

## **FEDERAL FISCAL YEAR 2009 DBE GOAL**

An Overall Annual Disadvantaged Business Enterprise Goal has been developed for Disadvantaged Business Enterprise (DBE) participation in the Oregon Department of Transportation (ODOT) Federal Fiscal Year (FFY) 2009 federally assisted contracts. The goal was developed in compliance with federal regulations set forth in 49 CFR Part 26, Participation by Disadvantaged Business Enterprises in U.S. Department of Transportation (DOT) Programs. The goal identifies the relative availability of DBEs based on evidence of ready, willing and able DBEs in relationship to all comparable businesses which are known to be available to compete for ODOT's USDOT assisted contracts. The overall annual goal reflects ODOT's determination of the level of DBE participation that would be expected absent the effects of discrimination. The currently approved ODOT DBE Program Document was approved in 2000, but a revised document was submitted in December 2007. The calculations for the FFY 2009 Annual Goal are the same as for the revised FFY 2008 Annual Goal submitted at the same time, since the same data was used.

### **FFY 2009 GOAL DETERMINATION**

**ODOT has determined that the annual goal for FFY 2009 is 11.5 percent, based on the lists used by the consultant, MGT of America, for the 2007 Availability and Disparity Study, and adjusted to reflect current availability.**

**ODOT proposes a total of 1 percent race-conscious and 10.5 percent race-neutral goals for FFY 2009, based on the fact that the statewide availability was 4.88 percent African American or Asian American owned for DBEs in the 2007 Disparity Study<sup>1</sup>, and the total Region 1 spending (Prime and sub) was 15.5 percent<sup>2</sup> of total ODOT spending ( $0.0488 \times 0.155 = 0.0076$ , rounded up to 1 percent). The race-conscious goal will be applied to African-American and Asian-American DBE firms for construction contracts only. No project-specific goals would be set for Native American, Hispanic American or non-minority Women owned DBE firms, and all participation by those firms would be considered race- and gender-neutral.**

### **STEP ONE – DETERMINING THE BASE FIGURE**

#### **USDOT Goal-Setting Requirements**

In setting the overall annual goal for the Oregon Department of Transportation (ODOT), the USDOT requires that the goal setting process begin with a base figure for the relative availability of DBEs. The overall 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 USDOT-

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<sup>1</sup> 2007 Availability and Disparity Study Exhibit 4-12

<sup>2</sup> 2007 Availability and Disparity Study Exhibits 4-2 and 4-16

assisted contracts. In particular, recipients must follow the USDOT's two-step methodology for goal setting to determine the level of DBE participation they expect absent the effect of discrimination:

- **Step 1** – Compute base figure for relative availability of ready, willing, and able DBEs
- **Step 2** – Adjust the base figure to make it as precise as possible utilizing the guidelines established in 49 CFR Part 26.45 and the goal-setting tips published by the USDOT's Office of Small and Disadvantaged Business Utilization (OSDBU)

ODOT is also required to project the portions of the overall goal it expects to be met through race-neutral and race-conscious measures, respectively (see 49 CFR Part 26.51). Additionally, recipients must provide for public participation in the establishment of their overall goal as well as specify the relevant market area used for the calculation.

Accordingly, ODOT determined the State of Oregon to be the relevant market area for highway construction and design services. This determination is based upon the market area analysis contained in MGT's 2007 Disparity Study. Once the State of Oregon was identified as the relevant market area, further analyses were performed only on data and contracting opportunities pertinent to firms expected to participate in the market area.

Furthermore, ODOT reviewed the alternatives for establishing a base figure listed in 49 CFR Part 26.45, and selected the 2007 MGT Disparity Study as the best data source and most accurate approach for ODOT's FFY 2009 goal setting.

**NOTE:** ODOT is only projecting goals for highway construction; therefore, there is no weighting for A&E versus construction.

