

## **CHAPTER 4.**

### **ODOT Operation of the Federal DBE Program**

Chapters 1 and 2 of this report introduced the Federal DBE Program, including requirements that an agency receiving USDOT funds set an overall goal for DBE participation and employ certain measures that would help it meet that goal. As described in Chapter 2, agencies such as ODOT must narrowly tailor their implementation of the Program to the conditions within their transportation contracting marketplace.

Chapter 4 provides a more detailed review of Federal DBE Program requirements and ODOT's implementation of the Program, organized around:

- A. Setting an overall DBE goal;
- B. Role of race- and gender-neutral measures in meeting the goal;
- C. Types of race- and gender-neutral measures;
- D. Permissible use of race- and gender-conscious programs, principally DBE contract goals; and
- E. Other program elements, including data collection and reporting.

Keen Independent examines actions ODOT has taken to implement each of these requirements. This overview provides important background when considering other report information concerning:

- The overall DBE goal for future FHWA-funded contracts (Chapters 6 and 9);
- Need, effectiveness and opportunities related to continued and expanded neutral measures (Chapters 5, 8, 10 and 11);
- Information indicating whether race- and gender-conscious programs are needed, and if so, for which DBE groups (Chapters 5, 7, 8 and 10); and
- Other enhancements to ODOT's implementation of the Federal DBE Program (Chapter 11).

#### **A. Setting an Overall Annual DBE Goal — 49 CFR Section 26.45**

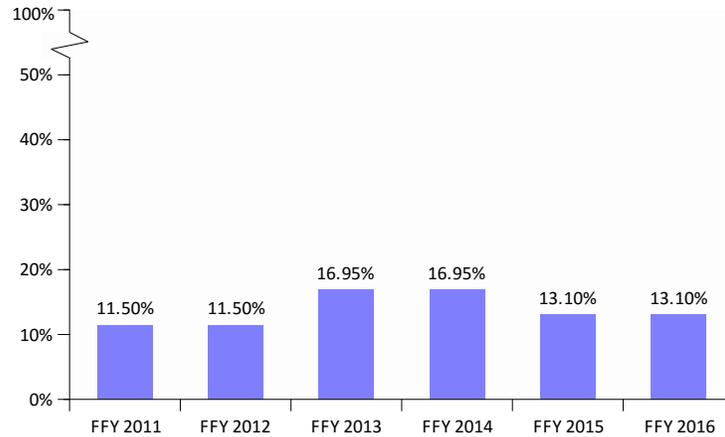
As part of implementing the Federal DBE Program, ODOT sets overall goals for DBE participation for USDOT-funded contracts. ODOT's overall DBE goal for FHWA-funded contracts for FFY 2015 and FFY 2016 is 13.10 percent, which FHWA has approved.

**ODOT’s overall DBE goals since FFY 2011.** Figure 4-1 shows ODOT’s FHWA-approved overall annual DBE goals for FHWA contracts since FFY 2011. They ranged from 11.50 percent to 16.95 percent over this time period.

**Figure 4-1.**  
**ODOT FHWA annual**  
**DBE goals FFY 2011–FFY 2016**

Note: ODOT proposed, but FHWA did not approve, an overall DBE goal of 12.29% for FFY 2014 through FFY 2016.

Source: ODOT Uniform Reports and other ODOT reports.



In the Final Rule effective February 28, 2011, USDOT changed how often agencies that implement the Federal DBE Program are required to submit overall annual DBE goals. Agencies such as ODOT need to develop and submit overall annual DBE goals every three years. ODOT’s next three-year goal for its FHWA-funded contracts will be for federal fiscal years 2017 through 2019, which begins October 1, 2016. It must submit its proposed goal for FHWA approval by August 1, 2016.

**Two-step process to set the overall DBE goal.** There is a two-step process for setting an overall DBE goal. Calculating the “base figure” is the first step, which Chapter 6 of this report provides. “Step 2 adjustments” can be made to develop the final overall DBE goal, which Chapter 9 explains. Keen Independent’s process follows the instructions given in 49 CFR Section 26.45 and additional USDOT guidance.<sup>1</sup>

ODOT must also provide for consultation and publication of its proposed overall DBE goal. Consultation must include stakeholders, and publication must be on the ODOT website and may include other means as well, as described in 49 CFR Section 26.45(g).

## **B. Role of Race- and Gender-Neutral Measures in Meeting the Goal**

As discussed in Chapters 1, 2 and 10, ODOT must meet the maximum feasible portion of its overall annual DBE goal through the use of race- and gender-neutral means of facilitating DBE participation (see 49 CFR Section 26.51).

<sup>1</sup> Tips for Goal-Setting in the Federal Disadvantaged Business Enterprise (DBE) Program. (2014, December 22). Available at <http://www.dot.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>

**Projecting the portion of the overall DBE goal to be met through neutral means.** Federal regulations require agencies such as ODOT to project the portion of their overall DBE goal that they expect to meet through neutral means. After establishing its overall DBE goal, ODOT must project the portion of the goal to be achieved through such means.

Chapter 10 of this report discusses different approaches to making this projection and provides information that ODOT can use regarding the three fiscal years beginning FFY 2017.

**ODOT's projections for FFY 2015 and FFY 2016.** The ODOT projection for FFY 2015 and FFY 2016, which FHWA approved, was for ODOT to:

- Meet 7.9 percentage points of its 13.1 percent overall goal through neutral means; and
- Meet the remaining portion, 5.2 percentage points, through race- and gender-conscious means (DBE contract goals).

