



Arizona Department of Transportation – Civil Rights Office
Disparity Study and Proposed Overall DBE Goals

ADOT Reference No. T07-02-A0011

Frequently Asked Questions

1. What prompted the Arizona Department of Transportation (ADOT) to review its Disadvantaged Business Enterprise (DBE) Program and to conduct a Disparity Study?

Answer:

The Federal Highway Administration (FHWA) issued guidelines on December 21, 2005, to all State Departments of Transportation in response to the Ninth Circuit Court of Appeals decision dated May 9, 2005, (*Western States Paving Co. v. Washington State DOT*), requiring recipients of federal-aid transportation to conduct an Availability/Disparity Study. In the absence of discrimination, race-conscious action is prohibited. The purpose of a *Study* is to ascertain whether discrimination exists in a state's transportation contracting industry and, if so, to identify its scope and extent on certain groups. The results of the Study can then be used to adopt remedies to any discrimination that may exist.

In response to the above-cited court decision, ADOT examined its DBE Program and determined it did not have the necessary quantitative evidence to support continuation of its race-conscious program. On January 23, 2006, ADOT suspended all race-conscious requirements and continued with implementing a wholly race-neutral program.

In July 2007, ADOT hired MGT of America, Inc. (MGT) to conduct a disparity and availability study. The purpose of the disparity was to determine whether minority-owned and disadvantaged business enterprises (DBEs) were underutilized in ADOT's transportation design and construction programs. The complete *Study* can be found on the ADOT Web site at:

<http://www.azdot.gov/>

2. What are race-neutral and race-conscious measures?

Answer:

Race-neutral measures are activities or programs undertaken by ADOT and other entities that benefit and assist all small businesses equally, including DBEs. Examples of race-neutral measures can be found on the USDOT, Office of Small and Disadvantaged Business Utilization's Web site at: <http://osdbu.dot.gov/DBEProgram/final/final69.cfm>

Race-conscious measures, such as the use of establishing an individual contract goal, are those measures and programs focused on specifically assisting DBEs.

Federal regulations require a recipient of federal highway funding to implement an approved DBE Program that consists of establishing a statewide DBE utilization goal and using race-neutral means to the maximum feasible extent to achieve the goal. Where race-neutral measures prove inadequate to achieve the goal, states are required to use race-conscious measures, such as a DBE participation goal for individual contracts.

3. What were the results of the Disparity Study?

Answer:

The study found that there was evidence supporting the use of race-conscious goals for African American, Hispanic American and Asian American construction firms in locations where there is a demonstrated availability of subcontractors in those classifications. The study also found evidence supporting the use of race-conscious goals for African American, Hispanic American, Asian American, Native American and Nonminority Women A&E firms where there is demonstrated subcontractor availability

4. What is ADOT's Proposed Overall Annual Disadvantaged Business Enterprise Goal?

Answer:

Pursuant to 49 Code of Federal Regulation (CFR), Section 26.45, FHWA requires ADOT to submit its proposed statewide goal and supporting methodology by August 1 each year for concurrence. The statewide goal must be expressed as a projection of the portions of the goal that are expected to be met with race-neutral and race-conscious means.

Based on the availability used by MGT in the 2008 Availability and Disparity Study and MGT's determination, ADOT proposes for the federal fiscal year (FFY) 2009 an overall annual statewide DBE goal of 8.0 percent, with 4.9 percent to be achieved through race-neutral measures and 3.1 percent to be achieved through race-conscious measures.

ADOT will request a waiver from the United States Department of Transportation (USDOT) to implement race-conscious goals of limited application for African American, Hispanic American, and Asian American for construction projects. A waiver will also be requested to implement race-conscious goals on A&E projects for African American, Hispanic American, Native American, Asian American and Nonminority Women owned firms.

5. Why are the race-conscious goals for construction projects limited to African American, Hispanic American and Asian American?

