



City of Seattle

Department of Finance and Administrative Services
City Purchasing and Contracting Services Division

THE CITY OF SEATTLE DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM PROPOSED THREE YEAR GOAL & METHODOLOGY FOR FEDERAL FISCAL YEARS 2014-2016

Summary: The City of Seattle requests a DBE goal from FTA of 13.6% for FTA funded work to be performed from 2014 through 2016. The City anticipates this goal will apply to construction contracts, as there are currently no Architectural or Engineering (A&E) contracts anticipated during this period relying upon FTA funds.

The City requests a 6.6% goal for race-conscious measures for all race groups, except for White Women owned businesses, and a 7% race-and-gender neutral goal for the total 13.6% goal.

The City utilized the 2013 availability and disparity results published by BBC Research & Consulting, LLC, as hired by Sound Transit. The City of Seattle and Sound Transit utilizes DBEs firms from the same geographic tri-county region (King County, Snohomish County and Pierce County) and contract for services with the same / or similar NAICS codes. As a result, the study is applicable to both agencies.

Note: The term White males refers to “Non-Hispanic White Males.” The term Women refers to “White Women” and not to women of color, who are instead counted within their respective race group.

Background: As recipient of U.S. Department of Transportation (USDOT) funds by Federal Transit Administration (FTA), the City of Seattle (City) must implement the Federal Disadvantaged Business Enterprise (DBE) Program, as guided by 49 Code of Federal Regulations (CFR), Part 26, in conjunction with USDOT guidance and relevant court decisions. The City submits a proposal to USDOT DBE Program for review and approval that:

- Sets an aspirational goal for DBE participation for any City contracts that utilize FTA funds;
- Determine the share of the DBE goal to be met through race-and-gender neutral means, and the portion to be met through race-and-gender-conscious means; and
- Identify race and gender groups eligible and proposed for race-and-gender conscious measures.

In FY 2014-2016, the City proposes goals to ensure the maximum opportunity for such firms in City contracts.

History of the City of Seattle’s Implementation of the Federal DBE Program

Western States Paving Decision in 2005: In May 2005, the Ninth Circuit Court of Appeals in *Western States Paving v Washington State DOT* held that the DBE Program enacted by Congress was facially constitutional,

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but the Washington State Department of Transportation’s (WSDOT’s) implementation of the program was unconstitutional. To satisfy *strict scrutiny*, a public entity implementing race-and gender-conscious measures must evidence discrimination within its transportation contracting industry. In response, affected state and local agencies suspended race-and gender-conscious elements of the DBE Program. USDOT recommended such agencies conduct availability and disparity studies to satisfy requirements of *strict scrutiny*.

City Analysis to determine availability and disparity, under strict scrutiny: The City utilized BBC data to determine availability and applied to City utilization and contract needs, to determine goals and whether a race-gender conscious component was appropriate.

Step 1: Determining a Base Figure -49 CFR Section 26.45(c):

BBC sought DBE and potential DBE firms in the three-county area. This included firms that could be a DBE (Certified Minority and Women Owned firms and firms not certified but Minority or Woman owned).

The City does not anticipate FTA funded Architectural & Engineering services in Federal Fiscal Years 2014-2016; only Construction availability will be used, weighted at 100%.

BBC expressed availability as the percentage of contracting dollars one would expect minority and women owned businesses to receive based on type of work involved, location of the work and contract value. BBC considered only minority and women owned businesses that are DBE certified or appear they could be DBE certified based on revenue requirements per 49 CFR Section 26.65 (called potential DBEs; see 76 Federal Register 5092 (January 28, 2011)).

Note: Consistent with USDOT guidance, the City of Seattle considers any contract with at least \$1 of FTA funding as an “FTA-funded contract” and includes the total value of the contract in its pool of total FTA-funded contracting dollars. BBC defined women-owned businesses as *non-Hispanic white women-owned businesses*. BBC grouped minority women-owned businesses with their corresponding minority groups (e.g., grouping Black American women-owned businesses with all other Black American-owned businesses). For details about BBC’s definition of women-owned businesses, see Chapter 5 of the 2013 Disparity Study report as submitted by Sound Transit in October of 2013. The Ninth Circuit Court of Appeals has accepted this definition of women-owned businesses. See *AGC, San Diego Chapter v. California DOT*, 713 F.3d 1187, 1198, 2013 WL 1607239 (9th Cir. April 16, 2013).

