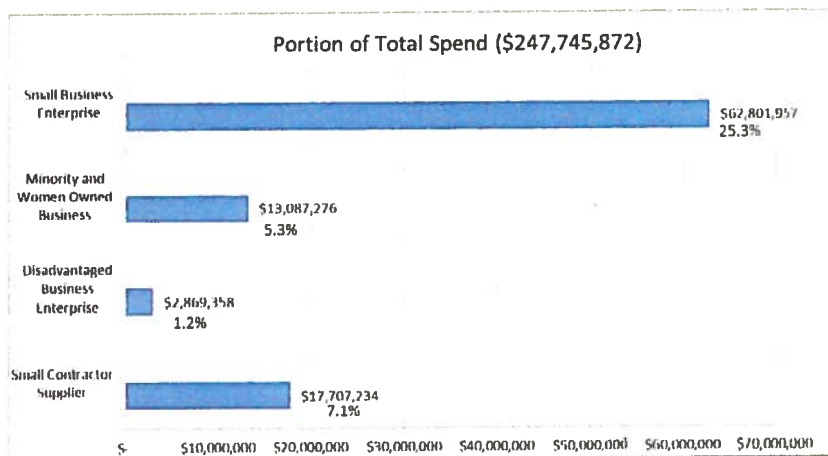
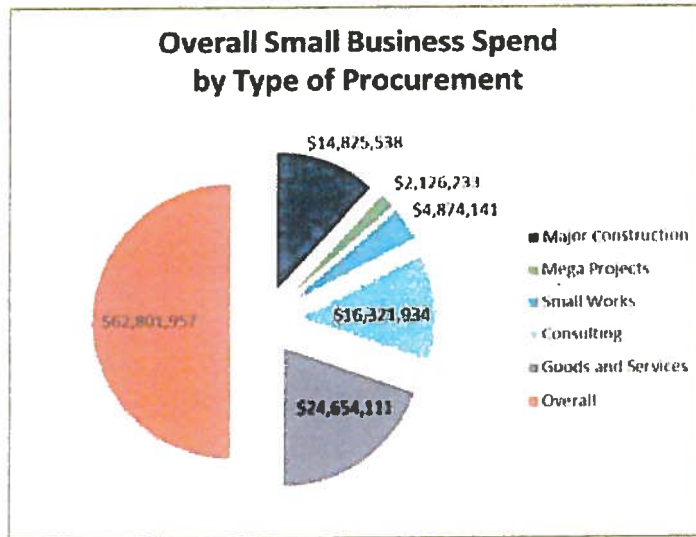




2016 Small Business Utilization Report



664
 Number of small businesses with which the Port conducted business

62.8 Million
 Total dollar amount of spend to small business

25.3 Percent
 Percent of small business spend to total Port spend

17.7 Million
 Total dollar spend with SCS firms

15.9 Million
 Total dollar spend with Minority, Woman and Disadvantaged Businesses

Washington State Department of Transportation Disparity Study 2017



Washington State
Department of Transportation

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HOLT
& ASSOCIATES

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I. Executive Summary

Colette Holt & Associates (CHA) was retained by the Washington State Department of Transportation (“WSDOT”) to perform a study in conformance with 49 C.F.R Part 26 to determine its utilization of disadvantaged, minority- and women-Owned Business Enterprises (“DBEs”), the availability of DBEs in its market area, any disparities between its utilization and DBE availability, and evaluate whether the use of race-conscious measures is supported by the results of this analysis. We were also tasked with making recommendations for the DBE program. We analyzed contract data for federal fiscal years (“FFYs”) 2012 through 2015.

A. Study Methodology and Data

The methodology for this study embodies the constitutional principles of *City of Richmond v. Croson*, *Adarand V. Pena*, Ninth Circuit Court of Appeals case law, U.S. Department of Transportation (“USDOT”) guidance, and best practices for designing race- and gender-conscious and small business contracting programs. The CHA approach has been specifically upheld by the federal courts. It is also the approach developed by Ms. Holt for the National Academy of Sciences that is now the recommended standard for designing legally defensible disparity studies.

We determined the Department’s utilization of DBEs, and the availability of DBEs in WSDOT’s geographic and industry market area. We then compared utilization to availability to calculate disparity ratios between those two measures. We further analyzed disparities in the wider economy, where affirmative action is rarely practiced, to evaluate whether barriers continue to impede opportunities for minorities and women when remedial intervention is not imposed. We gathered anecdotal data on DBEs’ experiences with the agency’s DBE program. We examined race- and gender-based barriers throughout the economy through focus groups with business owners and stakeholders, and interviews with agency staff. We also evaluated WSDOT’s DBE program for its effectiveness and conformance with strict constitutional scrutiny, the DBE program regulations and national standards for DBE programs.

