

CHAPTER 10.

Portion of DBE Goal for FHWA-funded Contracts to be Met through Neutral Means

The Federal DBE Program requires state and local transportation agencies to meet the maximum feasible portion of their overall DBE goals using race- and gender-neutral measures.¹ Race- and gender-neutral measures are initiatives that encourage the participation of all businesses, or all small businesses, and are not specifically limited to MBE/WBEs or DBEs. Agencies must determine whether they can meet their overall DBE goals solely through neutral means or whether race- and gender-conscious measures — such as DBE contract goals — are also needed. As part of doing so, agencies must project the portion of their overall DBE goals that they expect to meet (a) through race- and gender-neutral means, and (b) through race- and gender-conscious programs (if any).

- If an agency determines that it can meet its overall DBE goal solely through race- and gender-neutral means, then it would propose using only neutral measures as part of its program. The agency would project that 100 percent of its overall DBE goal would be met through neutral means and that 0 percent would be met through race- and gender-conscious means.
- If an agency determines that a combination of race- and gender-neutral and race- and gender-conscious measures are needed to meet its overall DBE goal, then the agency would propose using a combination of neutral and conscious measures as part of its program. The agency would project that some percent of its overall DBE goal would be met through neutral means and that the remainder would be met through race- and gender-conscious means.

USDOT offers guidance concerning how transportation agencies should project the portions of their overall DBE goals that will be met through race- and gender-neutral and race- and gender-conscious measures, including the following:

- USDOT Questions and Answers about 49 CFR Part 26 addresses factors for federal aid recipients to consider when projecting the portion of their overall DBE goals that they will meet through race- and gender-neutral means.²
- USDOT “Tips for Goal-Setting” also suggests factors for federal aid recipients to consider when making such projections.³

¹ 49 CFR Section 26.51.

² See <http://www.dotcr.ost.dot.gov/Documents/Dbe/49CFRPART26.doc>

³ Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program. Available at <http://www.osdbu.dot.gov/DBEProgram/tips.cfm>

- An FHWA template for how it considers approving DBE goal and methodology submissions includes a section on projecting the percentage of overall DBE goals to be met through neutral and conscious means. An excerpt from that template is provided in Figure 10-1.

Based on 49 CFR Part 26 and the resources above, general areas of questions that transportation agencies might ask related to making any projections include:

- A. Is there evidence of discrimination within the local transportation contracting marketplace for any racial, ethnic or gender groups?
- B. What has been the agency's past experience in meeting its overall DBE goal?
- C. What has DBE participation been when the agency did not use race- or gender-conscious measures?⁴
- D. What is the extent and effectiveness of race- and gender-neutral measures that the agency could have in place for the next fiscal year?

Chapter 10 is organized around each of those general areas of questions.

Figure 10-1.
Excerpt from Explanation of Approval of [State] DBE Goal Setting Process for FY [Year]

You must also explain the basis for the State's race-neutral/race-conscious division and why it is the State's best estimate of the maximum amount of participation that can be achieved through race-neutral means. There are a variety of types of information that can be relied upon when determining a recipient's race-neutral/race-conscious division. Appropriate information should give a sound analysis of the recipient's market, the race-neutral measures it employs and information on contracting in the recipient's contracting area. Information that could be relied on includes: the extent of participation of DBEs in the recipient's contracts that do not have contract goals; past prime contractors' achievements; excess DBE achievements over past goals; how many DBE primes have participated in the state's programs in the past; or information about state, local or private contracting in similar areas that do not use contracting goals and how many minority and women's businesses participate in programs without goals.

Source:
FHWA, Explanation for Approval of [State] DBE Program Goal Setting Process for FY [Year].

⁴ USDOT guidance suggests evaluating (a) certain DBE participation as prime contractors if the DBE contract goals did not affect utilization, (b) DBE participation as prime contractors and subcontractors for agency contracts without DBE goals, and (c) overall utilization for other state, local or private contracting where contract goals are not used.

A. Is there evidence of discrimination within the local transportation contracting marketplace for any racial, ethnic or gender groups?

