



## Disadvantaged Business Enterprise (DBE) Program 2015 Proposed Modifications to Waiver

### Summary

The Oregon Department of Transportation (ODOT) proposes to seek a modification to its current DBE program waiver to re-include all DBE groups for participation in its construction contract goals and maintain the current waiver provisions for architecture and engineering (A&E) related service contract goals, which permits participation by all DBE groups except the Asian Pacific American group. Because the Federal Highway Administration (FHWA) has expressed concerns that the US Department of Transportation (USDOT) may not approve a waiver modification that includes the Hispanic DBE group for participation on construction contract goals, to keep the approval process moving, ODOT also plans to propose an alternative option in the waiver request application. The alternative option would include all DBE groups, except the Hispanic group, for participation in its construction contract goals and maintain the current waiver provisions for A&E related service contract goals. ODOT proposes that upon USDOT-approval the waiver apply to any time remaining under the FHWA-approved overall DBE goal for federal fiscal years<sup>1</sup> 2015 – 2016 and the entire 2017 – 2019 overall goal period for FHWA-funded contracts.

ODOT is seeking stakeholder input and is holding a public meeting on August 18, 2015 at ODOT Region 1 Headquarters, 123 NW Flanders, Portland, OR 97209 to review this proposal and hear public comments. Written comments submitted by August 30, 2015 will also be considered and may be submitted by regular mail to ODOT Office of Civil Rights, MS 31, 355 Capitol Street NE Salem, OR 97301-3871 or by email to [OCRInfoRequest@odot.state.or.us](mailto:OCRInfoRequest@odot.state.or.us).

### Background

The federal DBE regulations require that goals on USDOT-funded contracts “must provide for participation by all certified DBEs and must not be subdivided into group-specific goals” [49 CFR 26.51\(e\)\(4\)](#).

On January 18, 2008, ODOT first applied to FHWA to request a waiver of this requirement to allow the agency to subdivide the use of race- and gender-conscious goals by group on its FHWA-funded contracts to comply with USDOT and FHWA guidance regarding the 2005 decision of the 9<sup>th</sup> US Circuit Court of Appeals in the case of *Western States Paving vs. Washington DOT*. In that case the Court ruled a state department of transportation must have evidence showing that discrimination and inequity in contracting opportunities had occurred in that state’s transportation industry to establish a race- and gender-conscious DBE program and that any such program must be limited to the specific DBE group(s) impacted. ODOT’s first waiver, based on evidence of disparities in DBE utilization gathered through a 2007 disparity study conducted by MGT of America, Inc., was approved by USDOT on September 9,

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<sup>1</sup> The federal fiscal year runs October 1 through September 30.

2008. On September 16, 2010, ODOT was granted an extension to the 2008 waiver to allow the agency time to complete its 2011 disparity study update.

ODOT's current [DBE Program Waiver](#), approved by the USDOT on August 20, 2012 for federal fiscal years 2013 - 2015, allows the agency to assign race- and gender-conscious goals only for African American and Subcontinent Asian American DBE groups on construction contracts, and for all groups except Asian Pacific American DBEs on architecture and engineering (A&E) and related services contracts. The waiver applies to those groups that were found to have been substantially underutilized relative to their availability based on the results of ODOT's 2011 disparity study update.

In November 2014, ODOT engaged Keen Independent Research, Inc. to conduct a [disparity study](#) anticipated to be complete in spring 2016. The study will provide a thorough review of DBE utilization by group for both construction and A&E and related services contracting. ODOT intends to use the disparity study data to develop its overall goal for federal fiscal years 2017 – 2019. Keen has suggested the agency wait until the disparity study is complete before requesting a modification to its waiver. This is due to concerns that their results may differ from ODOT's analysis, as Keen's methodology for determining availability is somewhat different from the agency's prior consultant's methodology. However, ODOT has taken the position, and numerous stakeholders have also voiced their concern, that waiting until the results of the 2016 study are published and the 2017 - 2019 overall goal is approved, is too long to wait for DBEs currently ineligible to meet construction contract goals.

Over the last year ODOT and FHWA met several times to review ODOT's contracting data and to discuss options regarding the waiver. FHWA explained that when the USDOT reviews a waiver application it typically wants to see overall, aggregated participation data for the most recent five years to support the request. ODOT's Civil Rights Compliance Tracking database has a comprehensive set of prime and sub-contract data for construction. At this time the agency has insufficient A&E subcontract information entered into the database to analyze how the waiver has affected all DBE groups in A&E related services contracting, but anticipates a thorough analysis as part of ODOT's 2016 disparity study. Depending on the study results, ODOT may also request further modifications to the waiver in 2016.

### **Analysis**

The utilization analysis described below and shown in the attached exhibits relates to FHWA-funded construction contracting over the last five federal fiscal years, 2010 through 2014. Data discussed is as of July 15, 2015 from the ODOT Civil Rights Compliance Tracking (CRCT) Database. Any dollars shown represent all dollars, not just the federal share. Crediting is at 100% and is not based DBE program crediting requirements (for example, 100% subcontractor or 60% supplier credit). Race Neutral (RN) projects include FHWA-funded projects to which a DBE goal of 0% was assigned. Race Conscious (RC) projects include FHWA-funded projects to which a DBE goal of greater than 0% was assigned.

