



# Overall Disadvantaged Business Enterprise Triennial Goal for the Federal Aviation Administration

**PROPOSED**

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Fiscal Years 2022-2024

Civil Rights Division

## Introduction

The Texas Department of Transportation (“TxDOT”) submits this report on its Disadvantaged Business Enterprise (“DBE”) triennial goal, and the methods used to calculate it, to the United States Department of Transportation’s (“USDOT” or “DOT”) Federal Aviation Administration (“FAA”). The overall goal was established in accordance with §26.45 of Title 49 C.F.R. Part 26 (“Part 26”) and guidance set forth in the DOT’s *Tips for Goal-Setting in the Disadvantaged Business Enterprise Program* (“DOT Tips”) published by its Office of Small and Disadvantaged Business Utilization (“OSDBU”).<sup>1</sup> This submission covers Federal Fiscal Years (FFYs) 2022-2024 and establishes an overall DBE goal of 11.5%. TxDOT plans to achieve its goal using 0.0% race-neutral measures and a remainder of 11.5% race-conscious measures.

TxDOT commissioned a disparity study from Colette Holt & Associates (“CHA”) that was completed and posted on TxDOT’s website in November of 2019.<sup>2</sup> To develop this goal submission, TxDOT has commissioned new availability estimates to refine its goal setting. As part of the analysis, CHA determined the base figure of DBE availability and provided refined data relevant to determine whether to adjust the base figure. The data and results are discussed below.

### ***The Disadvantaged Business Enterprise Regulatory Mandate***

Since TxDOT receives FAA grants for airport planning and development and anticipates awarding prime contracts that equal or exceed the cumulative amount of \$250,000.00 in the forthcoming FFYs, it must administer a DBE program in good faith; meet related requirements as a condition of receiving these funds; and establish an overall triennial DBE goal for FAA assisted contracts using the two-step Part 26 goal-setting process.<sup>3</sup> Under Step One, TxDOT must calculate the DBE availability for its federally assisted contracts based upon “demonstrable evidence of the availability of *ready, willing, and able*”<sup>4</sup> DBEs relative to all businesses *ready, willing, and able* to participate in its federally assisted contracts (the base figure).<sup>5</sup> The goal must reflect TxDOT’s determination of the level of participation it would expect in the absence of discrimination in the relevant market area. Under Step Two, TxDOT must examine all relevant evidence for consideration of a possible adjustment to the base figure to reflect the “effects of the DBE program and the level of participation that would be expected but for discrimination”.

Section 26.45(e)(2) requires that the overall goal must be expressed as a percentage of all FAA funds that TxDOT will expend in FAA assisted contracts in the three forthcoming FFYs. TxDOT must also include with its overall goal submission, a description of the methodology used to establish the goal, including the base figure

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<sup>1</sup>[https://www.transportation.gov/sites/dot.gov/files/docs/Tips\\_for\\_Goal-Setting\\_in\\_the\\_DBE\\_Program\\_20141106.pdf](https://www.transportation.gov/sites/dot.gov/files/docs/Tips_for_Goal-Setting_in_the_DBE_Program_20141106.pdf) (“DOT Tips”); see also 49 C.F.R. §26.45. The DOT Tips contain written guidance on goal-setting; have been approved by the DOT General Counsel; and represent the institutional position of DOT.

<sup>2</sup><https://ftp.dot.state.tx.us/pub/txdot/civ/txdot-disparity-study-2019.pdf>.

<sup>3</sup>49 C.F.R. §26.45.

<sup>4</sup>The term *ready, willing, and able* is not defined in Part 26. The CHA study treats this as the universe of businesses interested, capable, and able to perform industry work on TxDOT’s FAA assisted contracts as defined by 6-digit North American Industry Classification System codes.

