

SECTION IX.

Percentage of Overall Annual DBE Goal to be Met Through Neutral Means

The Federal DBE Program requires state and local transportation agencies to determine whether the overall annual DBE goal can be met solely through race-neutral measures, or whether race-conscious program elements such as DBE contract goals are also needed. Race-neutral program elements are initiatives that help all businesses or small businesses in general, including — but not limited to — DBEs. Agencies must meet the maximum feasible portion of the overall annual DBE goal using race-neutral means.¹

An agency's consideration of neutral measures includes projecting the portion of its overall annual DBE goal that can be met through neutral programs:

- If it determines that it can achieve its annual DBE goal by race-neutral means and that no race-conscious elements are appropriate or required, an agency would submit its program using only race-neutral means for USDOT approval — it would project that 100 percent of its overall annual DBE goal could be met through neutral means and that 0 percent would need to be met through race-conscious means.
- If a combination of neutral and race-conscious measures is determined by the agency to be needed to meet its overall annual DBE goal, the agency would project the relative portion of the overall annual DBE goal to be met through neutral and race-conscious means.

In narrowly tailoring its implementation of the Federal DBE Program to reflect local marketplace conditions, an agency that determines race-conscious measures are necessary needs to consider whether any race-conscious remedies such as DBE contract goals should be restricted to certain DBE groups. As discussed in Section I, several DOTs obtained waivers from USDOT that allow them to implement contract goals programs that apply to underutilized DBEs (UDBEs), which include some but not all of the racial/ethnic/gender groups presumed to be socially disadvantaged under the Federal DBE Program. If the agency determines that firms owned by a racial/ethnic/gender group specified in the DBE Program suffer discrimination in the local transportation marketplace, the agency should include that group as eligible for the race-conscious program elements the agency identifies as necessary, such as DBE contract goals.²

¹ 49 CFR Section 26.51

² If there are no DBE groups for which race-conscious programs should apply, ODOT would project 100 percent race-neutral implementation of the Federal DBE Program.

At the time of this study, several state DOTs such as Colorado, California and Oregon have received waivers from USDOT to limit race-conscious program elements to a subset of the DBE groups eligible for certification under the Federal DBE Program.

USDOT guidance concerning how transportation agencies should project the neutral/race-conscious division of their overall annual DBE goals includes the following:

- USDOT Questions and Answers about 49 CRF Part 26 addresses factors for federal aid recipients to consider when projecting the portion of their overall annual goal they will meet through race- and gender-neutral means.³
- USDOT “Tips for Goal-Setting” also suggests factors to consider when making such projections.⁴
- FHWA’s template for how it considers approving state DOTs’ DBE goal and methodology submissions includes a section on projecting the percentage of the overall annual DBE goal to be met through neutral and race-conscious means. An excerpt from this template is provided in Figure IX-1.

Based on 49 CFR Part 26 and the above sources, general areas of questions that transportation agencies might ask in performing this analysis include:

- A. What has been the past experience of the agency in meeting its overall annual DBE goal? Does the agency have a history of not meeting or exceeding its overall annual DBE goal?
- B. What has DBE participation been when the agency did not apply contract goals (or other race-conscious remedies)?⁵
- C. What is the extent and effectiveness of race-neutral efforts that the agency could have in place for the next fiscal year? What new neutral efforts are ready for immediate implementation?

Figure IX-1.
Excerpt from Explanation of Approval of [State] DBE Goal Setting Process for FY [Year]

You must also explain the basis for the State’s race-neutral/race-conscious division and why it is the State’s best estimate of the maximum amount of participation that can be achieved through race-neutral means. There are a variety of types of information that can be relied upon when determining a recipient’s race-neutral/race-conscious division. Appropriate information should give a sound analysis of the recipient’s market, the race-neutral measures it employs and information on contracting in the recipient’s contracting area. Information that could be relied on includes: the extent of participation of DBEs in the recipient’s contracts that do not have contract goals; past prime contractors achievements; excess DBE achievements over past goals; how many DBE primes have participated in the state’s programs in the past; or information about state, local or private contracting in similar areas that do not use contracting goals and how many minority and women’s businesses participate in programs without goals.

Source: FHWA, Explanation for Approval of [State] DBE Program Goal Setting Process for FY[Year]. http://www.fhwa.dot.gov/civilrights/dbe_memo_a4.htm

³ See <http://www.dotcr.ost.dot.gov/Documents/DbE/49CFRPART26.doc>

⁴ <http://www.osdbu.dot.gov/DBEProgram/tips.cfm>

⁵ USDOT guidance suggests evaluating certain DBE participation as prime contractors if the DBE contract goals did not affect utilization, as prime contractors and subcontractors for agency contracts without DBE goals, and overall utilization for other state, local or private contracting where contract goals are not used.

Section IX is organized around each of these groups of questions and ends with Part D — Other Considerations.

A. What has been the past experience of the agency in meeting its overall annual DBE goal?

BBC examined ODOT’s past experience in meeting its overall annual DBE goal, including whether ODOT had a history of not meeting or exceeding its overall annual DBE goal.