To make this projection, ODOT examined the race-neutral DBE participation on its FHWA-funded contracts over a number of years (using the median annual race-neutral participation for those years). Chapter 10 analyzes new information on race-neutral participation, including results from more comprehensive data than ODOT has had in the past.

### **C. Types of Race- and Gender-Neutral Measures**

Examples of neutral measures appear in a number of different parts of federal regulations governing the Federal DBE Program:

- **Fostering small business participation.** Federal regulations in 49 CFR Section 26.39 outline nine different groups of examples of neutral measures, which Keen Independent reviews in detail.
- **Business Development Program.** Regulations in 49 CFR Section 26.35 and Appendix D to Part 26 describe business development programs (BDPs), which are designed to assist DBE-certified businesses in developing the capabilities to compete for work independent of the DBE Program.
- **Mentor-protégé program.** Such programs provide mentorship of DBEs by other firms or groups.
- **Prompt payment mechanisms.** Prompt payment of subcontractors is a neutral measure required under 49 CFR Section 26.29.

The following discusses ODOT's activities as well as its partners' programs related to each of the above neutral measures.

**Fostering small business participation — 49 CFR Section 26.39.** When implementing the Federal DBE Program, ODOT must include a measure to structure contracting requirements to facilitate competition by small businesses, “taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may

preclude small business participation in procurements as prime contractors or subcontractors.”<sup>2</sup> The Final Rule effective February 28, 2011 added further requirements for transportation agencies to foster small business participation in their contracting.

Federal regulations in 49 CFR Section 26.51(b) provide examples of race-neutral means of facilitating DBE participation, summarized below:

1. Arranging solicitations, times for the presentation of bids, quantities, specifications and delivery schedules in ways that facilitate participation by DBEs and other small businesses;
2. Providing assistance in overcoming limitations such as inability to obtain bonding or financing;
3. Providing technical assistance and other services;
4. Carrying out information and communications programs on contracting procedures and specific contract opportunities;
5. Implementing a supportive services program to develop and improve immediate and long-term business management, recordkeeping, and financial and accounting capability for DBEs and other small businesses;
6. Providing services to help DBEs, and other small business, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;
7. Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;
8. Ensuring distribution of a DBE directory; and
9. Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

Federal regulations also include as acceptable program measures:

- Race- and gender-neutral small business set-asides for prime contracts under a stated amount (e.g., \$1 million). Keen Independent discusses these types of programs under Point #6 from the above list.
- On prime contracts that do not include DBE contract goals, requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all of the work involved.

Beyond this list, there are several other examples of neutral measures identified in the Federal DBE Program such as prompt payment mechanisms, establishing mentor-protégé programs and other means, which are also discussed below.

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<sup>2</sup> 49 CFR Section 26.39(a).

The study team's review of ODOT neutral initiatives identified efforts across each of these areas. In addition, other groups in Oregon provide services that ODOT leverages to provide assistances to DBEs and other small businesses.

**1. Arranging aspects of contracts in ways that facilitate participation by DBEs and other small businesses.** For its construction contracts, ODOT has an established, consistent schedule and process for advertisement and bid submission (9 a.m., Thursdays). ODOT also has a consistent way of assembling bids, quantities and specifications for construction projects. This standardization of the process and schedule is beneficial to prime contractors and subcontractors. Occasionally, ODOT has a special bid opening for a non-routine project on another day of the week, which is scheduled well in advance. The 2016 bid opening schedule is published on ODOT's Construction Contracts Unit website.

Throughout the organization, ODOT examines opportunities to unbundle contract elements to provide more opportunities to small businesses. ODOT has developed a Small Contracting Program that streamlines bidding and project delivery for construction contracts less than \$100,000 and engineering-related and other services contracts less the \$150,000. As discussed in Chapter 8, the Small Contracting Program increases participation of minority- and women-owned firms as prime contractors and consultants.

ODOT also works with local public agencies to encourage them to consider how unbundling contracts can benefit small business participation.

**2. Providing assistance in overcoming limitations such as inability to obtain bonding or financing.** ODOT partners with agencies such as the Northwest Small Business Transportation Resource Center (NW SBTRC) to provide bonding education programs. ODOT helped to plan and organize the training series in 2012 and 2013 and the follow-up workshops in 2015.

ODOT small business and DBE training provides information about opportunities to receive financing assistance through other organizations. A major component of this assistance is U.S. Small Business Administration loan programs offered through local banks and other private and not-for-profit organizations.

- For example, the Oregon Association of Minority Entrepreneurs (OAME) offers small business financing (including accounts receivable and term microloans) assistance in presenting loan packages to outside financing sources and technical support.
- The Oregon Capital Access Program (CAP) helps banks and credit unions make commercial loans to small businesses and provide capital for start-up or expansion. Lenders build a loan-loss reserve each time they enroll a loan. Contributions to the loan-loss reserve account are matched by CAP.
- The USDOT has a Short Term Lending Program (STLP) that enables DBE- and SBA-certified businesses to access the financing they need to participate in transportation-related contracts. The STLP allows for a maximum loan amount of \$750,000. While the line of credit normally covers a one-year period, the applicant has the option of

requesting one or more renewals; the line of credit cannot exceed five years.<sup>3</sup> NW TRBC also delivers this service. ODOT has conducted outreach to publicize this program and has assisted with confirmation of applicant information.

- There are many other organizations throughout the state that assist minority- and women-owned firms and other small businesses regarding financing. The 2010 ODOT Small Business Resources Guide identified more than 50 organizations. ODOT also provides resource links on its website.