<sup>5</sup>The DOT Tips state that the most important consideration relative to Step One is that the recipient is attempting to establish a measurement of the actual relative availability of DBEs to perform the types of contracts (both primes and subs) that it intends to let.

and evidence with which it was calculated, the adjustments made, and the evidence relied upon for the adjustments.<sup>6</sup>

## Data Source and Methodological Framework

For this goal submission, TxDOT used the 2019 Disparity Study performed by Colette Holt & Associates. Under §26.45(c), an FAA recipient may use a “percentage figure derived from data in a valid, applicable study” to establish its base figure under Step One. The Disparity Study analyzed TxDOT’s Federal Highway Administration, FAA and state funded contracts.<sup>7</sup> The highly detailed unweighted availability estimate serves as the starting point for setting narrowly tailored contract goals that reflect the percentage of available DBEs as a percentage of the total pool of available firms. The CHA study found that minorities and women continue to suffer discriminatory barriers to full and fair access to contracts and associated subcontracts in TxDOT’s market area.

TxDOT anticipates that the types, sizes, and locations of FAA funded contracts that the agency awards in the future will be similar to the FAA funded contracts that it awarded during the disparity study period, October 1, 2011 through September 30, 2016. It therefore is relying on the utilization data from the Disparity Study. These data have been supplemented by new availability estimates generated in 2021 using the same methodology as the Study. The CHA Study contains the most refined and up-to-date data available to TxDOT for this submission.<sup>8</sup>

## Step One Base Figure

Step One calls for the calculation of a base figure reflecting the relative availability of DBEs to perform the work intended to be let within TxDOT’s local marketplace. This entails determining the percentage of DBEs, including potential DBEs, represented among all firms (DBEs and non-DBEs) that are ready, willing, and able to compete for TxDOT’s FAA assisted contracts.

CHA analyzed TxDOT contract data for 2012 through 2016. CHA created a sample file of 76 contracts funded with FAA dollars representing the contracts with the largest dollar values. The Final Contract Data File for analysis contained a total award amount of \$162,190,832, representing 44 contracts to prime contractors. Of this amount, there were 318 associated subcontracts representing \$41,861,752. The Final Contract Date File was used to determine the geographic and product markets for the analyses; to estimate the utilization of DBEs<sup>9</sup> on those contracts; and to calculate DBE availability in TxDOT’s marketplace.

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<sup>6</sup>The *DOT Tips* emphasize that recipients must “show their work” by including all calculations and assumptions in submissions and ensuring that the DOT can follow the recipient’s thinking process.

<sup>7</sup>The Disparity Study was conducted in conformance with the *Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program*, Transportation Research Board of the National Academy of Sciences, NCHRP Report, Issue No. 644, 2010, 50-51 (*National Disparity Study Guidelines*).

<sup>8</sup>The *DOT Tips* require that TxDOT use the most refined and transparent data available in its marketplace and filter out businesses that are not relevant to calculations. The CHA study contains refined quantitative and qualitative data analyzed by social science research professionals.

<sup>9</sup>For this analysis, the term “DBE” includes firms that are certified by government agencies and minority- and woman-owned firms that are not certified. As discussed in Chapter II of the 2019 Disparity Study, the inclusion of all minority- and woman-owned businesses in the pool casts the broad net approved by the courts and recommend by USDOT that supports the remedial nature of the programs. See *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 723 (7th Cir. 2007) (The “remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net.”); *DOT Tips*.

A legally defensible disparity study must determine empirically the industries that comprise TxDOT's product market. This is a requirement under Part 26 and recommended in the National Disparity Study Guidelines and the *DOT Tips*. The generally accepted approach is to analyze those detailed industries, as defined by 6-digit North American Industry Classification System ("NAICS") codes<sup>10</sup> that make up at least 75% of the prime contract and subcontract payments for the study period.<sup>11</sup> CHA used this approach to ensure a comprehensive analysis of TxDOT's activities in the market.

