



Alaska Department of Transportation & Public Facilities

Disadvantaged Business Enterprise Goal Methodology

Federal Fiscal Years 2018 – 2020

Federal Highway Administration

Prepared by the Alaska Department of Transportation & Public Facilities Civil Rights Office

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Summary

The Alaska Department of Transportation & Public Facilities (ADOT&PF/the Department) has prepared this Disadvantaged Business Enterprise (DBE) goal methodology for the Federal Highway Administration (FHWA) pursuant to 49 Code of Federal Regulations (CFR) Section 26.45, for federally assisted highway contracts. For Federal Fiscal Year (FFY) 2018 – 2020, ADOT&PF will continue its race-neutral DBE program with an annual DBE goal of 8.83%, to be met entirely through race-neutral means.

As a primary recipient of federal-aid highway funds, ADOT&PF has established a DBE program as required by 49 CFR Part 26. As part of the DBE program, ADOT&PF is required to submit overall DBE goals once every three years to FHWA. Per 49 CFR Part 26.45, the overall DBE goal must be based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate on FHWA-assisted contracts. The purpose of this document is to explain how the Department has set the DBE triennial goal for FFY 2018 – 2020.

In setting the triennial goal for FFY 2015 – 2017 (the previous goal), ADOT&PF retained the services of MGT of America, Inc. (MGT) to conduct a DBE availability and disparity study update that included procurement activities from FFY 2007 – 2011 for ADOT&PF-let construction contracts and professional services agreements (PSAs) – the two primary procurement types let by the Department. Data from the study was used to estimate the combined availability of certified DBEs and minority and women-owned business enterprises that were not certified DBEs (M/W/DBEs). This estimate was used as the base figure in the previous goal methodology prepared by ADOT&PF, and was adjusted down based on past participation to arrive at the FFY 2015 – 2017 overall goal of 8.46%.

To establish the race-conscious and race-neutral projections for FFY 2015 – 2017, ADOT&PF relied primarily on anecdotal and statistical evidence, as well as legal analysis provided in the disparity study. Based on this evidence, the Department transitioned to an entirely race-neutral DBE program to meet the overall goal of 8.46%, which is effective through FFY 2017.

Under the race-neutral DBE program, ADOT&PF has implemented a set of measures meant to facilitate DBE participation on its FHWA-assisted contracts.

The measures are detailed in this goal methodology and include providing business consulting services, technical education, as well as efforts to identify and certify new DBEs. While difficult to quantify, ADOT&PF believes that these measures helped increase DBE utilization during FFY 2015 - 2017, and the Department will continue to expand its race-neutral measures to achieve the overall goal in the upcoming triennial period.

The following describes the process used by the Department to establish the proposed overall DBE goal for FFY 2018 - 2020, and follows the goal setting process outlined in 49 CFR Part 26.45. The process outlined in 49 CFR Part 26.45 can be categorized into three parts:

1. Step One Base Figure
2. Step Two Overall Goal
3. Race-Neutral and Race-Conscious Projections

Step One Base Figure

Relevant Market Area

To estimate the relative availability of DBEs ready, willing, and able to perform work on FHWA-assisted contracts, ADOT&PF first determined the relevant market area. In identifying the relevant market area, ADOT&PF analyzed data derived from the 2014 ADOT&PF Disparity Study (the Disparity Study), and supplemented this data with contracting records from FFY 2015 – 2017 maintained by the ADOT&PF Civil Rights Office (CRO). To determine the relevant market area, geographic units (such as states and boroughs) were found to be acceptable to use based on several considerations. First, courts have accepted the use of standard geographic units in conducting equal employment opportunity (EEO) and disparity studies. Second, because geographic units are externally determined, there are no subjective determinations being made, and lastly, U.S. Census and other federal agencies frequently collect data in this manner.

The Disparity Study utilized a two-step analysis to determine the relevant market area for the study. First an analysis of the overall market area was conducted to determine the market area and to establish the extent to which ADOT&PF utilized firms. Geographic locations of firms utilized by ADOT&PF during the study period were reviewed using MGT's Zone Improvement Plan (ZIP) Code Database. Once the geographic locations of firms were identified, all boroughs

and counties where dollars were awarded were analyzed and included in the overall market area. Once the overall market area was established, the relevant market area was determined for each of the business categories analyzed (construction, architecture/engineering/land surveying (AELS), and non-AELS). The firms' geographic location that received the most dollars, all of which totaled at least 75%¹ of the overall market area, were identified. The results of this analysis identified the State of Alaska as the relevant market area, with 89.38% of total FHWA dollars awarded to firms in the state².

To account for any changes in the market area since the publication of the Disparity Study, ADOT&PF took steps to supplement the relevant market area analysis from the Disparity Study by analyzing vendor data from contracting records³ for the period of FFY 2012 – 2017. The purpose of this supplemental analysis was to identify the area in which the substantial majority of the contractors ADOT&PF did business with during this time were located. The supplemental analysis showed that 89.70% of 641 firms that performed work on the Departments FHWA-assisted contracts from FFY 2012 – 2017 were based in the State of Alaska. The results of the supplemental analysis affirm the findings from the Disparity Study market area analysis, and the State of Alaska was identified as the relevant market area.

Method

To arrive at a step one base figure that is representative of the relative availability of DBEs ready, willing, and able to perform work on FHWA-assisted contracts, ADOT&PF reviewed acceptable methods identified in 49 CFR Part 26 to determine which would yield the most accurate results. Three methods were considered by ADOT&PF, and the summary of findings regarding each method follow.

Use DBE Directories and Census Bureau Data

¹ MGT utilized the "75 percent rule" to determine the relevant market area. This rule is generally accepted in antitrust cases. In another relevant case, *James C. Jones v. New York County Human Resources Administration*, 528 F.2d 696 (.2d Cir. 1976), the court accepted less than 100% of the data when it was reasonable to assume that the missing data would not significantly change the results of the analysis.

² 2014 ADOT&PF Disparity Study, Ch. IV-6, Ex. 4C

³ The ADOT&PF CRO maintains vendor data that includes the location of prime contractors/consultants and subcontractors/subconsultants that perform work on ADOT&PF contracts.

49 CFR Part 26.45(c)(1) provides for the use of DBE directory and Census Bureau data to determine the base figure for the relative availability of DBEs. This method relies on using the Alaska Unified Certifications Program (AUCP) DBE Directory to determine the number of ready, willing, and able DBEs in the relevant market area. The number of DBEs is expressed as a percentage of the number of all ready, willing, and able businesses in the relevant market area that perform work in the same North American Industry Classifications System (NAICS) codes, as determined by the Census Bureau's County Business Pattern (CBP) database.

This method was disregarded for several reasons. First, this method was found to be a less accurate measure of DBE availability than the Disparity Study, as this data is already accounted for in the Disparity Study's availability analysis. Second, this method fails to take into account the availability of firms that could potentially become certified, providing a less accurate estimate of DBE availability.

Use a Bidders List

49 CFR Part 26.45(c)(2) provides for the use of bidders list data to determine the base figure for the relative availability of DBEs. This method relies on determining the number of DBEs that have bid or quoted on the Department's FHWA-assisted prime and subcontracts during the previous three years, and expressing this figure relative to the number of all businesses that have bid or quoted on FHWA-assisted prime and subcontracts during the same period. If using the bidders list method, recipients are required to have in place a mechanism to directly capture data on DBE and non-DBE prime and subcontractors that submit bids or quotes on FHWA-assisted contracts. In compliance with 49 CFR Part 26.11(c), ADOT&PF maintains a bidders list containing data about the population of DBE and non-DBE contractors and subcontractors who seek to work on its FHWA-assisted contracts. ADOT&PF requires that all firms submit a copy of Form 25D-6 (Bidder Registration) on an annual basis by January 1, before any contract can be awarded to them. ADOT&PF reviewed the bidders list method and ultimately disregarded it because similar to using the DBE directory and Census Bureau data method, this method

fails to account for the availability of firms that could potentially become certified, providing a less accurate estimate of DBE availability.

Use Data from a Disparity Study

49 CFR Part 26.45(c)(3) provides for the use of disparity study data to determine the base figure for the relative availability of DBEs. In July of 2012, the ADOT&PF CRO contracted with MGT to conduct a DBE availability and disparity study update. This five-year study includes procurement activities from FFY 2007 – 2011, and draws on multiple data sources to provide an analysis of the availability of M/W/DBEs. MGT analyzed the availability of firms by business type (construction, AELS, and non-AELS) for prime contractors, prime consultants, and subcontractors using the ADOT&PF Plan Holders List, vendor data, and custom census.