### ***Highway Construction - Step 1***

1. The MGT 2007 disparity study used MWBE bidders to estimate availability.
  - a. Both the 2007 ODOT Disparity Study and ODOT DBE Goal Submissions have used bidders as a source of availability.
  - b. 2007 ODOT Disparity Study Included certified and non certified MWBEs
  - c. 2007 ODOT Disparity Study Aggregate availability over the study period
2. 2007 ODOT Disparity Study separated availability into primes and subs
  - a. 29.5 percent of available subcontractors<sup>3</sup>
  - b. 19.1 percent of available prime contractors<sup>4</sup>
  - c. Prime-retained dollars were 63.4 percent of total dollars paid to prime contractors over the study period. Prime retained dollars are prime contract dollars after

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<sup>3</sup> 2007 Availability and Disparity Study Exhibit 4-12

<sup>4</sup> 2007 Availability and Disparity Study Exhibit 4-11

subcontractor dollars are subtracted from payment to the prime; in other words subcontractors received 36.4 percent of contract dollars.<sup>5</sup>

- d. When these weights are used this results in a weighted construction goal of **22.9** percent  $[(19.1\% * 63.6\%) + (29.5\% * 36.4\%)]$ .

## **STEP TWO – ADJUSTING THE BASE FIGURE**

### ***Highway Construction - Step 2***

#### ***Adjust the data for MWBEs for median utilization and current availability***

1. Based on the 2007 ODOT Disparity Study the median prime utilization for MW/DBEs was **4.63** percent, much lower than the estimated MW/DBE prime contractor bidder availability<sup>6</sup>
  - a. MW/DBEs primarily won small prime contracts
  - b. For example, MW/DBE won only 3.44 percent of the dollar value of prime contracts in excess of \$5 million<sup>7</sup>.
2. The median utilization for MW/DBEs was **38.06** percent during the 2007 ODOT Disparity Study, 8.56 percent more than the subcontractor bidder availability.
3. Further adjustments
  - a. The list of all Prime bidders used in the 2007 Disparity Study was reviewed, and only 2 MW/DBE bidders on the list were not also included in the subcontractor list. Of the 214 entries on the list, only 2, or 0.9 percent, were MW/DBEs unique to the Prime contracting bidders list.
  - b. The subcontractor bidders list used in the 2007 Disparity Study contained 922 entries. A random sample of 20% of those entries (a total of 185 firms) was compared to the Oregon Secretary of State's Corporation Division database, and it was determined that 21.6 percent of those firms (40 firms) were no longer in business or were not eligible to do business in Oregon. Applying the results of the sample to the entire list, the resulting number is 723 subcontractors. Of the 270 MW/DBE firms on the list, a total of 52 MW/DBE firms were no longer viable. This would leave 218 MW/DBE firms out of 723 total subcontractors, or an availability of 30.1 percent.
4. Recalculating the DBE goal using the new Prime and sub availability this results in a weighted construction goal of **11.5** percent  $[(0.9\% * 63.6\%) + (30.1\% * 36.4\%) = 11.5\%]$ .

## **B. Public Participation**

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<sup>5</sup> Subcontracting dollars from 2007 Availability and Disparity Study Exhibit 4-8, and total dollars from Exhibit 4-2

<sup>6</sup> 2007 Availability and Disparity Study Exhibit 4-2

<sup>7</sup> 2007 Availability and Disparity Study Exhibit 4-7

The ODOT Office of Civil Rights attended various meetings, marketplace events, trade shows and conferences throughout the past year and encouraged public comments on the DBE annual goal and the goal setting methodology. The three major events for small businesses were the Governor's Marketplace (2/21/07), the OAME Trade Show (5/10/07), and the MED Week Trade Show and Luncheon (10/4/07). Other small business events were monthly Contractor and A & E meetings at OAME, the ACEC/ODOT Conference (4/17/07), the CH2M Hill Small Business Fair (Spring 2007), and the Latino Business & Workforce Development Conference (9/23/06). ODOT/OCR also received phone calls from certified DBEs, Prime Contractors and business organizations. In addition, several groups met on an ongoing basis to identify issues and discuss solutions to improve the business climate in Oregon for all businesses, including DBEs. The Small Business Initiatives workgroup is composed of representatives from ODOT, Prime Contractors, AGC, and several DBE firms. A series of meetings were held by the MWESB Focus Group, made up of agency directors and key personnel from various state agencies, to clarify and coordinate support services to small minority- and women-owned businesses. No written comments regarding the DBE goal setting methodology were received. Additional meetings included:

