

# DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM PROPOSED REVISED THREE-YEAR OVERALL GOAL & METHODOLOGY FOR FEDERAL FISCAL YEARS 2015 THROUGH 2019

The California Department of Transportation (Caltrans) last developed their overall Federal Transit Administration (FTA) DBE goal in 2014, which the agency is using for federal fiscal years (FFYs) 2014 through 2016 (a goal of 4%). In accordance with 49 CFR Part 26, the United States Department of Transportation's (USDOT's) Tips for Goal-Setting, and other USDOT official guidance, Caltrans based its goal and methodology on an analysis of ready, willing, and able firms that bid on FTA-assisted contracts from 2011 through 2013 and on other relevant information.

In 2013, the FTA conducted a State Management Review of Caltrans FTA-funded programs. Based on the review, the FTA recommended that Caltrans conduct a disparity study to implement the DBE program on its FTA-funded contracts more effectively. Upon completion of the study, Caltrans agreed to submit a revised goal and methodology to FTA for FFY 2015/16 and establish new goals from 2016 through 2019.

Caltrans commissioned BBC Research & Consulting (BBC) to conduct the disparity study. The study examines Caltrans' FTA-funded contracts, which are managed by the Division of Rail and Mass Transportation (DRMT) and the Division of Transportation Planning (DOTP). BBC completed the study in December 2014 (referred to herein as the 2014 Disparity Study). The disparity study is included in its entirety as Appendix A. Based substantially on study results, federal guidance, and relevant case law, Caltrans proposes a revised its FFY 2015/16 goal and establish a three-year overall DBE goal for FFYs 2016 through 2019. To determine its new overall DBE goal, Caltrans followed the two-step goal-setting methodology set forth in 49 Code of Federal Regulations (CFR) Section 26.45.

## **Step 1. Determining a Base Figure – 49 CFR Section 26.45(c)**

Caltrans began the process of determining its overall DBE goal for FTA-funded contracts by first establishing a base figure. Consistent with USDOT guidance, Caltrans established a base figure using data from a "custom census" availability analysis that BBC conducted as part of the 2014 Disparity Study (for details, see Chapter 4 and Appendix D of the 2014 Disparity Study report). BBC estimated the availability of minority- and women-owned businesses to participate in FTA-funded contracts — both prime contracts and subcontracts — that DRMT, DOTP, and subrecipient local agencies awarded between October 1, 2007 and September 30, 2013 (referred to herein as the study period).<sup>1, 2</sup> Caltrans has determined that the mix of the types and sizes of

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<sup>1</sup> Consistent with USDOT guidance, Caltrans 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.

<sup>2</sup> BBC defined women-owned businesses specifically 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 4 of the 2014 Disparity Study report. 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 (9th Cir. 2013).

FTA-funded transportation contracts that it anticipates awarding in FFYs 2015 through 2019 will be similar to the mix of types and sizes of transportation contracts that it awarded during the study period.

BBC expressed availability as the percentage of the associated contracting dollars that one might expect minority- and women-owned businesses to receive based on various factors including the type of work involved, the location of the work, and the size of the contract. In the base figure analysis, BBC considered only those minority- and women-owned businesses that are DBE-certified or appear that they could be DBE-certified based on revenue requirements described in federal regulations including 49 CFR Section 26.65 (referred to herein as potential DBEs; see 76 Federal Register 5092 (January 28, 2011)).

Figure 1 presents detailed information about the base figure for Caltrans' overall DBE goal for FTA-funded contracts:

- Column (a) presents the DBE groups that BBC considered as part of the base figure analysis; and
- Column (b) presents the availability percentage for each group for *all* FTA-funded contracts.

**Figure 1.**  
**Availability components of the base figure**

Note:

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

Source:

BBC Research & Consulting availability analysis from 2014 Disparity Study.

a. Potential DBEs	Availability percentage
	b. Total
Black American-owned	0.5 %
Asian-Pacific American-owned	0.9
Subcontinent Asian American-owned	0.4
Hispanic American-owned	7.4
Native American-owned	0.1
Non-Hispanic White women-owned	<u>1.5</u>
<b>Total potential DBEs</b>	<b>10.7 %</b>

As presented at the bottom of column (b), based on the availability analysis, Caltrans considers 10.7 percent as the base figure of its new overall DBE goal for FTA-funded contracts.

## **Step 2. Determining if an Adjustment is Needed – 49 CFR Section 26.45(d)**

After establishing the base figure, Caltrans considered available information to determine whether any adjustment was needed to the base figure to determine its new overall DBE goal for FTA-funded contracts and to make it as precise as possible. In considering an adjustment to the base figure, Caltrans evaluated information about:

- 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.