Minority-owned firms. There is quantitative evidence of disparities for minority-owned firms in ODOT contracts and in the Oregon transportation contracting marketplace, and qualitative evidence of racial discrimination in the Oregon transportation contracting marketplace.

When examining ODOT transportation-related contracts from October 2010 through September 2014, there were substantial disparities between the utilization and availability for:

- African American-owned firms (even though African American-owned DBEs were eligible to participate in ODOT's race-conscious contract goals program);
- Asian-Pacific American-owned firms (even though Asian-Pacific American-owned DBEs were eligible to participate in ODOT's construction contract goals program in the first year of the study period); and
- Native American-owned firms.

There were also substantial disparities for Subcontinent Asian American-owned firms and for Hispanic American-owned firms for certain years of the study period:

- For October 2010 through September 2012, there was a substantial disparity in the utilization of Subcontinent Asian American-owned firms, even though this group was eligible to participate in the DBE contract goals program for construction contracts. (There was also a substantial disparity when examining non-goals contracts for October 2010 through September 2014.)
- From October 2010 through September 2014, Hispanic American-owned firms obtained 2.4 percent of ODOT contract dollars, slightly higher than what might be expected from the availability analysis (2.3%), resulting in a disparity index of 104. Most of this utilization was two firms: Capital Concrete Construction and LaDuke Construction. The availability results for Hispanic American-owned firms are limited by the fact that neither of these firms provided information to be included in the detailed availability analysis. Capital Concrete has voluntarily surrendered its contractor's license, no longer has a working telephone number and does not appear to be available for ODOT work. LaDuke Construction indicated that they were not interested in discussing future work for ODOT when contacted by the study team to participate in an availability interview in 2015. Even though neither firm provided information necessary to be included in the availability analysis for Hispanic American-owned firms, both of these firms are still counted in the utilization results. (Without these two firms, utilization of Hispanic American-owned firms would have been 0.9 percent and availability would still be 2.7 percent.)

In sum, there appears to be evidence of substantial disparities for each MBE group when examining ODOT transportation contracts.

The federal courts have held that a significant statistical disparity between the utilization and availability of minority- and women-owned firms may raise an inference of discriminatory exclusion.⁵ However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.⁶ The second prong of the strict scrutiny analysis requires the implementation of the Federal DBE Program by recipients of federal funds be “narrowly tailored” to remedy identified discrimination in the particular recipient’s contracting and procurement market.⁷ The narrow tailoring requirement has several components.

In *Western States Paving*, the Ninth Circuit held the recipient of federal funds must have independent evidence of discrimination within the recipient’s own transportation contracting and procurement marketplace in order to determine whether or not there is the need for race-, ethnicity- or gender-conscious remedial action.⁸ In *Western States Paving*, and in *AGC, SDC v. Caltrans*, the Ninth Circuit Court found that even where evidence of discrimination is present in a recipient’s market, a narrowly tailored program must apply only to those minority groups who have actually suffered discrimination. Thus, under a race-conscious program, for each of the minority groups to be included in any race-conscious elements in a recipient’s implementation of the Federal DBE Program, there must be evidence that the minority group suffered discrimination within the recipient’s marketplace.⁹

In *Western States Paving*, the Ninth Circuit announced a two-pronged test for “narrow tailoring”:

“(1) the state must establish the presence of discrimination within its transportation contracting industry, and

(2) the remedial program must be limited to those minority groups that have actually suffered discrimination.” *Id.* 1191, *citing Western States Paving Co.*, 407 F.3d at 997-998.

The evidence of disparities and other quantitative and qualitative results in this report should be considered by ODOT in determining whether or not there is the presence of discrimination within the Oregon transportation contracting marketplace, and as to which groups that may be properly included in narrowly tailored race-conscious measures under the Federal DBE Program.

White women-owned firms. There is also quantitative evidence of disparities for white women-owned firms in ODOT contracts and in the Oregon transportation contracting industry, and qualitative evidence of gender discrimination for Oregon transportation contracting marketplace, which ODOT should consider in determining whether gender-based discrimination affects these firms. The disparities in the utilization of white women-owned firms in ODOT contracts were substantial for the October 2010 through September 2012 study period.