Answer:

The goals are limited to these groups because the results of the disparity study concluded that there was evidence supporting the use of race-conscious goal for African American, Hispanic American and Asian American were underutilized as construction subcontractors.

Although Native American and Nonminority Women participation are not being considered for race-conscious goals for construction projects, they are not excluded. Their participation will be counted towards the race-neutral portion of the goal on construction projects.

6. How will ADOT set individual contract goals?

Answer:

All DBE project goals will set by ADOT's Civil Rights Office (CRO). The CRO will make every attempt to establish realistic and achievable DBE goals. Individual contract goals will be

set based upon the dollar value of the project, the availability of DBEs to perform the work that is to be subcontracted, and the availability of DBEs in the location where the work is to be done. While the established goals may vary on individual contracts, the total of DBE participation in each contract will be combined into one report for ADOT's DBE reporting.

7. How is the Annual DBE goal divided between the Disadvantaged Business Enterprises?

Answer:

ADOT proposes an 8.0 percent overall annual DBE goal, with a targeted 4.9 percent race-neutral and 3.1 percent race-conscious DBE utilization. For the purpose of calculating attainment of the proposed overall annual DBE goal, the following designations apply:

Race-neutral participation and measures include all DBE firms, regardless of race, ethnicity, or gender. Native American and Nonminority Women participation will count toward the 4.9 percent race-neutral portion of the overall annual goal of 8.0 percent.

Race-conscious participation and measures include DBE firms for which contract goals of limited application will be applied, to include: African American, Hispanic American and Asian American for construction projects; and race-conscious participation for African American, Hispanic American, Native American, Asian American and Nonminority Women owned firms for A&E projects.

Prime contractor and/or prime consultants will be obligated to make "good faith efforts" to meet established DBE goals. Individual contract goal attainment will be monitored, and as data is collected on final utilization, adjustments to the overall annual goal and minority group application will be made.

8. Who will evaluate the contracts for Disadvantaged Business Enterprise goal attainment?

Answer:

The Civil Rights Office will be responsible for evaluating contracts for DBE goal attainment. The evaluation will involve assessing the DBE certification status, participation percentage, subcontract dollars and work categories in order to conclude one of the following:

- The bidder met the DBE goal; or
- The bidder did not meet the stated goal, but did make good faith efforts to meet The stated goal; or
- The bidder did not meet the stated goal and did not make good faith efforts to meet the stated goal.

9. What criteria will be used to evaluate a prime contractor's submission of a Good Faith Effort?

Answer:

When evaluating the Good Faith Effort submitted by a prime contractor, the following major components, as adopted by Appendix A to 49 CFR Part 26, will be examined by the Civil Rights Office:

- (A) Soliciting through all reasonable and available means (e.g., attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The bidder must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.
- (B) Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.
- (C) Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.
- (D) (1) Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.

(2) A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.
- (E) Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.
- (F) Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.

(G) Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, state, and federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

(H). Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

10. Where can a Disadvantaged Business Enterprise obtain assistance, training and technical assistance to participate in ADOT's projects?

Answer:

ADOT's DBE Supportive Services provide no-cost training, individualized technical assistance and outreach to certified DBEs. Service provided include marketing, cost estimating, bid and proposal development, and business as well as accounting and cash flow management.

11. The department has 45 day comment period. What is the purpose comment period?

Answer:

ADOT is required in accordance with federal regulation 49 CFR Part 26.45 to publish a notice announcing the proposed overall DBE goal and informing the public that the proposed goal and its rationale are available for inspection. The purpose of the comment period is for accepting comments on the goal for 45 days from the date of the April 8th notice. Comments received by May 23, 2009 will be included in the public record and considered prior to the establishment of ADOT's DBE goals.

12. What is the role of the Federal Highway Administration (FHWA) in setting the goals?

Answer:

FHWA role as it relates to the DBE goal is the review and approval of the annual overall disadvantaged business enterprise (DBE) goal submissions made by state transportation agencies (STA) to implement their DBE program.