ODOT has set an overall annual goal for DBE participation between 8.1 and 8.8 percent from FY 2005 through FY 2009. ODOT’s measurements of DBE utilization indicated levels within 1 percentage point of the annual goal for three of these five fiscal years. In FY 2008, utilization exceeded the goal by 3.6 percentage points, and in FY 2009, utilization fell 1.6 percentage points below the goal. Figure IX-2 presents DBE goals for each year and ODOT’s reported DBE attainment for each year.

Figure IX-2.
ODOT-reported DBE attainment and annual DBE goal, by fiscal year

Fiscal year	DBE attainment	Annual DBE goal	Difference
2005	8.1 %	8.8 %	(0.7) %
2006	9.5	8.5	1.0
2007	8.3	8.1	0.2
2008	11.7	8.1	3.6
2009	7.2	8.8	(1.6)

Note: Numbers rounded to nearest tenth of 1 percent.

Source: Oklahoma Department of Transportation, Disadvantaged Business Enterprise (DBE) Program Goal on Federally-assisted Projects for Federal Fiscal Year 2010.

BBC independently measured DBE utilization based on more complete information than what was contained in past ODOT DBE utilization reports (see Section V of this report). According to BBC’s analyses, DBEs obtained 8.0 percent of the FHWA-funded contract dollars that ODOT awarded between July 2004 through June 2009.

Based on this information, it does not appear that ODOT fell substantially short of its past overall annual DBE goals nor does it appear that the agency exceeded them.

B. What has DBE participation been when ODOT has not applied contract goals (or other race-conscious remedies)?

DBE participation that is projected to result from neutral programs should be counted as such when projecting the portion of the overall annual DBE goal that could be met through neutral means. Further, any time a DBE wins a prime contract or subcontract through customary competitive purchasing procedures (i.e., the firm is not placed at an advantage because of a DBE goal), that DBE utilization can also be considered as race-neutral participation.

BBC examined results of the utilization and disparity analyses and other research in this study to review participation of minority- and women-owned firms when race-conscious programs did not apply during the study period.

The following discussion presents results for:

1. Engineering-related contracts;
2. Construction contracts;
3. Combined construction and engineering-related contracts; and
4. Projection if ODOT makes an upward step 2 adjustment.

1. Engineering-related contracts. ODOT should review the full body of evidence in this report and other information it may have when determining the extent to which it must use neutral measures to encourage utilization of minority- and women-owned firms on its FHWA-funded engineering and other professional services contracts. It should also consider whether all DBE groups or only certain groups are eligible to participate in any race-conscious measures for these contracts.

Summary of the evidence in the disparity study. Information concerning ODOT engineering-related contracts includes the following.

- There were substantial disparities between MBE/WBE utilization and availability for ODOT engineering-related contracts.
 - The study team observed substantial disparities for African American-, Asian-Pacific American-, Subcontinent Asian American-, Hispanic American- and Native American-owned firms and WBEs.
 - Statistical simulations suggest that chance in contract/subcontract awards can be rejected as a cause of disparities found for MBE/WBEs overall (observed disparities are statistically significant).
 - BBC identified disparities in MBE/WBE utilization for both engineering prime contracts and subcontracts.⁶
 - Section VII presents quantitative and qualitative evidence that MBE/WBEs, on average, do not have the same success as majority-owned firms when seeking ODOT engineering-related prime contracts.
 - Until recently, ODOT was not implementing any race-conscious measures such as DBE contract goals for FHWA-funded engineering-related contracts. Although not part of the study period, BBC's review of late 2009 and 2010 engineering-related contracts that included DBE contract goals indicated that DBE goals have had some positive effect on MBE/WBE utilization.
- The engineering and related professional services firms that are prime consultants and subconsultants on ODOT engineering-related contracts come from the Oklahoma engineering marketplace. There is evidence of disparities in the Oklahoma marketplace related to business success for minorities and women in the local engineering industry. Few or no race-conscious programs apply when assessing these outcomes in the local marketplace.

⁶ Including small prime contracts.

One analytical framework to making a race-neutral projection for engineering-related contracts. If all of its annual DBE goal cannot be met solely through neutral means, ODOT will need to project the portion of its overall annual goal to be met through neutral means. If a projection is needed, ODOT might find the analytical approach presented in Figure IX-3 useful.

The results discussed below pertain to combined FHWA- and state-funded engineering and other professional services contracts. The lower part of Figure IX-3 presents calculations pertaining to the engineering-related portion of the base figure of ODOT’s overall annual DBE goal:

- Availability of current and potential DBEs for engineering-related contracts is 16.2 percent, as shown in Column (a) of Figure IX-3.
- Without contract goals or any other race-conscious measures, utilization of minority- and women-owned firms on ODOT engineering-related contracts was 22 percent of what would be expected based on availability for those contracts, as shown in column (b) of Figure IX-3. ODOT did not use race- or gender-conscious measures on any of those contracts. The disparity index reflects results for MBE/WBEs achieved through neutral means.
- Figure IX-3 multiplies engineering-related availability by the disparity index to produce a value of 3.6 percentage points as shown in Column (c). The difference between the engineering-related component of the base figure and the percentage projected through neutral means would be the part of the base figure projected to be achieved through race-conscious program elements. Using the numbers in Figure IX-3 as an example, the projection of race-conscious for engineering-related contracts is 12.6 percentage points.