The relative utilization terms and percentage rates referred to in this report are intended to be consistent with ODOT's [2011 Disparity Study Update](#) (see *Disparity Index*, p. 4-9). Parity (P) refers to when a group's utilization rate is on par with, or 100% of, its availability rate. Overutilization (O) refers

to when a group's utilization rate is greater than 100% of its availability rate. Underutilization (U) refers to when a group's utilization rate is between 80% and 99.9% of its availability rate. Substantial Underutilization (SU) refers to when a group's utilization rate is less than 80% of its availability rate. For ODOT's prior waiver applications, overall substantial underutilization has been threshold used in determining which groups to be covered by the waiver and included in meeting assigned contract goals.

As set out in the data tables in the attached Exhibit 1a, overall, aggregated prime and subcontractor data for construction contracts over the last five federal fiscal years, 2010 through 2014, show the following:

1. **Overall utilization of minority- and women-owned businesses:** Overall for the five-year period, minority- and women-owned businesses were substantially underutilized at 66.7% utilization compared to availability. In each year, except 2012, minority- and women-owned businesses were substantially underutilized, with utilization rates at 73.8%, 47.6%, 71.3%, and 54.5% in 2010, 2011, 2013, and 2014 respectively. In 2012, at 96.8% utilization, minority- and women-owned businesses were underutilized but not substantially so.
2. **Overall utilization of groups covered by current waiver:** Overall for the five-year period, the two groups currently covered by the waiver and permitted to meet assigned contract goals – African American- and Subcontinent Asian American-owned DBEs – experienced increased utilization over the 2011 disparity study period. At 94.6% utilization compared to availability, African American-owned businesses were underutilized; and at 198.2% utilization, Subcontinent Asian American-owned businesses were overutilized. However, on projects without an assigned DBE goal, aggregated prime and subcontractor data shows both groups were substantially underutilized (see Exhibit 3a.). In fact, at 3.9% and 0.6% utilization respectively, African American and Subcontinent Asian American-owned business utilization on projects without assigned DBE goals was negligible. The continued substantial underutilization of these groups on contracts without assigned goals supports the need to continue covering these DBE groups under the waiver.
3. **Overall utilization of groups excluded from current waiver:** Overall for the five-year period, each of the DBE groups excluded from meeting assigned contract goals under ODOT's current waiver experienced substantial underutilization except for the Hispanic group. Native American, Asian Pacific, and Non-minority women-owned businesses were each substantially underutilized relative to availability at 69.7%, 55.7% and 49.5% respectively. At 90.9% overall utilization Hispanic-owned businesses were underutilized. Overall, the non-minority and non-women-owned business group was overutilized at 109.2% utilization compared to availability. The substantial underutilization of the Native American, Asian Pacific, and Non-minority women groups supports re-including these DBE groups for participation in construction contract goals.
4. **Disaggregated or detailed review of utilization of the Hispanic group:** Hispanic DBEs have experienced overall "underutilization" over the last five years and have been "substantially underutilized" only in the last two years. Overall, substantial underutilization has been the

threshold USDOT has considered in determining whether a group should be included under ODOT's prior waiver applications. However, ODOT has received numerous requests from Hispanic-owned DBEs and trade organizations representing Hispanic businesses to take a more detailed look at the group's participation in ODOT contracting, particularly at the subcontractor level. After a detailed review of the subcontractor utilization, ODOT takes the position that only taking into account the overall aggregated data when determining which groups to cover under the waiver obscures a larger pattern of substantial underutilization as it relates to the Hispanic group (see Exhibit 4, and contrast Table 4a with 4b).

When viewing overall, aggregated prime and subcontractor utilization rates for the Hispanic group, at 90.9% overall utilization, the group appears to be underutilized for the five-year period, but not substantially so. In 2010 the group was slightly overutilized at 100.4%, and overutilized at 136.9% and 193.5%. This is largely attributable to only a couple of Hispanic firms winning large prime contracts in 2010, 2011, and 2012 (see Exhibit 1b). However, at 20.3% and 40% relative utilization in 2013 and 2014 respectively, the Hispanic group was substantially underutilized over the last two years (Exhibit 1a). Furthermore, in each of the last five years, at 21.6%, 31.4%, 37.4%, 6.7%, and 24.2% relative utilization rates, Hispanic businesses were substantially underutilized at the subcontractor level (Exhibit 1c). Because most of ODOT's projects are let through low bid procurement process for primes, discrimination is more likely going to occur at the subcontracting level, where there is more subjectivity in which subcontractor bids will be accepted than at the prime level, where the agency is bound to accept the lowest responsive bidder. ODOT believes this more detailed review of the disaggregated data supports covering the Hispanic group under the waiver application and including the group in meeting assigned construction contract goals.

