

## El Dorado County

### Disadvantaged Business Enterprise (DBE) Program Proposed Methodology and Calculations Used to Determine Overall Goal for Federal Fiscal Year 2011/2012 for Federal Aviation Administration-Assisted Projects

#### I. Executive Summary

The County of El Dorado (County), through its Department of Transportation (DOT) submits this Federal Fiscal Year (FFY) 2011 goal to the Federal Aviation Administration (FAA) pursuant to 49 Code of Federal Regulation (CFR) Section 26.45, for federally assisted airport contracts. For FFY 2011/2012 County proposes for its only FFY 11/12 FAA- assisted project, an overall goal of **3% (rounded)** comprised of a Race-Conscious component of **2%** and a Race-Neutral component of **1%** with no Step Two adjustments.

#### II. Goal-Setting Methodology – Section 49 CFR 26.45

County followed a two-step process for setting its overall DBE goal:

- Step One determines the calculation of a base figure for the relative availability of DBEs.
- Step Two is the examination of all the evidence available to determine if an adjustment to the base figure is needed to arrive at the overall goal.

#### III. Step One - Determining the Base Figure Section 49 CFR 26.45 (c)

A. County created a list of the project(s) that it anticipates awarding in FFY 11/12. Next, County determined the various work types and amounts of work that will be involved, using the Engineer's Estimate of Cost and the work categories and codes that can be found on the California Unified Certification Program (CUCP) website <http://www.dot.ca.gov/ucp/GetLicenseForm.do>. For each Work Category, the percentage (Weight) of the total contract work to be performed was calculated. Table 1 provides this information.

**TABLE 1**

<b>Project(s)</b>	<b>Work Category</b>	<b>NAICS Code</b>	<b>Estimated Contracts FFY 11/12</b>	<b>% of Federal Funding by Work Category (Weight)</b>
Placerville Airport Perimeter Fence and Gates Project	All Other Specialty Trade Contractors (Construction)	238990	\$350,600	74.5%

<b>Project(s)</b>	<b>Work Category</b>	<b>NAICS Code</b>	<b>Estimated Contracts FFY 11/12</b>	<b>% of Federal Funding by Work Category (Weight)</b>
Placerville Airport Perimeter Fence and Gates Project	Electrical Contractors	238210	\$64,000	13.6%
Placerville Airport Perimeter Fence and Gates Project	All Other Fabricated Wire Product Manufacturing	332618	\$56,000	11.9%

County then determined the Market Area by using the bidders' list containing all prime contractors that bid on County airport construction projects in 2005, 2006, 2007, 2008, and 2010. This approach resulted in the Market Area being comprised of eight (8) counties: Butte, El Dorado, Humboldt, Placer, Sacramento, San Joaquin, Shasta, and Yolo. For electrical work, San Bernardino County is also part of the Market Area.

B. In order to determine the overall goal, County first computed the following formula for each Work Category:

$$\text{Overall Goal (per Work Category)} = \left[ \sum \frac{\text{No. of DBEs in a Work Category}}{\text{No. of All Firms in same Work Category}} \times \text{Weight} \right] \times 100$$

Each Work Category Overall Goal was multiplied by its percentage (Weight) of the total work to be performed. The resulting numbers were then added up to obtain the overall goal Base Figure:

**FORMULA Overall Goal (Base Figure) =**

$$\left[ \frac{\text{\# of DBEs in 238990}}{\text{\# of all firms in 238990}} \times 0.745 + \frac{\text{\# of DBEs in 238210}}{\text{\# of all firms in 238210}} \times 0.136 + \frac{\text{\# of DBEs in 332618}}{\text{\# of all firms in 332618}} \times 0.119 + \right] \times 100$$

To determine the number of DBE firms (for the *numerator* in the calculation):

For each NAICS Work Category listed above, the total number of DBEs in County's Market Area that can perform that type of work was determined. To do this, the CUCP website was used, which was accessed by going to

<http://www.dot.ca.gov/ucp/GetLicenseForm.do>

To determine the total number of firms (for the denominator in the calculation):

For each NAICS Work Category, the total number of firms in County's Market Area that are willing to perform that type of work was determined. To do this, the following website was used:

<http://censtats.census.gov/cbpnaic/cbpnaic.shtml>

**FORMULA Overall Goal (Base Figure) =**

$$\left[ \frac{5}{363} \times 0.745 + \frac{6}{1079} \times 0.136 + \frac{1}{7} \times 0.119 + \right] \times 100$$

Entering the values shown above into the Formula Overall Goal (Base Figure) yields an **Overall Goal (Base Figure) of 2.80% (3% rounded).**

*1. Race-Conscious (RC) Portion of Overall Goal (Using UDBEs):*

To obtain the **RC** portion, County used the same method shown above, except substituted UDBEs<sup>1</sup> for DBEs in the formula.