Figure 1 presents the base data from BBC as a starting point to establish a goal:

Figure 1, from Page 2 of “Availability Components of the Base Figure”, BBC, 2013

a. DBE group	Availability percentage		
	b. Construction	c. A&E	d. Total
Black American-owned	1.6 %	0.4 %	1.3 %
Asian-Pacific American-owned	1.3	0.7	1.2
Subcontinent Asian American-owned	0.3	1.9	0.7
Hispanic American-owned	1.7	0.3	1.4
Native American-owned	1.8	0.4	1.5
WBE (white women-owned)	1.2	4.8	2.1
Total potential DBEs	8.0 %	8.6 %	8.1 %
Industry weight	0.76	0.24	

- Column (a) names the DBE group;
- Column (b) is availability for each group for FTA-funded for *construction*
- Column (c) is availability for each group for FTA-funded architectural and engineering (A&E);

- Column (d) is the total of both.

Per the BBC Study, a **Base Figure of 8% for Construction** will be used.

Step 2: Determining if an Adjustment is Necessary – 49 CFR Section 26.45 (d)

All evidence suggests no adjustment or upward adjustments to the base figure are appropriate. After establishing the base figure, recipients must determine if adjustment is needed to the base figure to make it precise. In considering an adjustment to the base figure, BBC evaluated:

- Current capacity of DBEs to perform work on DOT-assisted contracting;
- Any disparities in the ability of DBEs to get financing, bonding and insurance;
- Employment, self-employment, education, training and unions, and;
- Other relevant data.

Current capacity of DBEs to perform work on DOT-assisted contracting: USDOT’s “Tips for Goal-Setting” suggests agencies should examine data on past DBE participation on their USDOT-funded contracts in recent years and choose the median level of annual participation for those years as the measure of past participation. According to the City of Seattle Reports of DBE Awards or Commitments and Payments, median DBE participation from FFYs 2010-2012 was 9% (only one FTA-funded contract used DBEs and that was 9%).

Disparities in the ability of DBEs to get financing, bonding and insurance: BBC’s analysis of access to financing, bonding and insurance revealed quantitative and qualitative evidence that minorities, women, and minority & women owned businesses have disparate access to those business inputs compared to white males and majority owned businesses in the Seattle Metropolitan Area. Any barriers to financing, bonding and insurance affect minorities and women from forming and operating construction and A&E firms in the local marketplace. Such barriers also place those businesses at a disadvantage in obtaining local agency transportation prime contracts and subcontracts (Chapter 4 of the BBC Tri-County 2013 Disparity Study report).

Employment, self-employment, education, training and unions: BBC used regression analyses to investigate whether race or gender affects rates of self-employment among workers in the local construction and A&E industries. The regression analysis allowed BBC to statistically control for various race-and-gender-neutral personal characteristics including education and age (Chapter 4 and Appendix F of the 2013 BBC Tri-County Disparity Study). The analyses revealed Hispanics and women were significantly less likely to own construction businesses after accounting for various race-and-gender-neutral personal characteristics. Figure 2, displays the BBC analysis, sometimes referred to as a “but for” analysis, because it estimates the

availability of potential DBEs *but for* the continuing effects of past race-and-gender-based discrimination. The rows and columns of Figure 2 present the following information from the “but for” analysis:

Figure 2, from page 5 “Availability Components of the Base Figure”, BBC, 2013

Industry and group	a. Current availability	b. Disparity index for business ownership	c. Availability after initial adjustment*	d. Availability after scaling to 100%	e. Components of base figure**
Construction					
(1) Black American	1.6 %	n/a	1.6 %	1.5 %	
(2) Asian-Pacific American	1.3	n/a	1.3	1.2	
(3) Subcontinent Asian American	0.3	n/a	0.3	0.3	
(4) Hispanic American	1.7	23	7.4	6.9	
(5) Native American	1.8	n/a	1.8	1.7	
(6) WBE	1.2	59	2.0	1.9	
(7) Potential DBEs	8.0 %	n/a	14.5 %	13.6 %	10.3 %
(8) All other businesses ***	92.0	n/a	92.0	86.4	
(9) Total firms	100.0 %	n/a	106.5 %	100.0 %	

Note: Numbers rounded to nearest tenth of 1 percent. Numbers may not add to totals due to rounding.

