



U.S. Department  
of Transportation  
**Federal Highway  
Administration**

**Oregon Division**

August 23, 2011

530 Center Street NE, Suite 420  
Salem, Oregon 97301  
503-399-5749  
503-399-5838 (fax)  
[www.fhwa.dot.gov/ordiv](http://www.fhwa.dot.gov/ordiv)

In Reply Refer To:  
HDA-OR

Mr. Matthew Garrett  
Director  
Oregon Department of Transportation  
1158 Chemeketa St NE  
Salem, Oregon 97301

Dear Mr. Garrett:

In accordance with the provision of 49 CFR §26.45, we have reviewed the overall Fiscal Year (FY) 2011-2013 Disadvantaged Business Enterprise (DBE) goal submitted by the Oregon Department of Transportation (ODOT). ODOT submitted an overall goal of 11.5% for FY 2011-13, of which 10.5% is projected to be achieved through race and gender neutral means and 1% through race and gender conscious means. Our review considers the overall goal, the description of the data and methodology used in arriving at your overall goal, and the base figure calculation and evidence supporting the calculation.

After reviewing this information, we have determined that the goal setting methodology you have chosen is consistent with the requirements of 49 CFR §26.45 and that ODOT has followed the requirements for public participation in establishing an overall DBE goal. However, we have adjusted the portions of your overall goal that you expect to meet through race neutral and race conscious means. The projection is subject to adjustment during the fiscal year(s) in accordance with 49 CFR §26.51. The basis for our approval and associated adjustments and conditions is set forth more fully in the enclosure, titled "Explanation for Approval of Oregon Department of Transportation DBE Program Goal Setting Methodology for Fiscal Year 2011-13".

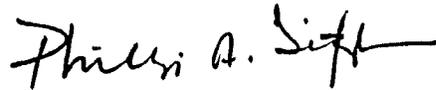
It is important to note that the DBE Program Waiver granted by the US DOT Secretary allows Oregon to set contract goals that are limited in scope or application; however it does not constitute approval of the goal setting methodology and process. The authority to review and approve the goal methodology and process resides with FHWA.

ODOT is expected to make a good faith effort to meet the overall goal each year during the three year period. Any mid-cycle adjustment to the overall goal that may be needed to reflect changed conditions or circumstances requires prior FHWA approval. The next regularly scheduled DBE goal submission is due to FHWA August 1, 2013.

As a reminder, the state is required to submit a separate overall DBE goal for programs funded by the Federal Transit Administration (FTA) and the Federal Aviation Administration (FAA), based upon the goal setting approach outlined in the State's approved DBE program. The State should contact the regional FTA and FAA offices for further guidance and assistance on these matters.

I would like to take this opportunity to thank Michael Cobb and the ODOT Office of Civil Rights for their diligence in delivering an aggressive DBE program.

Sincerely,

A handwritten signature in black ink, appearing to read "Phillip A. Ditzler". The signature is fluid and cursive, with a long horizontal stroke at the end.

Phillip A. Ditzler  
Division Administrator

Enclosure - "Explanation for Approval of Oregon Department of Transportation DBE Program Goal Setting Methodology for Fiscal Year 2011-13"

NS/rm

EXPLANATION FOR APPROVAL OF  
OREGON DEPARTMENT OF TRANSPORTATION  
DBE PROGRAM GOAL SETTING METHODOLOGY FOR FISCAL YEAR 2011-2013

This document sets forth the Federal Highway Administration (FHWA) Oregon Division's reasons for granting approval of the Oregon Department of Transportation (ODOT) Disadvantaged Business Enterprise (DBE) goal methodology. ODOT proposes an 11.5 percent overall goal, of which 10.5 percent will be attained by race-neutral (RN) means and 1 percent will be attained by race-conscious (RC) means. Note the RC measures apply to DBEs owned and controlled by African, Asian, and Subcontinent Asian Americans. For reasons set forth below, the RN and RC split proposed by ODOT has been adjusted to 8.5% RN and 3% RC.

GOAL SETTING METHODOLOGY (26.45)

The regulation requires recipients to set overall goals based on demonstrative evidence of the availability of DBEs, relative to all businesses, who are ready, willing and able to participate on US DOT-assisted contracts.