To get the number of UDBE firms (UDBE firms = male-owned UDBE firms + all female-owned firms), County eliminated all firms on the DBE lists from the CUCP database that are not designated as either female-owned or male-owned with the UDBE-designated ethnicities (Asian Pacific, Native American, African American).

The following formula shows the number of UDBE firms, number of total firms, and Work Category Weights results.

**FORMULA Race Conscious (Base Figure) =**

$$\left[ \frac{3}{363} \times 0.745 + \frac{3}{1079} \times 0.136 + \frac{1}{7} \times 0.119 + \right] \times 100$$

Inserting the Table values as appropriate in the formula

$$\text{RC Portion} = \left[ \sum \frac{\text{No. of UDBEs in a Work Category}}{\text{No. of All Firms in same Work Category}} \times \text{Weight} \right] \times 100$$

results in a **RC Portion = 2.35% (rounded to 2%).**

<sup>1</sup> See Step Two, Item B for definition of and rationale for use of UDBE.

2. *Race-Neutral (RN) Portion of Overall Goal:*

The Race-Neutral portion of the Overall Goal is the Overall Goal minus the Race-Conscious portion.

**RN Portion = Overall Goal – RC Portion = 2.80 – 2.35 = 0.45% (rounded to 1%)**

**IV. Step Two - Adjusting the Base Figure – Section 49 CFR 26.45 (d)**

According to the guidelines, Step Two is to examine all of the evidence available in the jurisdiction to determine what adjustment, if any, is needed to the Base Figure to arrive at the overall goal. Factors to consider include:

- Past participation (the volume of work DBEs have performed in recent years) or other measure of demonstrated capacity;
- Evidence from disparity studies conducted anywhere within our jurisdiction, to the extent that it is not already accounted for in the base figure;
- Statistical disparities in the ability of DBEs to get financing, bonding, and insurance required to participate in our program; and
- Data on employment, self-employment, education, training and union apprenticeship programs, to the extent that these factors can be related to the opportunities for DBEs to perform in our program.

**A. Adjustments Based on Past Participation**

In 2009 the responsibility for the airports within the County’s jurisdiction was assigned to DOT within the County. Although bidder information prior to 2009 is available, records of DBE participation for this period are somewhat limited.

Table 2 contains the list of past FAA-funded airport projects, the level of DBE participation, whether the DBE was a prime contractor or a subcontractor, and the DBE’s classification.

**TABLE 2**

	<b>Year</b>	<b>Project Name</b>	<b>DBE % Attainment</b>	<b>DBE Prime or Sub/Classification</b>
1	2005	Georgetown Airport – Reconstruct and Light Runway 16-4 <i>(grading, paving, lighting)</i>	69%	Prime/Hispanic
2	2006	Georgetown Airport – Construction of Security Fencing <i>(fencing)</i>	Not Available	Subs Not available

	<b>Year</b>	<b>Project Name</b>	<b>DBE % Attainment</b>	<b>DBE Prime or Sub/Classification</b>
3	2006	Georgetown Airport – Crack Repair and Slurry Seal General Aviation Apron, Taxiway ‘A’ and Tee Hangar Taxiways <i>(crack repair, slurry seal, and markings)</i>	Not Available	Subs Not available
4	2007	Placerville Airport – Connector Taxiway to Runway Threshold <i>(grading, paving, relocation of runway marking and lighting)</i>	6.8%	Sub/Hispanic
5	2007	Placerville Airport – Remove Obstruction and Construct Access Road <i>(grading and paving)</i>	10.8%	Sub/Hispanic
6	2008	Placerville Airport Runway 5-23 Lighting Rehabilitation (Phase II) Replacement of VASI with new 2-Box Papi on Runway 23 <i>(electrical)</i>	84%	Prime/Female
7	2008	Placerville Airport – Installation of Automatic Weather Observation System <i>(electrical)</i>	100%	Prime/Female
8	2009	No FAA-funded projects	Not applicable	Not Applicable
9	2010	Georgetown Airport – Fill Hole at Edge of Runway	3.5%	Sub/Female
10	2010	Placerville Airport – Crack Repair and Slurry Seal, Remark Runway Blast Pads, Construct Runway Exit Taxiway	0%	None

DBE firms were the prime contractors for projects 1, 6, and 7, which can not be presumed to apply to future projects. The project anticipated for FFY 2011/2012 is of the same type as project 2. Since DBE participation for project 2 is not available, and all previous projects were based on a Race-Neutral DBE Program, no adjustment to the base figure due to past participation is recommended.