Figure IX-3.
An analytical framework to calculating percentage of base figure projected to be achieved through neutral means (if no Step 2 adjustment)

	a.	b.	c.	d.
Current availability of potential DBEs	Current availability	Disparity index for ODOT contracts*	Portion met through neutral	Industry-weighted portion*
Construction				
African American	0.3 %	1	0.0 %	
Asian-Pacific American	0.0	0	0.0	
Subcontinent Asian American	0.0	100+	0.0	
Hispanic American	0.7	6	0.0	
Native American	4.0	100+	4.0	
White women	<u>4.0</u>	100+	<u>4.0</u>	
Total	9.0 %		8.0 %	7.6 %
Engineering				
MBE/WBE	16.2 %	22	3.6 %	0.2 %
Total*	9.3 %			7.8 %

Note: Values in Figure IX-3 to be determined by ODOT when actually projecting the portion of the base figure to be achieved through neutral means.
 * Applies 95% weight to results for construction and 5% weight to results for engineering-related contracts based on July 2004–June 2009 distribution of work.

Source: BBC Research & Consulting.

The values in Figure IX-3 are based on MBE/WBE utilization that ODOT achieved with current neutral programs. This is just one of the considerations as ODOT develops its projection of the portion of its overall annual DBE goal to be achieved through neutral means.

2. Construction contracts. As with engineering-related contracts, ODOT should review the full body of evidence in this report and other information it may have concerning construction contracts when determining what portion of its overall annual DBE goal it can achieve through neutral means and, if race-conscious measures are required, to which DBE groups they should apply. The top portion of Figure IX-3 provides one analytical framework for examining construction contracts.

African American-, Asian-Pacific American- and Hispanic American-owned construction firms. Disparity analyses indicate disparities for African American-, Asian-Pacific American- and Hispanic American-owned firms on ODOT state-funded construction contracts (for which DBE contract goals did not apply).

- There were substantial disparities for African American-, Asian Pacific American- and Hispanic American-owned firms on state-funded ODOT construction contracts.
- Prime contractors and subcontractors performing ODOT construction contracts predominantly come from the Oklahoma construction industry, where contract goals typically do not apply outside ODOT work. There is evidence of disparities in the Oklahoma construction industry related to business receipts for African American- and Asian American-owned construction firms.

Native American- and white women-owned construction firms. Participation of Native American- and white women-owned businesses in ODOT state-funded construction contracts — which did not include DBE goals — was higher than expected based upon the availability of these firms for ODOT contracts.

Subcontinent Asian American-owned firms. Due to the small size of the Subcontinent Asian American population in Oklahoma, analysis of marketplace conditions for this group was limited.⁷ Similarly, because the availability of Subcontinent Asian American-owned construction firms is small, it is difficult to reach conclusions concerning the low utilization that the study team observed for that group in ODOT construction contracts. As a result, there was no evidence of disparities in the participation of Subcontinent Asian American-owned firms in ODOT construction contracts.

One approach to a race-neutral projection for construction contracts. When determining the percentage of its overall annual DBE goal that can be met through neutral measures, ODOT might consider the disparities for African American-, Asian-Pacific American- and Hispanic American-owned firms.

⁷ There were disparities in business receipts for Asian American-owned construction firms, which include Subcontinent Asian American-owned businesses.

Figure IX-3 presents availability and disparity results for minority- and women-owned construction firms. Results for African American-owned firms indicate that:

- African American-owned firms comprise 0.3 percentage points of the base figure for the overall annual DBE goal for construction contracts. Column (a) of Figure IX-3 presents the portion of the base figure represented by each DBE group.
- The disparity index is 1 for African American-owned firms on ODOT construction contracts without DBE goals (i.e., state-funded contracts). ODOT might consider this type of information per the federal regulations 49 CFR 26.51 as part of its determination of what portion of its overall goal may be achieved using race-neutral means of facilitating DBE participation. Column (b) of Figure IX-3 shows the disparity index for each DBE group.
- The disparity index of 1 for African American-owned firms on state-funded contracts suggests that almost none of the ODOT's overall utilization of African American-owned firms on its construction contracts was achieved through neutral means. Column (c) of Figure IX-1 shows this result. It is calculated by multiplying Column (a) results by Column (b) results.

Figure IX-3 also shows similar calculations for Hispanic American- and Asian-Pacific American-owned firms.

Using the same analytical framework, the participation of Native American-, Subcontinent Asian American- and white women-owned firms on ODOT construction contracts achieved through neutral means might equal the portion of the base figure pertaining to these groups of firms.

Using the analytical framework in Figure IX-3, neutral measures might achieve utilization equal to 8 percentage points of the 9 percent base figure for ODOT construction contracts. As with the analysis for engineering-related contracts, ODOT would still need to consider other information, including possible expanded or additional neutral measures that might increase this percentage. (Part C of this section discusses additional neutral measures that ODOT might consider.)