Based on the results of these extensive analyses, we make recommendations for the Department’s DBE program for federal-aid contracts.

B. Study Findings

WSDOT’s DBE Program

Program Overview

As a recipient of US Department of Transportation (“USDOT”) funds through the Federal Highway Administration (“FHWA”) and the Federal Transit Administration (“FTA”), the Department is required as a condition of receipt to implement a DBE program in compliance with 49 C.F.R. Part 26.¹ The Department administers a DBE Program Plan based upon the samples and guidance from USDOT. This Plan has been approved by the relevant modal administrations. As part of the Plan, WSDOT is required to submit a

¹ 49 C.F.R. §§ 26.3 and 26.21.

triennial DBE to each USDOT modal administration. For federal fiscal years (“FFY”) 2014 through 2017, WSDOT’s FHWA-approved goal is 11.6 percent. For FTA-funded contracts, its proposed goal for FFYs 2014- through 2016 was 3.26 percent.

As required by 49 C.F.R. § 26.51, WSDOT sets contract goals to meet any portion of the overall DBE goal not projected to be met through race-neutral measures. To set contract goals, WSDOT evaluates the scopes of work of the project; the estimated percentage of those scopes; historical evidence of subcontractor utilization on similar projects, and the availability of ready, willing and able DBEs to perform the type(s) of subcontractable work (If there are fewer than three certified DBEs for one scope of work, within a reasonable mobilization distance, that scope is not be considered as DBE subcontractable work); and the Department’s progress towards meeting its overall, triennial goal.

Detailed Instructions to Bidders based on the standards of 49 C.F.R. Part 26 provide the requirements for the DBE program as part of the solicitation specifications. Bidders are required to submit a Disadvantaged Business Enterprise Utilization Certification form with the bid; failure to do so may cause the bid to be rejected as non-responsive.. Bidders may only count 50 percent of the work sublet as “force account;” 60 percent of dollars to be paid to Regular Dealers; and only the fees paid to brokers.

WSDOT conducts regular reviews to ensure that DBEs are performing a “commercially useful function” (“CUF”).

WSDOT passes through money from USDOT local agencies (often referred to as subrecipients in the federal regulation guidance and tips). Subrecipients are required to either adopt WSDOT’s DBE Participation Plan, or develop an equivalent plan.² Subrecipients must designate their own DBE Liaison Officer responsible to the chief executive of the agency. The Local Programs Project Development Engineer (“Local Engineer”) is to review each project to determine if it involves work elements that are conducive to DBE participation. Once established, local agencies are to follow WSDOT’s monitoring and compliance procedures, including on-site reviews to ensure the DBEs are performing a CUF, and submit monthly reports of the amounts credited as DBE participation.

The Department has set performance metrics for employees with responsibilities for the DBE program within the Human Resources Division’s Performance Management System.

To address complaints of discrimination under Title VI of the Civil Rights Act of 1964 and the DBE program regulations, WSDOT publishes External Complaint Procedures.

WSDOT has entered into an Interagency Agreement with the State’s Office of Minority and Women Business Enterprises (“OMWBE”) to delegate DBE certification to OMWBE.

To meet the requirement in § 26.39, Small Business Participation, WSDOT has established a race-neutral Small Business Program. Race-neutral measures employed by WSDOT include:

- “Unbundling” contracts to assist small firms to bid as prime contractors.
- Abbreviated procedures to prequalify contractors for contracts under \$100,000.
- A Small Works Roster program for contracts under \$300,000

² No local agencies have submitted their own plans.

- A Small Business Enterprise goal of 10 percent participation by SBEs certified by OMWBE on federal-funded design-bid-build contracts without DBE contract goals.
- The Safe Harbor program for small architectural and engineering firms to forgo the requirement to present audited financial statements.
- Materials to assist firms to navigate WSDOT's business processes.
- A Community Engagement Plan to guide the agency's interactions with stakeholders about all aspects of its operations.
- Training to employees and contractors on program compliance elements and procedures.
- Information sharing and outreach activities, including Information on how to do business with WSDOT and its various divisions.
- Networking events to facilitate relationships between DBEs and prime contractors on specific projects.
- The DBE Advisory Group to provide stakeholders with information about the program, and to provide feedback to WSDOT regarding roles responsibilities and other issues.
- DBE Supportive Services in conformance with 23 C.F.R. Part 230 and 49 C.F.R. Part 26, Appendix C, Business Development Programs, including general and firm specific training and technical assistance to help DBEs to become more competitive in the heavy highway construction industry.

