

# CHAPTER ES.

## Executive Summary

The federal government requires transportation agencies to implement the Federal Disadvantaged Business Enterprise (DBE) Program if they receive U.S. Department of Transportation (USDOT) funds. The Washington State Department of Transportation (WSDOT) receives USDOT funds through the Federal Highway Administration (FHWA) and other USDOT agencies, and thus, must implement the Federal DBE Program. WSDOT's implementation of the Federal DBE Program is guided by regulations in 49 Code of Federal Regulations (CFR) Part 26, USDOT guidance, and relevant court decisions.

As part of its implementation of the Federal DBE Program, WSDOT is required to:

- Set an overall aspirational goal for DBE participation in its FHWA-funded contracts;<sup>1</sup>
- Project the portion of its overall DBE goal to be met through race- and gender-neutral means, and if necessary, project the portion to be met through race- and gender-conscious means, such as contract-specific DBE goals; and
- Identify the specific racial/ethnic and gender groups that will be eligible for race- and gender-conscious measures, if the agency determines that such measures are necessary.

WSDOT must then submit its proposed implementation of the Federal DBE Program to USDOT for review and approval.

WSDOT retained BBC Research & Consulting (BBC) to conduct a “disparity study” to assist in its implementation of the Federal DBE Program. The disparity study examined whether there were any disparities between WSDOT's utilization of minority- and women-owned businesses (MBE/WBEs) on its transportation contracts and the availability of those businesses to perform that work. Note that the study team considered businesses as MBE/WBEs if they were owned and operated by minorities or women, regardless of whether they were certified as DBEs or as MBE/WBEs through the Washington State Office of Minority and Women's Business Enterprises (OMWBE). In this study, “certified DBEs” refers to those businesses that are specifically certified as such through OMWBE.

The study provided information that WSDOT might consider in setting its overall DBE goal; determining the portion of the goal that can be met through race- and gender-neutral and, if necessary, race- and gender-conscious measures; and, if appropriate, determining which groups would be eligible for race- and gender-conscious measures.

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<sup>1</sup> Although USDOT requires an agency to set its goal every three years, it is an *annual* aspirational goal. That is, the agency must monitor DBE participation in its USDOT-funded contracts every federal fiscal year (FFY). If DBE participation for a particular FFY is less than the overall DBE goal for that year, then the agency must analyze the reasons for the difference, and establish specific measures to address the difference and enable the agency to meet the goal in the next FFY.

## History of WSDOT’s Implementation of the Federal DBE Program

WSDOT has been implementing variations of the Federal DBE Program and the regulations that preceded it since the 1980s. After enactment of the Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21) in 1998, USDOT established a new Federal DBE Program to be implemented by state and local agencies receiving USDOT funds.

**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 Federal DBE Program enacted by Congress was facially constitutional, but ruled that WSDOT’s implementation of the program was unconstitutional.<sup>2</sup> The court held that in order to satisfy requirements of *strict scrutiny*, a public entity implementing race- and gender-conscious measures must have evidence of discrimination in its transportation contracting industry.<sup>3</sup>

In response to the *Western States Paving* decision, WSDOT and other state and local agencies that were affected by the decision discontinued their use of race- and gender-conscious elements of the Federal DBE Program. USDOT recommended that agencies implementing the Federal DBE Program should consider conducting availability and disparity studies to satisfy the requirements of strict scrutiny.

**2005 Availability Study.** WSDOT completed its first availability study in October 2005. The study measured the availability of MBE/WBEs for WSDOT transportation contracts. The study did not examine WSDOT’s utilization of MBE/WBEs nor did it examine any disparities between MBE/WBE utilization and availability. At the time that the 2005 availability study was released (October 2005), WSDOT was not using contract-specific DBE goals as part of its implementation of the Federal DBE Program.

**Implementation of contract-specific DBE goals.** Beginning in October 2006, WSDOT resumed setting contract-specific DBE goals on certain FHWA-funded construction contracts. All groups identified in 49 CFR Part 26 were deemed eligible for participation in the goals program. WSDOT’s implementation of the goals program was based in part on information from its 2005 availability study.

WSDOT did not set any contract-specific DBE goals on FHWA-funded engineering contracts until 2012. Prior to that time, the agency only used race- and gender-neutral measures to encourage MBE/WBE participation on engineering contracts.

**Implementation of voluntary MBE/WBE goals.** Initiative 200 amended state law to prohibit the use of race- and gender-based preferences in public contracting, public employment, and public education.<sup>4</sup> However, Initiative 200 did not prohibit those actions if an agency is required to take them “to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.” Thus, Initiative 200 prohibited government

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<sup>2</sup> *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006).

<sup>3</sup> Certain Federal Courts of Appeal, including the Ninth Circuit Court of Appeals, apply *intermediate* scrutiny to gender-conscious programs rather than strict scrutiny. For details, see Appendix B.

<sup>4</sup> RCW 49.60.400(1)

agencies in Washington from applying race- and gender-conscious measures to state-funded contracts but not necessarily to federally-funded contracts. Since Initiative 200's passing, WSDOT has been setting voluntary MBE/WBE goals to many state-funded contracts, but does not require contractors to meet those goals or show good faith efforts to do so.

## **Analyses in the 2012 Disparity Study**

Along with measuring potential disparities between MBE/WBE utilization and availability on WSDOT transportation contracts, the disparity study also examined other quantitative and qualitative information related to the legal framework surrounding an agency's implementation of the Federal DBE Program; local marketplace conditions for MBE/WBEs and for other small businesses; and contracting practices and business assistance programs that the agency currently has in place.

