

SECTION X.

Summary

As part of its implementation of the Federal DBE Program, Caltrans must set an overall goal for DBE participation, determine the portion of the overall goal it will attempt to meet through neutral versus race- and gender-conscious means, and consider specific measures it will use to execute the Program.

Overall Annual DBE Goal

The Federal DBE Program calls for a “base figure analysis” and consideration of any “step 2” adjustments in deriving an overall annual goal for DBE participation in federally-funded contracts.

Base figure analysis. After considering type, contract role, location and size of work involved in federally-funded projects and the relative availability of firms to perform that work, BBC determined that 17.6 percent of dollars on federally-funded contracts would go to minority- and women-owned firms (MBE/WBEs) if available MBE/WBEs received the same amount of work as similarly-situated majority-owned firms available for such work.

Many minority- and women-owned firms are not currently DBE certified, and some of the largest MBE/WBEs might not meet the federal eligibility requirements for DBE certification. After removing the largest minority- and women-owned firms from the analysis of potentially DBE-certified firms, the revised based figure analysis indicates 13.5 percent DBE utilization.

Step 2 adjustments. Caltrans could consider adjustments in the base figure through a “step 2” process. BBC reviewed relevant types of information for a step 2 adjustment that are outlined in the Federal DBE Program.

Based on the information compiled in the Caltrans disparity study, there are reasons to consider downward adjustments to the base figure and reasons to consider upward adjustments to the base figure. It will be difficult for Caltrans to encourage the many non-DBE-certified firms to apply for certification. However, other information indicates barriers to entry into the California construction and engineering industries, low rates of business ownership for certain groups working in the industries, lower business earnings and other barriers for minority- and women-owned firms including access to capital.

Caltrans should review information factors indicating downward adjustments in the base figure and factors indicating upward adjustments in the base figure.

Caltrans should include all of the above information in its consideration of a base figure and whether or not to make any step 2 adjustment when determining an overall annual goal for DBE participation.¹

Percentage of the Annual Goal to be Achieved through Neutral Means

The Federal DBE Program requires Caltrans to assess the percentage of its overall annual DBE goal that can be achieved through neutral means, and if necessary, the percentage to be achieved through race- and gender-conscious measures.

Evidence of disparities when Caltrans implements an all-neutral program. BBC compared utilization and availability of minority- and women-owned firms for both state-funded contracts and for federally-funded contracts.

State-funded contracts. Because Caltrans has operated a solely neutral program for state-funded transportation contracts since 1998, analysis of these contracts suggests how closely utilization matches availability in an all-neutral environment. BBC found that MBE/WBE utilization on state-funded contracts reached only 59 percent of what would be expected based on MBE/WBE availability for these contracts for 2002 through 2006.

Federally-funded contracts after May 1, 2006. BBC also examined MBE/WBE utilization and availability for federally-funded contracts for May through December 2006, after Caltrans discontinued DBE contract goals. Based on the limited number of federally-funded prime contracts and subcontracts during this time period, it appears that overall MBE/WBE utilization was relatively unchanged for the eight months following adoption of an all race- and gender- neutral program. MBE/WBE utilization was about 87 percent of what would be expected based on availability for the particular contracts and subcontracts in this time period, similar to the level prior to discontinuing the DBE contract goals.

It may be too early to tell whether or not MBE/WBE utilization on federally-funded contracts will continue at this level or whether utilization will decline to what has been found for state-funded contracts. Caltrans should closely monitor utilization of minority- and women-owned firms as well as certified DBEs on both federally-funded and state-funded contracts after December 2006, the end of the time period for the utilization analysis in the BBC Disparity Study.

Past effectiveness of the DBE contract goals program. Even with the DBE contract goals program, there were disparities between overall utilization and availability of minority- and women-owned firms in federally-funded contracts. MBE/WBE utilization was about 83 percent of what would be expected based on relative availability for those contracts.

¹ As discussed in Appendix J, BBC analyzed information on contracts using Federal Transit Administration funds administered through Caltrans and recommends that Caltrans not apply the availability information presented here to develop an overall annual goal for DBE participation on FTA-funded contracts. Caltrans should consider adopting the overall national DBE goal for these contracts until it develops a bidders list that includes firms available for FTA-funded activities.

Other disparity analysis. Beyond these analyses of overall utilization and availability of minority- and women-owned firms, BBC examined quantitative information concerning the California marketplace and the relative use of minority- and women-owned firms for specific types and locations of Caltrans contracts. BBC conducted disparity analysis by specific race/ethnicity/gender ownership of firms. This analysis found evidence of disparities for each race/ethnic/gender group of MBE/WBEs included in the Federal DBE Program for certain elements of transportation construction or engineering contracts. There is also some evidence of disparities in each of the 12 Caltrans districts.

Disparities between utilization and availability were often most severe for African American, Asian-Pacific American and Native American-owned firms. For example, African American-owned firms received only 15 cents of every dollar expected on state-funded construction and engineering contracts after considering the availability of African American-owned firms for specific components of these contracts. Similar levels of disparities were found for certain types of work for Asian-Pacific American- and Native American-owned firms. (Based on the Ninth Circuit decision in *Western States Paving v. WSDOT*, if Caltrans chooses to implement any race- or gender-conscious remedies, it must review the evidence for each minority group and for women to determine the specific groups eligible for certain remedies.)