Experiences with WSDOT's DBE Program

To explore the impacts of the Department's DBE program, we interviewed 202 individuals about their experiences and solicited their suggestions for changes.

Contract size and complexity. Many interviewees mentioned the size and complexity of WSDOT's projects as major barriers to participation by small firms in any role.

Payment. Complaints about slow payments came from all types of firms. This seemed to be a universal concern, mostly unrelated to DBE status. However, small firms were more negatively impacted by delayed payments. Providing forms for small firms to use to invoice WSDOT was one possible partial solution.

Obtaining WSDOT work: DBEs reported that the program remains necessary for them to obtain work with WSDOT. However, more monitoring of contract performance was recommended. Many DBEs believed that prime contractors do as little as possible to meet goals, and that the Department and local agencies need to be more vigilant about enforcing requirements. Some DBEs stated they had received support from WSDOT.

Experience and financial requirements: Many small firm owners reported it was difficult to become prequalified to work on WSDOT jobs. The requirements to have equipment and staff in place and to have already performed that level of project often made it impossible for them to compete. These criteria advantage incumbent and large firms. Many DBEs mentioned insurance requirements much higher than the cost of the job as a WSDOT-imposed restriction. Another important example is the requirement for audited financial statements to set rates for consultants. This was described as an unnecessary

expense for small firms. Even for large sophisticated firms, WSDOT's audit process was experienced as unduly and unusually burdensome. There was near universal consensus that while well intentioned, the Safe Harbor program to permit small architectural and engineering firms to become prequalified for a set time under a predetermined indirect cost rate does not help DBEs. The rate of 110 percent is too low to be profitable. Another issue is that consultants cannot mark up the rates for subconsultants, thereby requiring the prime firm to absorb the costs for training the DBE subconsultant.

DBE certification process: Participants who had sought certification were able to navigate the system. There was a general understanding that the certification process needs to be rigorous to ensure program integrity. However, several White women felt they were held to a higher standard than other applicants. Many DBEs reported a lack of knowledge of the highway construction industry by the OMWBE certification staff. Several interviewed, including non-DBEs, suggested more outreach, especially outside the Seattle area, to broaden the pool of certified firms.

Technical assistance and supportive services: Many DBEs have taken advantage of WSDOT's numerous outreach and assistance services. There was broad agreement that new and small firms need help to enter the highway industry and to perform on Department jobs. Non-DBEs often pointed to lack of business skills as a major issue for DBEs and their ability to use them to meet goals. The DBE program's limits on the personal net worth of the owner and the size of the applicant firm keep DBEs from growing and being more competitive. DBEs often lack the systems to do WSDOT work, resulting in headaches and costs to general contractors. One approach in addition to technical assistance would be to assist with bonding and financing. Some prime firms said that DBEs should not receive targeted services because these provide a crutch.

Small business setasides: There was significant support for a race- and gender-neutral small business setaside to assist DBEs and small firms to work as prime contractors and consultants.

Mentor-protégé relationships: Several participants supported the idea of a mentor-protégé program for federal-aid contracts. Some large contractors urged caution about adopting a mentor-protégé program.

Meeting DBE contract goals: Although it was not always easy, most prime contractors and consultants reported they were able to meet DBE contract goals. A lack of capacity to do work was frequently cited by general contractors and prime consultants as a major issue with the program. Contractors in Eastern Washington repeatedly reported that the goals on projects in their area are too high. "On call" contracts, where the actual scopes of work are not fully defined at the time of award, were especially challenging. A large number of concurrent public projects compounds the problem. Some consulting firms wanted credit towards meeting DBE goals for the diversity of the staff of their businesses. Many firms, both DBEs and prime contractors, objected to WSDOT's practice of refusing to credit DBE participation despite the firm's being certified in that NAICS code, because of the Department's narrower set of work codes. When bidders cannot meet goals, they found it difficult to submit documentation of their good faith efforts to do so that will pass WSDOT's muster. Change orders can make it difficult to meet goals. That DBE subcontractors submit higher prices than non-DBEs was a common refrain. Many primes stated that DBEs often do not want to submit on non-goals jobs. At the same time, DBEs

taking on more work than they can perform creates problems for the general contractor, often resulting in goals not being met. Many general contractors expressed frustration that they are prohibited from helping DBEs on an *ad hoc* basis when a tool is needed or a piece of equipment breaks down. Performance issues impact not only costs but also safety. It was difficult to substitute a non-performing DBE. Some general contractors stated they use good DBEs on non-goals jobs. Non-DBE subcontractors reported having been passed over in favor of DBEs, despite being lower cost. Some prime firm owners believed that the program is unnecessary.

