

SOUND TRANSIT
Central Puget Sound Regional Transit Authority
DBE GOAL for Federal Fiscal Year (FFY) 2010

I. INTRODUCTION

Sound Transit's mission is to plan, build and operate systems and services to improve mobility for the Central Puget Sound region, and the vast majority of its efforts are focused on planning, designing and building the regional transportation system. Its major activities require the services of firms in the construction industry, and firms that provide architecture and engineering (A&E) and professional services to plan, design, and manage Sound Transit projects, facilities, and services.

Sound Transit's jurisdiction includes most of the urban and suburban areas within Pierce, Snohomish and King Counties in Washington State. For purposes of identifying firms that would be available to perform work for Sound Transit, Sound Transit determined to include all firms within those three counties.

This Disadvantaged Business Enterprise (DBE) Goal Submittal is based on federal funded contracting for activity pertaining to contracts that will be let in FFY 2010 for its capital projects involving its commuter rail and regional bus transportation programs. Sound Transit has previously submitted a Project DBE Goal for its federally funded University Link light rail program under a separate process. For this submittal, only contracting activity outside of the University Link light rail program is analyzed and the DBE Goal for this submittal will only pertain to those contracts exclusive of University Link light rail. Sound Transit will adhere to the Federal Transit Administration's (FTA) notice of policy implementation and request for comments entitled, "Disadvantaged Business Enterprises; *Western States* Guidance for Public Transportation Providers."

II. METHODOLOGY AND EVIDENCE

Sound Transit prepared its DBE Goal for Federal Fiscal Year (FFY) 2010 using the "custom census" methodology identified by the U. S. Department of Transportation (DOT) in 49 CFR § 26.45. In 49 CFR Sect. 26.45, the DOT set forth a two-step process for setting an overall goal for DBE participation on DOT-assisted contracts.

Sound Transit's methodology and the supporting evidence fully comports with the federal regulations, as well as the decisions in *Western States Paving Co. v. Washington State Department of Transportation*, 907 F.3d 963 (9th Cir. 2005); *Northern Contracting Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (7th Cir. 2007); and *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 124 S.Ct. 2158 (2004).¹

¹ See also *Concrete Works of Colorado Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), *cert. denied*, 540 U.S. 1027 (2003) (Denver's program was constitutional based upon a similar methodology by the same consultant); *Builders Association of Greater Chicago v. City of Chicago*, 298

To meet the requirements of 49 CFR §26.45, Sound Transit used the same methodology that NERA Economic Consulting (NERA), a nationally recognized economics consulting firm, used the previous year to develop Sound Transit's narrowly tailored DBE availability benchmarks for its construction and construction-related contracting activity (including Engineering and Professional Services for the design and management of construction projects), other than that related to the University Link light rail program.

To do so, NERA relied on a subset of the availability data that it developed for the Washington State Department of Transportation (WSDOT)², as well as data from an unpublished special tabulation of the Census Bureau's 2002 *Survey of Business Owners* (SBO).³

The WSDOT Study, upon which WSDOT relied in setting its FFYs 2007-2009 DBE goals, provides a statistical analysis of baseline DBE availability, and examines econometric evidence of disparities between DBEs and non-DBEs in factors impacting entrepreneurial success on WSDOT contracts and subcontracts. In particular, for Step 1, the Study estimated statewide DBE availability using data on WSDOT's expenditures for highway construction and engineering consulting contracts and subcontracts, and carefully constructed databases of firms in those industries. To address Step 2, the Study reviewed existing quantitative evidence of discrimination and assessed the likelihood that statewide DBE availability would be different if the relevant markets in which WSDOT operates were race-neutral; it then estimated the magnitude of this difference.

Recent favorable judicial appellate decisions as well as USDOT's approval of other recipients' goals based upon NERA studies give Sound Transit confidence in the WSDOT Study's methodology, constitutional validity and narrowly tailored results. This approach has been upheld by the Eighth Circuit Court of Appeals in the challenge to Minnesota's 2001 DBE Program, and most recently by the Seventh Circuit Court of Appeals in a similar challenge to the Illinois Department of Transportation's DBE Program based upon a NERA Study. The Eighth Circuit's analysis was also adopted by the Ninth Circuit in *Western States*.

As required by the *Western States* decision, the WSDOT Study provided a narrowly tailored, statistically sound and detailed basis to meet the requirements of 49 CFR, Part 26, and fully addressed the remedial purpose of the DBE Program and Congressional intent. Sound Transit believes that extracting data from the WSDOT Study likewise provides it with the same constitutional and regulatory foundation.

A. STEP 1 -- DETERMINING A BASE FIGURE FOR THE OVERALL GOAL

The first element in estimating DBE availability is to determine empirically the relevant geographic and product markets for Sound Transit's federally-assisted contracts. An internal

F.Supp.2d 725 (N. D. Ill. 2003) (Chicago's Minority and Women Business Program was based upon similar "strong evidence").

² NERA Economic Consulting, *Race, Sex, and Business Enterprise: Evidence from the State of Washington*, prepared for the Washington State Department of Transportation, October 20, 2005 (WSDOT Study) (Attachment A).

³ U.S. Bureau of the Census, 2002 Survey of Business Owners, Unpublished special tabulation of results for states and metropolitan areas by 3-digit and 4-digit North American Industrial Classification System (NAICS) codes.

review by Sound Transit of past contracting activity determined that the appropriate geographic market consists of the Washington counties of King, Pierce, and Snohomish, which together comprise the Seattle-Tacoma-Bellevue, Washington Metropolitan Statistical Area (Seattle MSA).