ODOT can also waive certain bond requirements for small public improvement contracts. In April 2012, the Director reissued an exemption for ODOT public improvement contracts valued between \$50,000 and \$100,000 from bid security, performance, and payment bonds. Public works bonds regarding payment of wages are not covered under this exemption, but certified DBEs and MWESBs can obtain an exemption from providing a public works bond for the first four years of their certification.

**3. Providing technical assistance and other services.** ODOT has a series of different technical assistance programs delivered through Small Business Development Centers (SBDCs) in Oregon. ODOT pays for all but \$200 of the enrollment fee for certified firms (including certified ESBs) to attend these classes. Programs include the Small Business Management, ODOT Mentor-Protégé, DBE Boot Camp and DBE Business Development Program services. ODOT has also partnered with Business Diversity Institute, Inc. (BDI), the Metropolitan Contractor Improvement Partnership (MCIP), the Hispanic Metropolitan Chamber and other groups to provide small business training.

Additionally, ODOT sponsors the Turner School of Construction Management for Small, Women-Owned and Minority-Owned Businesses that is offered at Turner's offices. Since 2013, ODOT has sent nine DBE business owners to the University of Washington Foster School of Business Minority Business Executive Program.

Examples of other local sources of assistance include the following.

- **Chambers of commerce.** There are more than 80 chambers of commerce in the state, including minority and women's business organizations, that offer training and networking opportunities. There are membership organizations focusing on businesses owned by Native Americans, Asian Pacific Americans, Korean Americans, Philippine Americans, Hispanic Americans, African Americans and others.
- **Trade associations and professional groups.** There are many trade associations and professional groups related to transportation-related construction and professional services in Oregon. Organizations such as the Oregon Chapter of the Associated General Contractors of America (AGC) serve a broad range of firms engaged in transportation construction and other heavy construction. The American Council of Engineering Companies of Oregon (ACEC) is one example of a trade association serving engineering companies in the state. There are associations of minority

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<sup>3</sup> Short Term Lending Program. (2015, January 5) Retrieved August 28, 2015, from <http://www.transportation.gov/osdbu/financial-assistance/short-term-lending-program>

contractors with Oregon chapters, including the National Association of Minority Contractors (NAMCO) and associations of women business owners with Oregon locations (e.g., National Association of Women in Construction). There are also local organizations such as the Oregon Association of Minority Entrepreneurs (OAME) that help local small businesses.

These types of organizations offer a broad range of training, other technical assistance and networking opportunities to transportation-related construction and engineering companies in Oregon. ODOT has partnered with many of them.

- **Small business assistance organizations.** Examples of small business assistance organizations are provided below.
  - There are 19 centers across the state in the Oregon Small Business Development Center Network. These centers provide business counseling, planning assistance, help concerning financing, classes and assistance bidding on government contracts.
  - SCORE (Service Corps of Retired Executives) is a not-for-profit organization that partners with the U.S. Small Business Administration to provide general business assistance through locations throughout the country. SCORE has offices in communities throughout Oregon where it offers mentoring, business counseling, and workshops on topics including the basics of starting a business, how to administer and manage a business, marketing and social media, and business related computer skills and tools.
  - Business Oregon is Oregon’s state economic development agency. It offers many services including COBID certification, planning services, grants, incentives and finance programs.
  - The Oregon Entrepreneurs Network (OEN) connects peers and mentors. They also provide startup funding opportunities, training and educational opportunities.
- **Small business incubators.** Business incubators offer workspace for emerging businesses and also training, mentoring, networking and financing assistance. There are business incubators located in many of the larger communities in Oregon

The groups mentioned above are just examples of trade associations, professional groups and small business assistance organizations in the state. The 2010 ODOT Small Business Resources Guide identified nearly 50 organizations that provide such assistance.

4. Carrying out information and communications programs on contracting procedures and specific contract opportunities. ODOT has ongoing efforts to provide information on contracting procedures and contract opportunities. Examples of activities include the following:

- ODOT participates in Connect 2 Oregon, which provides training to vendors on government contracting.
- By visiting ODOT's website, firms interested in working as prime contractors or subcontractors on ODOT construction contracts can obtain:
  - Information about currently available construction projects;
  - Information about future projects;
  - Lists of companies that are planholders for contracts out for bid (especially useful for subcontractors and suppliers); and
  - Lists of firms that are prequalified with ODOT (also useful to subcontractors and suppliers).
- Goods and services vendors can register with the Oregon Procurement Information Network (ORPIN), the State of Oregon's online system used by the ODOT Procurement Office (and other state and local agencies) to advertise solicitations to the public for contracts, except for large highway and bridge construction contracting. After vendors identify the types of goods and services they provide in ORPIN, they are automatically sent an email notification of those bid opportunities.
- ODOT's Electronic Bidding Information Distribution System (eBIDS) is an online tool that enables contractors, suppliers and other interested parties to locate, view and download bid-related documents for design-bid-build highway and bridge construction projects that ODOT currently has advertised to bid. ODOT eBIDS provides free downloading of bid booklets, addenda, clarification letters, plans, specifications and bid reference documents. ODOT vendors may also self-register as prime or informational planholders on these projects, and identify other firms that have registered.
- Businesses interested in construction contracts can also obtain information from the ODOT Procurement Office, Construction Contracts Unit webpage. The page lists upcoming construction projects and includes an option to receive email updates when the page is updated.
- The ODOT Office of Civil Rights issues monthly emails announcing upcoming highway construction opportunities and other events.
- ODOT provides different list of construction prime contractors on its Procurement Office webpage (which is helpful to potential subcontractors).
- The Office of Civil Rights webpage includes a searchable database that includes a contract letting forecast for the upcoming six months.