In estimating the availability of prime contractors, MGT used the Department's Plan Holders List. Availability was based on firms located in the State of Alaska that were identified as general contractors that had obtained plans/proposals on construction projects awarded during the study period.

Vendor data was used to estimate the availability of prime consultants on AELS and non-AELS contracts. There is case law where studies estimating availability based on vendor data have been upheld in federal court⁴. Vendor data was extracted from the ADOT&PF CRO Contract Compliance Database (BizTrak).

MGT utilized custom census in addition to the ADOT&PF Plan Holders List to estimate the availability of subcontractors. Some cases have allowed custom census to calculate the availability of firms using Dun & Bradstreet – a current data source containing individual firms, firm revenue, number of employees, and specific areas of work. MGT collected Dun & Bradstreet data and identified several deficiencies, which included:

- No racial, ethnic, or gender information.
- No indication of whether a firm is interested or willing to work on ADOT&PF projects.
- No indication of whether a firm primarily works on projects as a prime contractor or subcontractor.

⁴ H.B. Rowe v. North Carolina DOT, 589 FSupp.2d 587 (ED NC 2008)

- No indication of whether a firm has a professional license in the State of Alaska.

These deficiencies were addressed in the Disparity Study by first pulling a random sample of firms from Dun & Bradstreet, limiting the results to firms located in the State of Alaska and identified as providing construction services based on their six-digit NAICS codes^{5 6}. MGT then cross-referenced firms with the State of Alaska Department of Commerce, Community, and Economic Development's Division of Corporations, Business, and Professional Licensing database. The remaining deficiencies were addressed by conducting a short survey in which firms were asked:

- Ethnicity, race, and gender information.
- If they had bid, or considered bidding on ADOT&PF projects (indicating the firm's interest/willingness).
- When bidding on projects (not limited to ADOT&PF projects), if they bid primarily as a prime contractor, subcontractor, or both.

MGT compiled and cross-referenced data from the custom census and ADOT&PF Plan Holders List to avoid double-counting, and to arrive at an estimate for subcontractor availability.

ADOT&PF found the disparity study method to be the most appropriate and acceptable method for several reasons. First, the Disparity Study contains the most accurate data concerning the availability of M/W/DBEs in the relevant market area. Second, federal regulations allow for using data from disparity studies to calculate the step one base figure, and there is precedent for federal

⁵ 20 unique NAICS codes were identified among the Dun & Bradstreet data as relating to construction services. These codes were comprised of Timber Operations (113310), Commercial & Heavy Construction Contractors (237110), Highway, Street, & Bridge Construction Contractors (237310), Concrete & Masonry Contractors (238110, 238140), Electrical Contractors (238210), Plumbing & HVAC Contractors (238220), Drywall, Plaster, Acoustic & Insulation Contractors (238310), Painting & Wall Covering Contractors (238320), Specialty Contractors (238330, 238350, 238990), Roofing, Siding, & Sheet Metal Contractors (238390), Site Preparation Contractors (238910), Architectural & Structural Metals Manufacturing (332322), Wholesale Sector (423320), Electrical Products Wholesalers (423610), Wholesale Sector (423990), Building Materials Dealers (444190), Transportation Services Sector (488490).

⁶ It is important to note that the list of NAICS codes in footnote 4 is not exhaustive of all NAICS codes represented in subcontractor availability, but only the custom census portion of subcontractor availability. These do not necessarily include the NAICS codes from prime contractor availability, and subcontractor utilization during the study period, which were also included in the calculations for subcontractor availability.

funds recipients using disparity study data for multiple goal cycles⁷. Lastly, the Disparity Study availability analysis accounts for both certified DBEs and firms that could potentially become certified, consistent with the United States Department of Transportation (USDOT) Tips for Goal-Setting in the DBE Program guidance.

To arrive at the step one base figure, ADOT&PF utilized data from the Disparity Study to analyze the availability of M/W/DBE construction, AELS, and non-AELS contractors in the relevant market area. While the bidders list method as detailed in 49 CFR Part 26 was not used to calculate the overall goal, to address potential inaccuracies arising from changes in the federal-aid contracting market since the publication of the Disparity Study, ADOT&PF supplemented the availability analysis with FFY 2015 – 2017 ADOT&PF Bidders Registration List records. The ADOT&PF Bidders Registration List is inclusive of construction, AELS, and non-AELS prime and subcontractors/consultants that have indicated their interest in performing work on ADOT&PF federal-aid contracts.

ADOT&PF first analyzed the M/W/DBE availability data from the Disparity Study, which was derived according to the methods previously stated, is inclusive of certified DBEs as well as minority and women-owned firms that are not certified, and is categorized by construction prime contractor, construction subcontractor, and AELS/non-AELS prime consultant categories. ADOT&PF then recompiled the construction, AELS, and non-AELS contractor data by combining related work-types from the availability analysis (construction, AELS, and non-AELS).

To supplement the Disparity Study availability analysis, ADOT&PF extracted data from the ADOT&PF Bidders Registration List for FFY 2015 - 2017, which contains information regarding DBE certification status, firm location, types of contracts bid, and gross receipts for firms that sought to perform work on ADOT&PF contracts. However, the bidders list does not contain information differentiating between AELS and non-AELS consultants. To address this deficiency, ADOT&PF referenced NAICS code data from the Alaska Department of Commerce, Community, and Economic Development Business License Database,

⁷ California Department of Transportation FFY 2016 – FFY 2018 DBE Goal Methodology and FHWA approval letter dated 8/28/2015.

and categorized professional services providers identified in the ADOT&PF Bidders Registration List as AELS or non-AELS firms.

Data from the Disparity Study and ADOT&PF Bidders Registration List were combined, and ADOT&PF reviewed the recompiled data sets to avoid double counting. The resulting M/W/DBE and non-M/W/DBE firm counts were then used to calculate M/W/DBE availability, which is summarized by work-type in Table 1.

Work Type	M/W/DBE Count	All Firms Count	M/W/DBE Availability
Construction	149	827	$\frac{149}{827} = 18.02\%$
AELS	29	297	$\frac{29}{297} = 9.77\%$
Non-AELS	27	155	$\frac{27}{155} = 17.42\%$

Table 1: M/W/DBE Availability by Work-Type

To refine the work-type availability estimates, ADOT&PF cross-referenced the M/W/DBEs identified in the Disparity Study⁸ with AUCP certifications records to exclude non-certified firms from the numerator that had previously been removed from the program. This step was taken to obtain a more accurate availability estimate for non-certified firms that could potentially become certified, under the premise that removed firms are not likely to seek certification beyond the appeals process. There are many causes behind changes in a firm’s certification status, among the most frequently observed are denied applications⁹, and voluntarily withdrawing from the DBE Program. Excluding non-certified firms that had previously been removed from the program yielded the following adjusted M/W/DBE availability figures:

⁸ Bidders list data does not identify non-DBE M/WBES.

⁹ Applications are denied when a firm does not meet the requirements set forth in 49 CFR Part 26 for reasons such as exceeding business size standards, exceeding personal net worth requirements, issues related to management and operational control, or independence.

Work Type	M/W/DBE Count	All Firms Count	M/W/DBE Availability
Construction	82	827	$\frac{82}{827} = 9.92\%$
AELS	21	297	$\frac{21}{297} = 7.07\%$
Non-AELS	21	155	$\frac{21}{155} = 13.55\%$

Table 2: M/W/DBE Availability by Work-Type, Adjusted for Removed DBEs

Imminent Certifications and Removals

In following the USDOT Tips for Goal-Setting in the DBE Program guidance, ADOT&PF reviewed data to address imminent DBE certification actions in step one. Utilizing the ADOT&PF CRO Contract Compliance Database, and in consultation with AUCP staff, ADOT&PF identified no imminent certifications actions that would impact DBE availability.

Weighting the Base Figure

ADOT&PF sought to weight the DBE availability estimates to arrive at a more accurate step one base figure, as recommended in the USDOT Tips for Goal-Setting in the DBE Program guidance. ADOT&PF explored weighting by NAICS code, however, the Disparity Study data does not provide for categorizing firms by NAICS code, and this method was therefore disregarded.

Availability data from the Disparity Study and bidders list categorize firms by work-type (construction, AELS, and non-AELS), and ADOT&PF analyzed contracting records to establish the proportions of FHWA expenditures attributable to each work-type during FFY 2015 – 2017.

