

DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM PROPOSED THREE-YEAR OVERALL GOAL & METHODOLOGY FOR FEDERAL FISCAL YEARS 2015 THROUGH 2017

The Washington State Department of Transportation (WSDOT) submitted its three-year overall Disadvantaged Business Enterprise (DBE) goal for federal fiscal years (FFYs) 2012 through 2014 to the Federal Aviation Administration (FAA) on August 1, 2011. FAA subsequently approved WSDOT's overall DBE goal of 2.0% on September 19, 2011. Recently, WSDOT commissioned BBC Research & Consulting (BBC) to conduct a disparity study related to the agency's implementation of the Federal DBE Program (referred to herein as the 2013 Disparity Study).¹ Based on study results and on guidance from the Ninth Circuit Court of Appeals rulings in *Associated General Contractors of America, San Diego Chapter vs. California Department of Transportation, et al. Western States Paving Company vs. Washington State DOT*, and other case law, WSDOT proposes a new overall DBE goal for FFYs 2015 through 2017.^{2, 3} To determine its new overall DBE goal, WSDOT followed federal regulations, including the two-step goal-setting methodology set forth in 49 Code of Federal Regulations (CFR) Section 26.45.

Step 1. Determining a Base Figure – 49 CFR Section 26.45(c)

WSDOT began the process of determining its new overall DBE goal by first establishing a base figure. Consistent with United States Department of Transportation (USDOT) guidance, WSDOT established a base figure based on data from a *custom census* availability analysis that BBC conducted as part of the 2013 Disparity Study (for details, see Chapter 5 and Appendix D of the 2013 Disparity Study report) and on information about FAA-funded projects that WSDOT anticipates awarding during FFYs 2015 through 2017. WSDOT anticipates that it will undertake two FAA-funded projects during FFYs 2015 through 2017. The first project will consist of multiple construction and engineering contracts to rehabilitate a runway at the Methow Valley State Airport. The second project will be an aviation system plan that WSDOT will contract out to a transportation engineering firm. The total cost of the projects will be \$3.62 million—\$2.94 million in construction contracts and \$0.67 million in engineering contracts.

As part of the disparity study, BBC estimated the availability of minority- and women-owned businesses to participate in USDOT-funded transportation contracts that WSDOT awarded in FFYs 2009 through 2011.^{4,5} BBC expressed availability as the percentage of the associated

¹ <http://www.wsdot.wa.gov/NR/rdonlyres/9F8F685A-9E47-4F13-AA79-F776AC0C576E/0/2012DBEProgramDisparityStudyFinalReport.pdf>

² *AGC, San Diego Chapter v. California DOT*, 713 F.3d 1187, 2013 WL 1607239 (9th Cir. April 16, 2013).

³ *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 997-98 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006).

⁴ The USDOT-funded transportation contracts that BBC examined for the 2013 Disparity Study did not include any FAA-funded contracts, because WSDOT did not execute any FAA-funded projects during FFYs 2009 through 2011. However, as part of the study, BBC examined contracts that were similar in scope and work types to the Methow Valley State Airport project.

⁵ BBC defined women-owned businesses specifically as *non-Hispanic white women-owned businesses*. BBC grouped minority women-owned businesses with their corresponding minority groups (e.g., grouping Black American women-owned businesses

contracting dollars that one might expect minority- and women-owned businesses to receive based on various factors including the type of work involved, the location of the work, and the size of the contract. For the base figure analysis, BBC considered only those minority- and women-owned businesses that are DBE-certified or appear that they could be DBE-certified based on revenue requirements described in federal regulations including 49 CFR Section 26.65 (referred to herein as *potential DBEs*; see 76 Federal Register 5092 (January 28, 2011)). Figure 1 presents detailed information about the availability of potential DBEs for WSDOT's USDOT-funded construction and engineering contracts:

- Column (a) presents the DBE racial/ethnic groups that BBC considered as part of the availability analysis;
- Column (b) presents the availability percentage for each group for USDOT-funded *construction* contracts; and
- Column (c) presents the availability percentage for each group for USDOT-funded *engineering* contracts.