## TxDOT's Unconstrained Product Market for FAA assisted Contracts

Tables 1 through 3 contain the NAICS codes used to define the product market for TxDOT's FAA funded contracts. The contracts were disaggregated by the level of contract (*i.e.*, whether the firm received the contract as a prime or a subcontractor), the label for each NAICS code, and the industry percentage distribution of the number of contracts and spending across NAICS codes. The Tables present TxDOT's unconstrained product market, which was later constrained by the geographic market area, discussed below.

### TxDOT's Product Market for FAA Funded Contracts

Table 1: Industry Percentage Distribution of Contracts by Dollars Paid for FAA Contracts

NAICS Code	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	67.91%	67.91%
238210	Electrical Contractors and Other Wiring Installation Contractors	7.5803%	75.49%
236220	Commercial and Institutional Building Construction	5.5781%	81.07%
238990	All Other Specialty Trade Contractors	3.3301%	84.40%
541330	Engineering Services	2.6148%	87.02%
238910	Site Preparation Contractors	2.1558%	89.17%
238110	Poured Concrete Foundation and Structure Contractors	1.2048%	90.38%
238220	Plumbing, Heating, and Air Conditioning Contractors	1.0930%	91.47%
<b>TOTAL</b>			<b>100.0%</b> <sup>12</sup>

Source: CHA analysis of TxDOT data.

<sup>10</sup>[www.census.gov/eos/www/naics](http://www.census.gov/eos/www/naics). NAICS codes constitute the standards used by Federal statistical agencies to classify business establishments for purposes of collecting, analyzing, and publishing statistical data related to the United States business economy.

<sup>11</sup>*National Disparity Study Guidelines*, at 50-51.

<sup>12</sup> Agency spending across another 67 NAICS codes comprised 8.53% of all spending.

Table 2: Industry Percentage Distribution of FAA Contracts by Dollars For FAA Funded Prime Contracts

NAICS Code	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	81.71%	81.71%
236220	Commercial and Institutional Building Construction	7.36%	89.07%
238210	Electrical Contractors and Other Wiring Installation Contractors	3.83%	92.90%
238990	All Other Specialty Trade Contractors	3.59%	96.50%
541330	Engineering Services	1.88%	98.38%
<b>TOTAL</b>			<b>100.0%<sup>13</sup></b>

Source: CHA analysis of TxDOT data.

Table 3: Industry Percentage Distribution of Contracts by Dollars Paid for FAA Contracts, Subcontracts

NAICS Code	NAICS Code Description	Pct Total Contract Dollars	Cumulative Pct Total Contract Dollars
237310	Highway, Street, and Bridge Construction	28.26%	28.26%
238210	Electrical Contractors and Other Wiring Installation Contractors	18.35%	46.61%
238910	Site Preparation Contractors	8.35%	54.96%
541330	Engineering Services	4.72%	58.68%
238110	Poured Concrete Foundation and Structure Contractors	4.67%	64.35%
238220	Plumbing, Heating, and Air Conditioning Contractors	4.23%	68.58%
238390	Other Building Finishing Contractors	3.29%	71.87%
237110	Water and Sewer Line and Related Structures Construction	2.97%	74.85%
423510	Metal Service Centers and Other Metal Merchant Wholesalers	2.76%	77.61%
484220	Specialized Freight (except used goods) Trucking, Local	2.75%	80.36%
238990	All Other Specialty Trade Contractors	2.57%	82.93%
238120	Structural Steel and Precast Concrete Contractors	1.79%	84.73%
423310	Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers	1.63%	86.35%
238310	Drywall and Insulation Contractors	1.11%	87.47%
237120	Oil and Gas Pipeline and Related Structures Construction	1.05%	88.51%
<b>TOTAL</b>			<b>100.0%<sup>14</sup></b>

Source: CHA analysis of TxDOT data.