Source: BBE Research & Consulting Availability Analysis from 2013 Disparity Study, Chart on page 2.

- a. **Current availability.** Column (a) presents the current availability of potential DBEs by group and industry, per Figure 1. Each row presents the percentage availability for each group. Before any adjustment, the availability of potential DBEs for the City of Seattle’s FTA-funded construction (weighed 100% since the City anticipates no A&E contracts in the upcoming triennial period)
- b. **Disparity indices for self-employment.** For each group significantly less likely than non-Hispanic white males to own a construction business, BBC estimated business ownership rates if those groups owned businesses at the same rate as non-Hispanic white males who share the same race-and gender-neutral personal characteristics. BBC calculated a self-employment disparity index for each group by dividing the observed self-employment rate by the estimated self-employment rate and multiplying by 100. Values under 100 indicate that the group is less likely to own businesses than for non-Hispanic white males with the same personal characteristics.
- c. **Availability after initial adjustment.** Column (c) presents availability estimates by group and by industry after initially adjusting for statistically significant disparities in self-employment rates. BBC calculated those estimates by dividing the current availability in column (a) by the disparity index for self-employment in column (b) and then multiplying by 100.
- d. **Availability after scaling to 100%.** Column (d) shows adjusted availability estimates that the study team rescaled so the availability equaled 100% for construction. BBC rescaled the adjusted availability estimates by taking each group’s adjusted availability estimates in column (c) and dividing it by the availability estimates shown under “Total firms” in column (c) and multiplying by 100. The rescaled adjusted availability estimate for Hispanic American-owned construction businesses in row (2) of column (d) was calculated in the following way: $(7.4\%/106.5\%) \times 100 = 6.9\%$
- a. **Components of goal.** Column (e) shows the component of the total base figure attributed to the adjusted MBE/WBE availability for each industry. As the City of Seattle anticipates no A&E contracts, the construction availability will be weighted at 100%. BBC calculated the availability of DBEs in construction is **13.6%** (column (d), row 7).

Other relevant data: The Federal DBE Program suggests recipients examine “other factors” when determining whether to make any Step 2 adjustments to their base figures.

Success of businesses. There is quantitative evidence that certain groups of minority or women firms (MWBE) face greater barriers in the marketplace, even after considering race-and gender-neutral factors. Chapter 4 and Appendix H of the 2013 BBC Tri-County Disparity Study report summarizes that evidence. There is qualitative evidence of “barriers to success” that discriminate on the basis of race and gender and affect MWBE firms in the Washington transportation contracting industry.

Initiative 200: Washington State Initiative 200 amended state law to prohibit using race-and gender-based preferences in public contracting, employment and education, unless required to “establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.”

Data and anecdotal reports indicate many MWBE firms closed as a result of Initiative 200 and the prohibition of face-and gender-conscious programs on locally funded contracts (Appendix J of the 2013 BBC Tri-County Disparity Study). Academic research has examined business ownership before and after the passing of Initiative 200 also found adverse effects for WMBE firms resulting from Initiative 200.

Step 2 Adjustment: Based upon the information about disparities in self-employment rates, the City proposes to adjust its base figure upward and amend its overall DBE Goal to 13.6%. The City considered available information relevant to a potential Step 2 adjustment and made an upward adjustment to the base figure given barriers that minorities and women face related to self-employment in the local transportation contracting industry. The City adjustment reflects the evidenced barriers to self-employment because of clear, direct and quantifiable effects of barriers to self-employment on the availability of DBEs. Accounting for barriers to self-employment in the overall DBE goal indirectly accounts for other barriers that minorities and women face in the local transportation contracting industry (e.g., barriers related to education, unions, financing, bonding and insurance).