Figure 1.
Availability components of the base figure

a. Potential DBEs	Availability percentage	
	b. Construction	c. Engineering
African American-owned	0.8 %	1.3 %
Asian-Pacific American-owned	0.5	0.8
Subcontinent Asian American-owned	0.3	3.3
Hispanic American-owned	1.9	0.6
Native American-owned	1.8	2.1
Non-Hispanic White women-owned	<u>2.7</u>	<u>4.9</u>
Total potential DBEs	8.1 %	12.9 %

Note: Numbers rounded to nearest tenth of 1 percent. Numbers may not add to totals due to rounding.

Source: BBC Research & Consulting availability analysis from 2013 Disparity Study

To determine the base figure for its overall DBE goal, WSDOT applied information from Figure 1 to the contracts that it will execute as part of the FAA-funded projects that the agency will award during FFYs 2015 through 2017. Based on the information presented in Figure 1, WSDOT estimates that the availability of potential DBEs for the construction work that will be involved with those projects will be 8.1% (see the last row of column b in Figure 1). WSDOT estimates that the availability of potential DBEs for the engineering work that will be involved with those projects will be 12.9% (see the last row of column c in Figure 1). WSDOT then used the following

with all other Black American-owned businesses). The Ninth Circuit Court of Appeals has accepted this definition of women-owned businesses as part of conducting availability and disparity studies. For example, see *AGC, San Diego Chapter v. California DOT*, 713 F.3d 1187, 1198, 2013 WL 1607239 (9th Cir. April 16, 2013). For details about BBC's definition of women-owned businesses, see Chapter 5 of the 2013 Disparity Study report.

equation to combine that information in a dollar-weighted manner to establish the base figure for its overall DBE goal:

$$\begin{aligned}
 \text{Base figure} &= \frac{\left[\begin{array}{l} \text{(Construction dollars * Potential DBE availability for construction work) +} \\ \text{(Engineering dollars * Potential DBE availability for engineering work)} \end{array} \right]}{\text{Total dollars involved with FAA-funded projects in FFYs 2015-2017}} \\
 &= \frac{\$2.94 \text{ million} * .081 + \$0.67 \text{ million} * .129}{\$3.62 \text{ million}} \\
 &= \mathbf{9.0\%}
 \end{aligned}$$

Thus, WSDOT has determined that its base figure for its overall DBE goal for FAA-funded contracts that the agency anticipates awarding in FFYs 2015, 2016, and 2017 is 9.0%.

Step 2. Determining if an Adjustment is Needed – 49 CFR Section 26.45(d)

After establishing the base figure, WSDOT considered available information to determine whether any adjustment was needed to the base figure to determine the overall DBE goal and to make it as precise as possible. In considering an adjustment to the base figure, WSDOT evaluated information about:

- Current capacity of DBEs to perform work on DOT-assisted contracting;
- Any disparities in the ability of DBEs to get financing, bonding, and insurance;
- Employment, self-employment, education, training, and unions; and
- Other relevant data.

WSDOT considered all of the above information in determining whether to make an adjustment to the base figure.

Current capacity of DBEs to perform work on DOT-assisted contracting. USDOT's *Tips for Goal-Setting* suggests that agencies should examine data on past DBE participation on their USDOT-funded contracts in recent years. WSDOT's *Uniform Reports of DBE Awards or Commitments and Payments* indicate that DBEs have participated to varying degrees on the agency's FHWA-funded and FTA-funded contracts in recent years. However, it is important to note that WSDOT has not shown any DBE participation on its FAA-funded contracts in recent years.

Any disparities in the ability of DBEs to get financing, bonding, and insurance. BBC's analysis of access to financing, bonding, and insurance revealed quantitative and qualitative evidence that minorities, women, and minority- and women-owned businesses do not have the same access to those business inputs as non-Hispanic white males and non-Hispanic white male-

owned businesses in Washington.⁶ Any barriers to obtaining financing, bonding, and insurance might affect opportunities for minorities and women to successfully form and operate construction and engineering businesses in the Washington marketplace. Those barriers might also place minority- and women-owned businesses at a disadvantage in obtaining WSDOT and local agency transportation prime contracts and subcontracts (see Chapter of 4 of the 2013 Disparity Study report).