- The ODOT Office of Civil Rights features teaming and training opportunities, including meet-the-primers events.
- ODOT encourages online bidding across its contracting and procurement. This can also make it easier for small businesses to easily submit bids and proposals.
- To communicate bid opportunities on local agency contracts, ODOT's Statewide Programs Unit webpage maintains contact information for ODOT Local Agency Liaisons as well as links to listings of Oregon city and county websites.
- In 2005, the American Council of Engineering Companies (ACEC) and ODOT established a partnership agreement that identifies issues and resolutions as well as partners on communication and collaboration protocols. Several standing committees undertake specific work assignments. Meetings are held bi-monthly. The group also holds an annual partnering conference.
- The Oregon chapter of the Association of General Contractors partners with ODOT to hold an annual industry meeting. AGC's Heavy-Highway Council (the Industry Leadership Team) meets with ODOT monthly. As with the ACEC partnership, this team creates subcommittees and work groups to address industry-related issues.
- ODOT's DBE Program staff trains internal staff, consultants, constructors and local public agency staff on DBE utilization and compliance. ODOT also maintains a complaint process related to DBE issues.
- ODOT participates in many tradeshow and other outreach events in partnership with chambers and trade associations;

Industry associations and other groups also provide such assistance.

**5. Implementing a supportive services program to develop and improve immediate and long-term business management, recordkeeping, and financial and accounting capability for DBEs and other small businesses.** Many of the small business services providers and other organizations previously mentioned provide services related to business management, recordkeeping, finances and accounting. ODOT provides additional workshops and supports other small business management training. ODOT's Small Business Resource Guide identified more than 50 organizations providing training and assistance with issues such as accounting.

**6. Providing services to help DBEs, and other small business, improve long-term development.** The Emerging Small Business (ESB) Program creates contracting opportunities for Oregon's small business community and assists ESBs in overcoming barriers to participating in public contracting procurement programs. Oregon independent firms with average gross annual receipts over the past three years under a certain threshold, qualify for the program. (Many DBEs are also ESBs.)

The ESB program identifies contracting opportunities that are small, not technically complex and are relatively short in duration. Under this program, ODOT can set-aside contracts for bidding by ESB-

certified firms. Most of the projects selected for the ESB program are advertised on ORPIN. Local agencies such as the City of Portland and Port of Portland operate ESB programs as well.

ESB firms also qualify to participate in the ODOT Office of Civil Rights' Project-Specific Mentor-Protégé Program. ESBs must perform ODOT-related work such as highway- or facility-related construction, architecture, engineering or related professional services and have an active contract or subcontract on an ODOT project. Primes and subcontractors on an active ODOT-funded project commit to participate in the mentor-protégé team for the duration of the project contract. The mentor-protégé relationship is facilitated by the Small Business Development Center. Members of the team (mentor, protégé, SBDC facilitator and ODOT ESB Manager) meet monthly to develop and implement a plan to assist the protégé in targeted areas.

The Small Contracting Program also provides opportunities for DBEs and other small businesses to develop prime contractor relationships with ODOT.

**7. Programs to assist new, start-up firms.** Many of the programs discussed above, whether operated by ODOT or other groups, apply to new businesses.

**8. Ensuring distribution of a DBE directory.** The State of Oregon Certification Office for Business Inclusion and Diversity (COBID) provides a directory of DBE firms. ODOT provides a link to the searchable online DBE directory on its website, which also includes firms certified as MBE/WBE/ESBs.

**9. Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.** Activities include the following:

- ODOT training includes topics such as e-commerce and electronic bidding.
- ODOT's Business Resources Guide provides information about many organizations that assist small businesses with marketing, including e-commerce. There were more than 40 organizations in the 2010 ODOT Small Business Resources Guide that provide technology training. As with other training, ODOT can provide reimbursement of the costs of technology training, with certain limits.
- ODOT sponsors Business Diversity Institute, Inc. (BDI), which provides electronic media-related training at some of its Breakthrough Breakfast and MED Week workshops.
- ODOT's AGC and ACEC annual conferences present sessions on emerging technologies, which DBEs are encouraged to attend.
- ODOT's Procurement Construction Contracts Unit has published detailed guidance on how to use eBIDS, offered training around the state after it launched, and continues to provide technical assistance on its use.

**Summary.** The study team's review of neutral initiatives identified efforts across the examples listed in 49 CFR Section 26.51(b).

**Business Development Program — 49 CFR Section 26.35 and Appendix D to Part 26.** Business development programs (BDPs) are programs designed to assist DBE-certified businesses in developing the capabilities to compete for work independent of the DBE Program. Agencies such as ODOT may establish a BDP as part of their implementation of the Federal DBE Program.

As part of a BDP, or separately, agencies may establish a mentor-protégé program, in which a non-DBE or another DBE serves as a mentor and principal source of business development assistance to a protégé DBE.

ODOT has contracted with SBDCs to deliver DBE Boot Camp to provide the business development program element. ODOT is in the process of transitioning from the boot camp program (short course) to a more spread out format with the DBE Business Development Program, also offered in part through SBDCs, and may supplement the SBDC services with other support services through other providers. New ODOT programs were under development at the time of this report.

**Mentor-protégé program.** ODOT has been a significant supporter of the mentor-protégé programs administered by the Port of Portland. The Port has had a mentor-protégé program for MBE/WBEs in place for 15 years. According to the Port, there are 100+ graduates of the program to date. Many of the MBE/WBE firms doing work with the Port and ODOT today are current participants in the program or past graduates.