STEP ONE - DETERMINATION OF BASE FIGURE - Section 26.45 (c) (3)

Under the regulations, the State must begin the process by determining the base figure for the relative availability of DBEs.

- Method Selected - ODOT's method for establishing the base figure for the relative availability of DBEs follows the method suggested by 49 Code of Federal Regulations (CFR) Section 26.45 (c) (2), which is the use of data from a bidder's list to determine the number of DBEs that have bid in previous years divided by the total number of bidders which have actively bid on DOT-assisted contracts; and Section 26.45 (c) (3), which is the use of data from the 2007 ODOT Disparity Study conducted by MGT of America. This method is acceptable, because the disparity study provides ODOT with a comprehensive analysis and most accurate use of available data on DBE activity on US DOT assisted construction contracts, as well as state funded contracts. The study covered an eight year period, 10/01/1999 - 09/30/2007. However, the data is limited to construction contracts only. The disparity study notes that ODOT data on A & E bidders and subcontractors was limited, but the data that did exist showed underutilization of all groups. Since then, ODOT has put in place a system to collect that data so that appropriate steps are taken to address any evidence of underutilization documented in the updated study currently underway.
  
- Description of Data Used - Data from the bidder's list is all ready, willing, and able bidders that have bid on or quoted on DOT-assisted contacts within the determined market area. The bidder's list is developed using a form that all prime contractors fill out when they bid on a project. The prime lists all subcontractors they have had contact with, solicited or unsolicited, whether they

will be used or not. The prime identifies any subcontractors that will be used (certified and non-certified) on the form as well. ODOT's procurement office also provides information on all bidders on federal contracts. The information from the procurement office and from the forms are entered into the Civil Rights Compliance Tracking System which generates the bidders list of all prime and sub contractors that are ready, willing and able to work on federal contracts;

- o ODOT determined that the state of Oregon is its relevant local market area. This is determined by an examination of the Department's prequalified bidders and the state's DBE directory, which show that 75 % of the contractors and subcontractors that ODOT does business with reside in the state of Oregon.

The data in the disparity study addresses: 1) Relevant Market Area, which is defined as the State of Oregon; and 2) Availability of construction firms derived from the bidder's list, delineated by prime and sub contractors. According to the study, 75% of firms doing business with ODOT are located in Oregon.

- Description of Calculation - The relative availability of DBEs in the State of Oregon contracting area was derived from the bidder's lists. Using data from the 2010 bidder's list resulted in an overall goal of 11.94%. The bidder's list showed that there were 1206 total bidders in 2010, with 144 of those bidders being either prime or subcontractor DBE firms.
  - o The 2007 Disparity Study stated that minorities accounted for 19.1 percent of prime construction bidders available to do business with ODOT. Minority subcontractors represented 29.5 percent of available firms within the State of Oregon. Prime contractors retained 63.4% of total dollars paid out during the eight year study period. Subcontractors received 36.4 percent of contract dollars over the study period. Resulting Baseline Figure - Based upon the best information available, the MGT Disparity Study, ODOT determined that the state's DBE availability is 22.9 percent.

Calculation shows:  $[(19.1\% \times 63.4\%)] + [(29.5 \times 36.4\%)] = 22.9\%$

However, ODOT found inaccuracy in the contracting data listed in the Disparity Study, as it relates to subcontractor bidders. The data showed 922 subcontractors and 270 MW/DBE subcontractors. ODOT took a random sample of 20 percent of subcontractors (185 firms) and performed a comparison to the Oregon Secretary of State's Corporate Division database. Results show:

- a. 21.6 percent (40 firms) were no longer in business or ineligible to do business in Oregon
- b. Out of the 270 firms, 52 MWDBE were no longer viable

- c. Sampling resulted in 218 DBE firms out of 723 total subcontractors, or an availability of 30.1 percent.

Further refinement was required when the list of all Prime bidders in the 2007 Disparity Study was reviewed, and only 2 DBE bidders on the list were not also included in the subcontractor list. Of the 214 entries on the list that were DBE subcontractors only 2, or 0.9%, were DBEs unique to the Prime contracting bidders list.

