_avail_stud.aspx).

<sup>9</sup> ODOT’s waiver requests and FHWA’s past approvals can be viewed at [http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/Pages/dbe\\_prog\\_wav.aspx](http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/Pages/dbe_prog_wav.aspx).

Figure 1-2. Chapters in 2016 Disparity Study report

Chapter	Description of 2016 Disparity Study report chapters
ES. Executive Summary	Brief summary of study results
1. Introduction	Study purpose, study team and overview of analyses
2. Legal Framework	Summary of Federal DBE Program regulations and relevant court decisions
3. ODOT Transportation Contracts	How the study team collected ODOT contract data and defined the geographic area and transportation contracting industry
4. ODOT Operation of the Federal DBE Program	Review of ODOT's implementation of the Federal DBE Program and other programs as well as State and local agency programs and other technical assistance programs in Oregon
5. Marketplace Conditions	Summary of quantitative and qualitative information about the Oregon transportation contracting marketplace
6. Availability Analysis	Methodology and results regarding availability of minority- and women-owned firms and other businesses for ODOT contracts and subcontracts
7. Utilization and Disparity Analysis	Comparison of utilization and availability of minority- and women-owned firms (disparity analysis)
8. Exploration of Neutral Explanations for any Disparities	Further examination of disparity results to determine if any can be explained by neutral factors
9. Overall Annual DBE Goal	Information to review when setting a three-year overall DBE goal, including consideration of a "step 2 adjustment"
10. Portion of Overall DBE Goal to be Met Through Neutral Means	Information to review when determining the portion of the overall DBE goal to be met through neutral means
11. Recommendations	Study team recommendations concerning future implementation of the Federal DBE Program and other ways to assist small businesses and minority- and women-owned companies

The following briefly describes where to find specific information in the 2016 Disparity Study report.

**Definition of terms.** Appendix A provides explanations of acronyms and definitions of key terms used in the study.

**Legal framework.** Chapter 2 summarizes the legal framework for the study. Appendix B presents detailed analyses of relevant cases.

**Collection of prime contract and subcontract information for past USDOT- and state-funded contracts.** The study team collected information about past FHWA- and state-funded contracts awarded by ODOT or by local public agencies from October 1, 2010 through September 30, 2014. Chapter 3 outlines the data collection process and describes these contract data. Appendix C provides additional documentation.

**ODOT and other agencies' programs.** Background on the Federal DBE Program is provided in Chapter 4. The chapter also discusses ODOT's implementation of the program and its race- and gender-neutral efforts for DBE participation.

**Analysis of local marketplace conditions.** The study team examined quantitative and qualitative information relevant to the Oregon transportation contracting industry. Chapter 5 synthesizes quantitative information about local marketplace conditions. In accordance with USDOT guidance, Keen Independent analyzed:

- Any evidence of barriers for minorities and women to enter and advance in their careers in the construction and engineering industries in Oregon (detailed results in Appendix E);
- Any differences in rates of business ownership in Oregon (discussed in Appendix F);
- Access to business credit, insurance and bonding (detailed results in Appendix G);
- Any differences in measures of business success and access to prime contract and subcontract opportunities (examined in detail in Appendix H); and
- Certain other issues potentially affecting minorities and women in the local marketplace.

Appendices E through I provide supporting information.

Chapter 5 also summarizes analysis of qualitative information, including results of in-depth personal interviews and focus groups with 71 business owners, trade associations and public agencies as well as comments 275 business owners and managers provided through online and telephone surveys. The study team conducted additional interviews and focus groups with staff from ODOT and local public agencies and public input as part of the public comment process held at the outset of the study. Appendix J of this report summarizes comments received and provides detailed analysis of this qualitative information.

This combined quantitative and qualitative information about the marketplace is relevant to ODOT's development of an overall DBE goal and its projection of how much of the goal will be met through neutral means.

**Availability analysis, including calculation of base figure for overall DBE goal.** Keen Independent's availability analysis generates benchmarks to use when assessing ODOT's utilization of minority- and women-owned firms. The availability results also provide information for ODOT to consider when setting its overall annual goal for DBE participation on FHWA-funded contracts in FFY 2017 through FFY 2019.



Chapter 6, which presents these results, is organized as follows:

- The methods used to collect and analyze availability of minority-, women- and majority-owned firms;
- Availability benchmarks used in the disparity analysis; and
- Information relevant to ODOT’s “base figure” for its overall DBE goals for FHWA-funded contracts.