ADOT&PF contracts are categorized by procurement type (construction or PSA), however, PSAs often have both AELS and non-AELS tasks associated with them. Additionally, PSA contracts are not further identified as AELS or non-AELS in the Department’s contracting records. To address this, ADOT&PF reviewed PSA contracting records from the most recent full federal fiscal year (FFY 2016) to estimate the portions of FHWA expenditures on PSAs for AELS and non-AELS

work. ADOT&PF compiled data on each PSA task¹⁰ included in PSAs awarded during FFY 2016, and identified each task as AELS or non-AELS. Following this procedure resulted in approximately 49.16% AELS and 50.84% non-AELS expenditures on PSAs during FFY 2016. The percentages of PSA expenditures attributable to each type were then applied to the total PSA expenditures for FFY 2015 – 2017 to estimate AELS and non-AELS expenditures during this period. Table 3 reflects FHWA construction and estimated AELS and non-AELS expenditures, as well as weighted M/W/DBE availability.

Work Type	FHWA Expenditure	Weight	Weighted M/W/DBE Availability
Construction	\$950,366,712	$\frac{\$950,366,712}{\$974,804,820} = 97.50\%$	$9.92 * 97.50\% = 9.67\%$
AELS	\$12,013,774	$\frac{\$12,013,774}{\$974,804,820} = 1.23\%$	$7.07 * 1.23\% = 0.09\%$
Non-AELS	\$12,424,334	$\frac{\$12,424,334}{\$974,804,820} = 1.27\%$	$13.55 * 1.27\% = 0.17\%$
Total	\$974,804,820	100%	9.93%

Table 3: Weighted M/W/DBE Availability by Work-Type, Adjusted for Previous and Imminent DBE Removals

This process yielded the following step one base figure:

$$\text{Step One Base Figure} = 9.67\% + 0.09\% + 0.17\% = 9.93\%$$

¹⁰ PSA tasks, subtasks, and activities detail each specific work item to be provided in a proposal and the estimated cost.

Step Two Adjustments

ADOT&PF analyzed available evidence to determine what adjustments, if any, were needed to the base figure to arrive at the overall goal. The following summarizes the evidence that was considered.

Current Capacity of DBEs to Perform FHWA-Assisted Work

ADOT&PF explored adjusting the base figure to account for past participation and the current capacity of DBEs to perform work on its FHWA-assisted contracts. Some of the M/W/DBEs counted in the base figure are noncertified firms. ADOT&PF, similar to other state DOTs, has historically experienced difficulty in encouraging firms to seek certification. It is also important to note that although non-certified M/WBEs are counted as potential DBEs in determining the base figure, only certified DBE utilization may be counted toward achieving the overall DBE goal. In following the USDOT Tips for Goal-Setting in the DBE Program guidance, the most recent five years of DBE utilization on the Department’s FHWA-assisted contracts is listed below.

Federal Fiscal Year	DBE Utilization
2012	4.6%
2013	9.1%
2014	9.6%
2015	7.73%
2016	5.77%
Median DBE Utilization	7.73%

Table 4: Median DBE Utilization (FFY 2012 – 2016)

Calculating the average of the base figure and the median annual DBE utilization yields a DBE availability estimate of 8.83%:

$$\frac{9.93\% + 7.73\%}{2} = 8.83\%$$

2014 ADOT&PF Disparity Study

MGT analyzed available evidence to determine what, if any, step two adjustments should be made. This evidence is summarized below.

Past Participation

MGT provided an evaluation of median past participation during the study period (FFY 2007 – 2011), which was found to be 4.00%. Because this figure was not significantly different from the overall goal proposed by MGT (3.60%), no adjustment was made¹¹.

Self-Employment Propensity and Earnings

MGT conducted a multivariate regression analysis of Public Use Microdata Samples (PUMS) derived from the 2011 U.S. Census to examine self-employment trends, and to determine:

- If racial, ethnic, and gender minority groups are less likely than non-minority males to be self-employed.
- If racial, ethnic, and gender status have an impact on individuals' earnings.
- How much racial, ethnic, and gender discrimination influence the probability of being self-employed.

The findings from the PUMS 2011 data indicated that when other variables¹² were held constant, in general, minorities were significantly less likely than non-minority males to be self-employed. If they were self-employed, minorities also earned significantly less in 2011 than self-employed non-minority males. When analyzed separately by race and business type, trends varied but disparities persisted, in general, for all minorities and non-minority women. MGT performed an analysis of self-employment disparities, and findings supported the conclusion that disparities for groups (those with adequate sample sizes to permit interpretation) were likely the result of differences in the marketplace due to race, gender, and ethnicity¹³.

Business Earnings

MGT conducted a multivariate regression analysis of data obtained from a 2012 survey of business owners to determine if M/WBEs tend to earn significantly less revenue than firms owned by non-minority males, and if so, whether the

¹¹ 2014 ADOT&PF Disparity Study, Appendix M-4

¹² Predictors of self-employment status in the regression analysis included: race and sex, availability of capital, marital status, ability to speak English well, disability status, age and age squared, owner's level of education, number of individuals over the age of 65 living in household, and number of children under the age of 18 living in household.

¹³ 2014 ADOT&PF Disparity Study, Appendix L-10

lower revenues are attributable to race or gender status. Controlling for variables related to firm capacity, owner's managerial experience, and demographics¹⁴, the regression analysis found that African American, Hispanic American, and non-minority women-owned firms earned less revenue in 2012 than non-M/WBEs, supporting the conclusion that M/WBE status is negatively correlated to earnings when compared with the earnings of non-M/WBE firms¹⁵.

Non-Certified Firms

The 2014 ADOT&PF Disparity Study proposes an overall DBE goal of 3.60% for FHWA¹⁶. The proposed overall goal is based on the weighted availability of construction prime contractors, construction subcontractors, and PSA prime consultants, and recommends no step two adjustments. Only certified DBEs were considered in the calculation of the overall DBE goal proposed by MGT.

Barriers to Doing Business with ADOT&PF

MGT conducted an analysis of anecdotal information by using a combination of surveys, focus groups, public hearings, and personal interviews to collect data. The purpose of this analysis was to identify issues that were common to M/W/DBE and non-M/W/DBE firms in Alaska during the study period, with a portion of questions focusing on identifying barriers to doing business with ADOT&PF. The following barriers were identified by construction, AELS, and non-AELS firms:

Prime Contractors and Consultants

- Unnecessary and restrictive contract specifications – 14.0%
- Contracts too large – 11.3%
- Limited time given to prepare bid package – 11.0%
- Lack of personnel – 11.0%

Subcontractors

- Slow payment or nonpayment from primes – 13.9%
- Lack of personnel – 11.3%

¹⁴ The regression analysis controlled for number of employees, percentage of total revenue from private sources, owner's education, owner's experience, company age, business owner group, business owner gender.

¹⁵ 2014 ADOT&PF Disparity Study, Appendix D-7

¹⁶ 2014 ADOT&PF Disparity Study, Appendix M-3

- Limited time given to prepare bid or quote – 10.6%
- Contracts too large – 9.3%

The anecdotal analysis performed by MGT explored other possible barriers to doing business with ADOT&PF as perceived by respondents. Some primes identified obstacles in the procurement process, meeting DBE goals, and the Central Region Waiver for non-minority women-owned DBEs as challenges they face in the procurement process.

Subcontractors stated that the perception that DBEs do not have the capacity or expertise to perform the work is a barrier in that primes will either not accept their bid or shop their numbers so they are no longer the lowest bidder. Subcontractors overwhelmingly agreed that they receive notification of contract opportunities either from primes, trade associations, other subcontractors, or ADOT&PF¹⁷.

DBE Program

Responses from the anecdotal analysis showed that participants collectively stated that they would like to see more oversight of the DBE program to ensure primes are adhering to program requirements and dealing fairly with DBE subcontractors. Respondents also stated that ADOT&PF should monitor non-minority female-owned firms more closely to ensure they are the true owners and operators of their businesses. Other respondents stated that they would like to see more utilization of Native Alaskans on projects in remote areas¹⁸.

Prime Contractor Practices

The anecdotal analysis collected information from respondents regarding their experiences working with or observing primes contracted by ADOT&PF or in the private sector market. Respondents stated that certain prime practices have been barriers to their success on ADOT&PF projects, with concerns surrounding prompt payment, unrealistic work schedules, and other practices¹⁹.