Recalculating the DBE goal using the new prime and sub contractors availability data above, resulted in a weighted construction goal of 11.5 percent.

$$[(0.9\% \times 63.6\%) + (30.1\% \times 36.4\%) = 11.5\%]$$

#### STEP TWO - ADJUSTMENT TO BASE FIGURE

Once a base figure has been calculated, the State must examine all of the evidence available in its jurisdiction to determine if an adjustment is needed to the base figure to arrive at the overall goal. The idea is to identify the level of DBE participation one would expect, absent the effects of current and past discrimination. The Study looked at the following types of information described in the DBE regulations governing the Step 2 analysis:

- a. Current capacity of DBEs to perform work on FHWA-assisted contracts, as measured by the volume of work DBEs have performed in recent years.
  - b. Barriers to entry such as education, training, employment, and advancement.
  - c. Rates of business formation, closure, and earnings.
  - d. Access to capital (including home ownership, home value, mortgage loan denials, subprime loans, business loan denial rates, and business loan values), bonding, and insurance.
- The economic data considered in the study was limited and not quantifiable. For that reason, no adjustment based on that data was made. Based on ODOT's reported DBE participation to FHWA for a six year period covering 2005 through 2010, the median utilization for DBEs was 9.25 percent. Using this information as past participation ODOT did not make an adjustment to the base figure. We agree that an adjustment is not warranted based solely on past participation.

#### RACE NEUTRAL AND CONSCIOUS MEASURES

In accordance with 49 CFR 26.51, ODOT anticipates that it can achieve 10.5 percent of its DBE participation through race and gender neutral (RN) means and 1 percent using race and gender conscious (RC) means.

- The RN/RC split is essentially derived by looking at the availability of the subgroups covered by the waiver granted by the Secretary (African, Asian, and Subcontinent Asian Americans) and the amount of spending in one region of the state. The waiver permits the use of DBE contract goals of limited applications for these subgroups. ODOT's race-conscious projection represents a number that is far below the relative availability of these groups statewide. This does not seem reasonable. A sound approach, under these circumstances, would be to take the relative availability of the subgroups (4.88% -- using the statewide number instead of focusing on Region 1 since there is no information in the study to indicate that firms are not willing to work across regions) and make an adjustment based on past participation by these subgroups (roughly 0.52% during the study period and 1.68% post-study period, for a 1.1% average) to get a goal of 3% ( $4.88\% + 1.1\% = 5.98\% \div 2 = 2.99\%$ ). Pursuant to 49 CFR § 26.45(f)(4) and § 26.51(c), the RN/RC projections are adjusted accordingly.
- ODOT recognizes that implementing a race-conscious goal program is only part of the strategy for increasing DBE participation. ODOT's programs have demonstrated that the key to creating opportunities for DBE firms is support, development, and training for these firms toward becoming viable and competitive.
- ODOT is currently working to streamline processes for contractors and vendors. The agency continues to improve and update its Web site in an effort to optimize information and resources for contractors, vendors, and stakeholders. Such efforts will ensure information is easily accessible, navigable, intuitive and up-to-date. The goal of Web site innovation is to increase small business access to opportunities for bidding on ODOT contracts.

#### • PUBLIC PARTICIPATION

Consistent with the requirements of 49 CFR §26.45(g), ODOT continues to aggressively seek input from the construction community in the implementation of its DBE program, including providing a forum to receive comments regarding the effectiveness of its proposed annual DBE goal and the methodology used for setting the goal.

- Fifteen meetings were convened specifically by ODOT (between February and September 2010). The meetings were designed to solicit input and provide information relevant to the goal setting process, to comply with consultation requirements. The groups contacted included: 1) the general public during public meetings, 2) prime contractors and sub-contractors (both DBE and non-DBE) at special interest meetings normally attended by industry professionals; and 3) minority groups at meetings designed specifically for minority contractors. Representatives from the National Association of Minority Contractors of Oregon and from the Oregon Association of Minority Entrepreneurs attended almost every meeting. At all meetings questions were

raised and answered concerning the goal setting process and information contained in the disparity study. No information relevant to the goal setting process was presented by stakeholders.

- A Public Notice was published in the local and minority papers and on ODOT's Web site for a 45-day comment period from August 1<sup>st</sup> through September 15<sup>th</sup>, 2010. Notices were published in the following papers:
  - a. Bend Bulletin
  - b. El Hispanic (minority focused)
  - c. Eugene Register Guard
  - d. LaGrande Observer
  - e. Medford Mail Tribune
  - f. Portland Daily Journal of Commerce
  - g. Portland Oregonian
  - h. Salem Statesman-Journal
  - i. The Asian Reporter (minority focused)
  - j. The Portland Observer

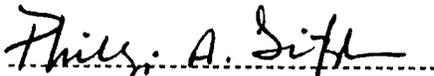
ODOT did not receive any written comments regarding the proposed FY 2011-2013 DBE goal and/or goal setting methodology.