5. **FHWA comments and recommendations:** FHWA expressed concerns that USDOT may not approve a waiver modification that includes the Hispanic DBE group for participation on construction contract goals. FHWA identified the following considerations: (1) USDOT typically prefers to review overall, aggregated prime and subcontract utilization data for at least a five-year period; (2) It may view the Hispanic DBE group's significant prime participation as an indicator that the group as whole is succeeding, as one of the overall program objectives is DBEs successfully compete as primes; and (3) USDOT has not typically been swayed by arguments that a group's success is attributable to only one or two firms. FHWA understands that ODOT would like to implement a narrowly tailored race-conscious DBE program that is as inclusive of as many DBE groups as possible, including Hispanic DBEs. FHWA has therefore suggested and ODOT is proposing to submit a waiver request with two options for USDOT consideration.

### **Waiver Modification Proposal**

Based on ODOT's analysis of both its aggregated and disaggregated construction contracting data from the last five federal fiscal years in comparison to contractor availability, which shows a clear pattern of substantial underutilization for all DBE groups in construction contracting when prime and

subcontractor participation data is disaggregated, the agency proposes to apply to the FHWA for approval of the state's preferred waiver modification option from the USDOT.

**(1) ODOT Preferred Option:**

- a. Include all DBE groups for participation in construction contract goals; and
- b. Maintain the current waiver provisions for architecture and engineering related service contract goals that allow all DBE groups, except Asian Pacific American-owned DBEs, to participate in contract goals.

Because FHWA expressed concerns that USDOT may give more weight to the aggregated contracting data over the disaggregated contracting data, ODOT also proposes to include an alternative option in its waiver modification application to keep the approval process moving. ODOT's analysis of its aggregated construction contracting data from the last five federal fiscal years in comparison to contractor availability shows substantial underutilization for all DBE groups in construction contracting not currently included in the waiver, except the Hispanic group. The aggregated prime and subcontractor data also shows an increase in participation for the African American and Subcontinent Asian American DBE groups currently included in the waiver, but their continued substantial utilization on contracts without assigned goals supports the need to continue including these DBE groups in the waiver. Thus, if USDOT determines the disaggregated data does not support the state's preferred option, ODOT proposed to seek approval of the following alternative option.

**(2) Alternative Option:**

- a. Include all DBE groups except Hispanic-owned DBEs for participation in construction contract goals; and
- b. Maintain the current waiver provisions for architecture and engineering related service contract goals that allow all DBE groups, except Asian Pacific American-owned DBEs, to participate in contract goals.

Upon USDOT-approval, ODOT proposes the modified waiver to apply to any time remaining under the state's FHWA-approved DBE Goal for federal fiscal years 2015 – 2016 and through the next 2017 – 2019 triennial goal period applicable to the state's FHWA-funded contracts and grants.

**Comments**

ODOT is seeking stakeholder input and is holding a public meeting on August 18, 2015 at ODOT Region 1 Headquarters, 123 NW Flanders, Portland, OR 97209 to review this proposal and hear public comments. Written comments submitted by August 30, 2015 will also be considered and may be submitted by regular mail to ODOT Office of Civil Rights, MS 31, 355 Capitol Street NE Salem, OR 97301-3871 or by email to [OCRInfoRequest@odot.state.or.us](mailto:OCRInfoRequest@odot.state.or.us).

## **Exhibit Information**

- The utilization analyses shown in the attached exhibits relate to FHWA-funded construction contracting over the last five federal fiscal years, 2010 through 2014.
  - Data shown is as of 07/15/2015 from the ODOT Civil Rights Compliance Tracking (CRCT) Database.
  - Dollars shown represent all dollars, not just the federal share. Crediting is at 100% and is not based DBE program crediting requirements (example, 100% subcontractor or 60% supplier credit).
  - Race Neutral (RN) projects include FHWA-funded projects to which a DBE goal of 0% was assigned.
  - Race Conscious (RC) projects include FHWA-funded projects to which a DBE goal of greater than 0% was assigned.
- Utilization Key: P = Parity (100%), O = Overutilization (> 100%), U = Underutilization (between 80% and 99.9%), SU = Substantial Underutilization (< 80%). This is consistent with ODOT's [2011 Disparity Study Update](#). See section on Disparity Index (p. 4-9).
- Exhibit 1, Tables 1a – 1c show DBE and M/WBE participation and relative utilization on all ODOT's FHWA-funded highway construction contracts.
- Exhibit 2, Tables 2a – 2c show DBE and M/WBE participation and relative utilization on ODOT's FHWA-funded highway construction contracts on RC projects only.
- Exhibit 3, Tables 3a – 3c show DBE and M/WBE participation and relative utilization on ODOT's FHWA-funded highway construction contracts on RN projects only.
- Exhibit 4, Table 4a and 4b show aggregated and detailed summaries of DBE and minority- and women-owned (M/WBE) firm relative utilization. This exhibit also explains how DBE group availability was calculated from ODOT's [2013 Availability Update](#) data shown in that report's Exhibits 2-2 and 2-3 (p. 2-6). Table 4c shows ODOT's availability calculations.