Access to Capital

¹⁷ 2014 ADOT&PF Disparity Study, Ch. VI-8

¹⁸ 2014 ADOT&PF Disparity Study, Ch. VI-10

¹⁹ 2014 ADOT&PF Disparity Study, Ch. VI-10

MGT surveyed vendors and collected anecdotal comments regarding participants’ experiences accessing financial capital during the study period. The survey responses show that of the 162 (41.2% of total) respondents that applied for a commercial loan, 36% were M/W/DBEs. Less than 11% of M/W/DBE applicants (6 firms) were denied loans; four of the six firms denied loans were Alaska Native-owned. Anecdotal comments showed that prime participants did not have an overwhelming concern about access to capital. However, subcontractor participants did express concerns with access to capital since they rely on timely payments from prime contractors. Participants agreed that if subcontractors do not have a line of credit, it is difficult to keep their company in business²⁰.

Discrimination and Disparate Treatment

As part of the survey, focus groups, interviews, and public hearings, MGT asked participants if they had experienced discriminatory or disparate behavior by ADOT&PF, its primes, or in the private sector during the study period. Table 5 reflects the percentage of respondents that identified as having experienced discriminatory or disparate behavior.

Respondent Category	By ADOT&PF	By Prime Contractors	Private Sector
M/W/DBE (Prime)	3.30%		
Non-M/W/DBE (Prime)	0.90%		
M/W/DBE (Subcontractor)		6.60%	
Non-M/W/DBE (Subcontractor)		4.40%	
M/W/DBE Firms			9.30%
Non-M/W/DBE Firms			7.00%

Table 5: Discrimination and Disparate Treatment Survey Results

With respect to disparate treatment, M/W/DBE respondents reported:

- An informal network precluded their firms from obtaining work in the private sector – 17.2%.
- Seldom or never being solicited when there were no DBE goals – 40.4%.

²⁰ 2014 ADOT&PF Disparity Study, Ch. VI-11

- Being dropped from a project after being included to satisfy good faith efforts requirements – 9.9%.
- Experiencing unequal or unfair treatment from primes – 20.5%.

Anecdotal responses from participants varied, with M/W/DBE firms stating that they had experienced disparate treatment from primes, as well as ADOT&PF, based on the treatment of their firm compared to non-M/W/DBEs. Non-M/W/DBE firms stated that the DBE program, in their view, creates a disadvantage for their firms because it takes work away from them²¹.

Stakeholder Interviews

In addition to receiving anecdotal comments from business owners, MGT conducted interviews with two trade associations to get their perceptions on the impact of the DBE program to their members. Stakeholders were asked to provide their perceptions on the implementation of DBE goals and barriers their members faced. Responses showed that while both stakeholder groups support the DBE Program, their members have been frustrated with various elements of the program such as the calculation of DBE goals. The groups expressed their belief that DBE goals are established on miscalculated availability of firms truly “qualified” to do work for ADOT&PF. They stated that firms are certified as DBEs in areas they do not have the experience or capacity to work. In some cases, the firms are certified to do work where professional licenses are required and the DBE firm does not hold that license, inflating availability calculations to unrealistic levels when bidders are attempting to identify qualified DBEs to meet goals. Group members stated that the establishment of unachievable goals is a barrier to meeting DBE goals²².

Suggested Remedies from Anecdotal Participants

Participants in the anecdotal analysis were asked to provide their suggestions and recommendations for improving the procurement process, increasing M/W/DBE utilization, or improving the DBE program. Some of the recurring responses included:

- Maintaining transparency when establishing DBE goals.

²¹ 2014 ADOT&PF Disparity Study, Ch. VI-11

²² 2014 ADOT&PF Disparity Study, Ch. VI-12

- Hiring local residents in remote areas.
- Offering courses on business growth and doing business with ADOT&PF. Courses on topics such as Davis-Bacon requirements, how to increase bonding capacity, etc.
- Revamp or revise the monitoring or compliance component of the DBE program to ensure DBEs are treated fairly²³.

Upcoming Contracts

The ADOT&PF Statewide Transportation Improvement Program (STIP) is the state's four-year program for transportation system preservation and development²⁴. It includes interstate, state, and some local highways, bridges, ferries, and public transportation, but does not include airports or non-ferry-related ports and harbors. The STIP covers all system improvements for which partial or full federal funding is approved and that are expected to take place during the covered four-year period (2016 – 2019). ADOT&PF reviewed upcoming projects and found that upcoming projects are similar to the contracts awarded during FFY 2015 – 2017 in type, size, and location. These contracts include construction and design work related to roadway rehabilitation, highway reconstruction, and bridge replacement.

Threshold Analysis

ADOT&PF analyzed FFY 2015 – 2017 DBE utilization by examining contracts in specific dollar ranges (threshold levels). Contracts awarded during the review period were grouped in the following thresholds based on total federal dollars awarded for the prime contract.

1. Less than \$100,000
2. Greater than or equal to \$100,000 and less than \$500,000
3. Greater than or equal to \$500,000 and less than \$1,000,000
4. Greater than or equal to \$1,000,000 and less than \$3,000,000
5. Greater than or equal to \$3,000,000 and less than \$5,000,000
6. Greater than or equal to \$5,000,000 and less than \$10,000,000
7. Greater than or equal to \$10,000,000

²³ 2014 ADOT&PF Disparity Study, Ch. VI-12

²⁴ <http://www.dot.alaska.gov/stwdplng/cip/stip/index.shtml>

Threshold Level	Contract Type	Total Dollars Awarded	% Fed Dollars	Total Awarded to DBES	DBE Utilization	Dollar-Weighted DBE Utilization
1	RC	\$90,363	0.01%	\$59,567	65.92%	0.01%
	RN	\$1,430,807	0.15%	\$199,811	13.96%	0.02%
	Combined	\$1,521,170	0.16%	\$259,378	17.05%	0.03%
2	RC	\$2,571,394	0.26%	\$349,516	13.59%	0.04%
	RN	\$10,435,623	1.07%	\$666,674	6.39%	0.07%
	Combined	\$13,007,017	1.33%	\$1,016,190	7.81%	0.10%
3	RC	\$5,128,307	0.53%	\$282,253	5.50%	0.03%
	RN	\$18,938,464	1.94%	\$2,003,305	10.58%	0.21%
	Combined	\$24,066,771	2.47%	\$2,285,558	9.50%	0.23%
4	RC	\$33,047,588	3.39%	\$4,760,649	14.41%	0.49%
	RN	\$55,857,449	5.73%	\$5,177,148	9.27%	0.53%
	Combined	\$88,905,037	9.12%	\$9,937,796	11.18%	1.02%
5	RC	\$30,951,869	3.18%	\$3,380,590	10.92%	0.35%
	RN	\$48,076,028	4.93%	\$11,159,150	23.21%	1.14%
	Combined	\$79,027,897	8.11%	\$14,539,741	18.40%	1.49%
6	RC	\$99,201,978	10.18%	\$13,392,512	13.50%	1.37%
	RN	\$164,253,148	16.85%	\$6,259,868	3.81%	0.64%
	Combined	\$263,455,126	27.03%	\$19,652,379	7.46%	2.02%
7	RC	\$170,025,879	17.44%	\$6,216,931	3.66%	0.64%
	RN	\$334,795,923	34.34%	\$14,747,629	4.40%	1.51%
	Combined	\$504,821,802	51.79%	\$20,964,561	4.15%	2.15%
Total	Combined	\$974,804,820	100.00%	\$68,655,603	7.04%	7.04%

Table 6: DBE Utilization by Threshold Level and Contract Type²⁵

Based on the data presented in Table 6, the DBE utilization rate remains above the overall DBE goal for the period (8.46%) across the majority of threshold levels, with the one significant deviation being threshold level 7 for contracts larger than \$10,000,000. This is notable because DBE utilization rates on larger contracts have a proportionally larger dollar-weighted impact on overall DBE utilization. ADOT&PF reviewed individual contracts from FFY 2015 - 2017 to identify possible factors that contributed to the comparatively lower DBE utilization rates on contracts larger than \$10,000,000. This review showed that DBE prime contractors and consultants were awarded prime contracts in all threshold levels barring threshold level 7. The absence of DBE prime contractor and consultant participation is a likely cause for the comparatively lower rates of

²⁵ The data in Table 6 reflects the prime contracts awarded during the review period and their associated subcontracts. Subcontracts awarded during the review period under prime contracts that were awarded outside of the review period were excluded.

DBE utilization, but may not fully explain the significantly lower DBE utilization rate in threshold level 7.

A potential factor impacting DBE utilization on contracts larger than \$10,000,000 is that larger contracts may have amplified barriers to DBE participation such as higher bonding requirements. The data in Table 6 shows that while threshold level 7 had the lowest DBE utilization rate, it also had the most dollars awarded to DBEs on a nominal basis. This is important to note because it indicates that DBEs are in fact being used consistently on large contracts, however, the total federal dollars awarded to DBEs in threshold level 7 is smaller on a relative basis, which is likely attributable to capacity limitations.