Caltrans considered all of the above information in considering whether to make an adjustment to the base figure.

**Current capacity of DBEs to perform work on DOT-assisted contracting.** USDOT’s “Tips for Goal-Setting” suggests that agencies should examine data on past DBE participation on their USDOT-funded contracts in recent years. USDOT further suggests that agencies should choose the median level of annual DBE participation for those years as the measure of past participation. According to Caltrans Uniform Reports of DBE Awards or Commitments and Payments, median DBE participation on Caltrans’ FTA-funded contracts during the study period was 3.2 percent (see Chapter 8 of the 2014 Disparity Study report).

The information about past DBE participation supports a downward adjustment to Caltrans’ base figure. If Caltrans were to use the approach that USDOT outlined in “Tips for Goals Setting” based on Uniform Reports of DBE Awards/Commitments and Payments, the overall goal for FTA-funded contracts would be the average of the 10.7 percent base figure and the 3.2 percent median past DBE participation, yielding a potential overall DBE goal of 6.95 percent.

**Any disparities in the ability of DBEs to get financing, bonding, and insurance.** BBC’s analysis of access to financing, bonding, and insurance also revealed quantitative and qualitative evidence that minorities, women, and minority- and women-owned businesses do not have the same access to those business inputs as non-Hispanic white males and non-Hispanic white male-owned businesses in California.<sup>3</sup> Any barriers to obtaining financing, bonding, and insurance might decrease opportunities for minorities and women to successfully form and operate businesses in the California transportation contracting marketplace. Any barriers that minority- and women-owned businesses face in obtaining financing, bonding, and insurance would also place those businesses at a disadvantage in obtaining Caltrans FTA-funded prime contracts and subcontracts (see Chapter 3 of the 2014 Disparity Study report).

**Employment, self-employment, education, training, and unions.** BBC used regression analyses to investigate whether race/ethnicity or gender affects rates of self-employment among workers in the California construction and engineering industries. The regression analyses allowed BBC to examine those effects while statistically controlling for various race- and gender-neutral personal characteristics including education and age (for details, see Chapter 3 and Appendix F of the 2014 Disparity Study report). The analyses revealed that Black Americans, Hispanic Americans, and women were significantly less likely than non-Hispanic whites and males to own construction businesses after accounting for various race- and gender-neutral personal characteristics. The engineering industry analysis revealed that Black Americans, Asian-Pacific American, Subcontinent Asian Americans, Hispanic Americans, and women were less likely than non-Hispanic whites and males to own engineering businesses after accounting for various race- and gender-neutral personal characteristics.

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<sup>3</sup> For the 2014 Disparity Study, BBC considered Caltrans’ relevant geographic market area to be the state of California. During the study period, Caltrans awarded approximately 99 percent of its FTA-funded contracting dollars that the study team analyzed as part of the study to prime contractors and subcontractors with locations in California.

**Other relevant data.** The Federal DBE Program suggests that federal fund recipients also examine “other factors” when determining whether to make any step-2 adjustments to their base figures.<sup>4</sup>

**Success of businesses.** There is quantitative evidence that certain groups of minority- and women-owned businesses are less successful than non-Hispanic white male-owned businesses and face greater barriers in the marketplace, even after considering race- and gender-neutral factors. Chapter 3 and Appendix H of the 2014 Disparity Study report summarize that evidence. There is also qualitative evidence of barriers to the success of minority- and women-owned businesses, as explored in Appendix J and summarized in Chapter 3 of the 2014 Disparity Study report. Some of that information suggests that discrimination on the basis of race/ethnicity and gender affects minority- and women-owned businesses in the California contracting industry.

**Evidence from disparity studies conducted within the jurisdiction.** USDOT suggests that federal fund recipients also examine evidence from disparity studies conducted within their jurisdictions when determining whether to make step-2 adjustments to their base figures. BBC recently conducted a disparity study related to Caltrans’ Federal Highway Administration (FHWA)-funded contracts. However, those contracts differ in many respects from the FTA-funded contracts that Caltrans awarded during the study period.

BBC also recently completed a disparity study for the San Diego Association of Governments (SANDAG) in 2014. Disparity analysis results for that study indicated that Black American-owned, Subcontinent Asian American-owned, Native American-owned, and white women-owned business groups exhibited substantial disparities. However, SANDAG’s FTA-funded contracts differ substantially in size and type from the FTA-funded contracts that Caltrans awarded during the study period. Therefore, the results of the 2014 SANDAG disparity study are of limited use to Caltrans in determining whether to make a step-2 adjustment to the base figure.