## TxDOT's Geographic Market for FAA Funded Contracts

The courts and Part 26 require that a recipient limit the reach of its race- and gender-conscious contracting program to its geographic market area (“GMA”).<sup>15</sup> While it may be the state’s jurisdictional boundaries, this element of the analysis must be empirically established.<sup>16</sup>

<sup>13</sup>Agency spending across another two NAICS codes comprised 1.62% of all spending.

<sup>14</sup>Agency spending across another 67 NAICS codes comprised 11.49% of all spending.

<sup>15</sup>*City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989) (Richmond was specifically faulted for including minority contractors from across the country in its program based on the national evidence that supported the USDOT DBE program).

<sup>16</sup>*Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1520 (10th Cir. 1994) (to confine data to strict geographic boundaries would ignore “economic reality”).

To determine the GMA<sup>17</sup> for TxDOT, the CHA study applied the standard of identifying firm locations that account for at least 75% of contract and subcontract dollar payments in the contract data file.<sup>18</sup> Location was determined by zip code and aggregated into counties as the geographic unit.

Spending in the state of Texas accounted for 95.7% of all contract dollars paid in TxDOT's unconstrained product market for FAA assisted contracts. Therefore, the state of Texas constituted the geographic market from which the availability data were drawn for FAA funded contracts.

## TxDOT's Utilization of DBEs on FAA Funded Contracts

The next essential step was to determine the dollar value of TxDOT's utilization of DBEs on FAA funded contracts, as measured by payments to primes and subcontractors and as disaggregated by race and gender. Since TxDOT and its subrecipients did not collect data for most non-DBE subcontractors as well as other records critical for the study, CHA obtained missing data from prime vendors and reconstructed other contract records, including researching the race and gender ownership of subcontractors and assigning NAICS codes to the firms.

The contract dollar shares are equivalent to the weight of each NAICS code spending. These weights were used to transform data from unweighted availability to weighted availability, as discussed below.

Tables 4 through 6 represent TxDOT's utilization by contract dollars paid for FAA funded contracts in the constrained product area.

Table 4: NAICS Code Distribution of FAA Funded Contract Dollars

NAICS Code	NAICS Code Description	Total Contract Dollars	Pct. Total Contract Dollars
237310	Highway, Street, and Bridge Construction	\$108,296,464.00	72.7%
238210	Electrical Contractors and Other Wiring Installation Contractors	\$12,278,845.00	8.2%
236220	Commercial and Institutional Building Construction	\$8,981,683.00	6.0%
541330	Engineering Services	\$4,240,957.00	2.8%
238910	Site Preparation Contractors	\$3,496,588.50	2.3%
238110	Poured Concrete Foundation and Structure Contractors	\$1,954,138.50	1.3%
238220	Plumbing, Heating, and Air-Conditioning Contractors	\$1,772,742.00	1.2%
238390	Other Building Finishing Contractors	\$1,378,085.38	0.9%
237110	Water and Sewer Line and Related Structures Construction	\$1,244,685.25	0.8%
423510	Metal Service Centers and Other Metal Merchant Wholesalers	\$1,157,230.50	0.8%
484220	Specialized Freight (except Used Goods) Trucking, Local	\$1,134,219.00	0.8%

<sup>17</sup>The DOT Tips indicate that the local market area is not necessarily the same as the political jurisdiction in which the recipient is geographically located. It is the area in which the substantial majority of the contractors and subcontractors with which the recipient does business are located and the area in which it spends the substantial majority of its contracting dollars.

<sup>18</sup>National Disparity Study Guidelines, at 49.

NAICS Code	NAICS Code Description	Total Contract Dollars	Pct. Total Contract Dollars
238990	All Other Specialty Trade Contractors	\$1,076,584.88	0.7%
238120	Structural Steel and Precast Concrete Contractors	\$750,189.94	0.5%
423310	Lumber, Plywood, Millwork, and Wood Panel Merchant Wholesalers	\$681,836.88	0.5%
238310	Drywall and Insulation Contractors	\$465,837.50	0.3%
237120	Oil and Gas Pipeline and Related Structures Construction	\$117,578.57	0.1%
<b>Total</b>		<b>\$149,027,665.90</b>	<b>100.0%</b>

Source: CHA analysis of TxDOT data.