Geographic Barriers

The State of Alaska is the market in which ADOT&PF operates, however, due to geographic and logistical barriers, individual firms often operate in portions of the market area. For the purposes of evaluating the variation in DBE availability across the relevant market area, and to gain insight into the availability of DBEs to perform work on FHWA-assisted contracts, ADOT&PF analyzed contract records and AUCP certifications records. During the certifications process firms are asked to identify in which ADOT&PF operating regions they are available to perform work. Using this data, Table 7 reflects the percentage of total certified DBEs²⁶ that indicated they are available to perform work in the ADOT&PF Central, Northern, and/or South Coast Regions.

²⁶ Excludes airport concessionaires.

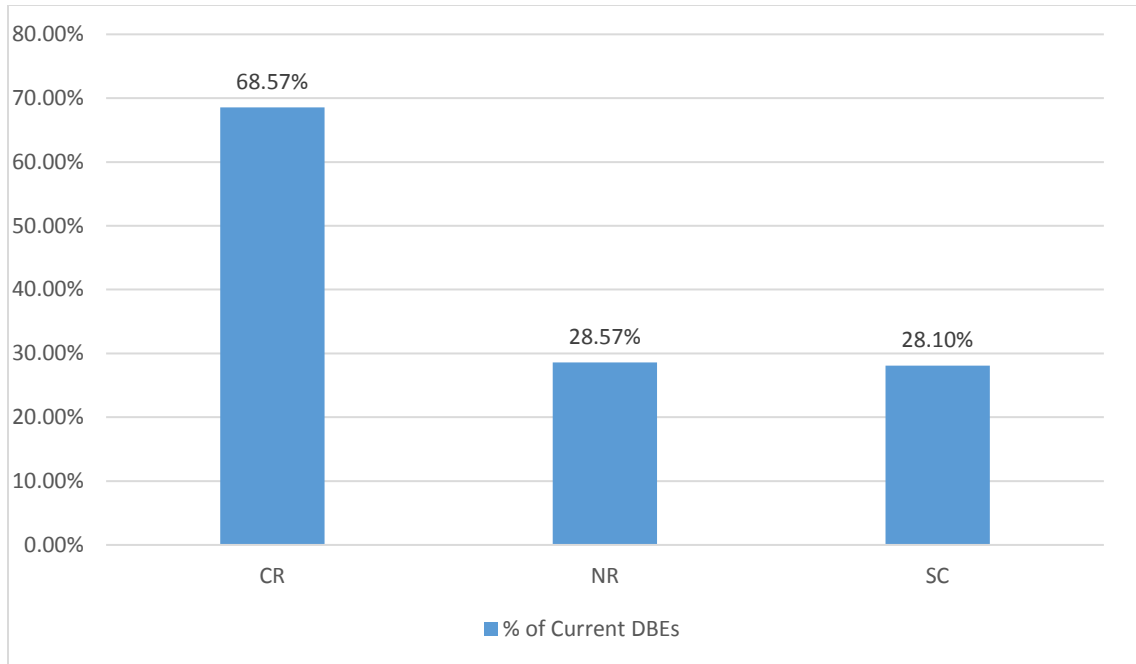


Table 7: % DBEs available

From Table 7 it is apparent that DBE availability varies by region. This may be partially explained by the geographic size of the market area, as well as the logistical costs associated with construction contracts.

Other Disparity Studies

No disparity studies aside from the 2014 ADOT&PF Disparity Study have been conducted in the relevant market area.

Public Participation

In accordance with the requirements of 49 CFR Part 26.45, ADOT&PF provided for consultation and publication of the proposed overall goal and race-conscious and race-neutral projections. This step was conducted to obtain information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and the DBE program. ADOT&PF utilized a two-step approach to obtain public comment. The Department first worked to raise awareness among interested stakeholders, then established a formalized process for stakeholders to submit comments. The process began on June 23, 2017 with the publication of the proposed goal and methodology on the CRO website.

To facilitate public participation in the goal-setting process, ADOT&PF developed an outreach plan to gather input from as many interested stakeholders as possible. The plan consisted of targeted outreach to minority and women's business organizations, public notices, and communication with DBE and non-DBE firms. On June 26, 2017 the CRO posted details of the overall goal methodology and public comment period on the State of Alaska Online Public Notices web portal. On June 30, 2017 email notification of the overall goal and public comment period was sent to DBE and non-DBE firms, as well as the following organizations:

- Associated General Contractors of Alaska (AGC)
- Minority Business Development Agency (MBDA)
- Procurement Technical Assistance Center (PTAC)
- National Association of the Advancement of Colored People (NAACP)
- Small Business Development Center (SBDC)

ADOT&PF followed up with additional outreach efforts to the general public through the following means:

- An advertisement was placed in the *Alaska Dispatch News*, which ran from July 6 through July 13 of 2017. *Alaska Dispatch News* was chosen due to its statewide reach both online and in print, and the dates were selected based on Google Web Analytics peak impressions and readership.

Instructions for submitting comments and feedback were included with all outreach efforts. The purpose of setting a formal process for submitting comments is to maintain organization in the public participation phase of the goal setting process and to aid in tracking feedback. A comment form was issued with notifications to stakeholders, along with details regarding the live public meeting hosted on July 13, 2017 to explain the goal methodology, answer questions, and take comments. The live public meeting was hosted in Anchorage, with teleconferencing available for those unable to attend.

The majority of comments received were obtained during the live session, and meeting minutes describing the comments and responses are attached to this document. Summaries of the written comments received, as well as the Department's responses, are detailed below.

1. Multiple DBEs pointed out a reduction in DBE utilization coinciding with the Department's transition to a race-neutral DBE program. Respondents suggested that race-neutral measures do not appear to be working, and that in the absence of DBE goals, DBEs are not being utilized. Further, respondents recommended adding a race-conscious component to the overall DBE goal.

ADOT&PF Response: *While it is likely that removing race-conscious measures from the ADOT&PF DBE program has contributed to a reduction in DBE utilization, this reduction does not in itself constitute relevant and persuasive evidence of discrimination. Relevant and persuasive evidence of discrimination or its effects, which may include valid statistical and anecdotal analyses, must be demonstrated before a recipient may utilize race-conscious measures to achieve the overall DBE goal.*

In WSDOT v. Western States Paving, the 9th Circuit panel stated that “even in states in which there has never been discrimination, the proportion of work that DBEs receive on contracts that lack affirmative action requirements will be lower than the share that they obtain on contracts that include such measures because minority preferences afford DBEs a competitive advantage”²⁷. The non-goal analysis conducted by MGT in the 2014 ADOT&PF Disparity Study revealed lower rates of DBE utilization on contracts that lacked DBE goals versus those that had DBE goals. However, on those contracts that lacked DBE goals, M/W/DBEs were utilized at or near M/W/DBE availability. These findings support the conclusion that the comparatively lower level of M/W/DBE utilization on contracts without DBE goals may have been due to the removal of the competitive advantage afforded to DBEs under the race-conscious program, and not necessarily due to discrimination.

Another variable that likely contributed to the reduction in DBE utilization after transitioning to a race-neutral program was the removal of several of the largest DBEs from the program. The Department's transition to a race-neutral DBE program coincided with policy changes that impacted the certification status of some of the largest DBEs that had been certified

²⁷ Western States Paving, 407 F. 3d at 1000

by the AUCP. An analysis conducted by the CRO for FHWA regarding the first year of implementing a race-neutral program showed that nearly 20% of all DBE utilization during FFY 2015 was attributable to firms that were removed after transitioning to a race-neutral program²⁸.

Based on the available evidence, and in consideration of the evidence as it pertains to the presence or absence of discrimination in the federal-aid contracting market, ADOT&PF maintains its proposal to meet the overall DBE goal through entirely race-neutral means.

In 2017 the CRO expects to begin the process of planning a disparity study update. Updated analyses of M/W/DBE availability and utilization under the race-neutral program will provide further clarification to questions regarding the effectiveness of the race-neutral program, and provide a basis for setting future overall DBE goals.

2. Several DBEs pointed to the Department's inability to meet the current DBE goal of 8.46% during the previous goal cycle as evidence of the need for race-conscious DBE goals to meet the proposed goal of 8.83%.