To determine the product market, Sound Transit compared the relevant availability from NERA with detailed engineers cost estimates for the federally-assisted contracts that are anticipated to be let by Sound Transit during the 2010 Federal Fiscal Year. Working from these estimates, Sound Transit matched the six-digit NAICS codes to the various work elements contained within the cost estimate. In this manner, a set of dollar-based weights was derived, with each weight representing the relative importance of each NAICS code to overall spending on the contract.

The contracts reviewed were:

- 1) Tukwila Station (Construction contract estimated at approximately \$24m)
- 2) D to M Track and Signal (Construction Management) (A & E contract estimated at approximately \$6m)
- 3) Edmonds Station (Construction contract estimated at approximately \$4.5m)
- 4) Mukilteo Station (Construction contract estimated at approximately \$7.2m)
- 5) Sumner Parking Lot (A & E contract estimated at approximately \$1.5m)
- 6) D to M Track and Signal (Construction contract estimated at approximately \$60m)
- 7) Puyallup Parking Expansion (Construction contract estimated at approximately \$3.6m)

Once all the NAICS codes involved in the above projects were identified, the corresponding DBE availability estimates⁴ for the Seattle MSA were extracted from the WSDOT study database for the following NAICS codes:⁵

- 236220 Commercial and Institutional Building Construction
- 237110 Water and Sewer Line and Related Structures Construction
- 237130 Power and Communication Line and Related Structures Construction
- 237310 Highway, Street and Bridge Construction
- 237990 Other Heavy and Civil Engineering Construction
- 238110 Poured Construction Foundation and Structure Contractors
- 238120 Structural Steel and Precast Concrete Contractors
- 238210 Electrical Contractors
- 238220 Plumbing, Heating and Air-Conditioning Contractors
- 238310 Drywall and Insulation Contractors
- 238320 Painting and Wall Covering Contractors
- 238910 Site Preparation Contractors
- 324121 Asphalt Paving Mixture and Block Manufacturing
- 484110 General Freight Trucking, Local
- 484220 Specialized Freight (except Used Goods) Trucking, Local
- 532412 Construction, Mining and Forestry Machinery and Equipment Rental and Leasing
- 541310 Architectural Services
- 541320 Landscape Architectural Services
- 541330 Engineering Services
- 541360 Geophysical Surveying and Mapping Services
- 541370 Surveying and Mapping (except Geophysical) Services
- 541611 Administrative Management and General Management Consulting Services
- 541618 Other Management Consulting Services
- 541620 Environmental Consulting Services
- 561730 Landscaping Services
- 562910 Remediation Services
- 541370 Surveying and Mapping (except Geophysical) Services

⁴ The WSDOT Study used Dun & Bradstreet's *Marketplace* database, an independent and established data source routinely relied upon by courts, to identify the total number of Washington businesses in each four-digit SIC code, weighted by that code's share of WSDOT's product market. It next identified the number of firms owned by minorities and women, based upon the information in *Marketplace*, WSDOT's DBE directory and other regional listings. As noted by USDOT's guidance, supplementing the DBE Directory with other information on minority- and women-owned firms may provide a more complete picture of the availability of firms to work on WSDOT contracts than reliance solely upon the number of WSDOT certified and prequalified and preregistered DBEs. Because of the possible misclassification and non-classification of firms from these sources, additional scientifically accepted safeguards were taken to verify listed DBEs and estimate unlisted DBEs. This approach to estimating DBE availability was specifically noted with approval in *Northern Contracting*.

⁵ The WSDOT study used Standard Industrial Classification (SIC) codes. The SIC system was the predecessor to the NAICS system. Correspondence tables from the Census Bureau were used to convert SIC codes into their corresponding NAICS codes. See <http://www.census.gov/epcd/naics02/> (viewed 30 September 2008).

Most, but not all, of the NAICS Codes identified for the Sound Transit contracts listed above were available from the WSDOT Study database. For those that were not, DBE availability estimates were obtained from an unpublished special tabulation of the 2002 SBO purchased from the Census Bureau. This special tabulation was disaggregated by the 4-digit NAICS Code and by metropolitan areas. Availability estimates from the Seattle MSA were derived from the SBO database for the following NAICS Codes:

- 238150 Glass and Glazing Contractors
- 2238160Roofing Contractors
- 238170 Siding Contractors
- 238290 Other Building Equipment Contractors
- 423210 Furniture Merchant Wholesalers
- 423310 Lumber, Plywood, Millwork and Wood Panel Merchant Wholesalers
- 423710 Hardware Merchant Wholesalers
- 423830 Industrial Machinery and Equipment Merchant Wholesalers
- 423990 Other Miscellaneous Durable Goods Merchant Wholesalers
- 541380 Testing Laboratories
- 541922 Commercial Photography

The resulting availability estimates are presented below in Table 1.

Table 1. Availability of Minority-Owned and Women-Owned Firms in the Seattle Metropolitan Statistical Area, Selected Industries