Protégés meet with their mentors and the Port once each month for at least for 90 minutes. The Port also assists with back-office infrastructure of companies, including training and other help concerning bookkeeping, marketing and IT. On average, it spends \$15,000 per year on each protégé.

The program also involves developing three-year strategic plans and relationship building. The Port directs firms to Albina Opportunities Corp. for capital needs. According to Port staff, mentors give their time freely, and seem willing to participate. They do it, in part, for “goodwill from the Port.”

There are other organizations in Oregon that offer general business assistance, including mentoring, as discussed elsewhere in this chapter.

**Prompt payment mechanisms — 49 CFR Section 26.29.** The Federal DBE Program (49 CFR Section 26.29) requires prompt payment of subcontractors. On USDOT-funded contracts, prime contractors are required to pay subcontractors for satisfactory performance of work no later than 30 days from their receipt of payment from the agency. There are parallel requirements for release of retainage to subcontractors. It is a current point of emphasis from USDOT.

Oregon has a ten-day prompt payment statute for prime contractor payment of subcontractors, including material suppliers, on public improvement contracts. Within ten days of receiving payment from the agency, prime contractors on construction contracts are required to pay subcontractors for satisfactory performance. This ten-day payment requirement applies to first-tier subcontractors and

their subcontractors. By state law, prime contractors and first-tier subcontractors must pay interest on any payments that are more than 30 days after contractor receipt of payment.<sup>4</sup>

In addition, state statute requires ODOT to promptly pay contractors on public improvement projects and pay late interest on payments that are more than 30 days after receipt of invoice.

In November 2012 ODOT convened a subcommittee of agency, prime, and small business subcontractors to address concerns identified during the 2011 disparity study about subcontractors not getting timely payment of retainage. The committee reviewed several options, including whether to disallow retainage, and the quarterly release was the agreed upon solution.

ODOT instituted a quarterly release of retainage process for completed pay items in 2013. Each quarter, ODOT reviews a contract for completed pay items, and releases retainage for those items. Once the prime contractor receives this retainage payment, it has 10 days to release corresponding retainage to its subcontractors.

**Overall assessment of neutral efforts.** Review of current race- and gender-neutral initiatives shows considerable ODOT efforts alone and in partnership with others. Much of ODOT's assistance is highly individualized to the specific needs of a DBE based on information developed in a formal assessment and business plan.

#### **D. Use of Any Race- and Gender-Conscious Measures**

The Federal DBE Program outlines proper consideration and use of race- and gender-conscious measures such as DBE contract goals.

**DBE certification — 49 CFR Part 26 Subpart D.** The State of Oregon Certification Office for Business Inclusion and Diversity (COBID) is the sole certifying agency in Oregon. It has designed its DBE certification process to comply with 49 CFR Part 26 Subpart D. It uses USDOT forms and follows federal regulations in certifying firms as DBEs within the state.

Federal regulations in 49 CFR Section 26.31 requires maintenance of DBE directory to include address, phone number and the types of work the firm has been certified to perform as a DBE, using NAICS codes. COBID maintains a searchable DBE directory on its website. It appears to meet and exceed the requirements in 49 CFR Section 26.31, as it has more detailed work types listed for each firm and provides fax number and email address when available. The DBE directory is searchable by business name, work type, NAICS code and company representative.

**Use of DBE contract goals — 49 CFR Section 26.51(d and e).** The Federal DBE Program requires agencies to establish contract goals to meet any portion of their overall DBE goals that they do not project being able to meet using race- and gender-neutral means, as noted in 49 CFR Section 26.51(d).

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<sup>4</sup> ORS 279C.525(2).

USDOT guidelines on the use of DBE contract goals, which are presented in 49 CFR Section 26.51(e), include the following guidance:

- Contract goals may only be used on contracts that have subcontracting possibilities;
- Agencies are not required to set a contract goal on every FHWA-funded contract;
- Agencies should set a goal for a specific contract based on factors such as the type of work involved, the location of the work and the availability of DBEs for the work of the particular contract;
- Over the period covered by the overall DBE goal, an agency must set contract goals so that they will cumulatively result in meeting the portion of the overall goal that the agency projects being unable to meet through race- and gender-neutral means; and
- An agency's contract goals must provide for participation by all DBE groups eligible for race- and gender-conscious measures, and must not be subdivided into group-specific goals.

ODOT appears to operate a DBE contract goals program in accordance with each of these instructions.

Federal regulations allow for an agency to require information regarding compliance with the DBE contract goal at time of bid or proposal, or up to seven days after bid opening (to be reduced to five days beginning January 1, 2017).<sup>5</sup> The regulations provide for some flexibility for what a proposer needs to provide under negotiated procurements such as design-build contracts.<sup>6</sup> Regulations also establish procedures for calculating the value of the DBE participation for specific types of subcontractors and suppliers.<sup>7</sup> For example, only if a DBE performs a “commercially useful function” can it be counted toward the goal.

Once the prime contractor has identified a DBE subcontractor to meet a contract goal, it may not terminate that DBE or substitute another DBE without the agency's prior consent. An agency may only give such consent if there is good cause for terminating the listed DBE (federal regulations provide direction on what constitutes “good cause”)<sup>8</sup>

**ODOT use of DBE contract goals.** In April 2006, ODOT suspended its use of DBE contract goals after FHWA directed state DOTs in the Ninth Circuit to do so until they completed a disparity study. ODOT reinstated the use of race- and gender-conscious goals in FFY 2009, but only for certain DBE groups and only for construction contracts (under an FHWA-approved “waiver”). ODOT reinstated setting DBE contract goals for architecture and engineering (A&E) contracts in April 2013. At the time of this study, ODOT continued to operate the DBE contract goals program in this way, with periodic changes in the DBE groups eligible to meet contract goals under an FHWA-approved waiver.