3. Combined construction and engineering-related contracts. Because ODOT will need to project the portion of its overall annual DBE goal to be met through neutral means (combining the projections for construction and for engineering-related contracts), Column (d) of Figure IX-3 shows results for construction and engineering after weighting based on the total dollars for each industry during the study period (95% and 5% weights, respectively, based on dollars of FHWA-funded construction- and engineering-related contracts).

- After weighting, Figure IX-3 shows 7.8 percentage points of the 9.3 percent base figure (or, 83% of the base figure) achieved through neutral means.
- In this example, ODOT would calculate the portion to be achieved through race-conscious measures by subtracting the neutral projection (7.8 percentage points) from the base figure (9.3%), which equals 1.5 percentage points.

Because IX-3 is just an example of an analytical framework, the values presented here are only for illustration. ODOT might use the analytical framework as part of its determination of what portion of its overall goal may be achieved using race-neutral means of facilitating DBE participation.

4. Analytical framework with step 2 adjustment. Figure IX-3 provides an example of an analytical framework using an overall annual DBE goal of 9.3 percent (base figure). As described in Section VIII, ODOT will assess whether to make a step 2 adjustment when establishing an overall annual DBE goal. If ODOT were to make an upward step 2 adjustment as described in Section VIII, it might use a similar analytical framework as presented in Figure IX-3 when projecting the portion of its overall annual DBE goal that would be achieved through neutral means.

Engineering-related contracts. Figure IX-4 shows how an upward step 2 adjustment for engineering-related contracts could affect ODOT’s projections of the portion of the goal achieved through neutral means.

- With an upward step 2 adjustment, ODOT’s base figure for engineering-related contracts would increase from 16.2 percent to 23.6 percent. That result is calculated in Section VIII of the report and is presented in column (a) of Figure IX-4.
- As shown in column (b) of Figure IX-4, increasing the engineering portion of the goal through an upward step 2 adjustment might mean that a larger portion of the goal would be met through race-conscious program elements. For purposes of illustration, Figure IX-4 shows 20 percentage points, or 85 percent of adjusted DBE availability for engineering, projected to be achieved through race-conscious means.

Figure IX-4.
An analytical framework to calculating percentage of base figure projected to be achieved through neutral means (with Step 2 adjustment)

Availability of potential DBEs after step 2 adjustment	a. Availability	b. Portion met through neutral	c. Industry-weighted portion**
Construction			
African American	0.5 %	0.0 %	
Asian-Pacific American	0.0	0.0	
Subcontinent Asian American	0.0	0.0	
Hispanic American	1.1	0.0	
Native American	4.5	4.5	
White women	<u>6.2</u>	<u>6.2</u>	
Total	12.4 %	10.7 %	10.2 %
Engineering			
MBE/WBE	23.6 %	3.6 %	<u>0.2</u> %
Total**	12.9 %		10.4 %

Note: Values in Figure IX-3 to be determined by ODOT when actually projecting the portion of the base figure to be achieved through neutral means.
 * For construction, reflects index for state-funded contracts; for engineering, reflects index for all contracts.
 ** Applies 95% weight for construction and 5% weight for engineering-related contracts based on July 2004–June 2009 distribution of work.

Source: BBC Research & Consulting.

Construction contracts. Figure IX-4 separately considers African American- and Hispanic American-owned firms; Asian-Pacific American- and Subcontinent Asian American-owned firms; and Native American- and white women-owned firms.

- With an upward step 2 adjustment, the portion of the overall annual DBE goal pertaining to African American and Hispanic-owned construction firms would be higher (for calculations, see Section VIII).
- No step 2 adjustment was necessary for the availability of Asian-Pacific American- and Subcontinent Asian American-owned firms. Calculations for these two groups are the same in Figures IX-3 and IX-4.
- Based on the calculations in Section VIII, a step 2 adjustment would increase the availability of Native American- and white women-owned firms by 2.7 percentage points. Combined utilization of Native American-owned firms and WBEs exceeded availability of these two groups on ODOT's state-funded construction contracts by 6.5 percentage points (see Figure K-7 in Appendix K). In the example provided in Figure IX-4, neutral measures are projected to meet the entire construction-related portion of the goal for these groups.⁸ Column (c) shows this result.

Combined construction and engineering-related contracts. For purposes of illustration, Column (c) of Figure IX-4 shows a projection of 10.4 percentage points that might be achieved through neutral measures. If ODOT chooses to establish an overall annual DBE goal after making a step 2 adjustment, it might use the analytical framework described here (but not necessarily the values in Figure IX-4) to make its projection of the portion of the goal achieved through neutral means.

C. What is the extent of race-neutral efforts that the agency could have in place for the next fiscal year?

BBC reviewed a broad range of potential neutral measures that ODOT might consider for future implementation. There may be a number of reasons why certain measures are not practicable, and there could be neutral remedies in addition to those discussed here that ODOT might consider.