**Step 2 adjustment.** Caltrans has considered available information relevant to a potential step 2 adjustment and has decided to make a downward adjustment to the base figure. Caltrans has decided to make a downward adjustment that specifically accounts for the current capacity of DBEs to perform work on FTA-funded contracts. Based on the approach that USDOT outlined in “Tips for Goals Setting” based on Uniform Reports of DBE Awards/Commitments and Payments, Caltrans proposes an overall goal on FTA-funded contracts of 6.95 percent, which represents the average of the 10.7 percent base figure and the 3.2 percent median past DBE participation.

### **Race-/Gender-Neutral and Race-/Gender-Conscious Split – 49 CFR Section 26.51 (c)**

In accordance with federal regulations and USDOT guidance, Caltrans will attempt to meet the maximum feasible portion of its proposed 6.95 percent overall DBE goal by using race- and gender-neutral measures. Based on information regarding awards and commitments to DBE-certified businesses, certified DBEs received an average of 3.3 percent of the dollars on Caltrans’ FTA-funded contracts during the study period. Caltrans did not apply contract goals or any other

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<sup>4</sup> 49 CFR Section 26.45

race- or gender-conscious measure to any FTA-funded contract that DRMT, DOTP, and subrecipient local agencies awarded during the study period.

Caltrans currently has a broad range of race- and gender-neutral measures to encourage DBE participation in its transportation contracts (for details, see Chapter 9 of the 2014 Disparity Study report). The agency still uses most of those measures and will continue to improve those measures and increase their use. Figure 3 presents a description of those measures.

**Figure 3.**  
**Current Caltrans race- and gender-neutral measures**

California Department of Transportation Race-Neutral Measures	
EXAMPLES OF CURRENT MEASURES	
Maintain One-Stop Disadvantaged Business Enterprise (DBE) certification with the California Department of Transportation (Caltrans) and 10 other certifying agencies.	Provide Caltrans plans and specification for small businesses, including DBEs statewide. The plans are available at no cost on the Caltrans Web site.
Continue paid advertisement in newspapers and trade and focus papers to increase participations, in addition to the Caltrans website.	Market Caltrans opportunities, including working with banks, surety, and insurance companies in their districts.
Maintain flowchart of Caltrans advertising, bid opening, awards, and approval on Caltrans program Web sites.	Utilize a standard "Outreach Marketing Kit" for all Districts to include a procurement fair guide, a mandatory pre-bid guide, a project specific guide, and an outreach guide.
Continue Statewide Small Business Council and subcommittee meetings.	Continue to standardize/improve HQ/District Web sites, connect to one another, consolidate all contract-type information on one Web site, and redesign Caltrans main Web page to highlight contracting opportunities.
Host District Procurement Fairs.	Cross-train internal staff on functional contract requirements and process.
Ensure District Small Business Liaisons (DSBLs) continue to conduct business communication, outreach events, and training on "How to do Business with Caltrans."	Improve access to bid openings by teleconference, Web-based video or Internet, in addition to electronic bid submittal.
Host project-specific outreach events for small businesses, including DBEs.	Expand the use of mandatory pre-bid meetings in construction contracts.
Market SBA Surety Bond Guarantee Program statewide through the DSBLs and industry partnership agreements.	Implement Mentor-Protégé Program statewide for construction and A&E
Outreach and market DBEs for participation in Caltrans emergency contracts.	Hold quarterly "Look Ahead" meetings for prime contractors and subcontractors, including DBEs and any interested parties.
Meet routinely with construction and Architectural & Engineering (A&E) prime contractors.	Produce a "How to do Business with Caltrans" brochure make it available online to include certification packages and marketing kits.
Increase number of DBE certifications listed in CUCP.	Maintain Director's Policy on Race-Neutral Measures to include and ensure District training and implementation.
Provide "Look Ahead" information to small businesses, including DBEs, for proposed construction and A&E contracting opportunities.	Make more use of the Caltrans Emergency Contractor Interest Registry and remove barriers for registration.
Improve communication channels between Caltrans Headquarters (HQ) and Districts for real-time information and decision making.	Continue administrative enforcement of prompt payment between prime contractors and subcontractors.
Implement the SBA Loan Program, which provides short-term relief for small businesses facing financial hardship.	Provide consistent and accurate data collection of DBE utilization.
Provide an "Opt-In" feature to the Caltrans Web site to allow subcontractors or suppliers to be considered for bids without ordering a plan set.	Track and circulate DBE usage by District and discuss monthly at Directorate level.