- The study team conducted an analysis of federal regulations, case law, and other information to guide the methodology for the disparity study. The analysis included a review of federal requirements related to the Federal DBE Program and an assessment of any state requirements concerning the implementation of the Federal DBE program.
- BBC conducted quantitative analyses of the success of minorities, women, and MBE/WBEs throughout Washington's transportation contracting industry. In addition, the study team collected qualitative information about potential barriers that small businesses and MBE/WBEs face in the Washington transportation contracting industry through in-depth anecdotal interviews, public hearings, and public meetings.
- BBC analyzed the percentage of MBE/WBEs that are "ready, willing, and able" to perform on WSDOT transportation prime contracts and subcontracts. That analysis was based on telephone interviews that the study team completed with more than 3,000 Washington businesses that work in industries related to the types of transportation contracts that WSDOT and local agencies award. (The study team attempted telephone interviews with every business establishment that it identified as doing work that is relevant to WSDOT transportation contracting.)
- BBC analyzed the dollars that WSDOT and local agencies awarded to MBE/WBEs on more than 11,000 transportation prime contracts and subcontracts executed between October 1, 2008 and September 30, 2011 (i.e., FFYs 2009, 2010, and 2011). BBC analyzed contracts that were USDOT-funded and contracts that were solely state-funded.
- BBC examined whether there were any disparities between the utilization of MBE/WBEs on transportation contracts that WSDOT and local agencies awarded during the study period. The study team also assessed whether any observed disparities were statistically significant.
- BBC provided WSDOT with information from the availability analysis and other research that the agency might consider in setting its three-year overall aspirational goal, including the base figure and consideration of a "step-2" adjustment.
- BBC reviewed WSDOT's current contracting practices and Federal DBE Program measures and provided guidance related to additional program options and refinements to those practices and measures.

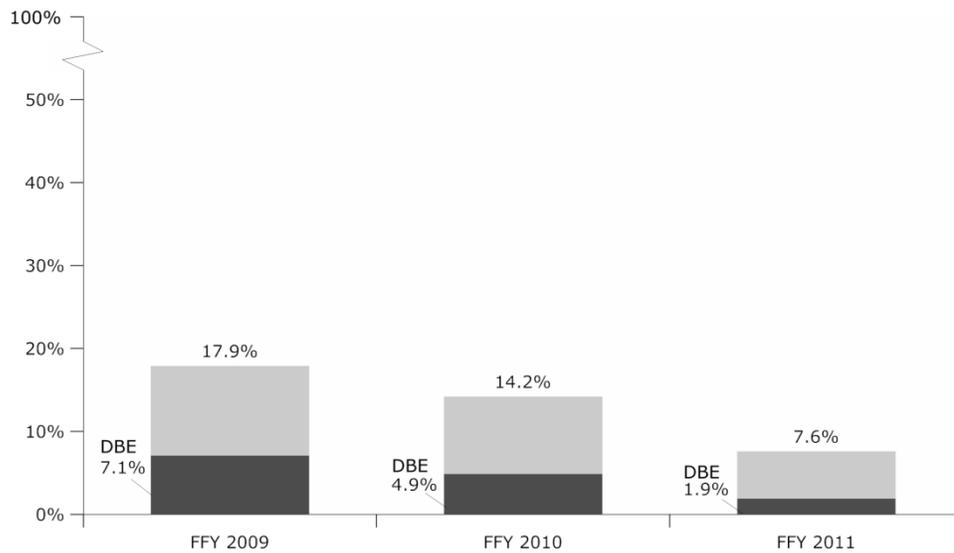
## Utilization and Disparity Analysis Results for Individual DBE Groups

In accordance with the Federal DBE Program, if WSDOT determines that it needs to continue the use of race- and gender-conscious measures on FHWA-funded contracts, then it should evaluate which DBE groups should be considered eligible to participate in those programs. If WSDOT determines that only certain DBE groups (e.g., groups classified as underutilized DBEs) and not other groups are eligible, then it must submit a waiver request to FHWA.

Utilization and disparity analysis results for WSDOT transportation contracts — along with other pertinent information — might be relevant to the agency’s determination of which DBE groups could be eligible for any race- or gender-conscious measures. BBC examined whether there were any disparities between WSDOT’s utilization of individual MBE/WBE groups on its transportation contracts and the availability of those businesses to perform that work.

**Utilization results.** The study team measured MBE/WBE participation in terms of “utilization” — the percentage of prime contract and subcontract dollars that WSDOT and local agencies awarded to MBE/WBEs during the study period. Figure ES-1 presents overall MBE/WBE utilization for each study period year (i.e., FFYs 2009, 2010, and 2011). The darker portion of each bar presents WSDOT’s utilization of MBE/WBEs that were DBE-certified during the study period. As shown in Figure ES-1, MBE/WBE utilization on WSDOT transportation contracts declined dramatically between FFY 2009 (17.9%) and FFY 2011 (7.6%). Certified DBE utilization also fell sharply, declining from 7.1 percent in FFY 2009 to only 1.9 percent in FFY 2011.

**Figure ES-1.**  
**MBE/WBE utilization on WSDOT and local agency transportation contracts (FHWA- and state-funded) by study period year**



Note: Includes FHWA- and state-funded WSDOT and local agency contracts.  
Darker portion of bar presents certified DBE utilization.  
Number of prime contracts/subcontracts analyzed was 4,244 for FFY 2009, 3,883 for FFY 2010, and 3,258 for FFY 2011.  
For more detail and results by group, see Figures K-5, K-6, and K-7 in Appendix K.

Source: BBC Research & Consulting from WSDOT contracting data.