## **B. Evidence Based Disparity Studies within County's Jurisdiction**

In order to comply with the DBE requirements of 49 Code of Federal Regulations (CFR) 26, County has implemented the California Department of Transportation's (Caltrans) DBE Program through the joint execution of a DBE Implementation Agreement. The current DBE Implementation Agreement requires the implementation of both race-conscious and race-neutral measures. The decision to use both race-conscious and race-neutral measures is the result of a 2005 Ninth Circuit Court of Appeals decision. Following this decision, Caltrans commissioned a Disparity Study<sup>2</sup> (Study) to determine whether discrimination exists in the conduct of the State transportation program.

Caltrans retained BBC Research & Consulting (BBC) to conduct the Study to assist Caltrans in its implementation of the Federal DBE Program. BBC examined the transportation construction and engineering industry in California and related contracts awarded by Caltrans or awarded by local agencies with Federal Highway Administration (FHWA) funds administered through Caltrans. BBC examined more than 10,000 construction and engineering contracts and subcontracts from 2002 through 2006 for both Caltrans and local agencies. To examine relative availability of minority- and women-owned firms for this work, more than 18,000 California business establishments were interviewed. The study included in-depth interviews with nearly 100 firm owners and trade association representatives and testimony from public hearings held across the state.

Caltrans accepted the Study and its findings in July 2007. As required by 49 CFR section 26.15 Caltrans requested a waiver to implement a Race-Conscious goal of limited application to four (4) identified groups: African American, Asian Pacific American, Women, and Native American businesses.<sup>3</sup> These four (4) groups are known as Underutilized DBEs or UDBEs. In a letter dated August 7, 2008, from U.S. Department of Transportation, Caltrans obtained approval of the waiver for three years.<sup>4</sup> In March 2009 Caltrans instructed local agencies that follow Caltrans DBE

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<sup>2</sup> [http://www.dot.ca.gov/hq/bep/study/Avail\\_Disparity\\_Study\\_Final\\_Rpt.pdf](http://www.dot.ca.gov/hq/bep/study/Avail_Disparity_Study_Final_Rpt.pdf)

<sup>3</sup> On March 23, 2011 the United States District Judge John A. Mendez of the Eastern District Federal Court in Sacramento, California, ruled that Caltrans DBE program was "clearly constitutional" and denied a request by Plaintiff Associated General Contractors, San Diego Chapter, that the Caltrans DBE program be declared unconstitutional and halted. (See attached March 30, 2011 letter from Caltrans.)

<sup>4</sup> Caltrans Goals and Methodology for FFY 11/12 are not available. However, Caltrans has not indicated that any changes to the Race Conscious/Race Neutral DBE Program are imminent.

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program to begin implementation of the newly-approved Race-Conscious/Race-Neutral program.

The Study focuses on FHWA-and state-funded contracts. Although the Study did not include FAA-assisted contracts, the bidder history for County airport projects indicates that the same contractors that bid on County's FHWA-assisted contracts administered through Caltrans, bid on the airport contracts. County airports are located in the rural portion of County. Consequently, unlike airport projects in large urban areas, County airport projects do not attract contractors that specialize in performing only airport work. Based on this fact, County has concluded that the Study applies to its FAA-assisted projects.

County is relying on the Caltrans disparity Study and has not performed its own study. The results of the Caltrans Study, the use of race-conscious goals for the four (4) underutilized DBE groups, have been incorporated into County's base figure.

### **C. Statistical disparities in the ability of DBEs to get financing, bonding, and insurance and Data on employment, self-employment, education, training and union apprenticeship programs**

Appendix F of Caltrans' Study examines in detail the numerous barriers to entry and expansion in the transportation industry. Highlights of the findings are:

- **Employment.** Employment of African Americans in the construction industry is relatively low compared to other industries in California, even among entry-level jobs. The employment of women in construction as a whole is relatively low, and very few women in the construction trades are involved in transportation construction. Employment of Hispanic Americans in the construction industry is considerably higher than for all industries as a whole (37 percent in construction and 29 percent in all industries in California).
- **Advancement.** There appears to be disparities in the advancement of Hispanic Americans to certain construction occupations and first-line supervisory positions. Compared to non-Hispanic whites (and men), relatively few African Americans, Hispanic Americans, and women working in construction are managers.
- **Business Formation and Ownership.** BBC examined U.S. Census data on business ownership rates using similar methods to the information reviewed in the court cases involving the Illinois and Minnesota Departments of Transportation. African Americans, Hispanic Americans, Subcontinent Asian Americans, and women working in the California construction industry are less likely than non-Hispanic whites to own construction