In the future, ODOT is expected to comply with the public participation requirements for goal setting (consultation and publication) before the August 1<sup>st</sup> deadline for submission to FHWA. After the fact compliance is not acceptable and contrary to the intent of the requirement.

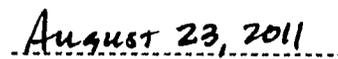
#### CONCLUSION

For the above reasons, the FHWA grants approval of the ODOT FY 2011-2013 DBE Goal Setting Methodology, with conditions.

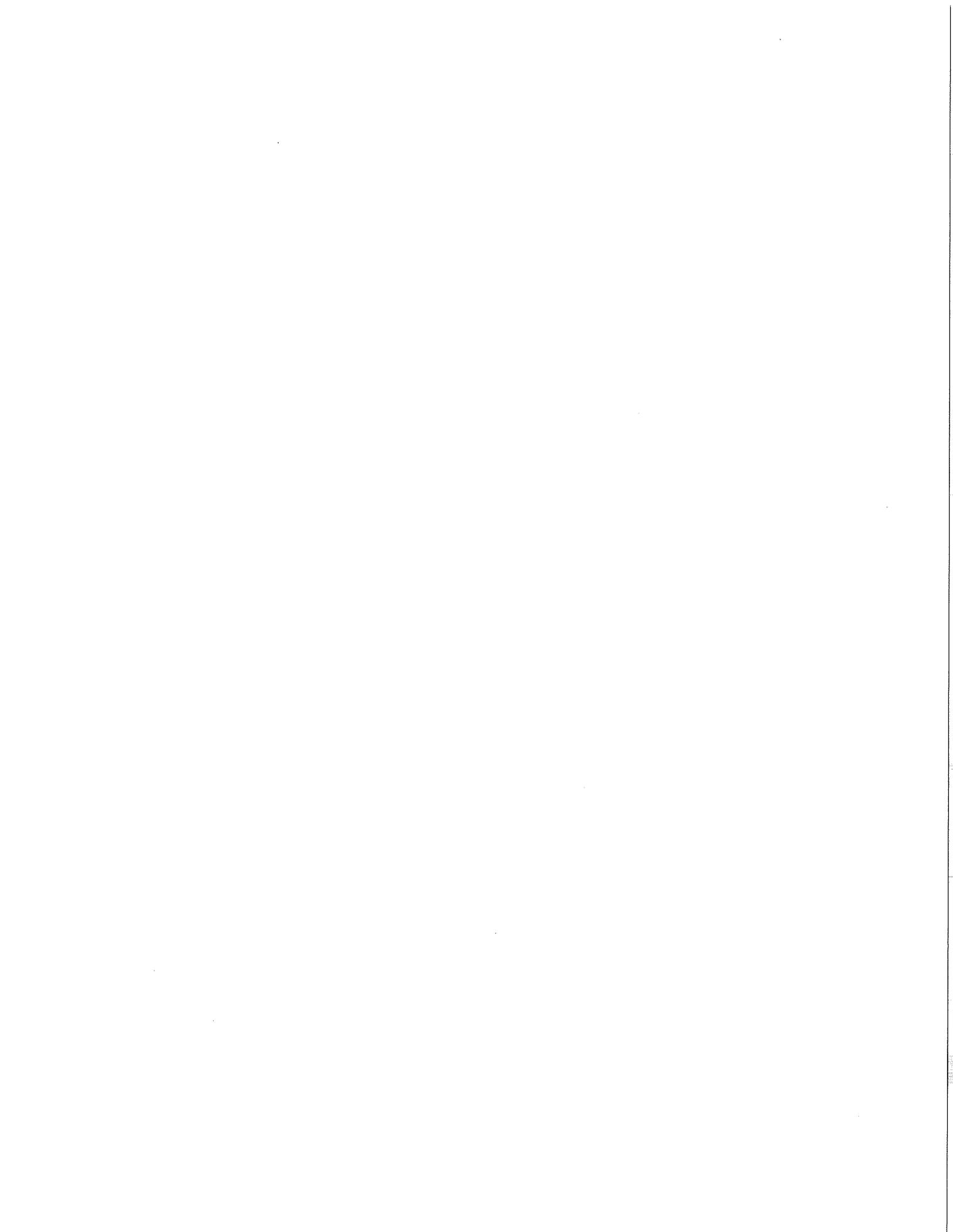
Although ODOT has received an approved waiver for use of contract goals during the reporting period of 2011-2013, it is still the responsibility of ODOT to re-evaluate the goal annually, making adjustments as needed. Just as important are the results of the updated Disparity Study that is due to be completed in the Fall of 2011. Evaluation of the contents and resultant analysis may affect the continued use of contract goals or the need for an adjustment to both the race/gender neutral projection and/or the race/gender conscious projection.