1. Current ODOT neutral programs. ODOT currently implements a broad range of neutral measures to increase MBE/WBE participation in its FHWA- and state-funded contracts. Based on interviews with staff, the study team learned that ODOT plans to continue these neutral measures in the future. In addition to ODOT, many other national and local organizations implement small business development programs in Oklahoma.

⁸ However, there could be a point at which the step 2 adjustment for these two groups would be so large as to require race-conscious measures for these groups to meet the overall DBE goal. Also, because the amount of step 2 adjustment for WBE construction availability was much larger than for Native American-owned firms, ODOT might choose to project a portion of the WBE construction component of the adjusted goal to be met through race-conscious measures. If so, it would include women-owned DBEs in the race-conscious program elements for FHWA-funded construction contracts.

Figure IX-5 lists examples of neutral measures provided in 49 CFR Section 26.52(b). ODOT already is implementing most of these types of measures. Appendix J summarizes some of ODOT's and others' neutral programs in the state.

Figure IX-5.
Examples of neutral measures listed in federal regulations

Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE, and other small businesses, participation (e.g., unbundling large contracts to make them more accessible to small businesses, requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces).

Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing).

Providing technical assistance and other services.

Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; provision of information in languages other than English, where appropriate).

Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses.

Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency.

Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low.

Ensuring distribution of the DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors.

Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

Source: 49 CFR Section 26.51(b)

2. Additional neutral programs for consideration. There are several other neutral program elements ODOT might consider, as discussed below. BBC assessed how quickly these initiatives might be put in place and the extent of their impact, if implemented.

Potential neutral initiatives include:

- Subcontracting minimum program;
- Small business subcontracting program;
- Small business program for prime consultants;
- Segmentation of large contracts into small contracts;

- Consultant qualifications evaluation system;
- Prequalification of construction prime contractors;
- Prompt payment of subcontractors;
- Construction contractor assistance program;
- General communications and outreach, including notification of bid opportunities;
- Data collection;
- Business credit programs;
- Bonding programs;
- Business insurance assistance; and
- Other assistance.

Subcontracting minimum. ODOT might consider a measure that would encourage more subcontracting on ODOT contracts. Even without DBE contract goals, the share of ODOT subcontracts that goes to MBE/WBEs is greater than the share of ODOT prime contracts (see Section VII).

DBE contract goals appear to be effective in encouraging subcontracting. Thirty percent of FHWA-funded construction contract dollars went to subcontractors compared with only 18 percent for state-funded contracts. Subcontracts represented 16 percent of engineering and other professional services contracts (for which contracting goals did not apply during the study period; see Section VII).

A subcontracting minimum program might increase the amount of subcontractor participation beyond the average for state-funded construction contracts. ODOT might consider an initiative similar to the City of Los Angeles' Mandatory Subcontracting Minimum (MSM) program.

- For each contract above a certain dollar amount, ODOT would set a percentage to be subcontracted based on an analysis of the work to be performed and past experience with similar contracts (different types of projects would involve greater or smaller amounts of subcontracting). For some contracts, ODOT could set no MSM.
- Prime contractors bidding on the contract would need to subcontract a percentage of the work equal to or exceeding the minimum for their bids to be deemed responsive.
- The program would need to be flexible, including the opportunity for the prime contractor to request a waiver (preferably before time of bid so that the waiver would apply to each prime).

An MSM program corresponds to a neutral remedy listed in the Federal DBE Program, which suggests that agencies could promote participation of all small businesses, including MBE/WBEs, by “requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces.”⁹

ODOT would need to consider whether the program described here is permitted under local and state law.

Small business subcontracting program. ODOT might consider implementing a program to include subcontracting goals for certified small businesses. ODOT might set goals and evaluate contractor compliance using the same processes provided in the Federal DBE Program.

To use such a program, ODOT would need to develop a small business certification program. ODOT might use the same economic eligibility criteria for small business certification as found in the Federal DBE Program, except that race/ethnicity/gender of ownership would not be considered (transportation agencies such as the Los Angeles County Metropolitan Transportation Authority currently employ this approach).

If ODOT chose to continue to set DBE contract goals, ODOT could test a subcontracting minimum program or a small business subcontracting program in combination with its DBE contract goals. The DBE contract goals would be a race-conscious remedy and the small business goals or MSM would be a neutral remedy.¹⁰

USDOT has considered how a small business program may be appropriately implemented as part of the Federal DBE Program.¹¹

- The program must be authorized under state law;
- Certified DBEs that meet the size criteria established under the program are presumptively eligible to participate in the program;
- There are no geographic preferences or limitations imposed on the program as applied to FHWA-funded contracts (i.e., no local preference and that small businesses outside Oklahoma could apply for and participate in the program);
- There are no limits on the number of contracts awarded to firms participating in the program but that every effort will be made to avoid creating barriers to the use of new, emerging, or untried businesses; and
- Steps will be taken to encourage those minority and women owned firms eligible for DBE certification to become certified.

⁹ 49 CFR Section 26.51 (b) (1).