- December 7, 2008, Oregon Department of Transportation Director Matthew Garrett and Office of Civil Rights Manager Michael A. Cobb met with Rep. Chip Shields where the results of the disparity study, including the reestablishment of the goals program, were discussed. Since his jurisdiction is within the area of the state that is most impacted by the study, considerable care was taken to ensure that the Representative understood the implications of the study to those groups in his neighborhoods. There were no concerns stated against moving forward with goals and ODOT was encouraged to do so in the interest of creating opportunities in the Portland tri-county area.
- January 7, 2008, ODOT Director Matthew Garrett and OCR Manager Michael A. Cobb met with Bernie Foster, the Publisher of The Skanner, a minority owned and operated newspaper, to discuss the Disparity Study recommended actions and ODOT's intention to reinstate the goals program. There were questions regarding those groups, particularly the Hispanic group, which were not identified as having a significant contracting disparity. Mr. Foster wanted to know what efforts would be taken to ensure that opportunities would be available for the other groups. Discussions continued with an overview of ODOT's Small Business Programs that are open to all groups, and that ODOT was intending on meeting with the Hispanic Chamber of Commerce to discuss further opportunities. There were no concerns voiced against, and considerable interest was voiced by Skanner in communicating to its readers what ODOT was intending to do. The Skanner was another source that was used to communicate the proposed changes to the minority and business communities.
- January 7, 2008, ODOT Director Matthew Garrett and OCR Manager Michael A. Cobb met with Governor Kulongoski's Deputy Chief of Staff Allen Alley and the results of the disparity study, including the reestablishment of the goals

program, were discussed. Since the Governor has been supportive of ODOT's efforts and encourages other state agencies to implement programs that would stimulate Oregon's economy, the Deputy Chief of Staff was very interested in the study's methodology and potential impacts. Methodology and statistics were discussed and ODOT's responses to the study recommendations were reviewed in detail. The meeting concluded with a commendation for ODOT's efforts. There were no concerns stated against moving forward with goals and ODOT was encouraged to do so.

- January 8, 2008, ODOT Director Matthew Garrett and OCR Manager Michael A. Cobb attended the monthly meeting of the National Association of Minority Contractors of Oregon (NAMCO), where the results of the disparity study, including the reestablishment of contract-specific goals, were discussed. There was a great deal of interest in when goals would be reinstated, but there were no questions regarding the percentage of goals or the goal-setting methodology. There was considerable interest in the timing for approval of the reinstatement of our goal-setting program. NAMCO is comprised of small businesses that are predominantly owned by African-Americans and they are among those who have been closely monitoring the progress of ODOT's projects in their area. They are anticipating increased opportunities for their member-owned small businesses and are poised to openly voice their concern and engage their political advocacy in the event that ODOT does not actively pursue reinstatement of a goals program. ODOT's support services programs were discussed at length and NAMCO members were encouraged to participate and maintain their DBE certification status since many had dropped certification when ODOT suspended its goal program.
- January 11, 2008, Jerry Hoffman, Emerging Small Business Manager for ODOT, attended the Oregon Association of Minority Entrepreneurs (OAME) monthly meetings for "Architects, Engineers, Professional and Technical" (AEPT), and Contractors. This gathering hosts approximately 50 small business owners and represents the grass-roots level of contracting in the state. The forum is convened to discuss news and upcoming opportunities for DBE and M/WBE or ESB certified firms and is used for networking as well as open discussion and presentation. Discussion on Disparity Study recommendations and ODOT actions were presented and there were no questions or comments received from the groups regarding DBE goals other than questions concerning ODOT's next steps. As with other meetings, one of the key questions is concerning timing, and whether or not ODOT is serious about returning to hard goals. The whole process for federal approval was discussed and the group requested that ODOT keep them apprised of ongoing developments.
- February 1, 2008. American General Contractors (AGC)/ODOT Annual Conference was convened with approximately 200 consultants/contractors. The