Other quantitative information. BBC presented information indicating barriers to entry and success for minorities and women in the California construction and engineering industries that Caltrans should review as part of any consideration of step 2 adjustments in the overall DBE goal. This information should also be reviewed in considering types of remedies Caltrans should pursue in its implementation of the Federal DBE Program.

Qualitative information. The disparity study team collected and reviewed qualitative information from in-depth personal interviews conducted with minority-, women- and majority-owned firms across the state, from oral and written testimony at public hearings held by Caltrans, and from other sources. Although there were some instances in which minority and female business owners reported that they were treated differently because of their race or gender, many minority and female business owners identified disadvantages pertaining to the size and age of their firms.

Opportunities to prove quality of work. Some minority and female business owners who seek subcontracts frequently reported that it is difficult to obtain opportunities with prime contractors who are not familiar with their work. Once they have a track record with a prime contractor, the prime often continues to consider them for work. For some MBE/WBEs, the past DBE contract goals program provided an opportunity to prove the quality of their work to prime contractors who otherwise would not have considered using their firms.

Abuse of good faith efforts process. A number of people who provided input through interviews or testimony said that some prime contractors abused the past good faith efforts process related to Caltrans' DBE subcontracting goals program. They reported that prime contractors would send notices of subcontracting opportunities to DBEs to just be able to document that they had done so, but were not serious about using DBEs as subcontractors.

Barriers in obtaining prime contracts. Based on interviews and testimony, contract sizes and bonding requirements for Caltrans construction work often preclude small firms that bid as primes in the private sector from pursuing Caltrans prime contracts. It was also widely reported that Caltrans

favors large engineering firms with substantial Caltrans experience for its engineering work. Many firms complained that they could not win such work as prime consultants if they were not allowed to establish such as track record.

These size-related barriers appear to affect utilization of minority- and women-owned firms as prime contractors. There may be additional barriers beyond size of firm, however. BBC's statistical analysis indicated that disparities for minority- and women-owned firms persisted after controlling for size of contracts or certain aspects of firm "size" (for example, the disparity analysis controls for the size of contracts firms have performed or bid on in the past). Further, BBC cannot rule out that current "size" of business is unaffected by past discrimination. Even so, many of the firm owners providing anecdotal information as part of this study pointed to barriers other than race and gender discrimination.

Caltrans should review the extensive qualitative information provided by firm owners and others when considering implementation of the Federal DBE Program.

Caltrans implementation of neutral programs. The Federal DBE Program requires Caltrans to meet the maximum feasible portion of its overall goal by using race-neutral means of facilitating DBE participation. Results of BBC's review include the following:

1. Caltrans has implemented some of the types of neutral remedies suggested in the Federal DBE Program but not others.
2. Some neutral remedies are in place in some districts or regions of the state but not others.
3. Many of the barriers reported by minority- and women-owned firms suggest further neutral measures such as:
 - ▶ Better outreach and communication;
 - ▶ Additional technical assistance to small businesses and DBEs;
 - ▶ Redesigning contractor and consultant selection practices to provide more opportunities for small businesses seeking construction and engineering prime contracts; and
 - ▶ Bonding programs and other assistance to small businesses and DBEs.
4. Caltrans' past implementation of the Federal DBE Program did not bring utilization of minority- and women-owned firms on federally-funded contracts to the level expected based on relative availability of MBE/WBEs for this work.
5. Additional actions such as developing a bidders list and improved data collection, tracking and reporting are necessary to be able to fully measure success of neutral measures in opening opportunities for minority- and women-owned firms.

Caltrans should consider this and other information in the study in determining whether any portion of the overall annual goal for the next fiscal year should be achieved through race- or gender-conscious means.

Measures to Implement the Program

In the 2002 through April 2006 study period, Caltrans' DBE contract goals program did not fully address disparities between utilization and availability of minority- and women-owned firms on federally-funded contracts. Strong new measures are needed, especially programs to assist development of the minority- and women-owned business community and to open both prime contract and subcontract opportunities to smaller businesses.

BBC recommends multiple tiers of assistance depending upon the age, size, line of work and other business factors to make assistance most useful for firms in different stages of development. Caltrans should do more to increase utilization of emerging and more developed MBEs and WBEs, including those that are too large to be DBE-certified or otherwise have not sought DBE certification.

Caltrans needs additional metrics to track success beyond those suggested in the Federal DBE Program, including careful tracking of MBE/WBEs (not just DBE participation) in both federally-funded and state-funded contracts. For example, one measure of Caltrans' success should be the number of minority- and women-owned firms that grow too large to be eligible for DBE certification. To this end, Caltrans will need to refine its data collection systems in collaboration with local agencies. These steps are critical for Caltrans to be in compliance with the Federal DBE Program and ensure that it is not an active or passive participant in race or gender discrimination against minority- and women-owned firms.

Some of these additional efforts may already be in development at Caltrans. Because of its size and opportunities for innovation at the district level, Caltrans can evaluate "best practices" in certain districts and expand them across the organization. Other actions may require state legislation as well as coordination with other state agencies, local governments and private sector partners. Caltrans must continue to work as a partner with USDOT in these efforts.

Caltrans will need to devote additional resources to implementing neutral measures and to comprehensively tracking MBE/WBE and DBE utilization on both federally-funded and state-funded transportation contracts.