

Washington State Department of Transportation's Federal Highway Administration Triennium Disadvantaged Business Enterprise Goal Federal Fiscal Years 2019-2021

The Washington State Department of Transportation (WSDOT) submits this Disadvantaged Business Enterprise (DBE) goal methodology to the U.S. Department of Transportation's Federal Highway Administration (FHWA) for review and approval pursuant to 49 CFR § 26.45 to establish the triennium DBE goal for its federally-assisted highway contracts for Federal Fiscal Years (FFYs) 2019 through 2021 (hereinafter the "triennium"). WSDOT has established a triennium DBE goal of 19.0%. The 19.0% goal is based on the results of the 2017 DBE Program Disparity Study. Out of that 19.0%, the Disparity Study found that 8.7% was race-conscious participation while 10.3% was race-neutral participation.

Based on a 2012 Disparity Study, WSDOT sought and received a waiver of the regulation that non-Hispanic White women as a group are not presumptively disadvantaged. Under the waiver's terms, dollars paid to DBEs owned by such persons are not eligible for credit towards meeting DBE contract goals, and WSDOT will count and report FHWA dollars to these firms as race-neutral participation.

The 2017 Disparity Study further found that non-Hispanic White women do not enjoy a level playing field for USDOT- assisted contracts and recommended that firms owned by such persons should be returned to the status of goal credit eligibility. WSDOT has sought a rescission of the waiver and awaits USDOT's response. Until the waiver is rescinded or expires, WSDOT will count all participation by certified DBEs owned by non-Hispanic white females as race-neutral participation.

WSDOT's Disadvantaged Business Enterprise Goal methodology is comprised of four sections, which are as follows:

- Section I outlines WSDOT's two-step methodology for setting a DBE program goal.
- Section II discusses the amounts of race-neutral and race-conscious participation under the waiver and the differing amounts in the event the waiver is repealed or expires.
- Section III discusses WSDOT's current efforts to increase race-neutral participation.
- Section IV provides information on public participation.

The Study's availability results are summarized below:

Race, Ethnicity or Gender	Availability	Race-Conscious or Race-Neutral
African American	1.0%	Race-Conscious
Hispanic American	2.6%	Race-Conscious
Asian American	2.1%	Race-Conscious
Native American	3.0%	Race-Conscious
Non-Hispanic White Women	10.3%	Race-Neutral

The regulations require that WSDOT must meet the maximum feasible portion of its overall goal by using race-neutral measures to facilitate DBE participation. Ongoing and new initiatives seek to reduce discriminatory barriers, increase capacity and level the playing field for the participation of DBEs and other small contractors. These ongoing and new initiatives will be discussed further in section IV.

Section I: Disadvantaged Business Enterprise Goal Methodology

To meet the requirements of 49 CFR § 26.45, WSDOT commissioned a Disparity Study from Colette Holt & Associates (CHA), a nationally recognized law and consulting firm. The Study provides a statistical analysis of baseline DBE availability which was used to establish the Step 1 base figure estimate of DBE availability in WSDOT's markets. The Study further analyzed Census Bureau and other econometric and social science evidence to determine whether there are disparities between DBEs and non-DBEs in factors impacting entrepreneurial success on WSDOT's contracts and subcontracts. It also provided anecdotal data on DBEs' experiences in seeking WSDOT prime contracts and associated subcontracts, and whether firms owned by minorities or women have equal opportunities to compete.

Step One Base Figure

Definition of WSDOT's contracting market

The first element in estimating DBE availability was to determine empirically the relevant product and geographic markets for WSDOT's FHWA-assisted contracts. Based upon five years of WSDOT's contract and subcontract expenditure data, the Study identified the six digit North American Industry Classification System (NAICS) codes that comprise WSDOT's product market for FHWA-funded contracts, and the State of Washington was identified as the geographic market. This approach incorporates USDOT's advice to use the most detailed data available and to weight that data by the recipient's expenditures. See <http://osdbuweb.dot.gov>. It also separates firms by detailed function, delineating, for example, general contractors from specialty trade firms that primarily act as subcontractors on WSDOT projects.