NAICS Code	NAICS Description	Percent African-American	Percent Hispanic or Latino	Percent Asian or Pacific Islander	Percent Native American	Percent Minority	Percent White Female	Percent DBE
236220	Commercial and Institutional Building Construction	3.58	.27	3.04	2.37	9.26	8.75	18.01
237110	Water and Sewer Line and Related Structures Construction	.52	1.28	2.33	3.18	7.31	5.63	12.93
237130	Power and Communication Line and Related Structures Construction	.52	1.28	2.33	3.18	7.31	5.63	12.93
237310	Highway, Street and Bridge Constructions	0	2.29	2.54	1.0	5.83	7.34	13.17
237990	Other Heavy and Civil Engineering Construction	.45	1.83	1.67	.52	4.48	5.2	9.68
238110	Poured Concrete Foundation and Structure Contractors	.40	1.03	2.42	3.68	7.53	12.62	20.15
238120	Structural Steel and Precast Concrete Contractors	1.71	0.04	2.85	4.12	8.73	14.21	22.93
238150	Glass and Glazing Contractors	0.03	0.98	2.94	.42	4.37	2.11	6.48
238160	Roofing Contractors	0.03	0.98	2.94	.42	4.37	2.11	6.48
238170	Siding Contractors	0.03	0.98	2.94	0.42	4.37	2.11	6.48
238210	Electrical Contractors	0.97	0.41	2.93	3.28	7.60	13.71	21.31
238220	Plumbing, Heating and AC Contractors	.34	.14	2.49	3.52	6.49	12.81	19.30

NAICS Code	NAICS Description	Percent African-American	Percent Hispanic or Latino	Percent Asian or Pacific Islander	Percent Native American	Percent Minority	Percent White Female	Percent DBE
238290	Other Building Equipment Contractors	.24	1.00	0.08	0.43	1.75	3.91	5.66
238310	Drywall and Insulation Contractors	0.86	1.46	2.52	3.36	8.20	14.24	22.44
238320	Painting and Wall Covering Contractors	.55	.75	2.65	3.02	6.97	14.41	21.38
238910	Site Preparation Contractors	0.66	0.38	2.48	3.28	6.79	13.66	20.44
324121	Asphalt Paving Mixture and Block Manufacturing	0	3.20	6.78	3.20	13.18	24.10	37.28
423210	Furniture Merchant Wholesalers	0	0.29	4.13	0.29	4.72	8.26	12.98
423310	Lumber, Plywood, Millwork and Wood Panel Merchant Wholesalers	0	0.29	7.24	0	7.53	3.33	10.85
423710	Hardware Merchant Wholesalers	0	0.17	0.33	0	0.50	4.80	5.30
423830	Industrial Machinery and Equipment Merchant Wholesalers	0.13	0.07	0.27	0.07	0.54	3.03	3.57
423990	Other Miscellaneous Durable Goods Merchant Wholesalers	0.06	0.55	7.00	0.06	7.68	13.23	20.91
484110	General Freight Trucking, Local	4.37	2.22	2.29	1.19	10.37	13.87	24.24

NAICS Code	Description	Percent African-American	Percent Hispanic or Latino	Percent Asian or Pacific Islander	Percent Native American	Percent Minority	Percent White Female	Percent DBE
484220	Specialized Freight (except Used Goods)	4.37	2.22	2.29	1.49	10.37	13.87	24.24
532412	Construction, Mining and Forestry Equipment Rental and Leasing	0.93	3.91	7.38	3.16	15.37	22.95	38.33
541310	Architectural Services	0.41	0.59	3.70	1.57	6.27	11.74	18.01
541320	Landscape Architectural Services	0.00	3.78	7.58	2.71	14.06	29.34	43.40
541330	Engineering Services	0.52	0.55	3.29	1.61	5.97	8.90	14.87
541370	Surveying and Mapping (except Geophysical) Services	0.57	0.60	2.13	2.01	5.30	9.81	15.11
541380	Testing Laboratories	0.48	1.02	3.11	0.02	4.63	7.47	12.10
541611	Administrative Management and General Management Consulting Services	0.40	0.29	2.41	1.29	4.39	19.92	24.31
541618	Other Mgmt Consulting Services	0.45	0.54	2.67	1.42	5.08	17.67	22.75
541620	Environmental Consulting Services	0.45	0.54	2.67	1.42	5.08	17.67	22.75
541922	Commercial Photography	0.01	1.94	3.65	0.79	6.40	23.11	29.50
561730	Landscaping Services	0.08	3.40	8.34	3.16	14.98	26.23	41.22
562910	Remediation Services	0.53	0.66	2.84	3.37	7.40	13.97	21.37

The availability estimates in Table 1 can be used to create a narrowly tailored Annual DBE Goal by identifying the specific NAICS codes involved and calculating a weighted average of their NAICS-level availability estimates, using the percentage of total contract dollars attributable to each NAICS code as the weights.

Table 2 on the following page shows the estimated project availability percentage for the Sound Transit contracts identified above, based on the DBE availability estimates in Table 1 and the specific dollar-based weights identified for the projected FFY 2010 contracts.

Table 2.

Contract Specific DBE Availability for the Sound Transit Puyallup Parking Expansion

NAICS Codes	NAICS Description	Contract Dollars	DBE Availability Percentage
236220	Commercial and Industrial Building Constructions	\$6,933,600.00	18.010%
237990	Other Heavy and Civil Engineering Construction	\$26,400.00	9.680%
238110	Poured Concrete Foundation and Structure Contractors	\$2,176,800.00	20.150%
238120	Structural Steel and Precast Concrete Contractors	\$5,395,200.00	22.930%
238150	Glass and Glazing Contractors	\$2,306,400.00	6.480%
238160	Roofing Contractors	\$492,000.00	6.480%
238170	Siding Contractors	\$172,800.00	6.480%
238210	Electrical Contractors	\$1,752,000.00	21.310%
238220	Plumbing, Heating and Air-Conditioning Contractors	\$268,800.00	19.300%
238290	Other Building Equipment Contractors	\$1,346,400.00	5.660%
238310	Drywall and Insulation Contractors	\$50,400.00	22.440%
238320	Painting and Wall Covering Contractors	\$273,600.00	21.380%
238910	Site Preparation Contractors	\$273,600.00	20.440%
423210	Furniture Merchant Wholesalers	\$160,800.00	12.980%
423310	Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers	\$9,600.00	10.850%
423710	Hardware Merchant Wholesalers	\$148,800.00	5.300%
423830	Industrial Machinery and Equipment Merchant Wholesalers	\$9,600.00	3.570%
423990	Other Miscellaneous Durable Goods Merchant Wholesalers	\$93,600.00	20.910%