Phillip A. Ditzler  
Division Administrator



(Date)



## **FEDERAL FISCAL YEARS 2011 to 2013 DBE GOAL for FHWA**

An Overall Annual Disadvantaged Business Enterprise Goal has been developed for Disadvantaged Business Enterprise (DBE) participation in the Oregon Department of Transportation (ODOT) for Federal Fiscal Years (FFYs) 2011 - 2013 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 2010.

### **FFYs 2011 - 2013 GOAL DETERMINATION**

**ODOT has determined that the overall goal for FFYs 2011 - 2013 is 11.5 percent, based on the information gathered by the consultant, MGT of America, for the 2007 Availability and Disparity Study, use of the bidder's list for the years since the study in determining availability, and adjustments made to the 2007 Disparity Study data.**

**ODOT proposes a total of 1 percent race-conscious and 10.5 percent race-neutral goals for FFYs 2011 - 2013, based on the statewide availability of African American or Asian American owned DBEs as identified in the 2007 Disparity Study, and the resultant despaired treatment of these groups as shown in the study. The race-conscious goal will be applied to African-American and Asian-American DBE firms only. No project-specific goals will be set for any other DBE firms.**

**ODOT will make every effort to meet the overall goal using race-neutral means, but currently has an approved waiver from the U.S. DOT allowing the use of race-conscious goals on projects for the despaired groups mentioned above.**

### **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-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 the base figure for relative availability of ready, willing, and able DBEs relative to all businesses ready, willing and able to participate on DOT-assisted contracts within

the market area. The resulting base figure is to be a result of examining all available evidence in ODOT's jurisdiction.

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 covering the years 2000 through 2007. The market analysis in the study used bidders as a source for both market area and availability. For the years 2008-2010, ODOT used the bidder's list data in confirming or adjusting the market area and availability. 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.

The ODOT Office of Civil Rights' database and tracking system, Civil Rights Compliance Tracking (CRCT), did not previously have the ability to track DBE utilization in non-construction contracts, nor has any other ODOT data system. The Agency is aware of this and has taken steps to correct the situation by implementing changes to reporting procedures and creating a computerized link between databases that will allow the system to download Personal and Professional Service Contract (PSK) data in the same way it is able to collect construction contracting information from the Trns\*Port database. This new system is in the final testing phase, therefore data was not available for inclusion into goal setting calculations. In addition, the request ODOT submitted for the waiver which was granted by US DOT in 2010, did not include any non-construction contracting. Since the 2007 Disparity Study has not been updated at this point, and did not thoroughly evaluate PSK contracting, even though there was some indication that contracting disparities exist, there is insufficient data to provide a balanced review of non-construction contracting. The 2011-2013 Overall Goal calculation will only consider construction contracting.

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 approach for ODOT's FFYs 2011-2013 goal setting. Since ODOT has not conducted a new Disparity Study in this time frame, we will continue to use the data from the 2007 Study. In addition to the data from the study, ODOT will be using the bidder's lists from 2007 through 2010 to give a more accurate and current picture of ready, willing, and able firms.

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

- **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)

### ***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 (e.g. bidder's list) 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>1</sup>
  - b. 19.1 percent of available prime contractors<sup>2</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 subcontractor dollars are subtracted from payment to the prime; in other words subcontractors received 36.4 percent of contract dollars.<sup>3</sup>
  - d. When these weights are used this results in a weighted construction goal of **22.9** percent  $[(19.1\%*63.4\%)+(29.5\%*36.4\%)]$ .
  