**Disparity analysis results.** Although information about MBE/WBE utilization is instructive on its own, it is even more instructive when it is compared with the utilization that might be expected based on the availability of MBE/WBEs for WSDOT work. As part of the disparity study, BBC compared the utilization of MBE/WBEs on WSDOT transportation prime contracts and subcontracts with the percentage of contract dollars that MBE/WBEs might be expected to receive based on their availability for that work.

BBC expressed both utilization and availability as percentages of the total dollars that a particular group received for a particular set of contracts (e.g., 5% utilization compared with 4% availability). BBC then calculated a “disparity index” by dividing utilization by availability and multiplying by 100.<sup>5</sup> A disparity index of 100 indicates an exact match between utilization and availability for a particular group for a specific set of contracts (often referred to as “parity”). A disparity index of less than 100 may indicate a disparity between utilization and availability, and disparities of less than 80 are described in this report as “substantial.”<sup>6</sup>

Disparity analysis results for key contract sets are described below.

**All transportation contracts.** Figure ES-2 presents disparity analysis results for all WSDOT and local agency transportation contracts by study period year. Note that contract-specific DBE goals applied to many of the FHWA-funded contracts that WSDOT and local agencies awarded during the study period. The line down the center of the graph shows a disparity index level of 100, which indicates parity between utilization and availability. Disparity indices of less than 100 indicate disparities between utilization and availability (i.e., underutilization). For reference, a line is also drawn at an index level of 80, because some courts use 80 as a threshold for what indicates a substantial disparity.

As an example, overall, MBE/WBEs did not show a disparity on WSDOT and local agency transportation contracts in FFY 2009. The disparity index of 136 indicates that, considered together, MBE/WBEs received \$1.36 for every one dollar that they would be expected to receive based on their availability for WSDOT and local agency work.

An examination of results by group indicates that whereas some groups did not show disparities during the study period, other groups showed substantial disparities, particularly, in FFY 2011.

- Subcontinent Asian American- and Hispanic American-owned businesses showed substantial disparities in each year of the study period.

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<sup>5</sup> For example, if actual utilization of WBEs on a set of contracts was 2 percent and the availability of WBEs for those contracts was 10 percent, then the disparity index would be 2 percent divided by 10 percent, which would then be multiplied by 100 to equal 20.

<sup>6</sup> Some courts deem a disparity index below 80 as being “substantial” and have accepted it as evidence of adverse conditions for MBE/WBEs. For example, see *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041; *Eng’g Contractors Ass’n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d at 914, 923 (11th Circuit 1997); *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994). See Appendix B for additional discussion of those and other cases.

- African American-owned businesses and Native American-owned businesses only showed substantial disparities in FFY 2011.<sup>7</sup>
- Neither WBEs nor Asian-Pacific American-owned businesses showed disparities in FFYs 2009, 2010, or 2011.

**Figure ES-2.**  
**Disparity indices for**  
**WSDOT and local**  
**agency transportation**  
**contracts (FHWA- and**  
**state-funded) by**  
**study period year**

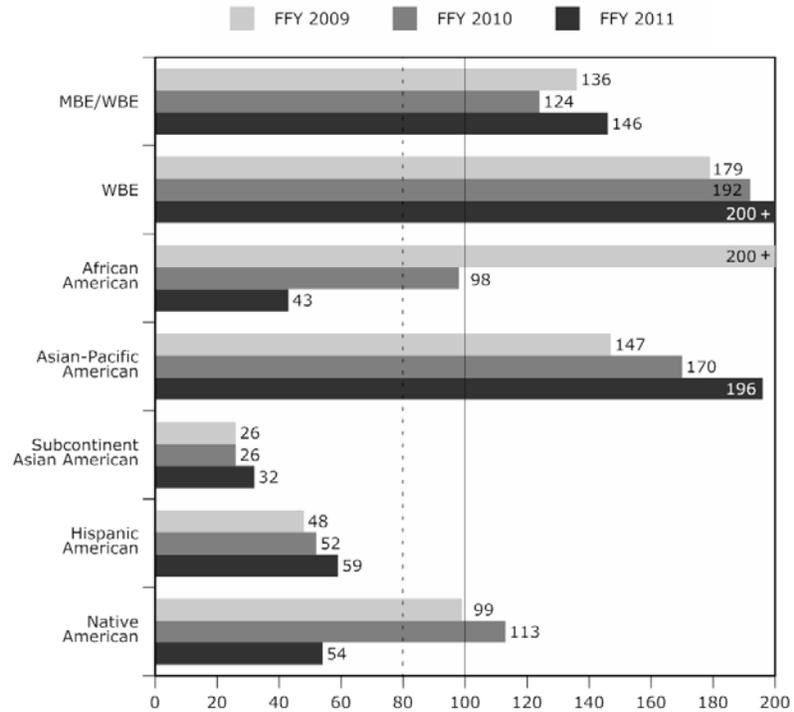
Note:

Number of prime contracts/subcontracts analyzed was 4,244 for FFY 2009, 3,883 for FFY 2010, and 3,258 for FFY 2011.

For more detail and results by group, see Figures K-5, K-6, and K-7 in Appendix K.

Source:

BBC Research & Consulting availability and utilization analyses.



**Contracts without DBE goals.** One way to assess whether a lack of race- and gender-conscious programs affected the participation of MBE/WBEs on WSDOT transportation contracts is to examine any disparities on contracts to which contract-specific DBE goals did not apply. BBC presents disparity analysis results for three types of contracts to which DBE goals did not apply:

- State-funded transportation contracts that WSDOT awarded in FFYs 2009, 2010, and 2011;
- Transportation-related engineering contracts that WSDOT and local agencies awarded in FFYs 2009, 2010, and 2011; and
- FHWA-funded construction contracts that WSDOT awarded between May 9, 2005 and September 30, 2006.