Table 5: Distribution of FAA Funded Contract Dollars by Race and Gender (total dollars)

NAICS Code	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
236220	\$0	\$662,055	\$0	\$0	\$126,091	\$788,146	\$8,193,537	\$8,981,683
237110	\$431,959	\$0	\$0	\$0	\$0	\$431,959	\$812,726	\$1,244,685
237120	\$0	\$44,124	\$0	\$0	\$0	\$44,124	\$73,455	\$117,579
237310	\$0	\$1,486,241	\$617,788	\$92	\$3,990,083	\$6,094,204	\$102,202,264	\$108,296,468
238110	\$183,771	\$0	\$0	\$0	\$375,374	\$559,145	\$1,394,993	\$1,954,138
238120	\$0	\$0	\$0	\$270,467	\$183,325	\$453,791	\$296,399	\$750,190
238210	\$2,172,280	\$3,098,577	\$0	\$0	\$1,304,897	\$6,575,754	\$5,703,091	\$12,278,845
238220	\$0	\$203,408	\$0	\$0	\$922,786	\$1,126,194	\$646,548	\$1,772,742
238310	\$0	\$0	\$0	\$0	\$3,019	\$3,019	\$462,818	\$465,838
238390	\$0	\$244,822	\$153,093	\$0	\$369,510	\$767,425	\$610,660	\$1,378,085
238910	\$0	\$0	\$0	\$0	\$13,535	\$13,535	\$3,483,053	\$3,496,589
238990	\$0	\$1,200	\$0	\$36,093	\$688,552	\$725,845	\$350,740	\$1,076,585
423310	\$0	\$0	\$0	\$0	\$0	\$0	\$681,837	\$681,837
423510	\$0	\$0	\$0	\$0	\$0	\$0	\$1,157,230	\$1,157,230
484220	\$0	\$56,478	\$0	\$302,931	\$650,176	\$1,009,585	\$124,634	\$1,134,219
541330	\$315,795	\$32,748	\$0	\$0	\$1,278,301	\$1,626,844	\$2,614,113	\$4,240,957
<b>Total</b>	<b>\$3,103,805</b>	<b>\$5,829,650</b>	<b>\$770,881</b>	<b>\$609,583</b>	<b>\$9,905,650</b>	<b>\$20,219,569</b>	<b>\$128,808,101</b>	<b>\$149,027,670</b>

Source: CHA analysis of TxDOT data.



Table 6: Distribution of FAA Funded Contract Dollars by Race and Gender (share of total dollars)

NAICS Code	Black	Hispanic	Asian	Native American	White Women	DBE	Non-DBE	Total
236220	0.0%	7.4%	0.0%	0.0%	1.4%	8.8%	91.2%	100.0%
237110	34.7%	0.0%	0.0%	0.0%	0.0%	34.7%	65.3%	100.0%
237120	0.0%	37.5%	0.0%	0.0%	0.0%	37.5%	62.5%	100.0%
237310	0.0%	1.4%	0.6%	0.0%	3.7%	5.6%	94.4%	100.0%
238110	9.4%	0.0%	0.0%	0.0%	19.2%	28.6%	71.4%	100.0%
238120	0.0%	0.0%	0.0%	36.1%	24.4%	60.5%	39.5%	100.0%
238210	17.7%	25.2%	0.0%	0.0%	10.6%	53.6%	46.5%	100.0%
238220	0.0%	11.5%	0.0%	0.0%	52.1%	63.5%	36.5%	100.0%
238310	0.0%	0.0%	0.0%	0.0%	0.7%	0.7%	99.4%	100.0%
238390	0.0%	17.8%	11.1%	0.0%	26.8%	55.7%	44.3%	100.0%
238910	0.0%	0.0%	0.0%	0.0%	0.4%	0.4%	99.6%	100.0%
238990	0.0%	0.1%	0.0%	3.4%	64.0%	67.4%	32.6%	100.0%
423310	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
423510	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100.0%	100.0%
484220	0.0%	5.0%	0.0%	26.7%	57.3%	89.0%	11.0%	100.0%
541330	7.5%	0.8%	0.0%	0.0%	30.1%	38.4%	61.6%	100.0%
<b>Total</b>	<b>2.1%</b>	<b>3.9%</b>	<b>0.5%</b>	<b>0.4%</b>	<b>6.7%</b>	<b>13.6%</b>	<b>86.4%</b>	<b>100.0%</b>