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<sup>5</sup> 49 CFR Section 26.53(b)(3)(i).

<sup>6</sup> 49 CFR Section 26.53(b)(3)(ii).

<sup>7</sup> 49 CFR Section 26.55.

<sup>8</sup> 49 CFR Section 26.53(f)(1).

At the time of this report, the following DBE groups were eligible to meet DBE contract goals:

- For construction contracts, DBEs owned by African Americans and Subcontinent Asian Americans were eligible to be counted toward a DBE contract goal; and
- For A&E contracts, DBEs owned by women, African Americans, Subcontinent Asian Americans, Hispanic Americans and Native Americans were eligible to be counted toward a DBE contract goal.

ODOT staff and some business owners interviewed in the study reported that limiting DBEs to two groups to meet contract goals for construction contracts makes it difficult for the Program to be effective. ODOT is somewhat limited in setting goals as the types of work involved might not match availability within the two groups of DBEs, and there is less competition among DBEs than might be ideal. ODOT staff and others described a number of projects where poor work or other behavior by the DBE caused major problems with certain construction projects.

**ODOT current process for setting goals for specific contracts.** ODOT sets DBE contract goals on certain FHWA-funded construction and A&E contracts.

- ODOT sets goals on construction contracts of \$1 million or more. ODOT's previous goal-setting process was to not include a DBE goal if a project was shorter than 90 days. Currently, ODOT considers a short project schedule as one factor in determining a contract goal. In the past, sometimes ODOT would not set a goal because it was in a rural location. However, according to ODOT staff, to increase participation and encourage broader opportunities around the state, ODOT has become more flexible in how it sets DBE contract goals, even in rural locations.
- To establish a goal for a construction contract, ODOT staff first review the engineer's estimate for different types of work. ODOT then examines DBEs that are available for the work. According to staff, the highest DBE contract goal ODOT has set on a construction contract in recent years has been 10 percent. Many projects have had contract goals in the range of 1 to 4 percent. One manager from a local public agency that implements ODOT's program said that ODOT's goals were much lower than that agency's goals on its own similar contracts.
- Over the past two years, ODOT has set higher DBE contract goals so that it can meet its overall DBE goal and encourage use of DBEs in a broader range of work types. Prime contractors have reported to ODOT staff that they tend to meet DBE contract goals by using disciplines that are the least risky to the project. Use of higher goals on select projects are intended to make it difficult for prime contractors to meet the contract goal by only awarding DBEs low risk work, such as flagging and trucking.

- ODOT sets goals on A&E contracts of \$100,000 or more. ODOT considers the amount of work that can be subcontracted when setting the goal. A typical DBE goal on an A&E contract might be 8.5 percent if there are five or more disciplines in the work; a lower goal could be set if there are fewer disciplines. ODOT has recently convened a DBE goal setting committee for consulting contracts to develop DBE-related evaluation criteria for the proposal process and to reevaluate DBE goal sizes and commitment review processes.

**ODOT process for determining whether a bidder had met the goal or shown good faith efforts to meet the goal.** ODOT required bidders on construction contracts to identify DBEs, their scope of work and their dollar commitments at time of bid. Sub-tier subcontractors can count toward a goal in the same way as first-tier subcontractors.

For construction contracts, bidders submit a DBE Commitment Certification and Utilization Form with the bid. ODOT reviews this information to determine whether the contract goal was met and the committed DBEs are able to perform the bid items listed. The awarded contractor provides a Committed DBE Breakdown and Certification Form, signed by the DBE, within 10 calendar days of notification of award and prior to contract execution. ODOT also receives subcontract agreements and a DBE Work Plan Proposal for DBEs used on a project prior to when they perform the work.

For A&E contracts, ODOT's current process is that the final commitments to DBEs do not need to come in before the proposal. ODOT does not consider DBE participation in the points it awards when evaluating proposals; there is a pass-fail requirement for a proposer to submit a Subcontractor Solicitation and Utilization Report with their proposals. Prior to contract execution, the awarded contractor must submit a Committed DBE Breakdown and Certification form, signed by the DBE, showing scope of work and dollar value for each DBE subcontractor committed to meet the goal.

When counting DBE participation, federal regulations require that certain contract roles not count full value toward meeting a DBE contract goal. Section 26.55 of 49 CFR describes how agencies should count DBE participation and evaluate whether bidders have met DBE contract goals. Federal regulations also give specific guidance for counting the participation of different types of DBE suppliers and trucking companies. ODOT complies with these crediting requirements when determining how much credit to allow a prime contractor toward meeting a contract goal and when reporting overall DBE participation to FHWA.

**Good faith effort procedures — 49 CFR Section 26.53.** A bidder or proposer can comply with a DBE contract goal by documenting that it made adequate good faith efforts to meet the goal, even though it did not succeed in doing so. If an agency determines that a bidder or proposer did not make good faith efforts to meet the contract goal, it must provide that bidder or proposer an opportunity for administrative reconsideration.

USDOT has provided guidance for agencies to review good faith efforts, including materials in Appendix A of 49 CFR Section 26. The Final Rule effective February 28, 2011 updated requirements for good faith efforts when agencies use DBE contract goals. ODOT's implementation of DBE contract goals includes good faith efforts procedures. ODOT also has an administrative reconsideration process for any bidder that wishes to appeal a negative good faith efforts review, as required in the Federal DBE Program.