Employment, self-employment, education, training, and unions. BBC used regression analyses to investigate whether race/ethnicity or gender affects rates of self-employment among workers in the Washington construction and engineering industries. The regression analyses allowed BBC to examine those effects while statistically controlling for various race- and gender-neutral personal characteristics including education and age (for details, see Chapter 4 and Appendix F of the 2013 Disparity Study report). The analyses revealed that Hispanic Americans and women were significantly less likely than non-Hispanic whites and males to own construction businesses after accounting for various race- and gender-neutral personal characteristics. In contrast, there were no statistically significant differences in self-employment rates for minorities and women working in the local engineering industry after accounting for race- and gender-neutral factors.

BBC analyzed the impact that barriers to self-employment would have on the base figure. BBC estimated the availability of potential DBEs if minorities and women owned businesses at the same rate as non-Hispanic white males who shared similar race- and gender-neutral personal characteristics (for details, see Chapter 9 of the 2013 Disparity Study report). The analysis included the same set of contracting dollars that BBC used to determine the base figure (i.e., USDOT-funded construction and engineering contracting dollars that WSDOT awarded during the study period). BBC took the following steps to complete the analysis:

1. BBC made adjustments to availability percentages for construction contracts based on observed disparities in self-employment rates for minorities and women. BBC only made adjustments for those groups that exhibited statistically significant disparities in self-employment rates compared to non-Hispanic whites and males.
2. BBC then combined adjusted availability percentages for construction contracts with availability percentages for engineering contracts in a dollar-weighted fashion. BBC did not make any adjustments to the availability percentages for engineering contracts due to the lack of statistically significant disparities in self-employment rates for minorities and women in engineering.

⁶ For the 2013 Disparity Study, BBC considered WSDOT's relevant geographic market area to be Washington state. During the contracting years that the study examined (FFYs 2009, 2010, and 2011), WSDOT awarded approximately 96% of its transportation construction and engineering contracting dollars that the study team analyzed as part of the study to prime contractors and subcontractors with locations in Washington state.

Figure 2 presents the results of the analysis, which is sometimes referred to as a *but for* analysis, because it estimates the availability of potential DBEs but for the continuing effects of past race- and gender-based discrimination. The rows and columns of Figure 2 present the following information from the but for analysis:

- a. **Current availability.** Column (a) presents the current availability of potential DBEs by group and by industry, as also presented in Figure 1. Each row presents the percentage availability for each group. Before any adjustment, the availability of potential DBEs for WSDOT's USDOT-funded construction and engineering contracts is 8.4%, as shown in row (19) of column (a).
- b. **Disparity indices for self-employment.** For each group that is significantly less likely than similarly-situated non-Hispanic white males to own construction or engineering businesses, BBC estimated business ownership rates if those groups owned businesses at the same rate as non-Hispanic white males who share the same race- and gender-neutral personal characteristics. The study team then calculated a self-employment disparity index for each group by dividing the observed self-employment rate by the estimated self-employment rate and then multiplying the result by 100. Values of less than 100 indicate that, in reality, the group is less likely to own businesses than what would be expected for non-Hispanic white males who share the same personal characteristics.

Column (b) presents disparity indices related to self-employment for the different racial/ethnic and gender groups. For example, as shown in row (4) of column (b), Hispanic Americans own construction businesses at 41% of the rate that one might expect based on the estimated self-employment rates of non-Hispanic white males who share similar personal characteristics.