¹⁰ For example, if ODOT decided to implement race-conscious elements, it might set a 30 percent subcontracting minimum on a contract, or a 20 percent goal for small business participation, and on the same contract also set a 1 to 2 percent DBE contract goal that could be met by certain DBE groups. In this example, ODOT would follow its current procedures for implementing the DBE contract goal, including the good faith efforts portion of the program.

¹¹ Official Questions and Answers. [http://www.osdbu.dot.gov/DBEProgram/dbeqna.cfm#26.21\(b\)](http://www.osdbu.dot.gov/DBEProgram/dbeqna.cfm#26.21(b)).

ODOT would need to consider whether the program described here is permitted under local and state law.

Small business program for prime consultants. ODOT might also evaluate whether it could implement a program to help certified small businesses obtain prime contracts.

- **Evaluation points for small businesses competing for professional services contracts.** Similar to the State of California’s small business program, ODOT might consider employing small business preferences for certain types of contracts to the extent that law permits. For example, in evaluating proposals for professional services contracts, ODOT might be able to include 5 evaluation points out of 100 to be awarded based on certified small business status.

This program may be effective in encouraging small consultants, including minority- and women-owned firms, to compete for ODOT engineering and other professional services contracts. It may also increase small businesses’ chances of being short-listed and then winning ODOT engineering and other professional services work. Section VII explains the disadvantages for small businesses, including MBE/WBEs, in competing for ODOT contracts.

- **Sheltered market for small contracts.** To the extent permitted by law, ODOT could consider employing a sheltered market program for small contracts that are not legally required to be publicly bid. For example, program participants certified as small businesses would be able to compete amongst themselves for contracts as the lowest bidder. A dollar threshold would be established by the Department and projects under that threshold could be considered for the program.

The sheltered market program may help encourage all small businesses, including minority- and women-owned firms, to compete for smaller ODOT construction contracts by limiting the competition to similar sized firms. This measure may give businesses access to new prime and subcontracting opportunities. ODOT would need to develop a small business certification program as a part of this effort.

Segmentation of large contracts into smaller contracts. ODOT should continue to evaluate when contracts can be divided into multiple, smaller contracts. However, barriers to participation for certain DBE groups appear to span contract size, as discussed in Section VII.

The percentage of ODOT dollars going to minority- and women-owned firms working as prime consultants was substantially higher for small, engineering-related contracts, so segmenting professional services work into smaller contracts may be beneficial. However, disparities between utilization and availability of MBE/WBEs as prime consultants nonetheless persisted for small engineering-related contracts (see Section VII).

Consultant qualifications evaluation system. BBC’s review of MBE/WBE consultants’ success in competing for ODOT engineering-related contracts found evidence that participation was impacted due to the design and application of evaluation criteria when reviewing consultant qualifications. The current process appears to favor firms that already have considerable experience performing ODOT

contracts. This practice may have the effect of perpetuating disparities in the use of minority- and women-owned prime consultants. ODOT should review process design and how evaluators implement the qualifications review system.

One of the changes ODOT should review is to create an evaluation category that explicitly considers the contract dollars a consultant currently has with ODOT and to award evaluation points to consultants with less or no current work (and zero points to the proposer with the most current work). BBC has experience with other public agencies that have successfully implemented this addition to the evaluation process. As with other neutral measures, ODOT should consider whether this change would be permitted under state law.

Prequalification for construction prime contractors. ODOT should review its prequalification procedures to ensure that they do not act as barriers to smaller and newer firms and firms that have less past success in receiving ODOT contracts. There are aspects of the prequalification process that may perpetuate disparities for African American-, Asian-Pacific American- and Hispanic American-owned firms, which have been relatively unsuccessful in obtaining ODOT construction prime contracts.

ODOT should review its practice of prequalifying based on type of work *and* prequalifying for the dollars of work performed. Because bonding is required for larger ODOT contracts, its practice of prequalifying for dollars of work performed may represent an unnecessary barrier for smaller contractors and contractors that have less past success in receiving ODOT contracts. Section VII of the report explains how this aspect of ODOT prequalification may affect certain groups of firms.

Prompt payment of subcontractors. ODOT requires prime contractors to pay all subcontractors for satisfactorily completed work no later than 30 days after receipt of payment from ODOT. Other states have even shorter requirements.¹² ODOT might consider a policy of payment within 10 or 15 days for satisfactorily completed work.

Construction contractor assistance program. Businesses that the study team interviewed discussed the lack of construction-specific assistance available in the marketplace. Businesses were typically pleased with the general business and entrepreneurial technical assistance available at the Small Business Development Centers and other resource centers, but identified a gap in the availability of construction-specific guidance. ODOT might consider partnering with or funding an outside agency training center or trade association to host a construction contractor assistance program center. The center would be staffed by individuals who have worked in the construction industry and understand the unique challenges and demands of the industry.

¹² For example, the Illinois State Prompt Payment Act (30 ILCS 540) requires payment of subcontractors within 15 days of receipt of corresponding payment by the state. Also, subcontractors can determine when payments have been made to prime contractors because notice of each payment is electronically posted. See <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=539&ChapAct=30%26nbsp%3BILCS%26nbsp%3B540%2F&ChapterID=7&ChapterName=FINANCE&ActName=State+Prompt+Payment+Act%2E>.