disparity study was discussed along with ODOT's proposal to return to race-conscious goals. Discussion focused around impact to specifications and timing, and which groups would have hard goals. The main concern is the availability of firms and what steps can be taken to ensure that firms will be ready to take on the work. ODOT shared information on its support services programs and database improvements, and committed to answering additional questions as required by any contractors desiring more information. AGC committed to working with ODOT in support of assisting with small businesses in moving forward.

- January 23, 2008, A Public Meeting was held in Portland at the ODOT Region 1 Headquarters to discuss the agency's plans for implementing recommendations from the disparity study. Goal-setting and goal implementation was addressed at the meeting with emphasis on the agency's intent to implement goals for African-Americans and Asians only. There were no negative objections raised during the meeting. Representatives of minority and contracting organizations, small business owners, state legislators, other state and public agencies, and interested stakeholders were invited to the meeting. Additional meetings are planned and will be ongoing to solicit public participation and consultation.
- January 23, 2008, Director Matthew Garrett and OCR Manager Michael A. Cobb met with Sam Brooks, Chairman, Portland Business Alliance, to discuss the agency's plans for implementing recommendations from the disparity study, goal-setting, and goal implementation. Mr. Brooks expressed support for the agency's decisions and offered assistance in rolling out ODOT's support programs. Mr. Brooks offered to announce ODOT's plans in his weekly contractors breakfast meetings held in Portland.
- January 30, 2008, Director Matthew Garrett and OCR Manager Michael A. Cobb met with Gale Castillo, Executive Director Hispanic Chamber of Commerce, to discuss the agency's plans for implementing recommendations from the disparity study, goal-setting, and goal implementation. Since the Disparity Study did not identify Hispanics as a group for which goals should be set, and this was discussed at length, the Chamber did not express objection to ODOT's plans for setting goals for African-Americans and Asians only. However, the Chamber did express interest in ODOT's support services programs and wishes to partner with ODOT to provide programs for Hispanics. ODOT concurs and is working with the Hispanic Chamber to provide support resources for the Hispanic business community.
- Additional meetings were held by organizations and Director Matt Garrett discussed the Disparity Study and its outcomes with impacts to attendees which consisted of women and minority-owned businesses and the general public. The meetings were held on April 19, 2008 with Oregon Tradeswomen, May 30 and

June 13<sup>th</sup>, 2008 at OAME's public and small business meetings for professional services and construction contractors. These forums are open to general public and small business owner,s, and isare a venue for sharing information and discussion. All meetings had robust discussion relativeng to ODOT's plans in moving forward post-Disparity Study.

- Although there have been no negative communications from the Asian or Native American business communities, meetings are being established to meet with these business communities to discuss ODOT's plans and support programs. Again, the intent is to move forward and continue to reach out to the small business community and those that are impacted by the proposed changes to inform and solicit input concerning ODOT's direction. As information is gathered ODOT will implement and structure its approaches as appropriate.

The ODOT Office of Civil Rights intends to publish legal notice of this proposed revised annual goal for FFY 2009 and this report on its website. Legal notices soliciting comments should be published prior to July 31, 2008, in the following general circulation media: The Bend Bulletin; The LaGrande Observer; The Medford Mail Tribune; The Portland Daily Journal of Commerce; The Portland Oregonian; The Salem Statesman Journal; The Asian Reporter; and, The Portland Observer. Comments will be accepted by ODOT for 45-days after the publishing date.