- c. **Availability after initial adjustment.** Column (c) presents availability estimates by group and by industry after initially adjusting for statistically significant disparities in self-employment rates. BBC calculated those estimates by dividing the current availability in column (a) by the disparity index for self-employment in column (b) and then multiplying by 100. Note that BBC only made adjustments for those groups that are significantly less likely than similarly-situated non-Hispanic white males to own businesses. (For that reason, BBC did not make any adjustments to availability percentages for engineering businesses.)
- d. **Availability after scaling to 100%.** Column (d) shows adjusted availability estimates that the study team rescaled so that the sum of the availability estimates equaled 100% for each industry. BBC rescaled the adjusted availability estimates by taking each group's adjusted availability estimate in column (c) and dividing it by the sum of availability estimates shown under "Total firms" in column (c)—in row (9) for construction and in row (18) for engineering—and multiplying by 100. For example, the rescaled adjusted availability estimate for Hispanic American-owned construction businesses shown in row (4) of column (d) was calculated in the following way: $(4.6\% \div 103.9\%) \times 100 = 4.5\%$.
- e. **Components of goal.** Column (e) shows the component of the total base figure attributed to the adjusted MBE/WBE availability for each industry. BBC calculated each component by taking the total availability estimate shown under "Potential DBEs" in column (d)—in row (7) for construction and in row (16) for engineering—and multiplying it by the proportion of total FAA-funded contract dollars for which each industry accounts (i.e., 0.81 for

construction and 0.19 for engineering). For example, BBC used the 11.6% shown in row (7) of column (d) for construction and multiplied it by 0.81 for a result of 9.4% (see row (7) of column (e)). The values in column (e) were then summed to equal the base figure adjusted for barriers in business ownership—11.8%, as shown in the bottom row of column (e).

Figure 2.
Adjustment to base figure to account for disparities in self-employment rates

Industry and group	a. Current availability	b. Disparity index for self- employment	c. Availability after initial adjustment*	d. Availability after scaling to 100%	e. Components of base figure**
Construction					
(1) African American	0.8 %	no adjustment	0.8 %	0.8 %	
(2) Asian-Pacific American	0.5	no adjustment	0.5	0.5	
(3) Subcontinent Asian American	0.3	no adjustment	0.3	0.3	
(4) Hispanic American	1.9	41	4.6	4.5	
(5) Native American	1.8	no adjustment	1.8	1.7	
(6) WBE	<u>2.7</u>	<u>68</u>	<u>4.0</u>	<u>3.8</u>	
(7) Potential DBEs	8.1 %	no adjustment	12.0 %	11.6 %	9.4 %
(8) All other businesses ***	<u>91.9</u>	<u>no adjustment</u>	<u>91.9</u>	<u>88.4</u>	
(9) Total firms	100.0 %	no adjustment	103.9 %	100.0 %	
Engineering					
(10) African American	1.3 %	no adjustment	1.3 %	1.3 %	
(11) Asian-Pacific American	0.8	no adjustment	0.8	0.8	
(12) Subcontinent Asian American	3.3	no adjustment	3.3	3.3	
(13) Hispanic American	0.6	no adjustment	0.6	0.6	
(14) Native American	2.1	no adjustment	2.1	2.1	
(15) White women	<u>4.9</u>	<u>no adjustment</u>	<u>4.9</u>	<u>4.9</u>	
(16) Potential DBEs	12.9 %	no adjustment	12.9 %	12.9 %	2.4 %
(17) All other businesses	<u>87.1</u>	<u>no adjustment</u>	<u>87.1</u>	<u>87.1</u>	
(18) Total firms	100.0 %	no adjustment	100.0 %	100.0 %	
(19) Total	8.4 %	no adjustment	n/a		11.8 %

Note: Numbers rounded to nearest tenth of 1%. Numbers may not add to totals due to rounding.

* Initial adjustment is calculated as current availability divided by the disparity index.

** Components of the base figure were calculated as the value after adjustment and scaling to 100%, multiplied by the percentage of total FAA-funded contract dollars in each industry (construction = 81%, engineering = 19%).

