
2016 Hawai'i Department of Transportation
Civil Rights Symposium

Annual Goal Setting in the DBE Program

Colette Holt
Attorney at Law

28 January 2016

Legal Standards for DBE Goal Setting

- DBE goals must be “narrowly tailored”
- DBE annual overall goal must be based upon evidence of DBE availability in the recipient’s market area
 - Geographic market
 - Product market
- In 9th Circuit, recipient must have evidence for each group’s inclusion for contract goal setting

DBE Program Requirements

- 49 C.F.R. § 26.45 (b)
 - “Your overall goal must be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on your DOT-assisted contracts (hereafter, the “relative availability of DBEs”). The goal must reflect your determination of the level of DBE participation you would expect absent the effects of discrimination.”

DBE Program Requirements, cont.

- Two step process
 - 49 C.F.R. § 26.45 (c)
 - “Step 1. You must begin your goal setting process by determining a base figure for the relative availability of DBEs. The following are examples of approaches that you may take toward determining a base figure....
 - (1) Use DBE Directories and Census Bureau Data....
 - (2) Use a bidders list....
 - (3) Use data from a disparity study....
 - (4) Use the goal of another DOT recipient....
 - (5) Alternative methods. ”

DBE Program Requirements, cont.

- 49 C.F.R. § 26.45 (d)
 - “Step 2. Once you have calculated a base figure, you must examine all of the evidence available...to determine what adjustment, if any, is needed to the base figure.....
 - (1) There are many types of evidence that must be considered when adjusting the base figure. These include:
 - (i) The current capacity of DBEs to perform work...as measured by the volume of work DBEs have performed...; use median past participation
 - (ii) Evidence from disparity studies conducted anywhere within your jurisdiction...; and
 - (iii) If your base figure is the goal of another recipient, you must adjust it for differences in your local market and your contracting program.

DBE Program Requirements, cont.

- (2) You may also consider available evidence from related fields that affect the opportunities for DBEs to form, grow and compete. These include, but are not limited to:
 - (i) Statistical disparities in the ability of DBEs to get the financing, bonding and insurance required to participate in your program;
 - (ii) Data on employment, self-employment, education, training and union apprenticeship programs, to the extent you can relate it to the opportunities for DBEs to perform in your program.

DBE Program Requirements, cont.

- (3) If you attempt to make an adjustment to your base figure to account for the continuing effects of past discrimination (often called the "but for" factor) or the effects of an ongoing DBE program, the adjustment must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought."

DBE Program Requirements, cont.

- 49 C.F.R. § 26.45 (e)(3)
 - “[The] FHWA, FTA or FAA Administrator may permit or require you to express your overall goal as a percentage of funds for a particular grant or project or group of grants and/or projects, including entire projects. Like other overall goals, a project goal may be adjusted to reflect changed circumstances, with the concurrence of the appropriate operating administration.
 - by a project goal, is calculated.

DBE Program Requirements, cont.

- (i) A project goal is an overall goal, and must meet all the substantive and procedural requirements of this section pertaining to overall goals.
- (ii) A project goal covers the entire length of the project to which it applies.
- (iii) The project goal should include a projection of the DBE participation anticipated to be obtained during each fiscal year covered by the project goal.
- (iv) The funds for the project to which the project goal pertains are separated from the base from which your regular overall goal, applicable to contracts not part of the project covered by a project goal, is calculated.

DBE Program Requirements, cont.

- 49 C.F.R. § 26.45 (g)(1) (Public Participation Requirement)
 - “(g) (1) Consultation with minority, women's and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and your efforts to establish a level playing field for the participation of DBEs.
 - (2) A published notice [is required]...”

DBE Program Requirements, cont.

- Single DBE Goal
 - “(h) Your overall goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.”

DBE Program Requirements, cont.

- Race-Neutral/Race-Conscious Projection
 - 26.51(a)
 - “You must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures or is awarded a subcontract on a prime contract that does not carry a DBE contract goal.”
 - 26.51(c)
 - A recipient must also submit “your projection of the portion of the goal that you expect to meet through race-neutral means and your basis for that projection.”

DBE Program Requirements, cont.

- Race-Neutral/Race-Conscious Projection
 - 26.51(d)
 - “You must establish contract goals to meet any portion of your overall goal you do not project being able to meet using race-neutral means..”

USDOT Guidance

- Step 1
 - Don't use past participation
 - Use the most refined data available
 - Supplement the DBE Directory
 - Explain the geographic market area
 - Conduct an “apples to apples” comparison
 - Use weighting
 - Factor information regarding certification
 - Don't adjust solely on the amount of federal dollars

USDOT Guidance, cont.

- Step 2
 - Past participation
 - If step 1 base figure & past participation are similar, then don't make an adjustment
 - Factor in changes in the type and/or size of contracts
 - Permissible to average step 1 & median past participation
 - Any other factors must be quantified & applied to both DBEs & non-DBEs

USDOT Guidance, cont.

- Race-Neutral Projection
 - Consider
 - By how much past goals were exceeded
 - DBE prime contractor participation
 - DBE subcontractor participation on contracts without goals
 - D/M/WBE participation in state or local programs
 - Concrete plans to implement new race-neutral measures
 - Past history of inability to meet goals
 - Do not double count evidence

DBE Goal Setting Methods

- DBE Directory Divided by County Business Pattern Data
 - Pros
 - Free
 - Easy
 - Cons
 - Apples to oranges comparison
 - Statutorily defined term over general measure in the economy
 - USDOT guidance says go beyond your directory
 - CBD measures all establishments
 - Leads to unrealistically low goal

DBE Goal Setting Methods, cont.

- Bidders List
 - Pros
 - Easy
 - Free
 - Cons
 - Not entire possible market
 - May be underinclusive if DBEs think the agency isn't receptive
 - May be overinclusive if the agency is the only game in town
 - What about subcontractors?

DBE Goal Setting Methods, cont.

- Goal of another recipient
 - Pros
 - Easy
 - Free
 - Cons
 - How close is the geographic & industry markets fit?
 - Pottery Barn rule

DBE Goal Setting Methods, cont.

- Disparity Study
 - Pros
 - Defensible (possibly)
 - Should provide data for contract goal setting
 - Recommendations for program improvements, including race-neutral measures
 - Cons
 - Expensive
 - Time consuming

Race-Neutral Projection

- Past race-neutral participation
 - Average over 3-5 years
 - Any outliers?
- Major increase in small business elements & enhanced race-neutral support programs?
- Change in contracting mix?
 - Larger projects with more subcontracting opportunities?
 - Smaller contracts with DBE prime possibilities?

Goal Setting Issues

- Step 1 base figure
 - Need a defensible methodology as the litigation has moved to the program implementation level
 - Be sure you can explain why you did what you did
 - “Show your work” & explain the reasoning for each step
 - Do not mix methods

Goal Setting Issues, cont.

- Step 2 “but for” adjustment
 - Conceptually, the goal must increase
 - Must be able to be quantified
 - What data?
 - Mixing data sources?
 - What has been the historical utilization?
 - No case has upheld an adjustment

Colette Holt

Attorney at Law

3350 Brunell Drive

Oakland, CA 94602

773.255.6844

colette.holt@mwbellow.com

@mwbellow

Colette Holt

& Associates