**Figure 3, Continued.**  
**Current Caltrans race- and gender-neutral measures**

California Department of Transportation Race-Neutral Measures	
EXAMPLES OF CURRENT MEASURES	
Spread project advertising and bid openings throughout the year to prevent overloading of prime contractors and subcontractors.	Report monthly small businesses, including DBE participation, on State and federal-funded contracts, including local agencies, directly into a data management system.
Provide a DBE brochure with vital information for DBEs.	Centralize tracking of all race-neutral activities District wide via OBEO.
Recognize prime contractors for hiring small businesses, including DBEs statewide.	Appoint staff for data collection, verification, measurement, oversight, and reporting.
Continue enforcement of prime contractors who use small businesses, including DBEs statewide, as pass-through companies.	Continue to use the Data Management System to capture subcontracting activities.
Institute performance measurement standards for all race-neutral measures.	Collaborate with associations, such as Associated General Contractors and Engineering & Utility Contractors Association, to increase DBE participation.
Promote the California Construction Contracting Program, which provides business management counseling and training to small businesses.	Update business preference information in the California Unified Certification Program database of those entities that are "ready, willing, and able" to perform Caltrans work.
Improve DBE/Small Business Enterprise cross-registration with other State agencies and departments.	Assign all bidders an identification number for capturing all businesses that bid Caltrans work.
Provide DBE Supportive Services that consist of technical training and one-on-one technical assistance to DBE firms	Continue to maintain Bidder's List.

Source: California Department of Transportation FTA DBE Goal & Methodology Document (FFY 2014-2016) and FHWA DBE Goal & Methodology document (FFY 2013-2105).

Based on the above information, Caltrans projects that it will be able to meet 4.0 percent of its new overall DBE goal through race- and gender neutral measures. Caltrans projects that it will meet the remainder of its proposed 6.95 percent overall DBE goal — 2.95 percent — through the use of 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 seminal court cases — particularly in the Ninth Circuit — have indicated that, in order to implement the Federal DBE Program in a narrowly tailored manner, agencies should limit the use of race- and gender-conscious program measures to those minority groups “that have actually suffered discrimination” within its transportation contracting industry.<sup>5, 6</sup> In addition, in *H.B. Rowe v. Tippett*, the Fourth Circuit Court of Appeals ruled that the North Carolina Department of Transportation (NCDOT) did not provide an “exceedingly persuasive justification” for including women-owned businesses in its use of race- and gender-conscious program measures, because the statistical evidence did not support an inference of

<sup>5</sup> *AGC, San Diego Chapter v. California DOT*, 713 F.3d 1187, 1191, 1199 (9th Cir. 2013)

<sup>6</sup> *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 997-98 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006)

discrimination against women-owned businesses.<sup>7</sup> The Court found that there was strong evidence of overutilization of women-owned businesses in the public sector. As a result, the court held that NCDOT's inclusion of women-owned businesses in its use of DBE contract goals was invalid. The Court thus held that the state legislation as applied to women-owned businesses was unconstitutional.<sup>8</sup>

Moreover, USDOT official guidance states that "even when discrimination is present in a state, a program is narrowly tailored only if its application is limited to those specific groups that have actually suffered discrimination or its effects."<sup>9</sup> As provided in 49 CFR Part 26, such guidance is "valid, and express[es] the official positions and views of the Department of Transportation ..."<sup>10</sup>

As part of the Caltrans 2014 FTA Disparity Study, BBC assessed whether there were any disparities between Caltrans' utilization of minority- and women-owned businesses and the availability of those businesses for Caltrans FTA-funded contracts (for details, see Chapter 6 and Appendix K of the 2014 Disparity Study report). In sum, disparity analysis results indicated that Black American-owned, Asian-Pacific American-owned, Native American-owned, and white women-owned business groups exhibited substantial disparities — that is, disparities whereby utilization was less than 80% of availability — on key contract sets that the study team examined. In contrast, Subcontinent Asian American-owned and Hispanic American-owned businesses did not exhibit substantial disparities on any key contract sets.