Source: CHA analysis of TxDOT data.

## Availability of DBEs in TxDOT's Market for FAA Funded Contracts

CHA next estimated the availability of DBEs in TxDOT's market area. Availability estimates are also critical for TxDOT to set narrowly tailored contract goals on FAA assisted contracts. In view of the potential impacts on the market of the COVID-19 pandemic, CHA developed new estimates for this goal submission.

CHA applied the "custom census" approach with refinements to estimating availability. The consultant utilized three databases:

- The TxDOT Final Contract Data File.
- The Master DBE Directory compiled by CHA.
- 2021 Dun & Bradstreet/Hoovers Database (downloaded from the companies' websites).

The Master DBE Directory combined directories and other lists containing information about minority- and woman-owned businesses. After compiling the Master DBE Directory, the firms used in the Custom Census analysis were limited to those firms operating within TxDOT's constrained product market. The resulting list is comprehensive.

CHA next developed a custom database from Hoovers, a Dun & Bradstreet company for minority- and woman-owned firms and non-DBEs. Hoovers maintains a comprehensive, extensive and regularly updated listing of all firms conducting business. The database includes a vast amount of information on each firm, including

location and detailed industry codes, and is the broadest publicly available data source for firm information. We purchased the information from Hoovers for the firms in the NAICS codes located in the Department's market area in order to form our custom Dun & Bradstreet/Hoovers Database. In the initial download, the data from Hoovers simply identifies a firm as being minority-owned.<sup>19</sup> However, the company does keep detailed information on ethnicity (*i.e.*, is the minority firm owner Black, Hispanic, Asian, or Native American). The consultant obtained this additional information from Hoovers by special request.

The Hoovers database is the most comprehensive list of minority-owned and woman-owned businesses available. It is developed from the efforts of a national firm whose business is collecting business information. Hoovers builds its database from over 250 sources, including information from government sources and various associations, and its own efforts. Hoovers conducts an audit of the preliminary database prior to the public release of the data. That audit must result in a minimum of 94% accuracy. Once published, Hoovers has an established protocol to regularly refresh its data. This protocol involves updating any third-party lists that were used and contacting a selection of firms via Hoover's own call centers.

CHA merged the Final Contract Data File, the Master DBE Directory and the Hoovers database to form an accurate estimate of firms available to work on TxDOT's FAA funded contracts.