Utilization, Availability and Disparity Analyses for WSDOT

Strict constitutional scrutiny, Ninth Circuit case law and the DBE program regulations require that a recipient limit its race-based remedial program to firms doing business in its product and geographic markets. CHA therefore analyzed contract data for federal fiscal years (“FFYs”) 2012 through 2015 for WSDOT’s federal aid and state-funded contracts for Construction and Construction-Related Services contracts. We received contract records from WSDOT that contained 1,741 contracts, worth \$3,523,164,304. Because of this large volume of contracts, we created a sample file for our analysis. We then constructed all the fields necessary for our analysis where they were missing in the Department’s contract records (*e.g.*, industry type; zip codes; NAICS codes of prime contractors and subcontractors; non-DBE subcontractor information, including payments, race, gender; etc.). The resulting Final Contract Data File for analysis contained a total award amount of \$2,328,344,423.60, representing 417 contracts to primes; of this amount, 5,475 associated subcontracts received \$983,172,968.90. The Final Contract Data File was used to determine the geographic and product markets for the analyses, to estimate the utilization of DBEs on those contracts, and to calculate DBE availability in WSDOT’s marketplace.

We analyzed data by federal modal administration funding source, *i.e.*, Federal Highway Administration (FHWA), the Federal Transit Administration (FTA) and the Federal Aviation Administration (FAA); and state-funded contracts. This delineation was to assist the Department with meeting its obligations for goal submission under 49 C.F.R. Part 26, which requires separate analyses to FHWA- and FTA-funded contracts. We also analyzed contracts funded solely with state monies, described in Chapter IV.

We first determined the Department’s product market for each funding source. Tables A and B present the NAICS codes, the label for each NAICS code, and the industry percentage distribution of spending across NAICS codes, for contracts, respectively. Chapter IV provides tables disaggregated by dollars paid to prime contractors and dollars paid to subcontractors on contracts with subcontracting opportunities.

Table A: Industry Percentage Distribution of Contracts by Dollars Paid for FHWA Contracts

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	50.4%	50.4%
238210	Electrical Contractors and Other Wiring Installation Contractors	8.4%	58.8%

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
238910	Site Preparation Contractors	6.1%	64.9%
236220	Commercial and Institutional Building Construction	5.8%	70.8%
541330	Engineering Services	5.5%	76.3%
236210	Industrial Building Construction	3.8%	80.0%
237990	Other Heavy and Civil Engineering Construction	3.7%	83.7%
238320	Painting and Wall Covering Contractors	2.9%	86.6%
238990	All Other Specialty Trade Contractors	2.4%	89.0%
238110	Poured Concrete Foundation and Structure Contractors	1.7%	90.7%
TOTAL			100.0% ³

Source: CHA analysis of WSDOT data.

Table B: Industry Percentage Distribution of Contracts by Dollars Paid for FTA Contracts

NAICS	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
336611	Ship Building and Repairing	58.0%	58.0%
237990	Other Heavy and Civil Engineering Construction	18.4%	76.4%
238320	Painting and Wall Covering Contractors	12.0%	88.3%
541330	Engineering Services	6.3%	94.6%
TOTAL			100.0% ⁴

Source: CHA analysis of WSDOT data.

To determine the relevant geographic market area, we applied the well accepted standard of identifying the firm locations that account for at least 75 percent of contract and subcontract dollar payments in the contract data file.⁵ Location was determined by ZIP code and aggregated into counties as the geographic unit.

³ Agency spending across another 17 NAICS codes comprised 9.3% of all spending.

⁴ Agency spending across another 11 NAICS codes comprised 5.4% of all spending.

⁵ National Disparity Study Guidelines, p. 49.

Spending in Washington State accounted for 91.8 percent of the Department's total FHWA-funded spend in its unconstrained product market. Therefore, Washington constituted the geographic market area from which we drew our availability data for these contracts. Table C presents data on how the contract dollars were spent across states.