Counting establishments in WSDOT's relevant markets

The Study next examined the availability of DBEs in WSDOT's relevant markets to perform on FHWA-assisted projects. It used Hoovers/Dun & Bradstreet's Marketplace database, an independent and established data source routinely relied upon by courts, to identify the total number of Washington businesses in each six digit NAICS code, weighted by that code's share of WSDOT's product market. It next identified the number of firms in each NAICS code owned by minorities and women, based upon the information in Hoovers, the Washington Unified Certification Program Directory and other regional listings. As noted by USDOT's guidance, supplementing the DBE Directory with other information on minority- and women-owned firms may provide a more complete picture of the availability of firms to work on WSDOT's contracts than reliance solely upon the number of WSDOT certified DBEs.

Estimating baseline DBE availability

Applying the "custom census" approach that has been repeatedly accepted by USDOT and the courts, the Study estimated 19.0% as the base DBE availability figure for Step 1.

Step Two Adjustment

Once the base figure has been calculated, WSDOT must examine all of the evidence available in its jurisdiction to determine if an adjustment is necessary to the base figure to reflect the level of DBE participation expected absent the effects of discrimination. Included among the types of evidence that must be considered are the current capacity of DBEs to perform work on WSDOT's federally-

assisted contracts, as measured by the volume of work DBEs have performed in recent years, and evidence from disparity studies conducted anywhere within WSDOT’s jurisdiction, to the extent not already accounted for in the base figure. If available, WSDOT must also consider available evidence from related fields that affect the opportunities for DBEs to form, grow and compete, including statistical disparities in the ability of DBEs to obtain the financing, bonding and insurance required to participate in the Program, and data on employment, self-employment, education, training, and union apprenticeship programs, to the extent relevant to the opportunities for DBEs to perform in the Program. The regulations caution that any adjustment to the base figure to account for the continuing effects of past discrimination or the effects of an ongoing DBE program must be based on “demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought.” §26.45(d)(3).

Past DBE utilization

WSDOT considered the current capacity of DBEs to perform work in Washington State, as measured by the amount of work performed by certified DBEs on federal-aid projects over the past three years. The median for WSDOT’s participation for FFY 2014 through FFY 2018 was 12.1%.

DBE Participation FFY 2014	14.1%
DBE Participation FFY 2015	11.7%
DBE Participation FFY 2016	15.1%
DBE Participation FFY 2017	12.1%
DBE Participation FFY 2018	11.2%

Evidence from local disparity studies

No other local jurisdictions have conducted studies relevant to WSDOT’s contracting activities.

Disparities affecting DBE opportunities

The Study explored the Census Bureau data and literature relevant to how discrimination in the Washington State highway industry market and throughout the wider economy affects the ability of minorities and women to fairly and fully engage in WSDOT’s prime contract and subcontract opportunities. Data from the Census Bureau’s Survey of Business Owners indicate very large disparities between Minority and Women’s Business Enterprises (M/WBE) firms and non-M/WBE firms when examining the sales of all firms, the sales of employer firms (firms that employ at least one worker), or the payroll of employer firms. Data from the Census Bureau’s American Community Survey (ACS) indicate that Blacks, Hispanics, Native Americans, Asian/Pacific Islanders, Others, and White women were underutilized relative to White men. Controlling for other factors relevant to business outcomes, wages and business earnings were lower for these groups compared to White men. Data from the ACS further indicate that non-Whites and White women are less likely to form businesses compared to similarly situated White men. The literature on barriers to access to commercial credit and the development of human capital further reports that minorities continue to face constraints on their entrepreneurial success based on race. These constraints negatively impact the ability of firms to form, to grow, and to succeed.

While relevant and probative to whether WSDOT needs to continue to employ race-conscious measures to meet its DBE goal, as well as the types of supportive services and other approaches to level the playing field WSDOT should consider, the Study recognized that these results are difficult to quantify within the rigors of the strict scrutiny standards.

Step 2 Adjustment Calculation

WSDOT considered the current capacity of DBE firms to perform work in this market area as measured by the amount of work performed by DBEs on FHWA-assisted projects over the past five years. Following the USDOT's Office of Small and Disadvantaged Business Utilization's *Guidance on Tips for Goal-Setting in the Disadvantaged Business Enterprises (DBE) Program*, the Department combined the Step 1 base figure with its median past DBE participation for an average of 15.6% (Step 1 base figure of 19.0% + median past participation of 12.1% = 31.1% ÷ 2 = 15.6%).