Consistent with key court rulings and USDOT official guidance, based on all available information including results from the 2014 Disparity Study, Caltrans proposes that the following groups will be eligible to participate in the race- and gender-conscious measures that will be part of the agency's implementation of the Federal DBE Program for FTA-funded contracts:

- Black American-owned businesses;
- Asian-Pacific American-owned businesses;
- Native American-owned businesses; and
- Women-owned businesses.<sup>11</sup>

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<sup>7</sup> *H.B. Rowe Corp., Inc. v. W. Lyndo Tippet, North Carolina DOT, et al*; 615 F.3d 233 (4<sup>th</sup> Cir. 2010)

<sup>8</sup> Although the state presented anecdotal evidence that suggested the existence of gender-based discrimination in the local marketplace, the Court ruled that the anecdotal evidence did not overcome the strong, statistical evidence of overutilization of women-owned businesses and it fell short of justifying NCDOT's inclusion of women-owned businesses in its use of DBE contract goals.

<sup>9</sup> United States Department of Transportation Official Questions and Answers (Q&A's) Disadvantaged Business Enterprise Program Regulation (49 CFR 26),

<http://www.dot.gov/osdbu/disadvantaged-business-enterprise/official-questions-and-answers-26>

<sup>10</sup> 49 CFR Section 26.9

<sup>11</sup> Courts have found that a substantial disparity index for white women-owned businesses may raise an inference of discrimination sufficient to support inclusion of all women in a recipient's DBE program. See *AGC, San Diego Chapter v. California DOT*, 713 F.3d 1187, 1195, 1198 (9<sup>th</sup> Cir. 2013).

Caltrans will request a waiver to consider Subcontinent Asian American-owned and Hispanic American-owned businesses as ineligible to participate in any race- and gender-conscious measures. DBEs that are owned by Subcontinent Asian American or Hispanic American women will still be eligible to participate in Caltrans' race- and gender-conscious measures if they are DBE-certified as a women-owned business.<sup>12</sup> Subcontinent Asian American-owned and Hispanic American-owned businesses will still be eligible to participate in the race- and gender-neutral measures that are part of Caltrans' implementation of the Federal DBE Program for FTA-funded contracts. Caltrans will monitor its utilization of Subcontinent Asian American-owned and Hispanic American-owned businesses and reassess the appropriateness of the requested waiver regularly. Several state departments of transportation have requested similar waivers that have been approved by USDOT including the FHWA division of Caltrans and the Oregon Department of Transportation.<sup>13,14</sup>

## **Public Participation – 49 CFR Section 26.45(g)**

Public participation is a key component of Caltrans' process for establishing a new overall DBE goal for FTA-funded contracts. Caltrans will make efforts to engage the public as part of the goal-setting process and will make additional public engagement efforts in finalizing its Goal and Methodology.

### **Summary**

Caltrans proposes to revise its 2015/16 goal and establish a new three-year overall DBE goal for FFYs 2016 through 2019 of 6.95 percent for FTA-funded contracts. Based on the results of a "custom census" availability analysis, Caltrans determined that the base figure for its new overall DBE goal is 10.7 percent. Caltrans decided to adjust the base figure to 6.95 percent to account for the current capacity of DBEs to perform work on DOT-assisted contracts. Caltrans projects that it will be able to meet 4.0 percent of its new overall DBE goal through race- and gender neutral program measures. Caltrans projects that it will meet the remainder of the goal — 2.95 percent — through the use of race- and gender-conscious measures. Based on disparity study results, Caltrans proposes that the following groups will be eligible to participate in race- and gender-conscious measures on its FTA-funded contracts:

- Black American-owned businesses;
- Asian-Pacific American-owned businesses;

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<sup>12</sup> For example, Hispanic American women-owned businesses would be eligible for Caltrans' race- and gender-conscious measures if they are certified as women-owned DBEs.

<sup>13</sup> Caltrans' request for a waiver to implement race-conscious goals of limited application on FHWA-funded contracts to four identified groups (Women, Asian-Pacific Americans, Native Americans, and Black Americans) was approved in August 2008. USDOT revoked the waiver in 2012. Upon completion of the Caltrans 2012 FHWA Disparity Study, Caltrans submitted another request for a waiver to implement race-conscious goals of limited application on FHWA-funded contracts to five identified groups (Women, Asian-Pacific Americans, Native Americans, Black Americans, and Hispanic Americans).

<sup>14</sup> Oregon Department of Transportation Waiver Approval for FFY 2013-2015, [http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/Pages/dbe\\_prog\\_wav.aspx](http://www.oregon.gov/ODOT/CS/CIVILRIGHTS/Pages/dbe_prog_wav.aspx)

- Native American-owned businesses; and
- Women-owned businesses.

Caltrans will request a waiver to consider Subcontinent Asian American-owned and Hispanic American-owned businesses as ineligible to participate in any race- and gender-conscious measures on FTA-funded contracts.