Table C: Distribution of Contracts in WSDOT's Product Market for FHWA-Funded Contracts by State

State	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
WA	91.8%	91.8%
OR	2.5%	94.4%
ID	1.3%	95.7%
OH	1.2%	96.9%
PA	1.2%	98.1%
TOTAL		100.0% ⁶

Source: CHA analysis of WSDOT data.

We performed a similar analysis for FTA-funded contracts. Spending in Washington State accounted for 64.54 percent of the FTA-funded spend in its unconstrained product market. Multnomah County, Oregon accounted for 34.4 percent. Therefore, Washington state and Multnomah County constituted the geographic market area from which we drew our availability data for these contracts. Table D presents data on how the contract dollars were spent across states.

Table D: Distribution of Contracts in WSDOT's Product Market for FTA-Funded Contracts by State

State	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
WA	64.54%	64.54%
OR	35.41%	99.94%
NJ	0.04%	99.98%
OH	0.02%	100.00%

Source: CHA analysis of WSDOT data.

⁶ Agency spending across another 15 states comprised 1.9% of all spending.

The next step was to determine the dollar value of WSDOT's utilization of DBEs in these market areas, as measured by payments to prime firms and associated subcontractors and disaggregated by race and gender. To fill in the Department's missing records for payments to all subcontractors, we contacted the prime vendors to describe in detail their contract and associated subcontracts, including race, gender and dollar amount paid to date. This was a very lengthy process. We further developed a Master DBE Directory based upon lists solicited from government agencies and private organizations. We used the results of this extensive data collection process to assign minority or woman status to the ownership of each firm in the analysis that was otherwise unclassified.

Tables E and F present the distribution of contract dollars by all industry sectors by funding source. Chapter IV provides detailed breakdowns of these results.

**Table E: Distribution of FHWA-Funded Contract Dollars
by Race and Gender**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
236210	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
236220	0.0%	0.0%	1.7%	13.5%	0.1%	15.3%	84.7%	100.0%
237310	0.0%	0.6%	1.1%	2.8%	7.7%	12.2%	87.8%	100.0%
237990	0.0%	5.3%	0.0%	0.8%	0.1%	6.2%	93.8%	100.0%
238110	0.1%	20.0%	0.0%	3.0%	5.2%	28.3%	71.7%	100.0%
238140	0.0%	0.0%	32.8%	0.0%	0.1%	32.8%	67.2%	100.0%
238210	1.0%	8.6%	0.0%	1.4%	11.7%	22.6%	77.4%	100.0%
238320	0.0%	0.0%	0.1%	0.0%	38.6%	38.7%	61.3%	100.0%
238910	1.4%	1.5%	0.0%	15.1%	10.8%	28.9%	71.1%	100.0%
238990	0.0%	19.2%	0.0%	12.4%	10.3%	41.9%	58.1%	100.0%
484110	0.7%	5.3%	5.7%	5.3%	12.6%	29.5%	70.5%	100.0%
541330	0.1%	1.0%	6.4%	0.7%	1.4%	9.7%	90.3%	100.0%
561730	2.5%	1.0%	23.5%	1.0%	59.8%	87.8%	12.2%	100.0%
561990	0.0%	7.6%	17.8%	7.6%	52.7%	85.7%	14.3%	100.0%
Total	0.2%	2.5%	1.8%	4.0%	9.0%	17.6%	82.4%	100.0%

Source: CHA analysis of WSDOT data.

**Table F: Distribution of FTA-Funded Contract Dollars
by Race and Gender**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
237990	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
238210	0.0%	0.0%	0.0%	0.0%	8.6%	8.6%	91.4%	100.0%
238320	0.0%	10.5%	0.0%	0.0%	0.0%	10.5%	89.5%	100.0%
336611	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
541330	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
Total	0.0%	1.3%	0.0%	0.0%	0.2%	1.5%	98.5%	100.0%

Source: CHA analysis of WSDOT data.

Using the “custom census” approach to estimating availability and the further assignment of race and gender using the Master Directory and other sources, we determined the aggregated availability of DBEs, weighted by WSDOT’s spending in its geographic and industry markets, to be 19.0 % for FHWA-funded contracts and 11.0% for FTA-funded contracts. Tables G and H present the weighted availability data for all product sectors combined for the racial and gender categories.

Table G: Aggregated Weighted Availability for FHWA-Funded

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
Total	1.0%	2.6%	2.1%	3.0%	10.3%	19.0%	81.1%	100.0%

Source: CHA analysis of WSDOT data; Hoovers; CHA Master Directory.