ODOT will need to evaluate this evidence in light of USDOT requirements and the intermediate scrutiny legal standard of review for gender-conscious programs when deciding whether gender-conscious remedies are supportable in its implementation of the Federal DBE Program in Oregon.

⁵ See, e.g., *Croson*, 488 U.S. at 509; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; see also *Western States Paving*, 407 F.3d at 1001.

⁶ *Western States Paving*, 407 F.3d at 1001.

⁷ *Western States Paving*, 407 F.3d at 995-998; *Sherbrooke Turf*, 345 F.3d at 970-71.

⁸ *Western States Paving*, 407 F.3d at 997-98, 1002-03; see *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

⁹ 407 F.3d at 996-1000; See *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

Certain federal Courts of Appeal, including the Ninth Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs.¹⁰ The Ninth Circuit and other courts have interpreted this standard to require that gender-based classifications be:

1. Supported by both “sufficient probative” evidence or “exceedingly persuasive justification” in support of the stated rationale for the program; and
2. Substantially related to a sufficiently important governmental interest or the achievement of that underlying objective.¹¹

The measure of evidence required to satisfy intermediate scrutiny is less than that necessary to satisfy strict scrutiny. (See Appendix B.)

B. What has been the agency’s past experience in meeting its overall DBE goal?

Figure 10-2 summarizes ODOT’s reported certified DBE participation since October 2010. As shown, reported DBE participation based on DBE commitments/awards on FHWA-funded contracts was above its goal in FFY 2011 and was below the goal in subsequent years.

Figure 10-2.

ODOT overall DBE goal and reported DBE participation on FHWA-funded contracts, FFY 2011 through FFY 2015

Federal fiscal year	DBE goal	DBE commitments/awards	Difference from DBE goal
2011	11.50 %	15.13 %	3.63 %
2012	11.50	10.38	-1.12
2013	16.95	8.96	-7.99
2014	16.95	8.70	-8.25
2015	13.10	6.30	-6.80

Source: ODOT Uniform Reports of DBE Awards/Commitments and Payments.
Source for 2014 and 2015: ODOT Shortfall Analysis reports submitted to FHWA.

¹⁰ See generally, *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); see also *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification”).

¹¹ *Id.*

C. What has DBE participation been when ODOT has not applied DBE contract goals (or other race-conscious remedies)?

Keen Independent examined three sources of information to assess race-neutral DBE participation:

- ODOT-reported race-neutral DBE participation on FHWA-funded contracts for the most recent years;
- Keen Independent estimates of DBE participation on FHWA-funded contracts for which no DBE contract goals applied; and
- Information concerning DBE participation as prime contractors.

The discussion in the following two pages examines these three sets of participation figures.

Race-neutral DBE participation in recent ODOT Uniform Reports. Per USDOT instructions, ODOT counts as “neutral” participation any prime contracts going to DBEs not used to meet DBE contract goals set for a project or that were otherwise awarded in a race-neutral manner.

ODOT’s Uniform Reports of DBE Awards/Commitments and Payments for the five most recent federal fiscal years and ODOT’s Shortfall Analysis reports submitted to FHWA indicate race-neutral participation of a high of 13.15 percent in FFY 2011 and a low of 4.40 percent in FFY 2015 (median of 7.10%). Figure 10-3 presents these results.

The right-hand column of Figure 10-3 calculates the share of total participation achieved through neutral means (neutral DBE participation ÷ total DBE participation). In FFY 2015, ODOT achieved about two-thirds of its total DBE commitments/awards through neutral means (4.40 ÷ 6.30 = 70%), higher than in FFY 2013 and lower than in other years.

Note that Figure 10-3 does not include engineering-related contracts.

Figure 10-3.
ODOT-reported race-neutral and race-conscious DBE participation on FHWA-funded contracts for FFY 2011 through FFY 2015

Federal fiscal year	DBE commitments/awards			Share achieved Through neutral
	Total	Race-neutral	Race-conscious	
2011	15.13 %	13.15 %	1.98 %	87 %
2012	10.38	9.61	0.77	93
2013	8.96	5.13	3.83	57
2014	8.70	7.10	1.60	82
2015	6.30	4.40	1.90	70

Source: ODOT Uniform Reports of DBE Awards/Commitments and Payments.
Source for 2014 and 2015: ODOT Shortfall Analysis reports submitted to FHWA.