- businesses. BBC, through regression analysis, identified statistically significant disparities after controlling for neutral factors (see Appendix H of the Study). If qualified members of these groups working in the construction industry owned businesses at the same rate as non-Hispanic whites (and men), then there would be about twice as many construction firms owned by African Americans, Hispanic Americans, Subcontinent Asian Americans, and women in California.
- **Rates of business closure.** BBC's analyses found that African American-owned firms in California, in general, are more likely to close than other firms (see Appendix F of the Study).
  - **Access to Capital.** Evidence reveals that minority-owned firms face disadvantages in accessing capital necessary to start and expand businesses.
  - **Business Capital from Home Equity.** Home equity is an important source of capital for business start-up and growth.
    - Fewer African Americans, Hispanic Americans, and Native Americans in California own homes than non-Hispanic whites, and those who do own homes tend to have lower home values.
    - African Americans, Asian-Pacific Americans, Hispanic Americans, and Native Americans applying for home mortgages are more likely than non-minorities to have their applications denied.
    - African American, Hispanic American, and Native American mortgage borrowers are more likely to have sub prime loans.
  - **Business Loans.** BBC also identified disparities in access to business loans for certain minority groups. African American, Asian-Pacific American, and Hispanic American-owned businesses have higher denial rates when applying for business loans, and when they receive loans they have smaller loan amounts. After accounting for certain neutral influences, firms owned by African Americans and Hispanic Americans remain significantly more likely to have their loans denied than other firms (see Appendix H of the Study). More African American and Hispanic American-owned firms that need credit do not apply for loans because they fear being denied the loan.
  - **Bonding.** Interviews with business owners and trade associations indicated difficulty obtaining bonding for small and new construction contractors in California. Problems in obtaining bonding were reported in interviews with minority/women-owned firms and non minority-owned firms (reported in Section VI and Appendix I of the Study). Minority/women-owned firms in the transportation contracting industry in California are more likely to be small businesses than majority-owned firms and, therefore, may be adversely affected by barriers in obtaining bonding.
  - **Insurance.** Similarly, some small business owners had problems obtaining insurance as required for Caltrans projects. These issues are further explored in Sections V through VIII and in Appendix I of the Study.

These factors are important and suggest an upward adjustment of the base figure. However given the nature of the project for 2011/2012, County believes an upward adjustment would result in an unrealistic goal. Therefore County has decided not to make any Step Two adjustments.

## **Overall DBE Goal for FFY 2011 and Race/Gender- Neutral/Conscious Measures —Section 26.45(e)**

### Race-Neutral/Conscious Division

Based on the information collected and data reviewed by Caltrans, and the methodology for calculation of the overall goal described in Step One, County sets an overall goal of 3% with 2% race-conscious and 1% race-neutral.

### Information Relied Upon

BBC calculated a disparity index on the relative utilization and availability of minority/women-owned firms. The disparity index for federally assisted contracts with DBE project goals is 83 when an index of 100 is needed for parity. An index below 80 has been deemed by some courts to constitute a substantial disparity. BBC conducted additional disparity analyses for specific types of contracts by race, ethnicity, and gender ownership of firms and for different State regions. There was evidence of disparities for both:

- Construction and engineering.
- Prime contracts and subcontracts.

There were disparities across most Caltrans districts. County of El Dorado is in District 3. Depending on the type of contract, disparities between utilization and availability were most severe (below the 80 disparity index) for:

- African American – Disparity Index 15.
- Asian-Pacific American – Disparity Index 31.
- Women – Disparity Index 48.
- Native American – Disparity Index 65.

The Study identified African American, Asian-Pacific American, Women, and Native American contractors and subcontractors that would require narrow tailoring of race-conscious measures. The Study identified an inference of disparity for the four (4) groups. For the last quarter of FFY 2009, Caltrans and County have limited race-conscious measures to African American, Asian-Pacific American, Women, and Native American-owned firms on transportation-related contracts and will continue to do so until future data indicates revision is necessary.

To narrowly tailor the Caltrans DBE Program to conform to Study results, Subcontinent Asian American and Hispanic American-owned firms have not been included in the individual race-conscious contract goal setting. If future data gathering by Caltrans indicates that there is significant disparity between the percent of available contractors and subcontractors from these groups and the percent of contract dollars awarded to these groups, they will be included in the individual race-conscious contract goal setting.