NAICS Codes	NAICS Description	Contract Dollars	DBE Availability Percentage
	Specialized Freight (except Used Goods)		
484220	Trucking, Local	\$91,200.00	24.240%
541330	Engineering Services	\$1,694,400.00	14.870%
	Geophysical Surveying and Mapping Services		
541360		\$76,800.00	15.110%
541380	Testing Laboratories	\$2,400.00	12.100%
	Environmental Consulting Services		
541620		\$36,000.00	22.750%
541922	Commercial Photography	\$4,800.00	29.500%
541730	Landscaping Services	\$50,400.00	41.220%
562910	Remediation Services	\$153,600.00	21.370%
Total Contract Dollars		\$24,000,000.00	17.27%

Contract Specific DBE Availability for the Sound Transit D to M Track and Signal CM (A & E)

NAICS Codes	NAICS Description	Contract Dollars	DBE Availability Percentage
	Landscaping Architectural Services		
541320		\$300,000.00	43.40%
541330	Engineering Services	\$3,900,000.00	14.87%
	Surveying and Mapping (except Geophysical) Services		
541370		\$300,000.00	15.11%
	Administrative Management and General Management Services		
541661		\$900,000.00	24.31%
	Other Management Consulting Services		
541618		\$300,000.00	22.75%
	Environmental Consulting Services		
541620		\$300,000.00	22.75%
Total Project Dollars		\$6,000,000.00	18.51%

Contract Specific DBE Availability for the Sound Transit Edmonds Station

NAICS Codes	NAICS Description	Contract Dollars	DBE Availability Percentage
236220	Commercial and Industrial Building Constructions	\$1,300,050.00	18.010%
237990	Other Heavy and Civil Engineering Construction	\$4,950.00	9.680%
238110	Poured Concrete Foundation and Structure Contractors	\$408,150.00	20.150%
238120	Structural Steel and Precast Concrete Contractors	\$1,011,600.00	22.930%
238150	Glass and Glazing Contractors	\$432,450.00	6.480%
238160	Roofing Contractors	\$92,250.00	6.480%
238170	Siding Contractors	\$32,400.00	6.480%
238210	Electrical Contractors	\$328,500.00	21.310%
238220	Plumbing, Heating and Air-Conditioning Contractors	\$50,400.00	19.300%
238290	Other Building Equipment Contractors	\$252,450.00	5.660%
238310	Drywall and Insulation Contractors	\$9,450.00	22.440%
238320	Painting and Wall Covering Contractors	\$51,300.00	21.380%
238910	Site Preparation Contractors	\$51,300.00	20.440%
423210	Furniture Merchant Wholesalers	\$30,150.00	12.980%
423310	Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers	\$1,800.00	10.850%
423710	Hardware Merchant Wholesalers	\$27,900.00	5.300%
423830	Industrial Machinery and Equipment Merchant Wholesalers	\$1,800.00	3.570%
423990	Other Miscellaneous Durable Goods Merchant Wholesalers	\$17,550.00	20.910%

NAICS Codes	NAICS Description	Contract Dollars	DBE Availability Percentage
	Specialized Freight (except Used Goods)		
484220	Trucking, Local	\$17,100.00	24.240%
541330	Engineering Services	\$317,700.00	14.870%
	Geophysical Surveying and Mapping Services		
541360		\$14,400.00	15.110%
541380	Testing Laboratories	\$450.00	12.100%
	Environmental Consulting Services		
541620		\$6,750.00	22.750%
541922	Commercial Photography	\$900.00	29.500%
541730	Landscaping Services	\$9,450.00	41.220%
562910	Remediation Services	\$28,800.00	21.370%
Total Project Dollars		\$4,500,000.00	17.27%

Contract Specific DBE Availability for the Sound Transit Mukilteo Station S. Platform

NAICS Codes	NAICS Description	Contract Dollars	DBE Availability Percentage
	Commercial and Industrial Building Constructions		
236220		\$2,080,080.00	18.010%
	Other Heavy and Civil Engineering Construction		
237990		\$7,920.00	9.680%
	Poured Concrete Foundation and Structure Contractors		
238110		\$653,040.00	20.150%
	Structural Steel and Precast Concrete Contractors		
238120		\$1,618,560.00	22.930%
	Glass and Glazing Contractors		
238150		\$691,920.00	6.480%
238160	Roofing Contractors	\$147,600.00	6.480%
238170	Siding Contractors	\$51,840.00	6.480%
238210	Electrical Contractors	\$525,600.00	21.310%
	Plumbing, Heating and Air-Conditioning Contractors		
238220		\$80,640.00	19.300%
	Other Building Equipment Contractors		
238290		\$403,920.00	5.660%
	Drywall and Insulation Contractors		
238310		\$15,120.00	22.440%