The construction contractor assistance program would be open to all firms, regardless of race or gender. Additionally, assistance opportunities would be tailored specifically to the needs of the construction industry and might include:

- Estimating;
- Project identification & matching;
- Bid preparation;
- Management assistance;
- Finance and accounting;
- Training in use of computers and the internet; and
- Introduction training in industry software.

General communications and outreach, including notification of bid opportunities. The study team examined ODOT communications with DBEs and other firms, especially in how ODOT notifies firms of opportunities to submit bids and proposals. Firms that the study team interviewed generally complimented ODOT on its efforts to make bidding opportunities known to potential bidders. ODOT might consider certain improvements to the process.

- A number of people interviewed in the disparity study suggested that ODOT could improve what it communicates and increase the frequency of communications with DBEs and other contractors. One opportunity is to change the quarterly DBE electronic newsletter to a monthly newsletter.¹³
- ODOT might ask contractors and consultants to review the ODOT website and make revisions to better communicate how to do business with the Department. For example, some contractors have suggested that the website might better identify ODOT staff to contact about bid opportunities.
- To encourage increased participation in outreach events, seminars and other opportunities, ODOT could consider hosting events at times that are accessible for all business levels and sizes. For example, early mornings, evenings and weekends might be options for ODOT to consider when scheduling such events. ODOT might identify ways to improve its process of inviting firms to seminars, meetings and conferences in order to increase participation in those events.
- A Hispanic trade association that the study team interviewed as part of this study recommended that ODOT provide more outreach to the Hispanic community and that communications be bilingual.

¹³ Idaho Transportation Department's DBE newsletter is one example. It can be found at <http://itd.idaho.gov/civil/dbefirms.htm>.

Data collection. BBC was able to collect subcontractor data for ODOT professional services through extensive survey efforts. For future studies and evaluation, ODOT should consider improving its data collection and tracking for professional services. Efforts should be made to address the following:

- Collect subcontractor utilization data for firms regardless of race, gender or certification status;
- Collect invoices for prime and subcontractors and consultants;
- Establish a training process for all staff who are responsible for managing and entering contract data. Training should convey data entry rules and standards, and ensure consistency in the data entry process; and
- Consider requiring firms to report their subcontractors' contact information and awarded dollar amounts at time of contract.

Although subcontractor data were available for construction projects, ODOT may consider using the above recommendations to review their tracking and data collection process.

Partnerships with trade associations and other government agencies. Several minority and female business owners whom the study team interviewed suggested that there is a history of distrust of ODOT by some MBE/WBEs. ODOT joining or partnering with local organizations, trade associations and other government agencies could aid the overall visibility and credibility of the Federal DBE Program in Oklahoma.

- **Public agency consortium.** ODOT might also consider initiating a consortium of public agencies that would jointly host quarterly outreach and networking events and training sessions for businesses seeking public sector contracts.
- **Trade association memberships.** ODOT might consider efforts to build stronger relationships in the local communities with business organizations and trade associations. Partnerships with these organizations could offer an alternative avenue for business training, outreach and technical assistance. Organizations and trade associations to consider include:
 - Capitol Chamber;
 - The Greater Oklahoma City Hispanic Chamber of Commerce;
 - The American Indian Chamber of Commerce;
 - The Association of General Contractors of America; and
 - The Consortium for Minority Business Development.

Training partnerships with private firms. Similar to the San Diego Airport Authority's role as host to the Turner School of Construction Management, ODOT might consider partnering with a large construction or engineering firm to host a construction management or engineering course. The multi-week course would be designed to improve the technical, administrative and managerial skills of small businesses. The course would be facilitated by industry professionals from the partnering firms.

Business credit programs. The disparity study identified disparities in access to capital for certain minority groups (see Section III for a summary). Some of the local programs to assist DBEs and other small businesses are described in Appendix J. ODOT could explore ways to better connect its contractors and consultants with available programs, including equity capital and long-term loans provided through Small Business Investment Companies in Oklahoma.¹⁴

Bonding programs. Section III of the report summarizes barriers for MBE/WBEs in obtaining bonding. ODOT might explore how it could better match small firms that require bonding assistance with the local resources available to provide that assistance. Appendix J describes some of these programs, including Small Business Administration and USDOT programs. Additional opportunities include:

- The USDOT Office of Small and Disadvantaged Business Utilization (OSDBU) and the Surety and Fidelity Association of America have partnered to develop a 10-week training course that prepares small contractors to obtain bonding. Businesses completing the training are paired with bonding specialists to help the companies obtain bonds.¹⁵ ODOT might explore whether it could bring the OSDBU program to Oklahoma or adapt the program and implement it in the state.
- Some transportation agencies such as the San Diego County Regional Airport Authority have created programs to directly provide bonding to small companies bidding on agency contracts.
- Some state DOTs, such as the North Carolina Department of Transportation, waive bonding requirements for smaller contracts.