### **BREAKOUT of ESTIMATED RACE/GENDER-NEUTRAL and RACE/GENDER-CONSCIOUS PARTICIPATION**

The USDOT regulations require that the maximum feasible portion of the DBE Overall Annual Goal of 11.5 percent be met by using race neutral methods. Included in the race/gender-neutral analysis is a consideration of: 1) The amount of dollars awarded to DBE firms as prime contracts; 2) Dollars awarded to DBE firms as non-committed DBEs on projects where goals were assigned, and; 3) Dollars awarded to DBE firms on projects where goals were not assigned.

Due to recent guidance issued by the USDOT, its Federal Highway Administration and Federal Transit Administration as a result of the decision of the 9<sup>th</sup> US Circuit Court in the Western States Paving Co., Inc. v. Washington State Department of Transportation, the State of Oregon has had an entirely race- and gender-neutral DBE Program since April 19, 2006. On October 31, 2007, MGT of America, Inc., completed a statewide disparity study of ODOT contracting and delivered the final report showing findings. The study includes both statistical and anecdotal information for the entire state and for each ODOT Region individually. The study concluded that for some of the presumptive groups (Native American, Hispanic American and non-Minority Women) there is no significant disparity in contracting, but Black American and Asian American DBE firms are underutilized in ODOT construction subcontracting when compared to availability during the life of the study. Prime contracts and personal and professional services and goods were not considered due to lack of availability or insufficient data.

ODOT submitted a waiver request to FHWA on March 7, 2008. Additional information was requested on March 19, 2008, and a response was sent to FHWA on April 7, 2008. On May 2, 2008, during a phone conference between ODOT and FHWA, it was agreed that ODOT would reengage MGT to do an analysis comparing the methodology used in the Disparity Study with that used by ODOT in calculating the 2009 Annual DBE Goal. The final report was received from MGT on May 12, 2008<sup>8</sup>. ODOT proposes a total of 1 percent race-conscious and 10.5 percent race-neutral goals for FFY 2009, based on the fact that the statewide availability was 4.88 percent African American or Asian American owned for DBEs in the 2007 Disparity Study, and the total Region 1 spending (Prime and sub) was 15.5 percent of total ODOT spending ( $0.0488 \times 0.155 = 0.0076$ , rounded up to 1 percent). The race-conscious goal will be applied to African-American and Asian-American DBE firms only. No project-specific goals would be set for Native American, Hispanic American or non-minority Women owned DBE firms, and all participation by those firms would be considered race- and gender-neutral. The ODOT will continue to closely monitor DBE participation for all presumptive groups to identify any trends indicating an increase or decrease in utilization.

The only previous Disparity Study of record conducted in Oregon was completed in May 1996, and was limited in scope. The 1996 study has not been considered in the annual DBE goal setting because it: a) only applied to the Portland Metro area, b) is over 10 years old, c) was conducted with minority-owned and women-owned firms who did not necessarily meet the criteria for certification as DBE, d) was primarily focused on contracting not associated with road and highway construction, and e) contained very little anecdotal information. In a legal opinion issued by Hardy Myers, Oregon Attorney General, ODOT was advised not to take any actions based on the 1996 Study.

To encourage race- and gender-neutral utilization, the ODOT will continue current efforts, and work to develop new strategies. DBE utilization will continue to be tracked as race-neutral participation where specific goals do not apply. ODOT will provide supportive services to DBEs, which may include technical support, training, qualified expense reimbursements, resource information, and other identified support, as funding allows. ODOT currently does not receive any federal funds for supportive services. The ODOT participates in outreach and networking events to communicate contracting information to firms, and is working on several projects to help all businesses to identify contracting opportunities. A new mentor/protégé program in collaboration with the Port of Portland is in the start-up phase. The ODOT continues to enforce its prompt payment provisions and processes. The ODOT will consider other race-neutral methods of increasing DBE utilization as they are identified.

### **Waiver of Prohibition on the Use of Group Specific Goals - §26.15**

A portion of the overall goal will be met using race-conscious measures. As indicated by the Disparity Study results, ODOT has requested a waiver to implement race-conscious goals of

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<sup>8</sup> A copy of the MGT supplemental study report is attached.

limited application to Black American, Subcontinent Asian American and Asian Pacific American owned DBE firms.