NAICS Codes	NAICS Description	Contract Dollars	DBE Availability Percentage
238320	Painting and Wall Covering Contractors	\$82,080.00	21.380%
238910	Site Preparation Contractors	\$82,080.00	20.440%
423210	Furniture Merchant Wholesalers	\$48,240.00	12.980%
423310	Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers	\$2,880.00	10.850%
423710	Hardware Merchant Wholesalers	\$44,640.00	5.300%
423830	Industrial Machinery and Equipment Merchant Wholesalers	\$2,880.00	3.570%
423990	Other Miscellaneous Durable Goods Merchant Wholesalers	\$28,080.00	20.910%
484220	Specialized Freight (except Used Goods) Trucking, Local	\$27,360.00	24.240%
541330	Engineering Services	\$508,320.00	14.870%
541360	Geophysical Surveying and Mapping Services	\$23,040.00	15.110%
541380	Testing Laboratories	\$720.00	12.100%
541620	Environmental Consulting Services	\$10,800.00	22.750%
541922	Commercial Photography	\$1,440.00	29.500%
541730	Landscaping Services	\$15,120.00	41.220%
562910	Remediation Services	\$46,080.00	21.370%
	Total Project Dollars	\$7,200,000.00	17.27%

Contract Specific DBE Availability for the Sound Transit Sumner Parking Expansion (A & E)

NAICS Codes	NAICS Description	Contract Dollars	DBE Availability Percentage
541320	Landscape Architectural	\$75,000.00	43.400%
541330	Engineering Services	\$975,000.00	14.870%
	Surveying and Mapping (except Geophysical)		
541370	Services	\$75,000.00	15.110%
	Administrative Management and General Management Consulting		
541611	Services	\$225,000.00	24.310%
	Other Management		
541618	Consulting Services	\$75,000.00	22.750%
	Environmental Consulting		
541620	Services	\$75,000.00	22.750%
	Total Contract Dollars	\$1,500,000.00	18.51%

Contract Specific DBE Availability for the Sound Transit D to M Track and Signal (Construction)

NAICS Codes	NAICS Description	Contract Dollars	DBE Availability Percentage
562910	Remediation Services	\$6,000,000.00	21.370%
238910	Site Preparation	\$3,000,000.00	20.440%
238210	Electrical Contractors	\$21,000,000.00	21.310%
237990	Other Heavy Civil	\$24,000,000.00	9.680%
561730	Landscaping Services	\$6,000,000.00	41.220%
Total Contract Dollars		\$60,000,000.00	18.61%

Contract Specific DBE Availability for the Sound Transit Puvallup Parking Expansion

NAICS Codes	NAICS Description	Contract Dollars	DBE Availability Percentage
238910	Site Preparation	\$720,000.00	20.440%
541310	Architectural Services	\$360,000.00	18.010%
561730	Landscaping Services	\$180,000.00	41.220%
324121	Asphalt Paving Mixture and Block Manufacturing	\$900,000.00	37.280%
238210	Electrical Contractor	\$540,000.00	21.310%
484110	General Freight Trucking, Local	\$900,000.00	24.240%
Total Contract Dollars		\$3,600,000.00	26.53%

Estimate of DBE Availability from the Projected 2010 Federally Funded Sound Transit Contracts

	DBE Dollars	Total Dollars
Tukwila Station	\$4,145,619	\$24,000,000
D to M Track and Signal (A&E)	\$1,110,750	\$6,000,000
Edmonds Station	\$777,304	\$4,500,000
Mukilteo Station	\$1,209,139	\$7,200,000
Sumner Parking	\$277,688	\$1,500,000
D to M Track and Signal (Construction)	\$11,166,900	\$60,000,000
Puyallup Parking Expansion	\$954,954	\$3,600,000
Totals	\$19,642,353	\$106,800,000

**DBE
Availability
Percentage 18.39%**

As the table above shows, the eight projected contracts have a total estimated dollar amount of \$106,800,000, of which \$19,642,353 represents DBE availability. **Thus, the Step 1, Base Figure DBE for Sound Transit's FFY 2010 Overall Goal is:**

18.39%

B. STEP 2—CONSIDERATION OF ADJUSTMENTS TO THE BASE FIGURE

Step 2 requires that Sound Transit examine all evidence of discrimination in its jurisdiction to determine what adjustment, if any, is needed to the base figure to arrive at the overall goal that reflects estimated DBE availability in a discrimination free market, and whether such discrimination renders Sound Transit likely to meet its goal without the use of race-conscious subcontracting goals on appropriate projects. Included among the types of evidence that must be considered pursuant to 49 CFR §26.45(d) are the current capacity of DBEs to perform work on Sound Transit's federally-assisted contracts, as measured by the volume of work DBEs have performed in recent years, and evidence from disparity studies conducted anywhere within Sound Transit's jurisdiction, to the extent not already accounted for in the base figure. Sound Transit must also consider any available evidence from related fields that affect the opportunities for DBEs to form, grow and compete. These include, but are not limited to, statistical disparities in the ability of DBEs to get the financing, bonding and insurance required to participate in the DBE Program, and data on employment, self-employment, education, training and union apprenticeship programs, to the extent relevant to the opportunities for DBEs to perform in the Program. The regulations caution that any adjustment to the base figure to account for the continuing effects of past discrimination or the effects of an ongoing DBE Program must be based on "demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought." 49 CFR §26.45(d) (3). Each of these categories is discussed separately below.

1. Past DBE Utilization

Sound Transit considered the current capacity of DBEs to perform on its federally-assisted contracts, measured by the volume of work DBEs have received in recent years.

FFY	DBE Participation on Federally-Funded Contracts
<u>2004</u>	<u>9.3%</u>
<u>2005</u>	<u>16.1%</u>
<u>2006</u>	<u>6.9%</u>
<u>2007</u>	<u>5.4%</u>
<u>2008</u>	<u>5.3%</u>
<u>2009*</u>	<u>8.11%</u>

*DBE Participation data for 2009 represents the first 6 months of the federal fiscal year (Oct. 1, 2008 through March 31, 2009). Full year report is due to FTA on Dec. 1, 2009.