Business insurance assistance. Business insurance is required to work on most ODOT construction and engineering-related contracts. Information from the study team's in-depth personal interviews indicated that minority- and women-owned firms may face barriers in the Oklahoma insurance market. As with bonding, ODOT could explore more ways to explain how to obtain needed insurance and ensure that small contractors and consultants have access to business insurance experts.

¹⁴ See <http://www.sba.gov/financialassistance/borrowers/vc/sbainvp/index.html>.

¹⁵ See <http://osdbu.dot.gov/bap/bep.cfm>.

Summary. ODOT could explore a broad array of new and expanded neutral means for implementation in the future. Some of these changes might be made quickly and require minimal resources. If ODOT chose to implement these measures after fully researching them, and if permitted by local or state law, the time required to implement the following measures might be less than a year:

- Establish a subcontracting minimum program;
- Enhance its consultant qualifications evaluation system for engineering-related and other professional services contracts;
- Revise how it prequalifies prime contractors for construction contracts;
- Enact changes in its prompt payment policy;
- Begin an improved data collection process;
- Initiate partnerships with trade associations and other government agencies; and
- Take steps to better encourage DBEs to take advantage of programs currently available in Oklahoma.

Other neutral measures would require additional time and resources to implement after full ODOT consideration. For example, any programs that would encourage participation of certified small businesses would require ODOT to establish new programs and certification procedures and allow time to advertise, accept and evaluate certifications. Program development and up-front implementation of these types of programs might require more than 12 months.

ODOT's projection of the portion of its overall DBE goal that could be achieved through neutral means should include the extent to which it has implemented additional neutral measures or has concrete plans to do so. ODOT's projections should also take into account the timing of programs.

- The neutral measures discussed above will affect state-funded as well as FHWA-funded contracts.
- ODOT should track utilization of MBE/WBEs and certified DBEs on its state-funded engineering and construction contracts, consistent with the utilization analyses in this disparity study.
- If, after implementation of any additional neutral remedies, ODOT observes improvements in utilization for certain racial/ethnic/gender groups on state-funded contracts (in comparison to the availability of these groups for such contracts), it might change its projection of how much of the overall annual DBE goal can be achieved through neutral means in future years.
- The analytical framework presented in Figures IX-3 and IX-4 might be useful in making these projections.

D. Other Considerations

Adjustments as ODOT implements the Federal DBE Program. ODOT will need to monitor the effectiveness of race-conscious and race-neutral measures during the course of an entire fiscal year.¹⁶

- Before the fiscal year is complete, ODOT might find that DBE utilization on FHWA-funded contracts will substantially exceed its overall DBE goal within the fiscal year. It might choose to adjust the extent to which it uses race-conscious measures if this outcome occurs.
- Similarly, ODOT might reach a mid-year decision to increase the extent to which it uses race-conscious remedies if it finds that the programs in place are not effective.

Firms potentially eligible for DBE certification. The Federal DBE Program requires ODOT to prepare DBE utilization reports based on firms actually certified as DBEs.¹⁷ However, many of the minority- and women-owned firms examined in this disparity study are not currently certified even though they might be eligible for certification. It is important for ODOT to encourage and facilitate certification for these firms.

The overall annual DBE goal includes minority- and women-owned firms that might be eligible for DBE certification but have not chosen to pursue certification.

- One reason that future DBE utilization may fall below ODOT's overall annual DBE goal is that many of the minority- and women-owned firms doing business with ODOT are not DBE-certified.
- Certain currently-certified DBEs may let their certification lapse if they are no longer eligible to participate in race-conscious programs on FHWA-funded construction contracts.
- For these and other reasons, ODOT should examine factors in addition to its utilization of certified DBEs to evaluate the effectiveness of its programs, as discussed below.

Tracking minority- and women-owned firms that are not currently certified as DBEs. ODOT will need to track the effectiveness of neutral programs for both FHWA- and state-funded contracts, including preparing utilization reports for all minority- and women-owned firms.¹⁸

- ODOT should use the BBC database developed as part of this study as a starting point for tracking MBE/WBE utilization.
- Firms doing business with ODOT as a prime contractor or subcontractor should be required to complete contractor/consultant registration documents, which should include MBE/WBE ownership information.

¹⁶ 49 CFR Section 26.51 (f) (2)

¹⁷ See 49 CFR Section 26.55 (f) and 26.87 (i).

¹⁸ Including MBE/WBEs that are self-identified.

- ODOT should collect and report information for prime- and subcontractor utilization on both FHWA- and state-funded contracts.
- Separate reports should be prepared for construction and engineering-related contracts.
- ODOT should also continue to prepare reports on the participation of certified DBEs in FHWA-funded contracts, as required under the Federal DBE Program.

Monitoring changes in the Federal DBE Program. The Federal DBE Program regulations periodically change, and USDOT also issues new guidance concerning implementation of the Program. ODOT should monitor these developments.

Other transportation agencies' implementation of the Federal DBE Program is under review in federal district court. ODOT should continue to monitor relevant court decisions in these and other cases.