3. To project the value of contracts expected to be let during FFY 2011, 2012 and 2013, we used ODOT's 2010 – 2013 Statewide Transportation Improvement Program (STIP) document. The document forecasts FHWA federal-aid dollars for ODOT projects valued at \$951,600,000 for construction and non-construction contracting. The location of projects scheduled to be let was also taken into consideration. The majority of those projects are located within ODOT's Region 1 or 2, and a moderate number in Region 3 which, geographically, is the western half of the state, from the Cascade Range to the Pacific Ocean and from the Oregon/Washington border in the north to the Oregon/California border in the south. An analysis of the certified DBEs that perform highway construction/professional services work shows that over 80% of the available population resides in the same geographic area. Based on this information no adjustment to the overall goal would be needed using project location as a factor.

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

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

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

1. Based on the 2007 ODOT Disparity Study the median prime utilization for DBEs was **4.63** percent, much lower than the estimated MW/DBE prime contractor bidder availability<sup>4</sup>
  - a. DBEs primarily won small prime contracts

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

<sup>2</sup> 2007 Availability and Disparity Study Exhibit 4-11

<sup>3</sup> Subcontracting dollars from 2007 Availability and Disparity Study Exhibit 4-8, and total dollars from Exhibit 4-2

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

- b. For example, DBE won only 3.44 percent of the dollar value of prime contracts in excess of \$5 million<sup>5</sup>.
2. The median utilization for 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 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 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 DBE firms on the list, a total of 52 DBE firms were no longer viable. This would leave 218 DBE firms out of 723 total subcontractors, or an availability of 30.1 percent.
  - c. Prime non-DBE firms that bid as subcontractors were eliminated from the subcontractor list so as not to skew the results and avoid duplicating the count.
4. Recalculating the DBE goal using the new Prime and sub availability this results in a weighted construction goal of **11.5** percent  $[(0.9\%*63.6\%)+(30.1\%*36.4\%)=11.5\%]$ .

In addition, consideration was given to other factors listed below, but they were rejected from inclusion in the calculations for the reasons stated.

1. Limited capacity of certified DBE firms – the state is required to consider adjusting the goal up or down based on the proven capacity of DBEs to perform work (as measured by the volume of work allocated to DBEs in recent years) and evidence of discrimination against DBEs obtained through disparity studies. Past participation data was analyzed over the last 3 years since the disparity study was completed to make a capacity determination, but this information was deemed inconclusive without additional site visits to each DBE to update a firm's capacity. The level of effort and financial burden was deemed prohibitive to conducting such an update. ODOT chose not to consider adjusting the goal based on this data.
2. Ability of DBE firms to travel to project sites – In May 2009, a survey was sent to 154 certified African American, Asian Pacific and Subcontinent Asian DBE firms identified from the bidder's list to determine their willingness to travel to projects. Only 13 Construction firms responded, and only 9 stated that they would travel statewide for contracts on ODOT projects. (Approximately 85 to 90 percent of the African American and Asian American DBE firms performing construction work are located in the Portland area.) Due to the non-responsiveness of the firms contacted no adjustments will be made

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<sup>5</sup> 2007 Availability and Disparity Study Exhibit 4-7

based on project location. No further attempt at sending a survey in 2010 was considered based on level of effort and lack of response in 2009.

3. As a part of our consideration, we researched the DBE past participation on federal-aid contracts executed in the Federal Fiscal Years 2005 through 2010. This included a review of the bidder's list data since the conclusion of the 2007 disparity study through 2010.

| <b>ANNUAL DBE PARTICIPATION</b> |                   |
|---------------------------------|-------------------|
| <b>FFY</b>                      | <b>PERCENTAGE</b> |
| <b>2005</b>                     | <b>9.10%</b>      |
| <b>2006</b>                     | <b>12.90%</b>     |
| <b>2007</b>                     | <b>10.60%</b>     |
| <b>2008</b>                     | <b>13.60%</b>     |
| <b>2009</b>                     | <b>12.40%</b>     |
| <b>2010</b>                     | <b>8.8%</b>       |
| <b>Median for 2005-2010</b>     | <b>11.5%</b>      |

Since the difference between the median value for past participation and the Step 1 goal is zero no adjustment based on past participation will have any affect. ODOT will not make any adjustment based on past participation.