2. Evidence from Availability and Disparity Studies

The *Western States Guidance* stated that agencies should consider evidence-gathering efforts that federal courts have approved in the past, including the studies and evidence cited in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation* and *Northern Contracting, Inc. v. State of Illinois* decisions. NERA conducted studies and Colette Holt & Associates provided expert testimonies that were cited in both cases. Sound Transit concluded the evidence of discrimination, both the data and conclusions, found in the NERA and Holt studies, were highly relevant and applicable to Sound Transit's consideration of the effects of discrimination on its contracting activities.

a. NERA WSDOT Study

In addition to a comprehensive and detailed methodology to establish the Step 1 baseline figure of current DBE availability, the WSDOT Study further examined disparities between the rates of business formation and the earnings from those businesses between DBEs and similarly situated white males. This analysis supports the inference that discrimination continues to impede the ability of minority- and women-owned firms to compete fully and fairly for Sound Transit prime contracts and subcontracts. This is precisely the type of evidence that Sound Transit must consider in determining whether to make an adjustment under Step 2. As recognized by the Illinois court in finding the Illinois Department of Transportation's DBE Program based in part upon a similar study, to be narrowly tailored, "[e]vidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between [DBEs] and majority-owned construction firms shows a "strong link" between a government's "disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination." Evidence that private discrimination results in barriers to business formation is relevant because it demonstrates that [DBEs] are precluded at the outset from competing for public construction contracts. *Concrete Works*, 321 F.3d at 977 (internal citations omitted). Having established the existence of such discrimination, a governmental entity "has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *Croson*, 488 U.S. at 492."

To provide a quantitative analysis of the effects of discrimination in WSDOT's marketplace, the Study examined disparities in Washington in earnings and business formation rates between DBEs and non-DBEs based upon the 2000 PUMS and Census Bureau's Current Population Survey (CPS).

ii. Disparities in Earnings

The Study analyzed whether minority and female entrepreneurs earn less from their businesses than do their White male counterparts. Other things being equal, if minority business owners as a group have lower earnings from their businesses than comparable non-minorities, economic theory suggests that minority business failure rates will be higher and minority business formation rates will be lower than those that would be observed in a race-neutral marketplace. Applying linear regression to assess whether minorities earn less than Whites with similar characteristics, the Study concluded that similarly situated minorities and women, especially Blacks, earn less than their comparable White male counterparts.

ii. Disparities in Business Formation

Likewise, the Study examined whether more minority businesses would have been formed if minorities were as likely to own their own businesses as were similarly situated White males, and if so, how many more such businesses would have been expected to be formed but for discrimination. Using Probit regression to control for age, industry and education, the Study found large and statistically significant disparities in the business formation rate for DBEs.

iii. DBE Availability “but for” Discrimination

Using the statistical data on disparities, the Study estimated that DBE availability in Washington in a race-neutral market would be approximately 54.6% higher than the Step 1 estimate, for an estimated availability of DBEs “but for” discrimination of 28.12% in a fully race-neutral, remediated and non-discriminatory market. The base figure is depressed because discrimination has impacted the likelihood that minorities and women will become entrepreneurs and that when they do those firms are likely to be less profitable and to fail more frequently.

b. 2006 Holt Anecdotal Evidence of Race and Sex Disparities Study for WSDOT

Colette Holt & Associates conducted a study for WSDOT in 2006 entitled “Anecdotal Evidence of Race and Sex Disparities in the Washington State Department of Transportation’s Contracting Market Place” (Holt Study) (Attachment B). The general conclusion of the study was that discrimination often results in barriers for minorities and women to succeed in obtaining WSDOT and private contracts whether as prime contractors or subcontractors.⁶

Holt conducted focus groups of DBEs and non-DBEs that explored the participants’ experiences with discrimination, bidding and performing WSDOT contracts and in accessing the financing, bonding, networks, etc., necessary for business success. Most DBEs reported experiencing significant racial, ethnic and gender barriers to their full and fair participation in WSDOT’s market place. These included:

⁶ Holt Study at p.2.

- The perception that they are inherently less competent and professional than their White male counterparts.
- The imposition of higher performance standards.
- Harassment and disparate treatment at worksites.
- Exclusion from industry and professional networks.
- Discrimination by lenders and sureties.
- Discrimination by trade unions.
- Very limited non-goals opportunities, including for public sector prime contract opportunities.
- Limitations on subcontracting scopes of work to no more than affirmative action goals.
- Substitution by prime contractors after contract award.
- Retaliation for complaining about poor treatment.
- Immediate and drastic reduction in solicitations and subcontract awards after WSDOT's suspension of contract goals.

Many non-DBE general contractors found the DBE Program requirements difficult and burdensome because:

- Goals were unrealistic.
- There is insufficient availability of qualified DBEs.
- Work that they preferred to self-perform was subcontracted to DBEs.
- Waivers were believed to be unavailable.

Non-DBE prime design consultants' experience of the Program was less burdensome, although they too experienced:

- Limited availability of qualified DBEs.
- Increased project management responsibilities and attendant costs from using DBEs.

Some non-DBE subcontractors that compete against DBEs felt that they suffered race and gender discrimination as a result of the DBE goals.

- DBEs were used to meet goals even when they provided higher quotes than non-DBEs.
- Small design firms had few opportunities because large firms prefer not to team unless it is to meet DBE goals.

c. Evidence from Local Disparity Studies

The only local disparity study, conducted for the Puget Sound local governments in 1999, is not sufficiently reliable, current or relevant to form the basis for an adjustment.