DBE participation on contracts without DBE contract goals. Keen Independent also analyzed DBE participation on ODOT’s FHWA-funded construction and engineering-related contracts without DBE contract goals. As reported in Chapter 8, ODOT achieved 5.0 percent DBE participation on these contracts from October 2010 through September 2014. (DBE participation was 5.1 percent when examining non-goals FHWA- and state-funded contracts combined.)

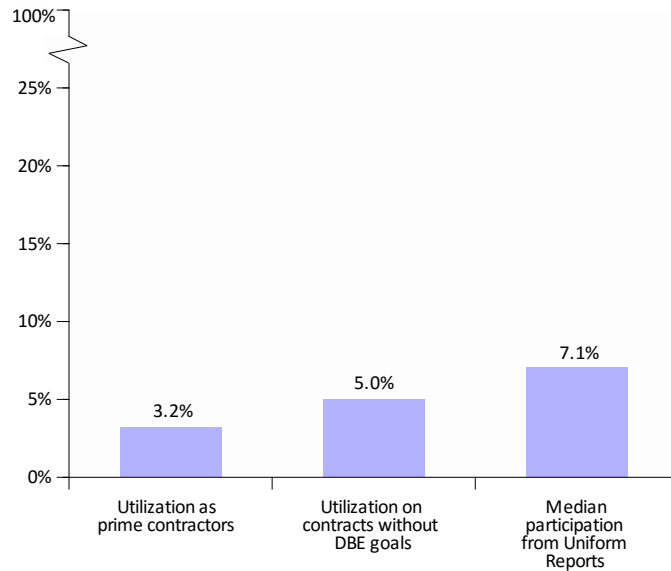
DBE participation as prime contractors. Focusing just on participation as prime contractors, DBEs obtained 3.2 percent of prime contract dollars on FHWA-funded contracts.

Conclusions. As shown in Figure 10-4, the three different measures of past DBE participation in a neutral environment show 3.2 percent, 5.0 percent and 7.1 percent participation.

Keen Independent’s 5.0 percent estimate of DBE utilization on ODOT contracts when DBE contract goals did not apply may be the most complete measure, as it combines prime contract and subcontracts and encompasses both construction and engineering contracts.

Figure 10-4.
Measures of race-neutral
DBE participation

Source:
Keen Independent from data on
ODOT contract records and ODOT
Uniform Reports of DBE
Awards/Commitments and
Payments.



D. What is the extent and effectiveness of race- and gender-neutral measures that the agency could have in place for the next fiscal year?

When determining the extent to which it could meet its overall DBE goal through the use of neutral measures, ODOT must review the race- and gender-neutral measures that it and other organizations have in place, and those it has planned or could consider for future implementation.

Keen Independent’s discussion of neutral remedies in Chapter 4 indicates that ODOT has implemented an extensive set of neutral measures, including a Small Contracting Program. The study team also examined other potential neutral measures. At this time, it is difficult to quantify how much more race-neutral participation these ongoing programs or any new efforts might achieve during the FFY 2017 through FFY 2019 time period.

E. Summary

Chapter 10 provides information to ODOT as it considers (1) its projection of the portion of its overall DBE goal to be achieved through neutral means, and (2) if all DBE groups will be allowed to participate in any DBE contract goals program, or whether ODOT will request a waiver that limits participation to certain groups.

1. Should ODOT project that it can meet all of its overall DBE goal through neutral means?

ODOT must consider whether it can achieve 100 percent of its overall DBE goal through neutral means or whether race-conscious programs are needed. Such a determination depends in part on the level of the overall DBE goal. If ODOT's overall DBE goal for FHWA-funded contracts is in the range of 11.63 percent or higher, the evidence presented in this report indicates that ODOT would not meet its DBE goal solely through neutral means.

ODOT should consider all of the information in the report and other sources when reaching its decision on any use of race- and gender-conscious programs (such as DBE contract goals).