ADOT&PF Response: *There are multiple factors that must be considered when establishing the overall DBE goal and the race-conscious and race-neutral projections for meeting the goal. One important consideration is that the availability of non-certified minority and women-owned businesses that could potentially become certified are included in the calculation of the overall goal, in following USDOT guidance. Additionally, participation by non-certified firms on federal-aid contracts cannot be counted toward the overall goal. With this being said, the overall DBE goal is reflective of the level of DBE participation that could be expected, absent the effects of discrimination, and assuming that non-certified firms that are considered available DBEs for the purposes of calculating the overall DBE goal, actually become certified.*

There are several things to point out about this. First, until a non-certified firm actually applies for DBE certification, there is no definitive way of knowing whether that firm can be certified as a DBE. This is due to the

²⁸ ADOT&PF Race-Neutral DBE Program One Year Review, 2016

necessity of reviewing non-public information in order to determine a firm's eligibility to participate as a DBE. Second, the onus of recruiting non-certified firms to join the program is on the Department as a federal-funds recipient, and similar to other state DOTs, ADOT&PF has historically experienced challenges in encouraging non-certified firms to seek certification. Because of this, the overall DBE goal is established at a level higher than what may be expected if only certified DBEs were considered, and the Department bears the responsibility of recruiting additional DBEs as part of its race-neutral efforts to meet the overall goal. As a primary means of meeting the DBE goal, the CRO intends to increase its efforts to recruit potential DBEs in the coming years.

In response to commenter's suggestions of the need for a race-conscious component of the overall goal, it is important to consider the findings of the 9th Circuit panel in the Western States Paving case. The courts have stated that whether race-conscious measures are needed depends on the presence or absence of discrimination or its effects in a state's transportation contracting industry. Further, even when discrimination is present, a recipient must narrowly tailor its use of race-conscious measures to apply only to specific groups that have suffered discrimination or its effects. In order to establish the presence or absence of discrimination among specific groups in a state's transportation contracting industry, the court identified valid and completed statistical analyses (disparity studies) as acceptable evidence that may justify the use of race-conscious measures.

The 2014 ADOT&PF Disparity Study is the most recent disparity study that has been conducted in the State of Alaska. The study does not provide strong evidence of the presence of discrimination in Alaska's transportation contracting industry, and therefore ADOT&PF maintains its proposal to meet the overall goal through entirely race-neutral means, including increasing efforts to recruit new DBEs.

3. One DBE expressed dissatisfaction with the previous ADOT&PF practice of identifying "subcontractable items" on race-conscious contracts, and suggested that this practice had contributed to the success of certain DBEs

to the detriment of others, and led to the adoption of the Central Region Waiver for non-minority women-owned DBEs.

ADOT&PF Response: *Under its race-conscious DBE program, ADOT&PF previously included, as part of its conformed contract for FHWA-assisted construction projects, a list of work items identified by ADOT&PF engineers as being part of the project, commonly subcontracted, and for which DBEs were available to perform the type of work. The purposes of these lists were to aid in establishing contract goals, and to identify types of work that could potentially be performed by DBEs.*

After receiving feedback from DBEs, and in consultation with FHWA, ADOT&PF discontinued its practice of identifying subcontractable items to address the incorrect perception that prime contractors needed only to consider the work items that were identified on the subcontractable items list.

As it pertains to the Central Region Waiver for non-minority women-owned DBEs, it is important to discuss the results of the 2008 ADOT&PF Disparity Study conducted by D. Wilson Consulting. The results of this study identified an overutilization of non-minority women-owned businesses, not limited to certified DBEs, in the ADOT&PF Central Region. Based on these findings, ADOT&PF requested, and was later granted a waiver excluding the participation of non-minority women-owned DBEs from counting toward race-conscious contract goals on FHWA-assisted ADOT&PF construction projects in the Central Region. Since implementing the waiver in 2009, ADOT&PF commissioned a disparity study update which analyzed procurement activities from FFY 2007 – 2011. The results of this study reflected a continued overutilization of non-minority women owned firms, including DBEs and non-DBEs, regardless of the use of DBE goals. In consideration of the results of the study, available evidence does not support the use of race-conscious measures for non-minority women-owned DBEs performing work on ADOT&PF FHWA-assisted construction projects in the Central Region.

Detailed minutes of the ADOT&PF Proposed DBE Goal and Methodology Public Meeting held on July 13, 2017 are attached and summarize the questions and comments received during the meeting.

Step Two Adjustments Summary

ADOT&PF examined the preceding evidence to determine what, if any, step two adjustments were necessary to arrive at an overall goal that accurately reflects the relative availability of DBEs ready, willing, and able to perform work on FHWA-assisted contracts. Challenges related to encouraging non-certified firms to become certified, the capacity of DBEs to perform work on large contracts, and geographic barriers impacting DBE availability are factors indicating a downward adjustment to the base figure is necessary. However, MGT's analysis of self-employment propensity and earnings found that minorities were significantly less likely than non-minority males to be self-employed, and if they were self-employed, minorities also earned significantly less in 2011 than self-employed non-minority males. Other evidence considered did not provide a strong basis for adjustment to the base figure. ADOT&PF considered all of the evidence collectively, and determined that a downward adjustment based on median past participation is necessary to account for DBE capacity.

$$\text{Step Two Overall Goal} = \frac{9.93\% + 7.73\%}{2} = \mathbf{8.83\%}$$

Race-Conscious and Race-Neutral Projections

ADOT&PF proposes an overall DBE goal of 8.83% for FFY 2018 – 2020. The following evidence was considered in establishing the Department’s projections for the portions of the goal to be met through race-conscious and race-neutral means.

2014 ADOT&PF Disparity Study

Disparity Analysis

For FHWA-assisted contracts let by ADOT&PF during the study period and in the relevant market area, overall, M/W/DBE subcontractors were utilized in excess of the level of utilization that would be expected, absent the effects of discrimination. This was also true for most groups when viewed individually, with the exceptions of Alaska Native Corporations, Alaska Tribal Corporations, and Asian Indian/Pacific Islanders, which showed substantial disparities. When M/W/DBE utilization and availability were analyzed with respect to each ADOT&PF operating region, the results differed from the statewide analysis. Some of the key findings from this analysis revealed that while there were disparities identified in the utilization rates of certain groups, no individual group showed disparity across all three regions. When analyzed by region, there was overutilization of M/W/DBE firms as a whole in all regions²⁹.

Non-Goal Analysis

Given that ADOT&PF operated both race-conscious and race-neutral DBE programs at different times during the study period, MGT was able to perform a non-goal analysis to examine M/W/DBE utilization on ADOT&PF construction projects with DBE goals and without DBE goals. The analysis revealed that across all federally-assisted contracts, M/W/DBE subcontractors received 40.5% of the dollars awarded on projects with DBE goals, compared to 24.4% of the dollars awarded on projects with no DBE goals, constituting \$15.7 million and \$80.8 million respectively. Looking only at FHWA-assisted contracts shows that when DBE goals were assigned, 75.3% of subcontract dollars awarded (\$5.4 million)

²⁹ 2014 ADOT&PF Disparity Study, Ch. V

went to M/W/DBEs, while 26.0% of the subcontract dollars awarded (\$66.2 million) went to M/W/DBEs when no goals were assigned³⁰.

Discriminatory and Disparate Treatment

MGT collected and analyzed anecdotal data to gain insight into disparate treatment, real or perceived, in the relevant market area. The following table displays the percentages of respondents that reported experiencing discriminatory or disparate treatment³¹.

Respondent Category	By ADOT&PF	By Prime Contractors	Private Sector
M/W/DBE (Prime)	3.30%		
Non-M/W/DBE (Prime)	0.90%		
M/W/DBE (Subcontractor)		6.60%	
Non-M/W/DBE (Subcontractor)		4.40%	
M/W/DBE Firms			9.30%
Non-M/W/DBE Firms			7.00%

Table 8: Discriminatory and Disparate Treatment Survey Results

Relevant Case Law

The Disparity Study provided an analysis of the state of the law applicable to affirmative action programs of contracting agencies, as the law has been interpreted and evolved in federal courts. The conclusions of the legal analysis explain that in implementing a race or gender-conscious contracting program, a governmental entity must demonstrate identified, systemic discrimination on the basis of race³², and to satisfy strict scrutiny, agencies must provide a compelling interest for a race or gender-conscious program. “The compelling interest begins with showing disparities, if any, between the availability and utilization of firms by demographic category. However, the disparity analysis must be supplemented by factoring in issues such as type of work, as well as firm capacity and interest in pursuing agency contracts. How subcontractors are treated in the absence of

³⁰ 2014 ADOT&PF Disparity Study, Ch. IV

³¹ 2014 ADOT&PF Disparity Study, Ch. VI-12

³² *Crosby*, 488 U.S. at 469.

goals is also an important part of the factual predicate for a race and gender-conscious program. This quantitative analysis must then be supplemented with qualitative evidence from interviews, surveys, and other methods of anecdotal data collection. If a factual predicate is found for race and gender-conscious efforts, the program still must be narrowly tailored. Critical elements of narrow tailoring include taking race-neutral measures seriously, setting goals near business availability, having mechanisms for flexible program implementation, and avoiding the random inclusion of groups into the program”³³.