<sup>7</sup> Although African American-owned businesses did not show substantial disparities in FFYs 2009 or 2010, most of the dollars that went to African American-owned businesses in FFYs 2009 (approximately \$53 million of \$57 million) and 2010 (approximately \$15 million of \$18 million) went to a single African American-owned electrical contracting firm that was not DBE certified. In some cases, other individual MBE/WBEs also accounted for relatively large proportions of their respective groups' utilization but not nearly to the same extent. For details, see Chapters 6 and 7.

**State-funded transportation contracts.** In FFYs 2009, 2010, and 2011, WSDOT did not apply contract-specific DBE goals to any state-funded contracts.<sup>8</sup> Instead, WSDOT applied voluntary MBE/WBE goals to many of those contracts but did not require contractors to meet those goals or show good faith efforts to do so. Figure ES-3 presents disparity analysis results for state-funded WSDOT transportation contracts by study period year.

**Figure ES-3.**  
**Disparity indices for**  
**WSDOT state-funded**  
**transportation**  
**contracts by study**  
**period year**

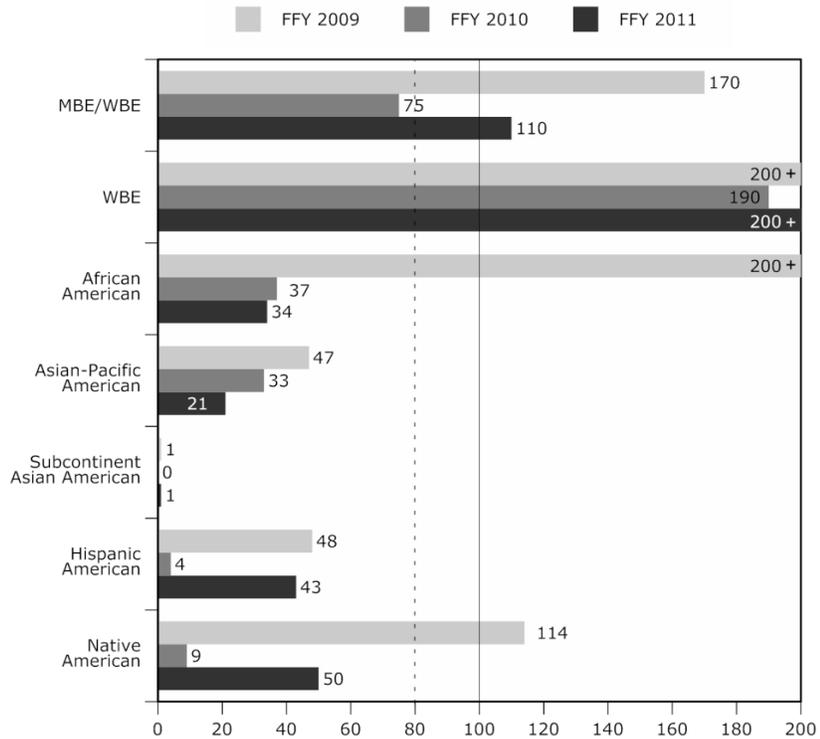
Note:

Number of prime contracts/subcontracts analyzed was 759 for FFY 2009, 798 for FFY 2010, and 507 for FFY 2011.

See Figures K-17, K-18, and K-19 for corresponding disparity results tables.

Source:

BBC Research & Consulting availability and utilization analyses.



- All MBE groups showed substantial disparities on state-funded contracts after FFY 2009.
- African American-owned businesses and Native American-owned businesses were the only two MBE groups that did not show substantial disparities on state-funded contracts in FFY 2009.<sup>9</sup>
- WBEs did not show substantial disparities in any year of the study period on state-funded contracts.

**Transportation-related engineering contracts.** During the study period, WSDOT and local agencies only used race- and gender-neutral measures to encourage MBE/WBE/DBE participation on engineering contracts. They did not apply contract-specific DBE goals or voluntary MBE/WBE goals to any engineering contracts, regardless of funding source.

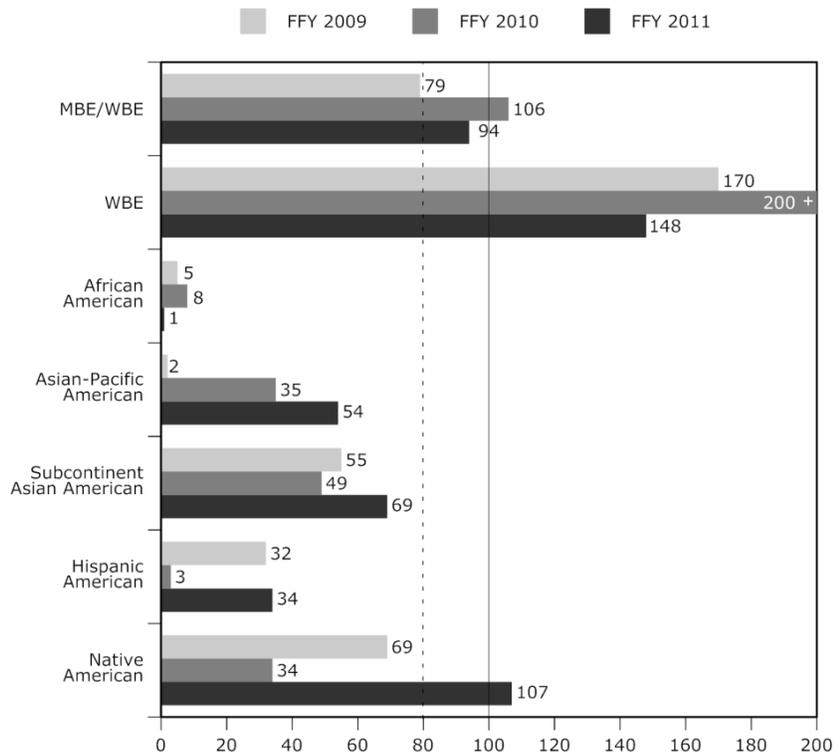
<sup>8</sup> WSDOT used to apply race- and gender-conscious contract goals to certain state-funded contracts. However, Initiative 200, passed by Washington voters in 1998, prohibited state agencies from applying race- and gender-conscious measures to those contracts.