In recent years, bidders on ODOT construction contracts with DBE contract goals typically complied with the contract goals program by showing DBE participation that met the goal. There have been only two or three construction contracts where good faith efforts submissions were necessary in recent years, according to ODOT staff. Based on communication from ODOT staff, ODOT monitoring of contracts found that prime contractors were able to meet those commitments.

ODOT staff report that some contractors and consultants have been confused as to how to meet a DBE contract goal; some would show MWESB subconsultants rather than DBEs, for example. Sometimes ODOT has agreed that consultants made adequate good faith efforts on A&E contracts. However, ODOT has mostly found bidders and proposers commit sufficient work to eligible DBEs to meet the assigned contract goals.

**Monitoring and compliance.** Agencies must monitor that the work prime contractors commit to DBE subcontractors at contract award (or through contract modifications) is actually performed by those DBEs. Prime contractors can only terminate DBEs for “good cause,” and with written consent from the awarding agency. USDOT describes the requirements in 49 CFR Section 26.37(b).

ODOT follows Federal DBE Program monitoring and compliance requirements:

- ODOT staff monitor DBE payments made to DBE firms and compares payments to contract award commitments. ODOT requires contractors to submit monthly Paid Summary Reports showing the amounts paid to their subcontractors. When monitoring whether committed DBE subcontractors are actually used on projects, ODOT has occasionally needed to withhold payment from a prime contractor for not meeting their DBE commitments for that project. However, ODOT does not impose penalties on prime contractors for not meeting a DBE contract goal when there is work that a DBE subcontractor did not perform through no fault of the prime contractor.
- When monitoring the project, ODOT will only give a prime contractor credit for DBEs that meet the Commercially Useful Function (CUF) requirements, per ODOT’s review.
- ODOT’s monitoring includes review of commercially useful function (CUF). ODOT staff prepare a Commercially Useful Function (CUF) report for each DBE on a project to ensure that work committed to DBEs at contract award or subsequently (e.g., as the result of modification to the contract) is actually performed by the DBEs to which the work was committed.
- ODOT also has DBE termination and substitution review procedures. ODOT has received requests from prime contractors to terminate a DBE subcontractor on a project. ODOT will obtain the DBE’s perspective on the situation before making a decision, and will review whether the prime contractor has “good cause” to terminate in accordance with the regulations.
- ODOT staff are also responsible for informing the USDOT of any false, fraudulent or dishonest conduct in connection with the program.

**Flexible use of any race- and gender-conscious measures — 49 CFR Section 26.51(f).** Agencies must exercise flexibility in any use of race- and gender-conscious programs. For example, if ODOT uses DBE contract goals and determines that its DBE utilization is exceeding its overall DBE goal in a particular fiscal year, it must reduce its use of DBE contract goals to the extent necessary. If it determines that it will fall short of the overall DBE goal in a particular fiscal year, then it must make appropriate modifications in the use of race- and gender-neutral and race- and gender-conscious measures to allow it to meet the overall goal.

**Analysis of reasons for not meeting overall DBE goal — 49 CFR Section 26.47(c).** Another addition to the Federal DBE Program made under the Final Rule effective February 28, 2011 requires agencies to take the following actions if their DBE participation for a particular fiscal year is less than their overall goals for that year. An agency must:

- Analyze in detail the reasons for the difference; and
- Establish specific steps and milestones to address the difference and enable the agency to meet the goal in the next fiscal year.

As ODOT's DBE participation has not met its overall DBE goal in recent years, it has had to submit a Shortfall Analysis and Action Plan describing reasons that it did not meet the overall goal and how it planned to do so in the next fiscal year.

**Shortfall in FFY 2014.** ODOT's Shortfall Report for FFY 2014 included the following reasons for not meeting the overall DBE goal for that year:

- High overall goal that was based in part on "potential DBEs," which included firms that were not DBE certified but might be;
- ODOT's lack of reporting of DBE participation on engineering-related contracts, even though the goal was based in part on availability analysis for those contracts;
- Insufficient DBE participation as subcontractors, primarily because eligibility for the DBE contract goals program for construction contracts was limited to African American- and Subcontinent Asian American-owned DBEs; and
- Low level of DBE participation as prime contractors.

Based on this assessment, ODOT took the following actions for FFY 2015:

- ODOT adjusted the overall goal that better reflected what was achievable given DBE availability for ODOT work. (FHWA approved the new goal of 13.1 percent DBE participation.)

- ODOT also began setting higher DBE contract goals to assist ODOT in meeting the overall goal. ODOT began using a DBE Goal Planning worksheet for construction contracts to help it identify projects for DBE contract goals and the levels of goals for those projects necessary to meet the race-conscious portion of ODOT's overall DBE goal. The Office of Civil Rights improved communications with Area Managers in each of ODOT's Regions to more accurately forecast DBE goal sizes on projects in each Region. ODOT also communicated the new practice to prime contractors and provided more intra-year DBE tracking information to key trade groups.
- As in previous years, ODOT encouraged DBEs to participate as prime contractors in ODOT projects. ODOT continued to provide DBEs with information about contracting opportunities. It also continued to offer technical assistance to DBEs (primes and subcontractors) through the DBE Business Development Program and other efforts.
- ODOT also changed its internal procedures to remove barriers to non-committed DBEs to participate on its projects as suppliers, truckers and specialty contractors on the same basis as non-DBE suppliers, truckers and specialty contracts. This required changes in boilerplate Special Provisions, which were implemented in October 2014.