Findings and Recommendations

Based on its analyses, MGT recommended an overall DBE goal of 3.60% for FHWA, to be met through entirely race-neutral means. MGT’s recommendations were based on the totality of their findings. MGT also notes that during the study period, minority and women-owned firms were being utilized near or above ADOT&PF DBE goals, but the utilization of certified DBEs was less due, in part, to the utilization of minority and women-owned firms that were removed from the DBE program for exceeding personal net-worth limits³⁴.

FFY 2015 – 2017 DBE Utilization

ADOT&PF analyzed race-conscious and race-neutral DBE utilization by procurement type from FFY 2015 – 2017 to identify how DBEs have been utilized on FHWA-assisted contracts since transitioning to a race-neutral DBE program³⁵. The following table details the results of this analysis.

³³ 2014 ADOT&PF Disparity Study, Ch. II-13

³⁴ 2014 ADOT&PF Disparity Study, Ch. VII-6

³⁵ ADOT&PF began advertising FHWA-assisted contracts without DBE goals in July of 2015, upon approval of the race-neutral DBE program plan and contract specifications. FFY 2015 contracts advertised prior to this were advertised under a race-conscious DBE program.

Procurement Type	Contract Type	Total Awarded	Total Awarded to DBEs ³⁶	DBE Utilization
Construction	RN	\$620,069,280	\$47,920,278	7.73%
	RC	\$330,297,432	\$20,192,343	6.12%
	COMBINED	\$950,366,712	\$68,112,621	7.17%
PSA	RN	\$13,718,162	\$316,662	2.31%
	RC	\$10,719,945	\$787,358	7.35%
	COMBINED	\$24,438,108	\$1,104,020	4.52%
Construction & PSA	RN	\$633,787,443	\$48,236,940	7.61%
	RC	\$341,017,377	\$20,979,701	6.15%
	COMBINED	\$974,804,820.00	\$69,216,641	7.10%

Table 9: FFY 2015 – 2017 FHWA DBE Utilization by Procurement and Contract Type³⁷

The data from Table 9 reflects comparable DBE utilization rates between race-conscious and race-neutral construction contracts, and when all procurement types are reviewed collectively. However, the data shows that DBE utilization on PSA procurements are over three times less on race-neutral contracts than race-conscious contracts. These findings are consistent with several anecdotal comments ADOT&PF received during FFY 2015 – 2017 stating that DBEs were not consistently being used on race-neutral PSA contracts.

Median Race-Neutral Participation

ADOT&PF considered race-neutral certified DBE participation for the five most recent fiscal years, as reflected in Table 10.

³⁶ Race-neutral DBE utilization includes DBE prime contractor participation and DBE subcontractor participation on contracts with no contract goals.

³⁷ Data includes all subcontracts awarded during the review period, regardless of prime contract award date.

Fiscal Year	Race-Neutral DBE Utilization
2012	2.14
2013	5.73
2014	6.38
2015	6.05
2016	5.73
Median	5.73

Table 10: Median Race-Neutral DBE Utilization FFY 2012 – 2016

Public Participation

In establishing the race-conscious and race-neutral projections, ADOT&PF considered evidence collected via a 30-day public comment period as described above.

Race-Conscious and Race-Neutral Projections Summary

ADOT&PF reviewed the preceding evidence collectively to arrive at a projection for the portions of the overall goal to be met through Conscious and race-neutral means.

Analysis of DBE utilization during FFY 2015 – 2017 revealed a disparity between DBE utilization on race-conscious and race-neutral PSAs. ADOT&PF explored the possibility of remedying this disparity using race-conscious measures. However, the 9th Circuit Court held that race-conscious elements of a national program, to be narrowly tailored as applied, must be limited to those parts of the country where its race-based measures are demonstrably needed. Whether race-based measures are needed depends on the presence or absence of discrimination or its effects in a state’s transportation contracting industry. Additionally, even when discrimination is present in a state, a program is narrowly tailored only if its application is limited to those specific groups that have actually suffered discrimination or its effects. The results of the Disparity Study did not support the use of race-conscious measures, and in the relevant market area no other comprehensive data on firm utilization by ownership group exists. To address the disparity between DBE utilization on race-conscious and race-neutral PSAs, ADOT&PF will work with its USDOT funding partners to conduct a disparity study update during the FFY 2018 - 2020 triennial goal cycle.

The non-goal analysis performed by MGT revealed that overall, M/W/DBE construction subcontractors were consistently used in excess of their availability, regardless of whether or not DBE goals were assigned. However, there was a disparity between utilization rates on projects when DBE goals were assigned, versus when no DBE goals were assigned. A relevant question that has arisen in case law is whether evidence of a decline in M/WBE utilization following a change in, or termination of an M/WBE program is relevant and persuasive evidence of discrimination. In *WSDOT v. Western States Paving*, the Ninth Circuit stated that “even in states in which there has never been discrimination, the proportion of work that DBEs receive on contracts that lack affirmative action requirements will be lower than the share that they obtain on contracts that include such measures because minority preferences afford DBEs a competitive advantage”³⁸. Thus ADOT&PF concluded that although there were lower rates of utilization on construction projects without DBE goals during the study period, the fact that utilization on those projects exceeded the rate of M/W/DBE availability discredits the argument that discrimination was the cause for the reduced utilization. A review of data from FFY 2015 – 2017 supports these conclusions, demonstrating similar rates of DBE utilization on race-conscious and race-neutral construction contracts.

The results of the disparity analysis revealed significant disparities among Alaska Native Corporations, Alaska Tribal Corporations, and Asian Indian/Pacific Islander-owned construction subcontractors on FHWA-assisted contracts. However, there is not strong anecdotal evidence to suggest that these disparities are the result of discrimination, as required to satisfy strict scrutiny for a race-conscious program.

Based on the information reviewed, ADOT&PF proposes an overall annual goal of 8.83%. Continuing its race-neutral DBE program, ADOT&PF expects to achieve 8.83% DBE utilization through race-neutral means, and 0.00% through race-conscious means.

As more data becomes available, and in particular if any disparity studies are conducted within the relevant market area, future modifications to the race-conscious and race-neutral proportions may prove necessary.

³⁸ *Western State Paving*, 407 F. 3d at 1000.

Race-Neutral Measures

ADOT&PF has a broad range of race-neutral measures in place to encourage DBE participation on its FHWA-assisted contracts, and will take steps to continue to strengthen its race-neutral DBE program. The following details the race-neutral measures utilized by ADOT&PF to foster DBE participation. Information regarding specific activities, including DBE participation and engagement, are available in the ADOT&PF DBE Support Services Annual Report.

ADOT&PF Race-Neutral Measures
Pre-Bid Notification of Subcontracting Opportunities
Aspirational Project Goals
Outreach Efforts
Increased Monitoring
M/WBE Outreach
Coordination with Industry Partners
One-on-One Business Reviews
Training Classes and Technical Education
Plan Holders Self-Registration List
The Transporter
Quality Assurance Reviews
Facilitating Relationships between DBEs and Prime Contractors
DBE Reimbursement Program
Access to Capital
PSA DBE Program Development
AASHTOWARE
Disparity Study Update
Contract Goals

Table 11: ADOT&PF Race-Neutral Measures

Pre-Bid Notification of Subcontracting Opportunities

ADOT&PF has taken steps to ensure DBE awareness of subcontracting opportunities through several approaches. One approach is utilizing the State of Alaska Online Public Notices Service. This service provides registered users a cost-free way of staying informed of upcoming federally-assisted contracts by procurement type and region. Building on the State of Alaska Online Public Notices service, the Plan Holders Self Registration List allows interested

subcontractors/consultants to connect with prime contractors bidding on federally-assisted contracts. Beyond these web-based mechanisms, the ADOT&PF CRO has begun working with prime contractors to ensure that interested DBEs are given fair consideration for subcontracting opportunities. Under the race-neutral program, prime contractors have demonstrated a continued commitment to soliciting bids from DBEs who register on the Plan Holders Self Registration List. Toward this end, the CRO has begun developing a sample bid solicitation form to assist prime contractors in their efforts to procure DBE participation. Additionally, ADOT&PF has taken steps to highlight subcontracting opportunities to DBEs on a non-project specific basis. By brokering discussions between DBEs and ADOT&PF leadership during events throughout the year, DBEs were able to preview upcoming projects and subcontracting opportunities. The efforts that ADOT&PF has made to inform DBEs of subcontracting opportunities appear to be effective, as evidenced by the Disparity Study which highlights that surveyed participants overwhelmingly agreed that they receive notification of contract or bid opportunities³⁹.