*** All other businesses included non-Hispanic white male-owned businesses and MBE/WBEs that were not potential DBEs.

Source: BBC Research & Consulting

Other relevant data. The Federal DBE Program suggests that federal aid recipients also examine “other factors” when determining whether to make any adjustments to their base figures.⁷

Success of businesses. There is quantitative evidence that certain groups of minority- and women-owned businesses are less successful than non-Hispanic white male-owned businesses and face greater barriers in the marketplace, even after considering race- and gender-neutral factors. Chapter 4 and Appendix H of the 2013 Disparity Study report summarize that evidence. There is also qualitative evidence of barriers to the success of minority- and women-owned businesses, as explored in Appendix J of the report. Some of that information suggests that discrimination on the basis of race/ethnicity and gender affects minority- and women-owned businesses in the Washington transportation contracting industry.

Initiative 200. Initiative 200 amended state law to prohibit the use of race- and gender-based preferences in public contracting, public employment, and public education, unless such requirements are required “to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.”⁸ Thus, Initiative 200 prohibits government agencies in Washington from applying race- and gender-conscious programs (e.g., DBE contract goals) to state-funded contracts but not necessarily to USDOT-funded contracts.

Many business owners and others knowledgeable about the Washington transportation contracting industry report that many MBEs and WBEs went out of business as a result of Initiative 200 and the prohibition of race- and gender-conscious programs on state-funded contracts (see Appendix J of the 2013 Disparity Study report). Consistent with those claims, some academic research that has examined business ownership before and after the passing of Initiative 200 has suggested adverse effects for minorities, women, and minority- and women-owned businesses as a result of the measure.⁹

Step 2 adjustment. WSDOT has considered available information relevant to a potential step 2 adjustment and proposes to make a downward adjustment to the base figure. WSDOT’s proposed adjustment is based on two pieces of quantifiable information—the current capacity of DBEs to perform on WSDOT’s FAA-funded contracts and barriers that minorities and women face related to self-employment in the local transportation contracting industry. To adjust the base figure, WSDOT chose to average the base figure of 9.0%, the 0.0% past DBE participation on FAA-funded contracts in recent years, and the 11.8% availability estimate of potential DBEs that accounted for barriers in self-employment. The average of those three values is 6.9%. Thus, WSDOT proposes to adjust its base figure downward and propose an overall DBE goal for FAA-funded contracts of 6.9%.

⁷ 49 CFR Section 26.45.

⁸ RCW 49.60.400(1).

⁹ Fairlie, R. & Marion, J. 2007. “Affirmative Action Programs and Business Ownership among Minorities and Women.” Ford Foundation and National Economic Development and Law Center.

Race-/Gender-Neutral and Race/Gender-Conscious Split – 49 CFR Section 26.51 (c)

In accordance with federal regulations and USDOT guidance, WSDOT will attempt to meet the maximum feasible portion of its proposed 6.9% overall DBE goal by using race- and gender-neutral measures. As part of the 2013 Disparity Study, BBC provided information about the degree to which WSDOT utilized certified DBEs on contracts that the agency awarded in a race- and gender-neutral environment (i.e., contracts to which WSDOT did not apply DBE contract goals). BBC examined the utilization of certified DBEs on four such contract sets:

- **State-funded contracts (FFYs 2009, 2010, and 2011)**, to which WSDOT applied voluntary minority- and women-owned business enterprise (MBE/WBE) goals but did not require contractors to meet those goals or show good faith efforts to do so;
- **Engineering contracts (FFYs 2009, 2010, and 2011)**, to which WSDOT applied neither DBE contract goals or voluntary MBE/WBE goals, regardless of funding source;
- **Public Transportation Division contracts (FFYs 2009, 2010, and 2011)**, to which WSDOT applied neither DBE contract goals or voluntary MBE/WBE goals; and
- **USDOT-funded construction contracts (May 9, 2005 - September 30, 2006)**, to which WSDOT applied neither DBE contract goals nor voluntary MBE/WBE goals in response to the 2005 *Western States Paving Company vs. Washington State DOT* decision.

Overall, certified DBEs received 2.8% of the dollars on those contracts. WSDOT used myriad race- and gender-neutral measures to encourage DBE participation on those contracts (for details, see Chapter 10 of the 2013 Disparity Study report). The agency still uses most of those measures and will continue using them through the time period that the amended DBE goal will cover. Figure 3 presents a description of those measures.