<sup>9</sup> Virtually all of the dollars that went to African American-owned businesses on state-funded contracts in FFY 2009 (\$19.3 million of \$19.6 million) went to a single African American-owned electrical contracting firm that was not DBE certified.

Figure ES-4 presents disparity analysis results for WSDOT and local agency engineering contracts by study period year.

- All MBE groups showed substantial disparities on transportation-related engineering contracts in every year of the study period with the exception of Native American-owned businesses in FFY 2011.
- WBEs did not show substantial disparities on transportation-related engineering contracts in any year of the study period.

**Figure ES-4.**  
**Disparity indices for**  
**WSDOT and local**  
**agency transportation-**  
**related engineering**  
**contracts (FHWA- and**  
**state-funded) by study**  
**period year**



Note:  
 Number of prime contracts/subcontracts analyzed was 690 for FFY 2009, 948 for FFY 2010, and 659 for FFY 2011. See Figures K-34, K-35, and K-36 for corresponding disparity results tables.

Source:  
 BBC Research & Consulting availability and utilization analyses.

**FHWA-funded construction contracts from 2005-2006.** BBC also analyzed FHWA-funded construction contracts that WSDOT and local agencies awarded between May 9, 2005 and September 30, 2006. WSDOT did not set DBE contract goals on its FHWA-funded contracts during that time period in response to the May 2005 *Western States Paving Company vs. Washington State DOT* court decision.

Figure ES-5 presents overall disparity analysis results for FHWA-funded construction contracts that WSDOT and local agencies awarded between May 9, 2005 and September 30, 2006. Overall, MBE/WBEs did not exhibit a substantial disparity on those contracts (disparity index of 96). However, results varied for individual MBE/WBE groups:

- Three MBE groups exhibited substantial disparities on FHWA-funded construction contracts in 2005-2006 — African American-owned businesses (disparity index of 40), Subcontinent American-owned businesses (disparity index of 0), and Hispanic American-owned businesses (disparity index of 41).

- Native American-owned businesses exhibited a disparity index of 84 on those contracts, somewhat higher than the threshold of 80 that some courts use as an indicator of a substantial disparity.
- Neither WBEs (disparity index of 155) nor Asian-Pacific American-owned businesses (disparity index of 182) exhibited disparities on those contracts.

**Figure ES-5.**  
**Disparity indices for**  
**WSDOT FHWA-funded**  
**construction contracts,**  
**May 2005 – September**  
**2006**

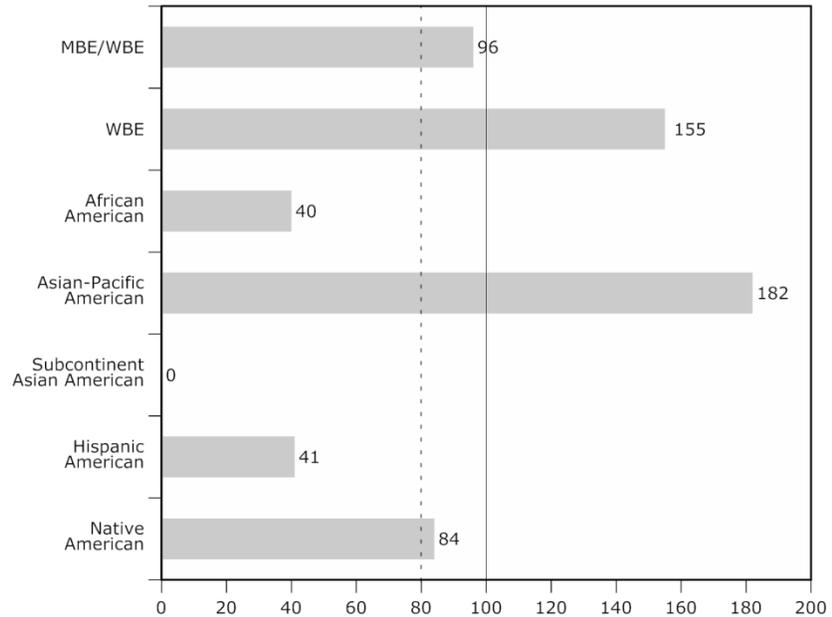
Note:

Number of prime contracts/subcontracts analyzed was 1,005.

For more detail and results by group, see Figure K-42 in Appendix K.

Source:

BBC Research & Consulting availability and utilization analyses.



**Other information.** The study team also examined information concerning the local marketplace, including results by MBE/WBE group, as part of the disparity study. WSDOT should review the full disparity study report, as well as other information it may have, in determining whether it needs to use any race- or gender-conscious measures, and if so, in determining which racial/ethnic and gender groups should be considered eligible for those measures.