Race/Gender-Neutral and Race/Gender-Conscious Split -49CFF Section 26.51 (c)

Under the Federal regulations and USDOT guidance, the City of Seattle will meet the maximum feasible portion of its proposed 13.6% overall DBE goal by using race and gender neutral measures. City data for locally funded contracts from 2010-2012 and the FTA funded contracts during that same time period:

Figure 3, Median Race Conscious SDOT Spend, 2010-2012

Seattle Transportation (SDOT) Local and Federal Funds Spent			
Year	Overall Spend	Race Neutral (No Goals) DBE Spend	Percent Race Neutral
2010	\$81,300,243.93	\$7,983,846.76	9.82%
2011	\$81,625,573.39	\$2,450,015.03	3.00%
2012	\$115,962,585.14	\$7,689,061.55	6.63%
Total	\$278,888,402.46		

Median Race Neutral DBE Spend	6.63%
DBE Goal	13.60%
<u>Race Neutral Portion</u>	<u>6.97% (7%)</u>
<u>Race Conscious Portion</u>	<u>6.63% (6.6%)</u>

Note: All contracts had voluntary DBE attainment since the City had no DBE goals on either our Federal or local contracts

Considering both contract sets together, the median percentage of DBE spending for construction in a race- and gender-neutral environment was 6.6%. The City of Seattle has various race- and gender-neutral measures to encourage DBE participation on those contracts:

Figure 7, Current City of Seattle race- and gender-neutral measures

Current Race and Gender Neutral Measures	
Advertise contracts worth more than \$47,000 on website and in the Daily Journal of Commerce	Encourage firms who could potentially qualify for DBE certification to apply
Conduct training for firms interested in City Contracts the first Friday of every month ("First Fridays")	Use E-bid system to notify bidders of solicitations, bid results and solicitation award information
Has prompt pay mechanism that requires prime contractors to pay subcontractor within 30 days of completion of work, whether prime contractor has been paid or not	Eliminated the City Small Works Roster after evidence of potential race and gender disparity among firms winning work, and directed such work to instead go through traditional public bid processes
Provides snap shots of procurements (solicitations, pre-bid meetings, due dates and execution) during the week	Allows any bidder to request a debriefing following the award of a contract
Creating a Mentorship Program for small businesses, with the active participation of current General Contractors/Construction Management teams	Maintains a bidders list (Vendor Registration and E-bid) with race and gender identification to assist primes in building teams

Considering the above, City expects to meet 7% of its DBE goal through race-and gender-neutral measures. The remainder of the proposed 13.6% overall DBE goal – 6.6% - requires race-and gender-conscious measures (i.e. DBE contract goals).

DBE Groups Eligible for Race-and Gender-Conscious Measures – 49 CFR, Section 26.15: Several court cases- particularly in the Ninth Circuit- indicate that to implement the Federal DBE Program in a narrowly tailored manner, agencies should limit using race-and gender- conscious measures to race groups “that have suffered discrimination” within its transportation contracting industry. In *H.B. Rowe v Tippett*, the Fourth Circuit Court of Appeals ruled the North Carolina Department of Transportation (NCDOT) did not provide an “exceedingly persuasive justification” for including women-owned businesses in using race-and gender-conscious program measures, because the statistical evidence did not support an inference of discrimination against women-owned businesses. The Court found there was strong evidence of overutilization of women-owned businesses. The Court held that NCDOT’s inclusion of women-owned businesses in using DBE contract goals was invalid and state legislation as applied to women-owned businesses was unconstitutional.

USDOT official guidance states “even when discrimination is present in a state, a program is properly narrowly tailored only if its application is limited to those specific groups that have actually suffered discrimination or its effects.” As provided in 40 CFR Part 26, such guidance is “valid, and express(es) the official positions and vies of the Department of Transportation...”

As part of the 2013 Disparity Study, BBC analyzed for disparities in Sound Transit’s utilization of minority-and women-owned businesses compared to their availability. Following this methodology, the City also looked for such disparities as well and found all race groups exhibited substantial disparities – utilization was less than 80% of availability. The only exception was Native Americans for the single year of 2010.

White women-owned businesses did not face disparity on contracts in any year reviewed and were therefore over-utilized (see “City of Seattle Utilization”, Tables 4-6, below).

The following compares Availability of transportation construction by Race and for White Women Owned firms in the City’s tri-county region (13.6%) to their percentage use on City transportation contracts between 2010 and 2012, to determine if there is disparity (Per BBC, “Significant Disparity” is any utilization under 80% of availability):

Figure 4, Roadway Construction (SDOT) Availability, Utilization and Disparity, 2010

2010 SDOT Construction Contracts

	Availability Percentage	Percent Used on Contracts	Percent Utilized	Significant Disparity?
Black	1.50%	0.28%	18.7%	Yes
Asian American	1.50%	1.13%	75.33%	Yes
Hispanic	6.90%	4.32%	62.61%	Yes
Native American	1.70%	1.44%	84.71%	No
White Women	1.90%	5.68%	298.95%	No
Total WMBE Availability	13.60%			

* Availability per the BBC Tri-County Availability & Disparity Report 2013.