Table 7: DBE Availability for FAA Funded Contracts

NAICS Code	Black	Latino	Asian	Native American	White Woman	DBE	Non-DBE	Total
236220	5.9%	8.1%	2.2%	1.1%	7.8%	25.0%	75.0%	100.0%
237110	1.8%	5.7%	0.4%	0.2%	5.7%	13.7%	86.3%	100.0%
237120	1.5%	1.9%	0.1%	0.8%	3.2%	7.5%	92.5%	100.0%
237310	6.5%	12.6%	1.5%	0.7%	7.5%	28.8%	71.2%	100.0%
238110	2.1%	6.2%	0.4%	0.2%	3.2%	12.0%	88.0%	100.0%
238120	3.9%	16.2%	1.7%	1.9%	10.8%	34.6%	65.4%	100.0%
238210	1.5%	4.2%	0.5%	0.2%	4.7%	11.0%	89.0%	100.0%
238220	0.8%	1.8%	0.2%	0.1%	2.7%	5.5%	94.5%	100.0%
238310	2.6%	5.5%	0.3%	0.4%	4.7%	13.5%	86.5%	100.0%
238390	0.8%	2.3%	0.2%	0.2%	2.7%	6.3%	93.7%	100.0%
238910	4.5%	8.4%	0.5%	0.5%	7.8%	21.6%	78.4%	100.0%
238990	1.3%	2.6%	0.3%	0.2%	3.9%	8.2%	91.8%	100.0%
423310	0.3%	1.0%	0.1%	0.1%	3.1%	4.7%	95.3%	100.0%
423510	0.3%	2.0%	0.5%	0.3%	4.2%	7.3%	92.7%	100.0%
484220	8.2%	21.7%	0.5%	0.7%	9.1%	40.2%	59.8%	100.0%
541330	2.5%	5.9%	3.6%	0.6%	6.2%	18.8%	81.2%	100.0%
<b>TOTAL</b>	<b>2.1%</b>	<b>4.5%</b>	<b>0.9%</b>	<b>0.3%</b>	<b>4.6%</b>	<b>12.4%</b>	<b>87.6%</b>	<b>100.0%</b>

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

<sup>19</sup>The variable is labeled: "Is Minority Owned" and values for the variable can be either "1" (for yes) or blank.

As a result of the foregoing analysis, DBEs and businesses eligible for DBE certification might be expected to receive 12.4% of TxDOT's FAA funded prime contract and subcontract dollars based on their availability for that work, as noted in Table 7. Thus, TxDOT is using 12.4% as the base figure for its overall DBE goal.

Because the United States Congress has already determined that discrimination operates in the market for federally funded transportation-related contracts, local governments not subject to the jurisdiction of the Ninth Circuit Court of Appeals do not perform a disparity analysis on USDOT funded contracts. Under 49 C.F.R. Part 26, all that is required is an availability analysis.<sup>20</sup>

## Step Two Adjustments to the Base Figure

Once the base figure has been calculated, TxDOT must examine all of the available evidence in its jurisdiction to determine if an adjustment is necessary to reflect the level of DBE participation expected absent the effects of discrimination. DOT recipients are not required to make an adjustment. However, they must explain why one was not made. Included among the types of evidence to be considered are the current capacity of DBEs to perform work on TxDOT's federally assisted contracts, as measured by the volume of work DBEs performed in recent years, and evidence from disparity studies conducted anywhere within TxDOT's jurisdiction, to the extent not already accounted for in the base figure. If available, TxDOT must also consider available evidence from related fields that affect the opportunities for DBEs to form, grow, and compete, including statistical disparities in the ability of DBEs to obtain the financing, bonding, and insurance required to participate in the program, and data on employment, self-employment, education, training, and union apprenticeship, to the extent relevant to opportunities for DBEs to perform in the program. Part 26, §26.45(d)(3) and the *DOT Tips* 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".

### *TxDOT's Past DBE Utilization*<sup>21</sup>

As part of its Step Two analysis, TxDOT considered the current capacity of DBEs to perform work on its FAA assisted projects, as measured by the amount of work performed by certified DBEs on FAA funded contracts over the past five years.

DBE Participation FFY 2016: 9.4%
DBE Participation FFY 2017: 10.5%
DBE Participation FFY 2018: 14.3%
DBE Participation FFY 2019: 12.3%
DBE Participation FFY 2020: 9.7%

<sup>20</sup>See <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/western-states-paving-company-caseq-and-a>.

<sup>21</sup>The *DOT Tips* provide that it is not acceptable to use past participation as the Step One Base Figure. The Step One Base Figure must represent an attempt to measure the availability of firms that are ready, willing, and able to compete, not just those who have won contracts in the past.