Section II: Projection of Race-Neutral vs. Race-Conscious Goal Attainment

The regulations require that WSDOT must meet the maximum feasible portion of its overall goal by using race-neutral measures to facilitate DBE participation. Ongoing and new initiatives seek to reduce discriminatory barriers, increase capacity and level the playing field for the participation of DBEs and other small contractors. They are also designed to assist WSDOT in meeting the increased goal for DBE participation by prime contractors and subcontractors.

The Study found that DBEs face disparities in full and fair access to WSDOT's FHWA-assisted contracts. While not all disparity ratios in every industry code for each racial and ethnic group and non-Hispanic White females groups were statistically significant, large disparities remain overall. Further, DBE utilization on state-funded contracts, for which no goals were set, was extremely low. Coupled with the additional anecdotal and economy-wide evidence, the Study findings paint a clear picture of a mostly closed market. These results strongly suggest that narrowly tailored contract goals remain necessary to ensure nondiscrimination.

While the waiver remains in effect

As WSDOT is still operating under the DBE Program waiver excluding non-Hispanic white women owned businesses from race-conscious participation, WSDOT will continue to operate under 8.7% race-conscious participation and 10.3% race-neutral participation until such time as the waiver is repealed. This race-conscious and race-neutral projection is based upon the availability information contained in the 2017 DBE Program Disparity Study, which show the participation for non-Hispanic white women to be equal to 10.3% while all minority owned DBEs (race-conscious) have a total participation of 8.7%. Under the waiver, the 10.3% participation non-Hispanic white women will count entirely as race-neutral participation while all minority owned DBE participation will be equal to the full amount of race-conscious participation.

When the waiver expires or is repealed

WSDOT requested that FHWA repeal the non-Hispanic white women owned business waiver on September 13, 2017. In addition, the waiver is set to expire on October 1, 2020 (see December 8, 2016 USDOT letter to Secretary Millar). Upon repeal of the waiver or its expiration, WSDOT will operate under a 16.7% race-conscious goal and a 2.3% race-neutral goal as outlined below:

Past DBE race-neutral participation

To estimate the portions of the goal to be met through race-neutral and race-conscious measures, WSDOT evaluated past race-neutral DBE participation, as defined in 49 CFR § 26.51(a). WSDOT’s median percentage on federal-aid contracts through race-neutral means for FFY 2014 through 2018 was 2.3%.

Federal Fiscal Year	Total DBE Participation	Race-Neutral Participation	Race-Conscious Participation
2014	14.1%	1.8%	12.3%
2015	11.7%	2.2%	9.6%
2016	15.1%	2.7%	12.5%
2017	12.1%	2.7%	9.4%
2018	11.2%	2.3%	8.9%

Therefore, in the event the waiver is no longer in effect, WSDOT projects that it will meet 2.3% of its overall goal through race-neutral measures and 16.7% of its overall goal through race-conscious measures. WSDOT will monitor DBE participation throughout the year to adjust its use of contract goals to ensure that their use does not exceed the overall goal.

Section III: Race-neutral measures to achieve DBE participation

The regulations require that WSDOT must meet the maximum feasible portion of its overall goal by using race-neutral measures to facilitate DBE participation. Ongoing and new initiatives seek to reduce discriminatory barriers, increase capacity and level the playing field for the participation of DBEs and other small contractors. They are also designed to assist WSDOT in meeting the increased goal for DBE participation by prime contractors and subcontractors. WSDOT’s ongoing and new initiatives will be discussed fully in section three.

The Study found that DBEs face disparities in full and fair access to WSDOT’s FHWA-assisted contracts. While not all disparity ratios in every industry code for each racial and ethnic group and White female groups were statistically significant, large disparities remain overall. Further, DBE utilization on state-funded contracts, for which no goals were set, was extremely low. Coupled with the additional anecdotal and economy-wide evidence, the Study findings paint a clear picture of a mostly closed market. These results strongly suggest that narrowly tailored contract goals remain necessary to ensure non-discrimination.

WSDOT will meet the maximum feasible portion of its triennium goal through the race-neutral measures listed below. WSDOT will maximize outreach efforts to the DBE contracting community and the use of DBE Support Services to increase the utilization and support of DBEs that participate on upcoming WSDOT projects.