Table H: Aggregated Weighted Availability for FTA-Funded Contracts

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
TOTAL	1.1%	2.1%	1.8%	1.7%	4.5%	11.0%	89.0%	100.0%

Source: CHA analysis of WSDOT data; Hoovers; CHA Master Directory.

**Table 4.60 Aggregated Weighted Availability for State-Funded
Contracts**

NAICS	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
TOTAL	1.1%	2.5%	2.3%	3.1%	10.0%	19.0%	81.0%	100.0%

Source: CHA analysis of WSDOT data; Hoovers; CHA Master Directory.

To meet the Ninth Circuit's test that all groups must have suffered discrimination in WSDOT's markets to be eligible for credit towards meeting DBE contract goals, we next calculated disparity ratios comparing the Department's utilization of DBEs as prime contractors and subcontractors to the availability of these firms in its market areas. Tables I and J present these results for federal-aid contracts.

Table I: Disparity Ratios by Demographic Group, FHWA-Funded Contracts

	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE
Disparity Ratio	22.2%†***	95.9%	87.4%	135.4%**	87.3%*	92.5%*	101.6%*

Source: CHA analysis of WSDOT data.

‡ Indicates substantive significance

***Indicates statistical significance at the 0.001 level

**Indicates statistical significance at the 0.01 level

*Indicates statistical significance at the 0.05 level

Table J: Disparity Ratios by Demographic Group, FTA-Funded Contracts

	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE
Disparity Ratio	0.0%‡	62.0%‡	0.0%‡	0.0%‡	4.4%‡	13.4%†***	110.7%**

Source: CHA analysis of WSDOT data.

‡ Indicates substantive significance

**Indicates statistical significance at the 0.01 level

*Indicates statistical significance at the 0.05 level

To evaluate whether the results would differ on contracts without DBE goals ("unremediated markets data"), we further calculated disparity ratios on state-funded contracts upon which goals were not set during the study period. Table K presents these results.

Table K: Disparity Ratios by Demographic Group, State-Funded Contracts

	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE
Disparity Ratio	1.3%†*	71.1%‡	15.2%†*	25.6%†***	34.3%†***	33.5%†***	115.5%***

Source: CHA analysis of WSDOT data.

‡ Indicates substantive significance

***Indicates statistical significance at the 0.001 level

**Indicates statistical significance at the 0.01 level

*Indicates statistical significance at the 0.05 level

Analysis of Economy-Wide Race and Gender Disparities in WSDOT's Market

We explored the Census Bureau data and literature relevant to how discrimination in the Washington State highway industry market and throughout the wider economy affects the ability of minorities and women to fairly and fully engage in the Department's prime contract and subcontract opportunities.

We analyzed the following data and literature:

- Data from the Census Bureau's Survey of Business Owners indicate very large disparities between M/WBE firms and non-M/WBE firms when examining the sales of all firms, the sales of employer firms (firms that employ at least one worker), or the payroll of employer firms.
- Data from the Census Bureau's American Community Survey ("ACS") indicate that Blacks, Hispanics, Native Americans, Asian/Pacific Islanders, Others, and White women were underutilized relative to White men. Controlling for other factors relevant to business outcomes, wages and business earnings were lower for these groups compared to White men. Data from the ACS further indicate that non-Whites and White women are less likely to form businesses compared to similarly situated White men.
- The literature on barriers to access to commercial credit and the development of human capital further reports that minorities continue to face constraints on their entrepreneurial success based on race. These constraints negatively impact the ability of firms to form, to grow, and to succeed.

All three types of evidence have been found by the courts to be relevant and probative of whether a government will be a passive participant in overall marketplace discrimination without some type of affirmative intervention. Taken together with anecdotal data, this is the type of proof that addresses whether, in the absence of DBE contract goals, WSDOT will be a passive participant in the discriminatory systems found throughout Washington. These economy-wide analyses are relevant and probative to whether the agency may continue to employ narrowly tailored race- and gender-conscious measures to ensure equal opportunities to access its contracts and associated subcontracts.

Qualitative Evidence of Race and Gender Barriers in WSDOT's Market

In addition to quantitative data, the courts and the DBE regulations look to anecdotal evidence of firms' marketplace experiences to evaluate whether the effects of current or past discrimination continue to impede opportunities for DBEs such that race-conscious measures are supportable.