In addition to the measures presented in Figure 3, WSDOT has developed a small business participation plan that USDOT approved on July 13, 2012 and which WSDOT fully implemented in July 2013. The small business participation plan includes the following measures:

- Setting aside certain small public works contracts—that is, construction contracts worth \$35,000 or less—for small business bidding;
- Requiring prime contractors to submit small business participation plans as part of bidding on design-build projects; and
- Applying aspirational small business goals on USDOT-funded contracts to which DBE contract goals do not apply, including requiring prime contractors to submit small business participation plans.

In 2008, WSDOT implemented a similar participation plan to encourage the utilization of minority- and women-owned businesses and experienced a relatively large increase in DBE participation. WSDOT expects a similar increase in DBE participation as a result of its approved small business participation plan, because many small businesses are owned by minorities and women.

Figure 3.
Current WSDOT race- and gender-neutral measures

Current measures	
Provides plans and specifications to small businesses, including DBEs, statewide	Encourages firms that could potentially qualify for DBE certification to apply
Offers enrollment in business related courses	Trains internal staff on the social and economical importance of supplier diversity, diverse supplier sourcing techniques, proper DBE reporting, and the benefits of certifications
Provides training programs	Offers technical assistance in estimating and bidding; financing and accounting; prompt payment and retainage; and general business practices
Conducts on-site reviews of all DBE contractors performing work on contracts to verify that DBEs are performing commercially useful functions	Offers enrollment in business development programs
Has prompt payment mechanisms that require prime contractors to pay subcontractors within 10 business days of receiving payment from WSDOT	Sponsors outreach at the annual Regional Contracting Forum and other networking events
Operates a DBE fraud and abuse hotline	Works with the Washington State DBE Work Group, which advises WSDOT on DBE issues
Contacts all qualified certified DBE firms in the database, which shows relevant NAICS classifications for engineering contracts	Offers DBE-certified firms individual business counseling services
Operates the Washington Electronic Business Solution program to disseminate notifications of available WSDOT contracts	Conducts outreach events with small businesses statewide
Hosts roundtables for the DBE community	Operates the Small Business Portal, which is available at: www.wsdot.wa.gov/Business/opportunities/
Utilizes a Limited Public Works roster for awarding contracts under \$35,000 to businesses that have less than \$1 million in average gross receipts	Contracts with the Seattle Business Assistance Center to assist small, minority-owned, and women-owned businesses in obtaining certification and with bidding on transportation projects
Tracks whether there are adequate contracts of a reasonable size for small businesses	Hosts pre-bid meetings and site walkthroughs
Maintains a bidder's list	Offers DBE training and one-on-one consulting sessions on construction and consulting-related issues.

Source: Washington State Department of Transportation Office of Equal Opportunity, 2012.

Considering the 2.8% DBE participation that WSDOT has previously achieved on contracts to which DBE contract goals did not apply, the additional DBE participation that the agency expects to achieve as a result of its approved small business participation plan, and the relatively small contract sizes that will be involved with the FAA-funded projects that the agency anticipates awarding during FFYs 2015 through 2017, WSDOT projects that it will be able to meet all of its proposed 6.9% overall DBE goal through race- and gender neutral measures.

Public Participation – 49 CFR Section 26.45(g)

Public participation is a key component of WSDOT's process for establishing a new overall DBE goal. WSDOT published a public notice announcing its proposed overall DBE goal and rationale for the goal. The notice stated that WSDOT was accepting comments on its overall DBE goal for 45 days, and it provided physical addresses and e-mail addresses where the public could send any comments. The public notice appeared for 30 days at the WSDOT Office of Equal Opportunity's principal office (310 Maple Park Ave. SE, Olympia, WA 98504). The notice was also posted on WSDOT's website and was published in general circulation media and trade

association publications (e.g., Seattle Daily Journal of Commerce). WSDOT also e-mailed the public notice to all registered DBEs and prime contractors.