3. DBE Utilization on No-Goals Contracts

One indicator of the need to continue to apply race-conscious measures is the participation of DBEs in the absence of those measures. The results of unremediated markets were an important component of Illinois' successful defense of the DBE Program in the *Northern Contracting* case, and other courts have recognized that this is important evidence of the continuing existence of discrimination and barriers to full access to agency contracts and subcontracts.

To comply with the USDOT's directive on the *Western States* case, Sound Transit suspended the use of DBE contract goals beginning September 29, 2006. Since that time, contractual obligations to DBEs had fallen to an average of 6% per year, including contracts awarded before the court's opinion with DBE goals, from an average of 13% from 1999-2005. For FFY2007, Sound Transit reported 5.47% DBE awards/commitments compared to the 15% Small Business Goal. For FFY2008, Sound Transit reported 5.3% DBE awards/commitments compared to the 13% Small Business Goal.

For first six months of FFY 2009, Sound Transit reported 8.11% DBE awards/commitments compared to the 18.51% for FFY 2009. The following reasons and insights are related to this achievement:

- The FFY 2009 Goal was established October 31, 2009, thus the goal was in effect for a maximum of five months;
- There were only two Construction and A&E contracts let/awarded since the DBE Goal for FFY 2009 was established;
- Even though the first half of FFY 2009 DBE achievement is only 8.11% (out of an established DBE Goal of 18.51%), this is still a 53% increase over FFY 2008, where there was no race conscious goal;

Sound Transit's experience confirms that un-remediated contracts will not reflect DBE availability and ensure non-discrimination.

WSDOT likewise experienced a drastic decline in DBE utilization, well below availability. After WSDOT suspended the use of race-conscious measures in 2005, its DBE utilization fell to under 4%, including contracts awarded before the court's opinion with DBE goals, from an average of 12% from 1999-2005. DBEs' participation on WSDOT's state-funded no-goals contracts was also below the estimate of their availability.

This precipitous and drastic decline in DBE participation, after Sound Transit's and WSDOT's use of DBE contract goals was suspended, provides strong support for the conclusion that ongoing discriminatory effects persist in the Washington marketplace such that Sound Transit will need to implement race-conscious subcontracting goals to reach its overall DBE goal. Such declines were noted by the courts in the *Sherbrooke*, *Western States* and *Northern Contracting* cases in holding the revised Part 26 to be facially constitutional because race-neutral measures have proven to be inadequate to ameliorate discrimination. As noted by the Ninth Circuit,

Congress properly recognized that “[a]fter the ... *Croson* decision, many state and local governments removed affirmative action provisions from their public contracts. This prompted a significant drop in racial minorities’ participation in the construction industry.”⁷ The Eighth Circuit further relied upon this evidence in holding Minnesota DOT’s implementation of the new regulations to be constitutional as applied.

Likewise, expert testimony in the *Northern Contracting* and *BAGC v. Chicago*⁸ trials documented the experiences of other state and local governments whose race-conscious programs have either been enjoined or that do not set goals on locally-funded transportation contracts. In the absence of DBE programs, utilization of minority- and women-owned construction firms dropped dramatically below availability in all jurisdictions.

Step 2 adjustment evaluation

The federal regulations caution that any adjustment to the Step 1 base figure to account for the continuing effects of past discrimination or the effects of an ongoing DBE program must be based on “demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought.” 49 CFR §26.45(d) (3).

Sound Transit has determined that the past participation of DBEs should not be used to adjust the Step 1 base figure. First, there is no evidence that DBEs are being overutilized relative to their availability and capacity. To the contrary, Sound Transit’s utilization of DBEs is below the baseline estimate of DBE availability, and utilization continued to decline when the use of contract goals was suspended. Therefore, relying upon past participation to define current capacity in determining the goal for a non-discriminatory market is inapposite for Sound Transit, particularly in view of the suspension of contract goals.

All of the statistical and anecdotal evidence of the continuing effects of discrimination in Sound Transit’s marketplace described above supports the qualitative judgment that, but for the continuing effects of discrimination, the availability of minorities and women to participate on Sound Transit’s contracts would be considerably higher than 18.39 percent in a race-neutral, non-discriminatory market. The WSDOT Study provides a quantitative estimate of the degree to which discriminatory factors artificially depress DBE participation in Sound Transit’s marketplace and establishes a basis of an upward adjustment of the base figure. While the statistical disparities established by the WSDOT Study could serve as the basis for an upward adjustment of the base figure, Sound Transit believes that an upward adjustment is not warranted for the upcoming Federal Fiscal Year, in view of the low utilization of DBEs in FFYs 2006, 2007 and 2008, and the increase shown for the first six months of FFY 2009 when race conscious goals were established.

⁷ 407 F.3d at 992.

⁸ 298 F.Supp.2d 725 (N.D. Ill. 2003).

Sound Transit therefore adopts the step 1 base figure of

18.39%

as its DBE goal for FFY 2010.

II. PROJECTION OF RACE-NEUTRAL VS. RACE-CONSCIOUS GOAL ATTAINMENT

Sound Transit will meet the maximum feasible portion of its overall goal through race-neutral means. The ongoing initiatives described below seek to reduce discriminatory barriers, increase capacity and level the playing field for the participation of DBEs and other small contractors. They are also designed to assist Sound Transit in meeting the increased goal for DBE participation as prime contractors and subcontractors and to increase race-neutral participation on its contracts.