**Shortfall in FFY 2015.** ODOT's DBE participation of 6.01 percent in FFY 2015 also fell short of its 13.1 percent DBE goal for that year, which requires a Shortfall Report for that year. In fall 2015, ODOT submitted a request to modify its program waiver to re-include all DBE groups as eligible to meet DBE contract goals for construction contracts. ODOT believes re-including all DBE groups as eligible to meet contract goals would help increase overall DBE participation. ODOT is also continuing to refine its DBE goal forecasting process, reevaluating some projects for higher goals, and identifying additional outreach and "meet the primes" networking opportunities across the state, including mandatory pre-bid meetings on certain large projects.

**Prohibition of DBE quotas and prohibition of set-asides for DBEs unless in limited and extreme circumstances — 49 CFR Section 26.43.** DBE quotas are prohibited under the Federal DBE Program. DBE set-asides are only to be used in extreme circumstances. ODOT does not use DBE quotas in any way in its administration of the Federal DBE Program.

**Overconcentration — 49 CFR Section 26.33.** Agencies implementing the Federal DBE Program are required to report and take corrective measures if they find that DBEs are so overconcentrated in certain work areas as to unduly burden non-DBEs working in those areas. If an agency does identify overconcentration, examples of appropriate measures include the use of incentives, technical assistance, business development programs and mentor-protégé programs to assist DBEs in performing work outside of the specific field in which the agency has determined that non-DBEs are unduly burdened. An agency can also consider varying its use of contract goals to ensure that non-DBEs are not unfairly prevented from competing for subcontracts. Any determination of overconcentration and measures to address it must receive approval from FHWA.

Chapter 8 of this report further examines this issue based on data collected in this disparity study.

**Complaint procedure.** ODOT maintains a complaint procedure for DBEs experiencing difficulties or other firms wishing to provide information to ODOT.

## **E. Statements, Reporting and Recordkeeping**

There are number of requirements under 49 CFR Part 26 related to required statements and assurances, reporting and recordkeeping. They include the following, presented in the same order as found in the federal regulations.

**Policy statement — 49 CFR Section 26.2.** ODOT has a signed and dated policy statement expressing its commitment to the DBE Program.

**Reporting to DOT — 49 CFR Section 26.11 (b).** ODOT must periodically report DBE participation in its transportation-related construction and engineering contracts to FHWA. ODOT compiles information on DBE commitments/awards and on DBE payments and timely submits Uniform Reports of DBE Awards or Commitments and Payments to FHWA every six months. ODOT had not included non-construction contracts in these reports until federal fiscal year 2015, however.

ODOT must also develop a bidders list of businesses that are available for its transportation contracts. The bidders list must include the following information about each available business:

- Name;
- Address;
- DBE status;
- Type of work performed;
- Age of business; and
- Annual gross receipts (within a selected range).

This information is required to help agencies such as ODOT develop accurate data about the universe of DBE and non-DBE firms that seek to work on contracts.

ODOT collects information from the following sources:

- ODOT has a database of contractors submitting bids on construction contracts and their DBE or MWESB certification (but not data such as age or gross receipts);
- Bidders on construction contracts are also to provide ODOT with a list of firms from which they obtained subcontract quotes; and
- ODOT maintains lists for other types of contracts, such as firms interested in receiving information about engineering contract opportunities.

COBID maintains information about race, ethnicity or gender ownership of firms and the types of work they perform in the DBE Directory. ODOT Office of Civil Rights receives this information through a nightly database upload.

The information Keen Independent prepared from the detailed availability interviews can supplement ODOT information to provide age, gross receipts and other firm information in a consistent list.

**Assurances — 49 CFR Section 26.13.** ODOT must make certain required assurances in its agreements with FHWA, and does so.

**Program updates — 49 CFR Section 26.21.** ODOT has submitted a DBE Program document for approval to FHWA and periodically updates this document.

**DBE Liaison Officer — 49 CFR Section 26.25.** At present, the Manager of the Office of Civil Rights is the DBE Liaison Officer for ODOT.

**DBE financial institutions — 49 CFR Section 26.27.** ODOT is required to investigate services offered by financial institutions owned and controlled by socially- and economically-disadvantaged individuals. In its March 2014 update of its DBE Program Plan, ODOT reported that it had not identified any minority-owned financial institutions in Oregon.

## **F. Summary**

The Federal DBE Program requires agencies receiving USDOT funds to set an overall DBE goal and meet the maximum feasible portion of that goal through the use of race- and gender-neutral means. As necessary and appropriate, agencies such as ODOT must use DBE contract goals to meet any portion of the overall goal that cannot be met through neutral means.

ODOT is operating the Federal DBE Program for its FHWA-funded contracts in this fashion, and has monitoring and compliance elements to ensure its proper operation.

The 2016 Disparity Study will provide new information for ODOT to:

- Set its overall DBE goal for FHWA-funded contracts for FFY 2017 through FFY 2019 (Chapter 9);
- Examine any additional race-neutral opportunities to encourage DBE and other small business participation in its contracts (Chapter 11);
- Project the portion of its overall DBE goal to be met through neutral means (Chapter 10);
- Assess whether any race- and gender-neutral measures such as DBE contract goals are needed (relevant information in Chapters 5, 7, 8 and 10 as well as supporting appendices); and
- If use of DBE contract goals is needed to meet the overall DBE goal, assess which DBE groups might be eligible to participate in the contract goals program (Chapters 5, 7, 8 and 10 and supporting appendices).