To explore this type of anecdotal evidence, we interviewed 202 participants. Most reported that, while progress has been made in reducing barriers on the basis of race and gender, significant inequities remain obstacles to full and fair opportunities. Race- and gender-neutral approaches alone were described as unlikely to ensure a level playing field for WSDOT contract opportunities.

- *Stereotypes, Discriminatory attitudes and negative perceptions of competence:* Many minority and women owners reported that they continue to encounter discriminatory attitudes, stereotypes and negative perceptions of their qualifications and capabilities. The assumption is that minority firms are less qualified. Women of all races often experienced gender bias and exclusion in the highway industry. The continuing effects of stereotypes about gender roles and sexist attitudes from male colleagues, clients and agency staff hamper their opportunities.
- *Exclusion from industry networks:* Many minorities and women reported that there still exists a “good old boys” network that makes it difficult for them to fairly obtain contract opportunities. It can difficult for DBEs to access important decision makers.
- *Obtaining work on public sector construction and consulting projects on an equal basis:* There was almost universal agreement that the DBE Program remains necessary to reduce barriers to equal contracting opportunities. Most DBEs reported that without the requirement that prime firms make good faith efforts to meet contract goals, they would receive little or no work. While minorities and women found it is easier to obtain subcontracts than prime contracts on public projects because of affirmative action goals, it is still difficult to get work, receive fair treatment, and be paid on time. Many believed that majority prime firms use them only if forced to do so. Obtaining work from local governments that receive WSDOT funds as subrecipients was especially difficult because of deeply entrenched small networks of white male-owned firms. Some participants felt the barriers were more about size and experience, and less about race and gender. Some owners reported that although their firms have been listed on the contract, they were underutilized or not utilized at all. Prime contracts were especially difficult to obtain. Many firm owners would like to perform prime work but are not afforded that opportunity.

We also conducted an electronic survey of firms in WSDOT's market area about their experiences in obtaining work, marketplace conditions and WSDOT's DBE program. 78 minority- and women-owned firms participated. The results were similar to those of the interviews. A significant portion of DBEs reported they still experience barriers to equal contracting opportunities; questioning of their competency because of their race or gender; less access to business networks and information; job-related sexual or racial harassment or stereotyping; and slow payment by WSDOT and/or prime contractors.

Recommendations for WSDOT's DBE Program

The quantitative and qualitative data provide a thorough examination of the evidence of the experiences of disadvantaged, minority- and women-owned firms in WSDOT's geographic and industry markets. These results provide the agency with the evidence necessary to narrowly tailor its DBE program for federal-aid contracts, as required by 49 C.F.R. Part 26. The statistical data and the anecdotal testimony provide a sufficient basis for the continued use of narrowly tailored remedial race- and gender-conscious measures to ensure full and fair access by all firms to WSDOT federally-funded prime contracting and associated subcontracting opportunities. Based upon these findings, USDOT guidance and national best practices for DBE programs, we make the following recommendations

- *Increase certification outreach and expertise:* Conduct additional outreach to uncertified minority- and women-owned firms, including those identified through the study process. Focus on increasing the pool of certified firms that can provide goods or services in construction subindustries where DBEs have received little work. Ensure that firms applying for DBE certification are evaluated by a highway industry expert, and that WSDOT is regularly consulted about certification issues and unusual situations.
- *Monitor prompt payment to subcontractors:* Fully implement the B2GNow electronic data collection and monitoring system and train staff, contractors and subcontractors on the compliance requirements and how to use it. Evaluate how well this approach addresses the complaint by subcontractors that prime contractors often unnecessarily withhold payment. Better educate small subcontractors about their rights;
- *Increase contract unbundling:* Continue to unbundle contracts into smaller or less complex segments to improve small firms' access to prime and subcontracting opportunities.
- *Ensure bidder non-discrimination and fairly prices subcontractor quotes:* To investigate whether prime contractors solicit DBEs on an equal basis and whether DBEs inflate their prices to prime contractors, require bidders to maintain all subcontractor quotes received on specified projects.
- *Review insurance and experience requirements:* Review surety bonding, insurance and experience criteria so they are no greater than necessary to protect the Department's interests. This might include reducing or eliminating insurance requirements on smaller contracts and removing the cost of the surety bond from the calculation of the "as read" low bidder on appropriate solicitations.
- *Review DBE policies for consulting contracts:* Consider permitting prime consultants to mark up their costs for subconsultants. Review the Safe Harbor indirect cost rate to ensure small firms can make a profit on WSDOT contracts and provide access to construction accountants at reduced fees as part of supportive services. Evaluate whether prequalification criteria can be reduced to increase small firm opportunities and competition for WSDOT work. Reduce the threshold for setting contract goals to \$100,000 from \$250,000.
- *Provide information and training to bidders on program compliance:* Provide with the invitation for bid or request for proposal the scopes of work used by the Department to set the contract goal. Conduct training on issues such as commercially useful function determinations, documenting good faith efforts to meet goals, etc. Training could be mandated as part of the prequalification process.
- *Enhance the small business element:* Set aside some smaller or less complex contracts for bidding only by SBEs as prime contractors. Provide additional assistance if needed for these firms.
- *Enhance supportive services and business development programs:* Add a focus on Black construction and consulting firms. Enhance outreach and provide supportive services to expand the types of work performed by DBEs. Develop forms for small firms to use for invoicing and documenting other requirements. Provide a roster of experienced construction accountants and attorneys at