## Overall DBE Goal

According to 49 CFR Part 26, an agency is required to develop and submit an overall aspirational percentage goal for DBE participation. The goal must be based on demonstrable evidence of the availability of DBEs relative to the availability of all businesses to participate on the agency's USDOT-funded contracts. The agency must try to meet the goal using race- and gender-neutral means and, if necessary, race- and gender-conscious means (or a combination of both).<sup>10</sup>

As specified in the Final Rule effective February 28, 2011, an agency is required to submit its overall DBE goal every three years.<sup>11</sup> However, the overall DBE goal is an *annual* goal in that an agency must monitor DBE participation in its USDOT-funded contracts every FFY. If DBE participation for a particular FFY is less than the overall DBE goal for that year, then the agency

<sup>10</sup> 49 CFR Sections 26.45, 26.51.

<sup>11</sup> <http://www.gpo.gov/fdsys/pkg/FR-2011-01-28/html/2011-1531.htm>.

must analyze the reasons for the difference, and establish specific measures to address the difference and enable the agency to meet the goal in the next FFY.

WSDOT must prepare and submit an overall DBE goal that is supported by information about the steps that it used to develop the goal. WSDOT is required to next submit a goal for FFYs 2015 through 2017. However, the agency intends on using information from the disparity study to amend its overall DBE goal for FFYs 2012 through 2014.

Federal regulations require WSDOT to establish its overall DBE goal using a two-step process:

1. Determine a base figure; and
2. Consider a “step-2” adjustment.

**Determine a base figure.** Establishing a base figure is the first step in calculating an overall DBE goal for WSDOT’s FHWA-funded transportation contracts. BBC calculated the base figure by measuring the availability of “potential DBEs” — that is, MBE/WBEs that are DBE-certified or appear that they could be DBE-certified based on revenue requirements described in 49 CFR Part 26. BBC examined the availability of potential DBEs for FHWA-funded prime contracts and subcontracts that WSDOT and local agencies awarded during the study period. BBC’s approach to calculating WSDOT’s base figure is consistent with relevant court decisions, federal regulations, and USDOT guidance.

BBC’s analysis indicates that the availability of potential DBEs for WSDOT’s FHWA-funded transportation contracts is 8.4 percent. WSDOT might consider 8.4 percent as the base figure for its overall goal for DBE participation.<sup>12</sup>

**Considering a “step-2” adjustment.** The Federal DBE Program requires that an agency consider a step-2 adjustment to its base figure as part of determining its overall DBE goal. Factors that an agency should assess in determining whether to make a step-2 adjustment include:

- Current capacity of DBEs to perform agency work, as measured by the volume of work DBEs have performed in recent years;
- Information related to employment, self-employment, education, training, and unions;
- Any disparities in the ability of DBEs to get financing, bonding, and insurance; and
- Other relevant data.<sup>13</sup>

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<sup>12</sup> WSDOT should consider whether the types, sizes, and locations of FHWA-funded contracts that the agency anticipates awarding in the time period that the goal will cover will be similar to the types of FHWA-funded contracts that the agency awarded during the study period.

<sup>13</sup> 49 CFR Section 26.45

Based on information from the disparity study, there are several reasons why WSDOT might consider a higher overall DBE goal than the 8.4 percent base figure:

- WSDOT utilization reports for FFYs 2009 through 2011 indicate median annual DBE participation of 9.4 percent for those years, which is higher than the 8.4 percent base figure. Consistent with USDOT “Tips for Goal-Setting,” WSDOT might consider averaging the 8.4 percent base figure and the 9.4 percent past median DBE participation for an overall DBE goal of 8.9 percent.<sup>14</sup>
- WSDOT might consider making an upward adjustment to its base figure ranging up to 11.6 percent to account for barriers to business ownership that minorities and women appear to face in the Washington transportation contracting industry (for details, see Chapter 9). Such an adjustment would correspond to a “determination of the level of DBE participation you would expect absent the effects of discrimination.”<sup>15</sup>
- BBC examined the availability of potential DBEs for FHWA-funded transportation-related construction contracts that WSDOT and local agencies awarded between May 9, 2005 and September 30, 2006. Those contracts were awarded prior to the economic downturn of 2008 and were not affected by American Recovery and Reinvestment Act funds. The types and sizes of transportation contracts that WSDOT and local agencies awarded during that time period may be more representative of the overall mix of FHWA-funded transportation contracts that WSDOT and local agencies anticipate awarding in the future. Potential DBEs would have been available for 14.9 percent of WSDOT’s FHWA-funded transportation prime contract and subcontract dollars between May 9, 2005 and September 30, 2006. If WSDOT determines that the mix of the types and sizes of contracts in that time period is representative of future FHWA-funded contracts, then it might consider an upward adjustment to its base figure ranging up to 14.9 percent.
- WSDOT might consider an upward adjustment based on the evidence of barriers that affect minorities, women, and MBE/WBEs in obtaining financing, bonding, and insurance; evidence that certain groups of MBE/WBEs are less successful than comparable non-Hispanic white male-owned businesses; and reported adverse effects of Initiative 200 on MBE/WBEs.
- If WSDOT chose to average the base figure of 8.4 percent, the 9.4 percent past median DBE participation, the 11.6 percent adjusted base figure to account for barriers in business ownership, and the 14.9 percent availability for contracts between May 9, 2005 and September 30, 2006, the result would be an overall goal of 11.1 percent (such averaging would be consistent with certain approaches outlined in “Tips for Goal-Setting”).

USDOT “Tips for Goal-Setting” states that an agency is not required to make a step-2 adjustment to its base figure as long as it can explain what factors it considered and can explain its decision in its Goal and Methodology document.

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<sup>14</sup> Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program, <http://www.osdbu.dot.gov/dbeprogram/tips.cfm>.

<sup>15</sup> 49 CFR Section 26.45 (b).