Support Services

WSDOT provides the following supportive services to DBEs:

- Immediate and long-term business management, record keeping, financial and accounting capabilities;
- Long-term development assistance to increase opportunities to participate in more varied and

- significant work, and to achieve eventual self-sufficiency;
- Programs on contracting procedures and specific contract opportunities;
- Assistance in obtaining bonding or financing;
- Assistance to start-up firms, particularly in fields with historically low DBE participation;
- Identification of potential highway-related DBEs and prequalification assistance; and
- In an effort to increase awareness of the DBE Supportive Services program, WSDOT has developed a DBE Supportive Services hotline (888) 259-9143, email address dbess@wsdot.wa.gov, and website: www.wsdot.wa.gov/EqualOpportunity/DBE.htm.

Outreach and Networking

WSDOT engages in a number of outreach efforts to minority and women's organizations to enhance DBE opportunities in WSDOT projects. These efforts include but are not limited to:

- Sponsorship of the annual Regional Contracting Forum held in Seattle, Washington, in partnership with state, local and federal agencies. Last year's event attracted approximately 2,000 individuals.
- Works with organizations such as the Northwest Minority Supplier Diversity Council, Women in Construction, USDOT's Small Business Transportation Resource Center, the Women's Transportation Seminar, Tabor 100, the National Association of Minority Contractors, Association of General Contractors, American Council of Engineering Companies, the Office of Minority and Women's Business Enterprises and other groups to promote the DBE Program.
- Establishing a Washington State DBE Advisory Group comprised of WSDOT divisions and local agencies, among others, that will advise WSDOT on DBE issues, including but not limited to, goal setting, outreach, training, etc.

Prompt Payment

WSDOT continues to enforce its prompt payment provisions and processes through the B2GNow software system. Through its investment in B2GNow, WSDOT has been able to increase its effectiveness in enforcing the prompt payment regulations. B2GNow requires prime contractors and consultants to report payment subcontractor and subconsultant payment information. The subcontractors and subconsultants can then confirm or dispute the payment. If the payment is disputed and not quickly resolved, WSDOT staff then become involved. More information is available at: www.wsdot.wa.gov/EqualOpportunity/DMWSBE.htm.

Emerging Contractor Support Initiatives

WSDOT recognizes the necessity of developing new and innovative race-neutral contractor support services and has begun implementing new programs and resources (*e.g.*, Capacity Building Mentorship Program; Minority, Small, Veteran and Women's Business Enterprise Program; remodeled DBE Support Services Program, etc.). This process involved examining other states' strategies, as well as working with the DBE Advisory Group, construction, consulting, minority and women business organizations to improve our programs and services.

Section IV: Public Participation

Consultation

Per 49 CFR § 26.45, WSDOT employs a consultative process requesting input from organizations serving or representing DBEs, minority-owned or women-owned businesses, state or local offices of procurement, federal, state or local offices responsible for enforcing civil rights laws, local labor offices and organizations, etc. WSDOT developed the proposed overall annual DBE goal and presented it to the DBE Advisory Group (individuals from various WSDOT divisions and offices, and other state agencies), including:

- WSDOT Highways and Local Programs Division
- WSDOT Construction Office
- Washington State Attorney General's Office
- WSDOT Ad & Award Office
- WSDOT Public Transportation Division
- WSDOT Secretary of Transportation
- WSDOT Consulting Services Office
- WSDOT Aviation Division
- Washington State Ferries
- Washington State Office of Minority & Women's Business Enterprises

Once the DBE Work Group reviewed and provided comments, the overall DBE goal was revised accordingly. Upon DBE Work Group review, the goal was then reviewed by the DBE Advisory Group, comprised of minority, women and trade organizations, including but not limited to:

- Tabor 100
- National Association of Minority Contractors
- Latino Civil Alliance
- American Council of Engineering Companies of Washington
- Laborer's Local 440, Street Pavers, Sewer, Watermain, and Tunnel Workers
- Washington Association of General Contractors
- Washington Asphalt Pavement Association Northwest Mountain Minority Supplier Diversity Council
- Tribal Employment Rights Office
- Women's Transportation Seminar
- Washington Asphalt Pavement Association
- Women in Highway Construction

WSDOT will follow the public participation requirements, outlined in 49 CFR Part 26, and if necessary, revise the goal based upon feedback received.

Published Notice

To satisfy the public consultation requirements of 49 CFR § 26.45(d)(2), WSDOT will provide a press release to all media outlets in Washington State and publish the proposed overall annual DBE goal for the triennium in the Seattle Daily Journal of Commerce. Included in its press release and publication is WSDOT's request for public comment and inspection of the goal methodology for 30 days from the date of publication.