These numbers relate to WMBE construction firms' availability. The City does not anticipate A&E contracts, so construction contracts represent 100% weight in the Availability numbers. "Significant Disparity" is utilization below 80% of Availability.

Figure 5, Roadway Construction Availability, Utilization and Disparity, 2011

2011 SDOT Construction Contracts

	Availability Percentage	Percent Contract Dollars	Percent Utilized	Significant Disparity?
Black	1.50%	.35%	23.33%	Yes
Asian American	1.50%	0.50%	33.33%	Yes
Hispanic	6.90%	1.88%	27.25%	Yes
Native American	1.70%	0.61%	35.88%	Yes
White Women	1.90%	3.64%	191.58%	No
Total WMBE Availability	13.50%			

Figure 6, SDOT Availability, Utilization and Disparity, 2012

2012 SDOT Construction Contracts

	Availability Percentage	Percent Contract Dollars	Percent Utilized	Significant Disparity?
Black	1.50%	0.13%	8.67%	Yes
Asian American	1.50%	1.04%	69.33%	Yes
Hispanic	6.90%	3.93%	56.96%	Yes
Native American	1.70%	.36%	21.18%	Yes
White Women	1.90%	2.89%	152.11%	No
Total WMBE Availability	13.50%			

The above shows all race groups faced significant disparity and White Women faced no disparity in construction contracting.

Summary: The City of Seattle proposes a three-year DBE goal for FFYs 2014-2016 of 13.6%. Based on the “custom census” availability analysis done for the Tri-County region by BBC (which is the same census of DBEs and potential DBEs the City uses), the City determines the base figure for its DBE goal is 8%. The City adjusted the base to 13.6% given barriers minorities and women face in self-employment and other factors in the local transportation contracting industry. The City projects it can meet 6.97% (7%) of its proposed DBE goal through race-and gender-neutral program measures and the remainder of the goal (6.7%) through race-and-gender conscious measures. The City proposes all race groups be eligible for race-and gender-conscious measures:

- Black-owned businesses;
- Asian-Pacific-owned businesses including Subcontinent Asian-owned businesses.
- Hispanic-owned businesses;
- Native American-owned businesses, and;

The City requests a waiver for White Women-owned businesses, as ineligible for race-and gender-conscious measures. DBEs owned by minority women remain eligible for race-and gender-conscious measures within their corresponding race category. Non-Hispanic white women-owned businesses remain eligible to participate for race-and gender-neutral measures within the City DBE Program. The City will monitor utilization of non-Hispanic White Women-owned businesses and reassess the appropriateness of the requested waiver regularly. Several state departments of transportation requested and received similar waivers from USDOT including the California Department of Transportation and the Oregon Department of Transportation

Public Participation – 49 CFR Section 26.45(g): Public participation is a component of the City process for establishing a new overall DBE goal. The City will try to engage the public as part of the goal-setting process and will make additional public engagement efforts in finalizing its Goal and Methodology.

Public notice: The City will publish public notice announcing its proposed overall DBE goal and rationale for the goal, inviting comments on its proposed DBE goal for 45 days with an e-mail where the public can send comments. The public notice will appear for 30 days at City Purchasing and Contracting Services offices (Seattle Municipal Tower, 700 5th Avenue, Suite 4112, Seattle, WA, 98124) and posted on the City website, and published in the Daily Journal of Commerce. The City of Seattle will e-mail the notice to City WMBE firms and prime contractors.

Consultation with organizations: The City of Seattle will brief community organizations that have interest to discuss its proposed overall DBE goal and rationale for the goal and also solicit comments about the goal from meeting participants:

- Tabor 100
- National Association of Minority Contractors
- Minority Business Development Agency

Closing: This concludes the City request for the FTA 2014-2017 goals. For questions, please contact Nancy Locke, City Purchasing and Contracting Services Director, at nancy.locke@seattle.gov.