## Whether the DBE Goal Can be Achieved Through Neutral Means

The Federal DBE Program requires WSDOT to assess the percentage of its overall DBE goal that can be achieved through race- and gender-neutral measures, and if necessary, the percentage that can be achieved through race- and gender-conscious measures. USDOT offers guidance concerning how transportation agencies should project the portions of their overall DBE goals that will be met through race- and gender-neutral and race- and gender-conscious measures. USDOT suggests examining four general questions:

1. Is there evidence of discrimination within the local transportation contracting marketplace for any racial/ethnic or gender groups?
2. What has been the agency's past experience in meeting its overall DBE goal?
3. What has DBE participation been when the agency did not use race- or gender-conscious measures?
4. What is the extent and effectiveness of race- and gender-neutral measures that the agency could have in place for the next fiscal year?

**1. Is there evidence of discrimination within the local transportation contracting marketplace for any racial/ethnic or gender groups?** As discussed in detail in Chapter 4, BBC examined conditions in the Washington marketplace, including:

- Entry and advancement;
- Business ownership;
- Access to capital, bonding, and insurance; and
- Success of businesses.

There was quantitative evidence of disparities for MBE/WBEs overall, and for specific groups, concerning the above issues. Qualitative information also indicated some evidence of discrimination affecting the local marketplace. However, some minority and female business owners that the study team interviewed as part of the disparity study did not think their businesses had been affected by any race- or gender-based discrimination.

### 2. What has been the agency's past experience in meeting its overall DBE goal?

Figure ES-6 presents the participation of certified DBEs on WSDOT transportation contracts in recent years, as presented in WSDOT reports to USDOT. As shown in Figure ES-6, WSDOT has not met its DBE goal in recent years based on awards and commitments to DBE-certified businesses.

**Figure ES-6.**  
**WSDOT reported past certified DBE participation on FHWA-funded contracts, FFYs 2009, 2010, and 2011**

Source:

Commitments/Awards reported on WSDOT Uniform Reports of DBE Awards/Commitments and Payments.

FFY	DBE attainment	Annual DBE goal	Difference
2009	9.4 %	15.9 %	-6.5 %
2010	11.6	15.5	-3.9
2011	6.5	15.5	-9.0

**3. What has DBE participation been when the agency did not use race- or gender-conscious measures?** BBC analyzed a broad range of information to examine certified DBE participation when WSDOT has not applied contract-specific DBE goals.

**WSDOT’s utilization of DBEs on state-funded contracts.** During the study period, WSDOT applied contract-specific DBE goals to many FHWA-funded contracts but did not apply DBE goals to any state-funded contracts. Instead, WSDOT applied voluntary MBE/WBE goals to many state-funded contracts, but did not require contractors to meet those goals or show good faith efforts to do so. Overall, certified DBEs received 2.0 percent of the state-funded transportation contract dollars that WSDOT awarded during the study period.

**WSDOT’s utilization of DBEs on engineering contracts.** WSDOT only used race- and gender-neutral measures to encourage MBE/WBE/DBE participation on engineering contracts during the study period. WSDOT did not apply contract-specific DBE goals or voluntary MBE/WBE goals to any engineering contracts, regardless of funding source. Overall, certified DBEs received 2.6 percent of the transportation-related engineering contract dollars that WSDOT awarded during the study period.

**WSDOT’s utilization on FHWA-funded construction contracts without goals.** BBC analyzed DBE utilization on FHWA-funded construction contracts that WSDOT and local agencies awarded between May 9, 2005 and September 30, 2006. WSDOT did not set DBE contract goals or use any other race-or gender-conscious measures on its USDOT-funded contracts during that time period in response to the May 2005 *Western States Paving Company vs. Washington State DOT* court decision. Overall, certified DBEs received 5.4 percent of the dollars on those contracts.

**WSDOT’s utilization of DBEs on Public Transportation Division (PTD) contracts.** WSDOT administers some FTA-funded construction and engineering contracts through its PTD division. PTD awards FTA-funded grants to local agencies, and they use some of that grant money to fund construction and engineering projects, such as installing bus shelters and building or redesigning transit stations. Local agencies only used race- and gender-neutral measures to encourage MBE/WBE/DBE participation on engineering contracts during the study period. BBC’s analyses indicated that there was no utilization of certified DBEs on those contracts during the study period.

**4. What is the extent and effectiveness of race- and gender-neutral measures that the agency could have in place for the next fiscal year?** When WSDOT is considering the extent to which it could meet its overall DBE goal through race- and gender-neutral measures, it will need to review race- and gender-neutral measures that are already in place as well as neutral measures that it has planned or that could be considered for future implementation. The study team reviewed many of WSDOT’s current and planned measures as well as those of other organizations in Washington. The neutral measures that WSDOT and other local agencies currently have in place are extensive. WSDOT plans on continuing to use those measures in the future as well as implementing additional program measures (for details, see Chapter 10). There were several recommendations that business owners and managers made related to those measures as part of in-depth anecdotal interviews, stakeholder meetings, public meetings, and public hearings (for details, see Appendix J).

## Measures to Implement the Program

Chapter 11 reviews USDOT requirements for implementation of the Federal DBE Program and identifies potential areas for further WSDOT refinement. Three key potential areas of refinement are discussed below.

**Encourage firms to become DBE-certified.** Participation of certified DBEs would be higher if more MBE/WBEs that participate on, or are potentially available for, WSDOT and local agency prime contracts and subcontracts would become DBE certified. For example, only 25 percent of the MBE/WBEs that the study team included in the availability database are certified as DBEs (as of January 2012). Many businesses participating in in-depth interviews, public meetings, or public hearings commented on the DBE certification process. Although some business owners gave favorable comments about the OMWBE certification process, several business owners were highly critical about the difficulties and time requirements associated with certification. Some interviewees also said that OMWBE is unfair in its treatment of WBEs that seek DBE certification.