Western States Paving 407 F.3rd 983, 993 (9th Cir. 2005), quoting *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003):

*49 CFR, Part 26 does not require all possible race- and gender-neutral measures be implemented before a recipient can implement race- and gender-conscious measures, but rather the recipient meet the maximum feasible portion of the overall goal using race-neutral means.*

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

Caltrans has conducted extensive consultation with minority, women, general contractor groups, and community organizations. Duplication of these efforts by County would yield no new information. A summary of Caltrans' consultations results have been included below:

### Consultation

Caltrans has conducted year-round consultation by hosting monthly Statewide Small Business Council (SBC) and committee meetings. In turn, the SBC members and committee members met with their individual organizations to provide feedback to Caltrans.

Additional consultation in 2010 included meetings with non-DBE organizations such as:

- Associated General Contractors.
- Associated General Contractors of San Diego.
- Engineering and Utility Contractors Association.
- American Council of Engineering Companies - California.
- Southern California Contractors Association.
- California Public Utilities Commission.
- California Small Business Association.

Caltrans also participated in the following statewide and local chamber of commerce meetings:

- California Hispanic Chamber of Commerce.
- California Black Chamber of Commerce.
- California Asian American Chamber of Commerce.
- California American Indian Chamber of Commerce.

Caltrans continued to have over 1,000 one-on-one discussions on the goal and methodology and race-neutral measures with small businesses (SB), DBEs, and minority/women-owned firms as they sought help on how to do business with Caltrans. Based on the public consultations and discussions throughout the year, DBEs and non-DBEs identified barriers as:

- Access to capital.
- Financial limitations.
- Bonding.
- Prompt payment.
- Access to insurance or limits requirements too high.
- Certification process is too long, too difficult, too costly, and need help to complete the application.
- Recertification should not require documentation be resubmitted unless there was significant business structure changes.

- Projects are too large; therefore, very few DBEs can act as primes.
- DBEs have more success in the private sector as there is less competition, more profit, greater accessibility, and less bureaucracy.
- Primes do not engage in a genuine "good faith effort."
- Enforcement of the "good faith effort" submitted by primes is desired.
- Bidding process was costly and time/labor intensive.
- Internet access and knowledge.
- Auditing of public professional service contracts is not efficient and is unfair.

These comments obtained within the last year are identical to the comments received during the anecdotal interviews and public hearing testimony collected by BBC for the Study.

#### Published Notice

County published a public notice in the Sacramento Bee (General Circulation Media) on November 15, 2011; Small Business Exchange (Minority Focused Media) on November 10, 2011; and on the website of Construction Bid Source LLC (Trade Association) on November 14, 2011, requesting comments on the proposed FFY 2011 overall DBE goal and methodology. The FFY 2011 overall DBE goal and methodology is available at County of El Dorado Department of Transportation at 2850 Fairlane Court, Placerville, California 95667; via the DOT website at <http://edcgov.us/Government/DOT/DBE.aspx>; and by e-mail to Janel Gifford at [Janel.Gifford@edcgov.us](mailto:Janel.Gifford@edcgov.us).

#### Comments

County will review all public comments solicited by the public notice and make adjustments to the overall goal, if necessary.

## **VI. Race-Conscious and Race Neutral Measures – Section 49 CFR 26.51 (f) (3)**

### **A. Race Conscious Measures**

The Race-Conscious goal will be achieved by:

- Setting a DBE goal on individual contracts based upon the type of work included in each contract, opportunities for subcontracting, and on the availability of the four (4) targeted groups capable of performing such work.
- Using Appendix A of 49 CFR 26, "Guidance Concerning Good Faith Efforts" to justify the award when the goal is not met.

### **B. Race Neutral Measures**

- Arrange solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE, and other small businesses, participation (e.g., unbundling large contracts to make them more accessible to small businesses, requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces);

- Through the Good Faith Effort requirements included in County's contracts, provide assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing);
- Ensure compliance with prompt payment specifications by requiring prime contractors to include in their subcontracts language providing that prime contractors and subcontractors will use appropriate alternative dispute resolution mechanisms to resolve payment disputes, and by enforcing the provisions of Section 7108.5 of the Business and Professions Code;
- Track all DBE participation on federally-assisted contracts, including monitoring the Commercially Useful Function of DBEs;
- Host construction pre-bid meetings, encourage all businesses to attend, and facilitate networking among potential bidders;
- Maintain County website describing projects advertised for bids; and
- Unbundle large consultant contracts into smaller contracts.