Aspirational Project Goals

Aspirational goal-setting serves several purposes in the race-neutral program, and gives ADOT&PF a standard against which DBE utilization on individual projects can be measured. Aspirational goals are calculated in the same manner as race-conscious contract goals, however, they are not advertised. By considering available work that may be subcontracted on a project and the availability of DBEs to perform that work, the Department can estimate the level of DBE utilization that could be expected on a given project. By allowing the Department to compare actual utilization against projected utilization, aspirational goals help generate more oversight of the program. In regard to the information collected for the purposes of calculating aspirational goals, subcontractable items aid in identifying probable upcoming subcontracting opportunities available for DBEs.

Outreach Efforts

One of the key components of the ADOT&PF DBE race-neutral DBE program is documenting efforts made by prime contractors to procure DBE participation

³⁹ 2014 ADOT&PF Disparity Study, Ch. VI-10

on FHWA-assisted contracts. This is accomplished through contract provisions that require prime contractors to detail their outreach efforts to procure DBE participation. Under this system, the sufficiency of outreach performed is not evaluated, however, documentation of any efforts made to utilize DBEs is required. Capturing this data has afforded the Department additional insights into DBE utilization on its FHWA-assisted contracts. By allowing ADOT&PF to monitor the efforts made by prime contractors to obtain DBE participation, and in some circumstances the reasons why those efforts fail, the Department can tailor its future efforts to increase DBE utilization on its FHWA-assisted contracts.

Increased Monitoring

Increased monitoring refers primarily to monthly status reports prepared by ADOT&PF and provided to FHWA regarding overall DBE utilization. However, the Department has expanded this to include other DBE program stakeholders such as the Associated General Contractors of Alaska (AGC), certified DBEs, and other sections within the Department. By using multiple platforms such as AGC's DOT Steering Committee and DBE events sponsored by ADOT&PF, the Department seeks to maintain a high level of awareness about the DBE program, progress against annual goals, and the responsibilities of individual stakeholders. Additionally, ADOT&PF expects to expand on its monitoring efforts in the coming triennial period by preparing DBE utilization projections based on current DBE utilization rates and upcoming contracts. These reports will be provided to FHWA regularly throughout each fiscal year, increasing program accountability and improving the Department's ability respond to projected shortfalls in DBE utilization, helping to achieve the overall goal.

M/WBE Outreach

Performing outreach to non-certified M/WBEs includes activities related to building the population of available DBEs to perform work on FHWA-assisted contracts. The Department estimates that there are at least some firms performing work on its FHWA-assisted contracts that could become certified. When firms that can be certified actually become certified, DBE participation is increased. The Department's efforts to recruit DBEs have included collecting references from prime contractors, utilizing disparity study data to identify non-

certified M/WBEs, and partnering with the Procurement Technical Assistance Center (PTAC) and other agencies to recruit potential DBEs.

Coordination with Industry Partners

Coordination with industry includes identifying and leveraging external resources to encourage DBE utilization on FHWA-assisted contracts. External partners play an important part in the DBE program not only from the perspective of being primary stakeholders, but also in providing resources for many of the race-neutral initiatives that help DBEs compete on FHWA-assisted contracts.

One – on – One Business Reviews

The Map to Success Specialized Assistance Program offers one – on – one consultations with business advisors who conduct in-depth analyses of firms' business operations. The consultations are intended to identify areas for improvement, and upon completion of the initial assessment, provide firms with a business profile that includes recommendations for strengthening their business infrastructure. The goal of the program is to provide business owners with the tools necessary to bring their businesses to a performance level that would result in an increased percentage of work on FHWA – assisted contracts.

Training Classes and Technical Education

Training classes and technical education are effective ways of delivering generalized information that is applicable to most DBEs. Various platforms are available for providing these educational offerings. Quarterly orientations for newly certified DBEs, business consultant presentations, and coordinated trainings with PTAC, USDOT, and the SBA are some of the avenues ADOT&PF uses to provide DBEs with information pertinent to their business operations. These trainings provide information to DBEs on topics including navigating the ADOT&PF procurement process, and other information beneficial for firms interested in working on FHWA-assisted contracts.

Plan Holders Self Registration List

The Plan Holders Self Registration List serves as a portal for DBE and non-DBE subcontractors to express interest in participating on FHWA-assisted contracts. For prime contractors, the Plan Holders Self Registration List is a

simplified way to identify potential DBE subcontractors. Additionally, the Plan Holders Self Registration List can act as an indicator of the availability of DBEs to perform work on a given project, and in turn, provide the Department with information helpful for evaluating DBE outreach and participation.

The Transporter

The Transporter is a quarterly newsletter published by the ADOT&PF CRO Office of Support Services. The newsletter communicates DBE program news, upcoming events, and other news pertinent to DBE firms and DBE program stakeholders. The newsletter is made available on the CRO website, and is also emailed to prime contractors, industry stakeholders, and all DBE firms.

Quality Assurance Reviews

The objective of quality assurance reviews is to evaluate DBE experience on ADOT&PF construction projects from the DBE, prime contractor, and project staff perspectives. Quality assurance reviews help to ensure that all DBE program requirements are being met on FHWA-assisted contracts, and also serve as a means to promote DBE program best practices on construction projects.

Facilitating DBE and Prime Contractor Relationships

Facilitating networking opportunities for DBEs is an important part of the Department's race-neutral DBE program. Networking events allow DBEs and prime contractors to meet face-to-face to build their networks of professional relationships, which can translate into additional DBE utilization on FHWA-assisted contracts.

DBE Reimbursement Program

The DBE Reimbursement Program benefits DBEs by assisting them in building their business so that they may better compete in the marketplace. This ultimately benefits the Department's race-neutral DBE program by providing an additional incentive to becoming certified, and by building DBE capacity to perform work on FHWA-assisted contracts. DBE firms may receive assistance to cover the costs of training, consultation and/or association fees that enhance the management skills or expertise of the DBE. A 50% reimbursement program is available to individuals of qualifying DBE firms. Under this program, firms may be

reimbursed for 50% of tuition or other costs (up to \$1,000 per calendar year) for business or technical training, workshops, consulting services, and professional association fees. Small Business Development Center core classes are reimbursed at 90% through the program.

Access to Capital

External resources such as the USDOT Short Term Lending Program (STLP), the Alaska Department of Economic Development Microloan Fund, the 504 Loan Program, and the Kenai Peninsula Economic Development District are available to both certified and non-certified DBEs to help with access to capital.

PSA DBE Program Development

ADOT&PF has begun work to improve implementation of DBE program requirements on professional services contracts. Responding to concerns from stakeholders, ADOT&PF has taken steps to unify its processes and contract language across operating regions, and is coordinating with the community of prime consultants to ensure awareness of DBE program goals and responsibilities.

AASHTOWARE

ADOT&PF has begun the process of transitioning its information systems to AASHTOWARE, an integrated data management system with civil rights functionality. ADOT&PF expects that this transition will ultimately benefit the contracting community, including DBE and non-DBE contractors, by reducing paperwork requirements, augmenting the Department's prompt payment monitoring mechanisms, and facilitating a more transparent DBE program. The AASHTOWARE go-live date is January 1, 2018, and ADOT&PF will be working with DBE and non-DBE contractors to strive for a smooth transition.

Disparity Study Update

ADOT&PF will work with its USDOT funding partners to conduct a disparity study update during the upcoming triennial period. The disparity study update should include analyses of M/W/DBE availability and utilization on USDOT-assisted contracts across all procurement types, and identify any evidence of discriminatory behavior in the market area. ADOT&PF expects the disparity study update to be completed prior to the FFY 2021 – 2023 DBE goal cycle.

Contract Goals

ADOT&PF will monitor DBE utilization throughout each fiscal year, and compliant with the requirements of 49 CFR Part 26.51(f)(1), will evaluate whether adding contract goals is necessary to meet the overall DBE goal. If it is determined that contract goals are necessary to meet the overall DBE goal during a fiscal year, ADOT&PF will coordinate with FHWA to make the required adjustments to its program implementation for the remainder of that year or until DBE utilization reaches a level where contract goals are not needed to meet the overall DBE goal.