discounted rates. Collect data on the rates at which certified firms submit bids; their success in receiving contracts; and any barriers to their participation in the program or on Department contracts.

- *Develop a bonding and financing program for SBE:* Work with a surety and a lender to provide a bond and financing for firms that have successfully completed the program.
- *Adopt a DBE mentor-protégé program:* Develop a program in conformance with the DBE regulations and guidance. Include criteria on the parties' qualifications; a Department-approved written development plan; a long term and specific commitment between the parties; delineate the use of any equipment or equipment rental; extra credit for the mentor's use of the protégé to meet a contract goal; define any WSDOT-approved financial assistance; a fee schedule to cover the direct and indirect cost for services provided; terminations provisions; reporting requirements; and Department review procedures.
- *Provide information and training to WSDOT staff and subrecipients regarding program:* Conduct agency wide and subrecipient training for appropriate staff regarding topics such as understanding certification eligibility requirements; goal setting; evaluating good faith efforts and commercially useful function; contract performance compliance and documentation; Title VI compliance; outreach and supportive services; and USDOT reporting.
- *Increase program resources:* Create liaisons in each WSDOT District reporting to the Director of Civil Rights.
- *Use the study to set the narrowly tailored triennial DBE goal:* The availability estimates in Chapter IV should be the basis for consideration of the triennial DBE goals for FHWA- and FTA-funded contracts. We found the availability of DBEs to be 19.0 percent for FHWA-funded contracts and availability of DBEs to be 11.0 percent for FTA-funded contracts. These results can serve as the step 1 base figure under 49 C.F.R. § 26.459(c). The statistical disparities in Chapter V in the rates at which DBEs form businesses could serve as the basis for consideration of an adjustment to the step 1 figure to reflect DBE availability "but for" discrimination.
- *Use the study to set narrowly tailored DBE contract goals:* The detailed availability estimates in the study should serve as the starting point for contract goal setting. WSDOT should weigh the estimated scopes of the contract by the availability of DBEs in those scopes in the study, and then adjust the result based on current market conditions. The Department's new B2GNow electronic system goal setting module should be employed to use the study data as the baseline, ensure consistency and transparency of this critical element of narrow tailoring.

The disparity results meet the Ninth Circuit's requirement that WSDOT consider whether each racial and ethnic group and white women have suffered discrimination in its market. These results were statistically significant for spending on federally-funded jobs for all groups (other than Native Americans on FHWA contracts). Disparities were especially low for Black-owned firms, that is, Blacks-owned businesses received few dollars compared to their availability. The disparity ratio on state-funded contracts for DBEs combined was 33.5 percent, including a ratio of 34.3 percent for White women. Further, business owners provided strong anecdotal evidence of the continuing existence of race- and

gender-based barriers, including bias, stereotyping, harassment, exclusion from networks and unfair performance standards. The picture drawn by these results is of a playing field for WSDOT work that is still not level. These stark findings suggest that WSDOT may infer that the cause is the continued effects of discrimination on the basis of race and gender. Therefore, to ensure it is not a passive participant in this discriminatory market, we recommend that the Department continue to utilize race-conscious contract goals and include all groups for credit towards meeting contract goals.

- *Develop Performance Measures for Program Success:* WSDOT should develop quantitative performance measures for overall success of its programs. These could include progress towards meeting the annual DBE goals; tracking good faith efforts waivers, findings of non-responsiveness and DBE substitutions; increased bids/proposals from certified firms; increased variety of types of contracts awarded to DBE prime vendors and subcontractors; and increased “capacity” of certified firms as measured by bonding limits, size of jobs, profitability, etc.