**MBE/WBE utilization and disparity analysis.** Chapter 7 describes Keen Independent’s analysis of the utilization of minority- and women-owned businesses in ODOT’s FHWA- and state-funded contracts during the study period. The disparity analysis in Chapter 7 compares utilization to availability to determine whether there is underutilization of minority- or women-owned firms in ODOT transportation contracts. Chapter 7 provides utilization and disparity analysis results for ODOT contracts overall, and for contracts within two-year time periods.

Chapter 8 further explores this information, including utilization and disparity results for different types of ODOT contracts. It also contains analysis of DBE participation on FHWA- and state-funded contracts, and explores whether there is any evidence of overconcentration of DBEs.

**Information for overall DBE goal and DBE Program operation for FHWA-funded contracts.**

Chapter 9 provides Keen Independent’s analysis of the overall DBE goal for FHWA-funded contracts for October 1, 2016 through September 30, 2019. This provides information to ODOT as it determines its overall DBE goal for these three federal fiscal years.

**Portion of overall DBE goal to be met through neutral means.** Chapter 10 details Keen Independent’s analysis of the portion of the overall DBE goal that can be met through neutral means and whether there is evidence that race- and gender-conscious programs will be needed. ODOT can review this information as it determines how it will implement the Federal DBE Program starting October 1, 2016, including which racial, ethnic and gender groups of DBEs, if any, will participate in a DBE contract goals program.

**Recommendations.** Keen Independent suggests refinements to ODOT implementation of the Federal DBE Program and other efforts to include small and minority- and women-owned businesses in ODOT contracts. Chapter 11 provides recommendations for ODOT consideration.

## **F. Public Participation in the 2016 Disparity Study**

Keen Independent and ODOT implemented an extensive public participation process as part of the 2016 Disparity Study. To date, these activities include:

- An External Stakeholder Group that met with the study team and ODOT at key junctures of the study process (meetings in December 2014; January, June, August and October 2015; and January and March 2016).
- Information provided to interested groups through press releases, email blasts and presentations.

- A study website that posted information about the 2016 Disparity Study from the outset of the study.
- A telephone hotline and dedicated email address for anyone wishing to comment.
- Public meetings at the start of the study to obtain input from stakeholders and other interested groups. ODOT held these meetings in Bend, Roseburg, Salem and Portland in February 2015, and included call-in opportunities for individuals unable to attend a meeting in person.
- Opportunities for company owners and managers to provide information about their businesses and any perceived barriers in the marketplace. The study team successfully reached 7,119 businesses through online surveys and telephone surveys conducted in summer 2015.
- In-depth personal interviews and focus groups with 71 business owners, managers and trade association representatives throughout the state. The study team also interviewed staff from ODOT and other public agencies in Oregon.

#### **G. Public Comment Process for the 2016 Disparity Study Report and ODOT DBE Goal**

Keen Independent has published this draft Disparity Study report for public comment before finalizing the report. Public comments concerning information in this report as well as ODOT's proposed overall DBE goal can be made through April 30, 2016. The public will be able to give feedback at the meetings listed below and provide written comments (a) in person at the meetings, (b) online at [www.ODOTDBEstudy.org](http://www.ODOTDBEstudy.org), (c) via email at [info@ODOTDBEstudy.org](mailto:info@ODOTDBEstudy.org), (d) through regular mail to ODOT Office of Civil Rights, MS31, 355 Capitol Street NE, Salem OR 97301-3871.

ODOT will hold five public meetings concerning the study and ODOT's proposed DBE goal:

- La Grande on April 5;
- Bend on April 6;
- Medford on April 7;
- Portland on April 11; and
- Eugene on April 12.

The La Grande and Bend public meetings will also be hosted live online for people who wish to participate remotely.

The [www.ODOTDBEstudy.org](http://www.ODOTDBEstudy.org) website provides the time and location of each meeting. Those interested in attending can also call ODOT Office of Civil Rights at 503-986-4350 or email [OCRinforequest@ODOT.state.or.us](mailto:OCRinforequest@ODOT.state.or.us) for more information.

Keen Independent will incorporate information from the public meetings and written comments into the final Disparity Study report in late spring 2016. ODOT will also review this information as when finalizing its proposed overall DBE goal calculation for submission to FHWA prior to August 1, 2016.