- There is information indicating disparities in outcomes for minorities and women in the Oregon contracting marketplace, substantial disparities for MBE/WBEs in ODOT contracts, and qualitative evidence of race and gender discrimination within the local transportation contracting marketplace.
- ODOT's DBE participation on FHWA-funded contracts has fallen considerably below its overall DBE goal in FFYs 2012, 2013, 2014 and 2015 based on commitments and awards data, even with race-conscious programs in place for certain DBE groups.
- Based on ODOT Uniform Reports for FFY 2011 through FFY 2015, ODOT reported less than 10 percent DBE participation achieved through neutral means in four out of the five years. The median participation was 7.1 percent. (FFY 2011 through FFY 2014 reports do not include information on engineering-related contracts, which would lower these figures.) This level of participation is less than an overall DBE goal of 11.63 percent or higher.
- Keen Independent estimated that DBE participation for FFY 2011 through FFY 2014 was 5.0 percent on ODOT construction and engineering-related contracts without DBE contract goals. This is considerably below an overall DBE goal of 11.63 percent or higher.
- DBE participation as prime contractors and consultants was 3.2 percent over the study period, also below an 11.63 percent goal.
- For ODOT FHWA-funded construction and engineering contracts overall, including those with DBE contract goals, Keen Independent determined that DBE participation was only 7.42 percent, considerably below an overall goal of 11.63 percent or higher.

- ODOT has extensive neutral measures in place and there are many small business assistance programs offered by other institutions throughout the state. Any additional measures ODOT might be able to immediately institute would probably have only a small impact in comparison with what already exists. It appears unlikely that ODOT could increase its neutral participation of DBEs to reach an overall DBE goal to the level of 11.63 percent or higher solely through additional neutral measures.

2. If ODOT uses a combination of neutral means and DBE contract goals, how much of the overall DBE goal can ODOT project to be met through neutral means? ODOT will need to choose the appropriate neutral projection based on information in this study and other information it may have. Relevant results include the following:

- The most complete and accurate information about past DBE participation in a neutral environment comes from Keen Independent’s utilization analysis for contracts without DBE contract goals.

ODOT achieved 5.0 percent DBE participation on FHWA-funded ODOT contracts without DBE contract goals based on Keen Independent analysis of these contracts from October 2010 through September 2014 (calculated across the entire time period).¹²

If ODOT achieved the same level of race-neutral participation on FHWA-funded contracts in FFY 2017 through FFY 2019 as it did for contracts without DBE contract goals from October 2010 through September 2014 (5.0%), it would need to achieve 6.63 percentage points of an 11.63 percent overall DBE goal through race- and possibly gender-conscious means ($11.63\% - 5.00\% = 6.63\%$).

If the overall DBE goal were higher than 11.63 percent, ODOT might need to project a larger portion of the goal to be met through race- and gender-conscious means, as demonstrated in Figure 10-5.

- For purposes of comparison, the left-hand column of Figure 10-5 shows the overall DBE goal and projections that ODOT developed for FFY 2015 through FFY 2016.
- The three columns to the right in Figure 10-5 present neutral and race-conscious projections for three examples of the different levels of overall DBE goals that ODOT might select for FFY 2017 through FFY 2019.
- In each column, the neutral projection (row 2) is subtracted from the overall DBE goal (row 1) to derive the race-conscious projection (row 3).

¹² There was 5.1 percent DBE participation on non-goals contracts during the study period if FHWA- and state-funded contracts are combined. This result might be used project future neutral participation as well.

Figure 10-5.

Current ODOT overall DBE goal and projections of race-neutral for FHWA-funded contracts and examples of overall goal and projections for FFY 2017 through FFY 2019

Component of overall DBE goal	FFY 2015- FFY 2016	FFY 2017- FFY 2019		
		Downward adjustment	Base figure	Upward adjustment
Overall goal	13.10 %	11.63 %	15.84 %	21.31 %
Neutral projection	- <u>7.90</u>	- <u>5.00</u>	- <u>5.00</u>	- <u>5.00</u>
Race-conscious projection	5.20 %	6.63 %	10.84 %	16.31 %

Source: Keen Independent analysis.