Race-Neutral Initiatives

Sound Transit has and will continue to implement the following race-neutral practices:

- Conducting outreach activities to small businesses to encourage participation on Sound Transit contracts, including interagency forums to provide information on upcoming contracting opportunities.
- Encouraging small businesses to register on Sound Transit's E-Bid Notification System to facilitate notification of contract solicitations, the ability to download solicitation documents, to provide a record of all document holders, to obtain information on upcoming pre-proposal/pre-bid meetings and review minutes and answers to questions regarding the solicitation.
- Conducting networking sessions, to provide small businesses an opportunity to meet and initially market themselves to likely prime proposers/bidders.
- Unbundling large contracts to make them accessible to small businesses to bid directly to Sound Transit.
- Serving as a satellite office for easier access for small businesses to the region's Small Business Transportation Resource Center (SBTRC) for business assessment, technical assistance, business training, and one-on-one counseling, sponsored by the USDOT Office of Small and Disadvantaged Business Utilization.
- Co-sponsoring business technical assistance, supportive services and training programs with Seattle Public Schools and with Turner Construction, other local agencies and the Associated General Contractors of Washington.

Projection of Race-Neutral versus Race-Conscious Participation

Sound Transit will meet the maximum feasible portion of its overall goal through these race-neutral measures. While Sound Transit's current vigorous race-neutral efforts will continue, past DBE utilization using only race-neutral measures suggests that contract goals are needed to ensure non-discrimination and to level the playing field for DBEs.

To estimate the portions of the goal to be met through race-neutral and race-conscious measures, Sound Transit evaluated past race-neutral DBE participation as defined in § 26.51(a).

Year	Total FTA Awards	Race-neutral DBE Utilization
2006	\$56,849,823	1.16% (\$659,512)
2007	\$26,481,726	5.32% (\$1,410,426)
2008	\$71,194,780	5.30% (\$3,935,344)

The median of Sound Transit's achievement of its goal through race-neutral means for FFY 2006-2008 was **5.30%**. Therefore, Sound Transit projects that it will meet 5.30% of its overall goal of 18.39% through race-neutral measures and 13.09% of its overall goal through race-conscious contract goals.

Sound Transit will monitor DBE participation throughout the year to adjust its use of contract goals to ensure that their use does not exceed the overall goal.

III. PUBLIC PROCESS

Over the past year, Sound Transit and its Diversity Programs Office have held discussions with persons and community organizations about Sound Transit's DBE Goal, its race- and gender-neutral small business strategies, and opportunities for DBEs and other small businesses to participate on its contracts.

A. Diversity Oversight Committee

Sound Transit established a Diversity Oversight Committee to advise Sound Transit's Chief Executive Officer (CEO), and to report periodically to the CEO and to the Sound Transit Board regarding Sound Transit's compliance with its diversity policies and programs. Appointed in January 2007, the Committee membership includes representatives of small business, trade and craft organizations, neighborhood and community organizations, and other interested parties. Committee members cannot have contracts for, or plans to compete for, work on Sound Transit projects. The Committee reflects the cultural and ethnic diversity of the communities within Sound Transit's three-county area.

Included in the Committee's oversight responsibilities are the following: contracting opportunities available to minorities and women in connection with Sound Transit and its public works projects; minority and women participation on Sound Transit contracts including actual utilization rates for DBE firms; DBE compliance; and issues affecting the ability of DBE contractors to successfully compete for public works contracts. The Committee meets monthly to review existing programs and advise Sound Transit on development and implementation plans and programs that support its diversity objectives.

Sound Transit's DBE Program has been a key topic of discussion by the Diversity Oversight Committee (DOC). In the preparation of Sound Transit's Draft DBE FFY 2010 Goal, the Committee was consulted. Sound Transit's DBE Goal Submittal for FFY 2010 will be provided to the Committee to receive comments from interested stakeholder groups from throughout the region as a part of the public comment process.

B. Public Notice of Proposed DBE Goal for FFY 2010

In announcing its intent to submit its FFY 2010 DBE Goal to the FTA, Sound Transit will advertise in various newspapers throughout the Central Puget Sound Region and in interstate publications, including newspapers with a target minority population readership, beginning on June 12, 2009.

The Appendix attached to this submittal is a representation of the notice that was placed in publications to reach the contracting community and communities interested in opportunities for DBEs in the Sound Transit region, and in at least one national publication.

APPENDIX

- **Notice of Sound Transit FFY 2010 DBE Goal for Public Comment**

**Notice of
Sound Transit DBE Goal
for
Federal Fiscal Year 2010**

SOUND TRANSIT

Central Puget Sound Regional Transit Authority

Sound Transit, the Central Puget Sound Regional Transit Authority, hereby gives notice pursuant to 49 Code of Federal Regulations Part 26, issued by the U. S. Department of Transportation, that Sound Transit will set the following DBE utilization goal for Federal Fiscal Year 2010:

**Federal Transit Administration
Federally Assisted Projects:
18.39 %**

Sound Transit intends to submit the above-referenced DBE utilization goal to the Federal Transit Administration. Persons interested in obtaining a copy of Sound Transit's submittal to the Federal Transit Administration may find it on the Sound Transit website under Diversity Programs: <http://www.soundtransit.org/diversity>, or contact Sound Transit's Diversity Programs Office via phone at 206-398-5000 or toll-free at 1-800-201-4900, email at diversity2@soundtransit.org or write to the address below. The submittal is also available for review at Sound Transit's main offices until July 24, 2009 during normal business days from 9:00 a. m. until 4:00 p. m. at Union Station, 401 S. Jackson St., Seattle, WA 98104.

Sound Transit will accept written comments on the DBE program and goal, received no later than July 28, 2009 via email at diversity2@soundtransit.org, or by mail to Sound Transit, Union Station, 401 S. Jackson St., Seattle, WA 98104-2826. Attention: Diversity Programs Office.