**B. Public Participation**

The ODOT Office of Civil Rights utilizes an annual Outreach Events Calendar which is comprised of key chambers of commerce, community, and professional organizations that are involved with small firms. ODOT attended various meetings, marketplace events, trade shows and conferences listed on the Calendar throughout the past year and encouraged public comments on the DBE annual goal and the goal setting methodology. The major events for small businesses were the Oregon Association of Minority Entrepreneurs (OAME) Trade Show, and the Minority Enterprise Development (MED) Week Trade Show and Luncheon. Other small business events were monthly Contractor and A & E meetings at the OAME, the American Council of Engineering Companies/ODOT Conference, the Annual Associated General Contractors of America/ODOT Training Conference and the Latino Business & Workforce Development Conference. ODOT/OCR staff made themselves available for conversations and comments in person, by phone and/or e-mail. Goals were a topic of discussion at various meetings during the year, and in total there were 61 meetings. Fifteen of those meetings were convened specifically by ODOT to solicit input and provide information relevant to the goal setting process as part of meeting consultation requirements. Additional meetings where the goal and goal setting methodology were discussed included:

- ODOT Civil Rights and Region 1 staff met with members of the National Association of Minority Contractors of Oregon (NAMCO) several times during 2010, to discuss DBE goals, the goal setting methodology, contracting

on federal-aid assisted highway projects, and to explore areas for collaboration in increasing DBE participation on projects.

- ODOT and consultant Mason Tillman & Associates held three public meetings in Region 1 as part of a Capacity Analysis study. A meeting was held in Multnomah, Clackamas and Washington Counties. The primary focus of the meetings was to inform the community about the Capacity Analysis and to discuss Small Business Programs. During an open forum for public comments there were questions about how the DBE Annual Goal and the project-specific goals are calculated and how the Disparity Study and subsequent waiver from US DOT affect the DBE Program in Oregon.

The ODOT Office of Civil Rights published legal notice of this proposed annual goal for FFYs 2011 – 2013 and this report on its website. Legal notices soliciting comments will be published between August 1, 2010 and September 15, 2010, in the following general circulation media: The Bend Bulletin (general media); El Hispanic (minority focused); Eugene Register Guard (general media); The La Grande Observer (general media); The Medford Mail Tribune (general media); The Portland Daily Journal of Commerce (general media); The Portland Oregonian (general media); The Salem Statesman Journal (general media); The Asian Reporter (minority focused); and The Portland Observer (general media). Comments will be accepted by ODOT for 45-days after the publishing date. Notices will also be sent to minority, women, general contractors groups, community organizations and other U.S. DOT recipients. These groups are knowledgeable about the availability of disadvantaged and non-disadvantaged businesses and the effects of discrimination on contracting opportunities for DBEs in the ODOT's marketplace.

### **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 had an entirely race- and gender-neutral DBE Program from April 19, 2006, until September 9, 2008. 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>6</sup>. On September 9, 2008, US DOT approved ODOT's request for a waiver, which allows the Agency to subdivide the overall annual DBE goal and set race-conscious project-specific goals for African American, Asian Pacific and Subcontinent Asian DBE firms only. ODOT proposes a total of 1 percent race-conscious and 10.5 percent race-neutral goals for FFY 2011-2013. The race-conscious goal will be applied to African-American and Asian-American DBE firms only. No project-specific goals will 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.

In March 2010, ODOT submitted a request to have the current waiver, which expires on 9/30/10, from USDOT extended. A new study to update the 2007 Disparity Study is being planned to start in October 2010. Results are expected by summer 2011, and the waiver request and DBE Overall Goal will be revised accordingly.

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.

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<sup>6</sup> A copy of the MGT supplemental study report is attached.

### **STATUS of DISPARITY STUDY**

ODOT expects to reengage MGT of America in late calendar year 2010 to update and supplement the 2007 Disparity Study. The timeframe allows ODOT to collect two full years of race-conscious measures under the waiver from US DOT, and should provide at least one full year of non-construction contracting, so that there can be supportable evaluations of those areas, in addition to updating the construction contracting information which was previously studied.

### **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 received a waiver to implement race-conscious goals of limited application to Black American, Subcontinent Asian American and Asian Pacific American owned DBE firms.