- It appears that many businesses and local agencies are confused about the multiple SBE, MBE, WBE, and DBE programs that Washington agencies operate.
- Representatives of some MBE/WBEs reported that their companies were not DBE-certified because they perceived the process to be difficult or that there would be little benefit from certification.
- Some interviewees reported that they had inquired about certification and were dissuaded from becoming certified after learning about the time and effort required, or about the difficulties for WBEs to become certified if family members were also involved in their businesses.

WSDOT is currently working with OMWBE to develop measures that will further encourage MBE/WBEs that are not DBE-certified to become certified. WSDOT might consider more effectively communicating information about the Federal DBE Program, particularly information about the benefits of DBE certification. It may be effective for WSDOT to coordinate with local agencies that operate similar programs and to verify that the information that OMWBE provides is accurate and current. WSDOT might also consider encouraging OMWBE to examine its staffing, training, and information systems to improve its implementation of the DBE certification process as well as other aspects of the Federal DBE Program.

**Need for separate accounting for participation of potential DBEs.** In accordance with guidance in the Federal DBE Program, BBC's analysis of the overall DBE goal was based on the combination of DBEs that are currently certified and on MBE/WBEs that could *potentially* be certified. One reason that WSDOT has not met its overall DBE goal in past years, and might not meet it in the future, is that its measurement of DBE participation only includes businesses that are DBE-certified, in accordance with federal regulations. MBE/WBEs that are not DBE-certified are considered in the overall DBE goal but are not counted in the participation reports that are used to measure whether WSDOT has met its overall DBE goal.

USDOT permits agencies to explore whether one reason why they have not met their overall DBE goals is because they are not counting the participation of potential DBEs. USDOT might expect an agency to explore ways to further encourage potential DBEs to become DBE certified as one

way of closing the gap between reported DBE participation and its overall DBE goal. In order to have the information to explore that possibility, WSDOT might consider:

- Developing a system to collect information on the race/ethnicity and gender of the owners of all businesses — not just certified DBEs — that participate in WSDOT and Local Programs contracts;
- Developing internal participation reports of MBE/WBEs (by race/ethnicity and gender) and of businesses currently and potentially DBE-certified (based on race/ethnicity and gender of ownership; annual revenue; and other factors such as whether the firm has been denied DBE certification in the past), for both WSDOT and Local Programs contracts; and
- Continuing to track participation of certified DBEs on FHWA-funded WSDOT and Local Programs contracts, per WSDOT reporting requirements.

**Exploration of alternative approaches to current DBE contract goals program.** Some individuals participating in in-depth interviews, public hearings, and public meetings suggested that WSDOT should explore new ways of implementing the Federal DBE Program that better achieve the objective of further developing MBE/WBEs. They reported that DBE contract goals and the good faith efforts process encourage extensive efforts on the part of prime contractors to document that they have contacted DBEs about subcontracting opportunities, but that the nature of the bidding process makes it difficult to ensure meaningful and substantial participation of DBEs on those contracts.

Issues that participants identified include the following:

- Challenges related to unbundling subcontract elements ahead of time into sizes suitable for DBEs;
- Difficulties meeting DBE contract goals that some prime contractors reported are too high, given the work involved with certain projects and the locations of those projects;
- Difficulties associated with obtaining quotes from DBEs and including them in bid submissions in the final minutes before a bid deadline;
- Tendencies of prime contractors to look to DBEs to perform portions of projects that are easily separated in overall bid packages (e.g., trucking);
- Allegations that prime contractors often use front companies to meet DBE contract goals; and
- Challenges associated with selecting DBE subcontractors even if their quotes are higher than those of other subcontractors.

Comments about the Federal DBE Program included the following examples (for details, see Appendix J):

- Several participants indicated that the current DBE contract goals program produces an incentive for prime contractors to use perfunctory good faith efforts processes to comply with the program rather than to seek meaningful participation of DBEs on a project.

- Some owners of smaller DBEs said that new certification size standards were allowing larger DBEs to remain in the program, which adversely affects their businesses. They urged WSDOT to consider steps to limit the program to “true” small businesses.
- Some business owners reported that only a few DBEs get most of the work at the expense of other DBEs.
- Some interviewees reported that front companies have been a barrier to legitimate DBEs.
- Some representatives of non-Hispanic white male-owned businesses and non-certified MBE/WBEs said that WSDOT should eliminate the use of DBE contract goals. Some said that WSDOT should consider using small business goals or other race- and gender-neutral efforts instead of using DBE contract goals.
- Some owners and managers of non-Hispanic white male-owned businesses said that DBE contract goals made it very difficult for their businesses to obtain WSDOT subcontracts.

WSDOT might review such concerns further when evaluating ways to improve its current implementation of the Federal DBE Program. It should also review legal issues, including state contracting laws and whether certain program options would meet USDOT regulations.

## **Next Steps**

The disparity study represents an independent analysis of information related to WSDOT’s implementation of the Federal DBE Program. WSDOT should review study results and other relevant information in connection with making decisions concerning its implementation of the Federal DBE Program.

Chapter 11 of the disparity study report provides additional information concerning program elements for WSDOT’s consideration. USDOT periodically revises elements of (and regulations related to) the Federal DBE Program and issues guidance concerning implementation of the program. In addition, new court decisions provide insights related to the proper implementation of the Federal DBE Program. WSDOT should closely follow such developments.