The TxDOT median DBE participation for FFY 2016 through 2020 is 10.5%.

### ***Evidence from other disparity studies***

The only been relevant disparity study performed since TxDOT's last goal submission was conducted by CHA in 2020 for Harris County.<sup>22</sup> CHA determined the County's utilization of minority- and woman-owned business enterprises ("M/WBEs") during FFY 2016 through the first quarter of FFY 2019; the availability of these firms as a percentage of all firms in the County's geographic and industry market areas; and any disparities between the County's utilization of M/WBEs and M/WBE availability. CHA also analyzed disparities in the wider Houston economy, where affirmative action is rarely practiced, to evaluate whether barriers continue to impede opportunities for minorities and women where remedial intervention is not imposed. It also collected quantitative and qualitative data concerning the experiences of M/WBEs in obtaining County contracts and associated contracts. Utilizing the custom census approach discussed above, the CHA study found that M/WBEs in the County's market area continue to experience significant disparities in their access to County contracts and private sector opportunities and to the resources necessary to achieve business success. CHA concluded that these results provide a sufficient basis for the use of narrowly tailored remedial race- and gender-based measures, including contract goals, to ensure equal opportunities for all firms to do business with the County.

### ***Disparities Affecting DBE opportunities***

The 2019 TxDOT Disparity Study explored the Census Bureau data and literature relevant to how discrimination in the overall Texas economy affects the abilities of minorities and women to fully and fairly engage in TxDOT's prime contract and subcontract opportunities. Data from the Census Bureau's Annual Business Survey establish very large disparities between M/WBE firms and non-M/WBE firms when examining the sales of all firms, the sales of employer firms (those 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 available 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, grow, and succeed.

While relevant and probative to whether TxDOT needs to continue to employ race-conscious measures to meet its DBE goal, the Study recognized that these results are difficult to quantify within the rigors of constitutional strict scrutiny and therefore should not serve as the basis for a Step Two adjustment.<sup>23</sup>

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<sup>22</sup>While the City of Austin, Texas conducted a study during the last five years, it has remained in draft form and was not accepted by the city. CHA is conducting the study for the city of Austin. It is scheduled to be completed by August 2021.

<sup>23</sup>Strict scrutiny, the highest level of judicial review is applied to race-based programs. Under this standard, the public entity must establish its "compelling governmental interest" in remediating race discrimination by current "strong evidence" of the persistence of discrimination. Any remedies adopted must be "narrowly tailored" to that discrimination; that is, the program must be directed at the types and depth of the identified discrimination.

## Step Two Base Figure Final Adjustment

Following the *DOT Tips*, TxDOT combined the Step One base figure of 12.4% with its median past DBE participation of 10.5% for an average of 11.5%. TxDOT therefore proposes a triennial DBE goal of 11.5% for its FAA funded contracts.

## Race-Neutral Achievement on TxDOT's FAA Funded Contracts

Under §26.51(a), TxDOT must meet the maximum feasible portion of its overall FAA goal by using race-neutral (“RN”) measures to facilitate DBE participation.<sup>24</sup> The race-neutral attainment for the past five FFYs is presented in the following table to determine the maximum RN participation. As suggested in the *DOT Tips*, TxDOT used the median race-neutral achievement of 0.0% as TxDOT’s measure. TxDOT will establish race-conscious (“RC”) measures and contract goals to meet the balance of the overall goal.<sup>25</sup>

Fiscal Year	RN Projection	RC Projection	Overall DBE Goal	RN Achievement	RC Achievement	Overall DBE Participation
2016	5.00 %	6.60%	11.60%	0.0%	9.4%	9.4%
2017	5.00%	6.60%	11.60%	0.0%	10.5%	10.5%
2018	5.00%	6.60%	11.60%	0.0%	14.3%	14.3%
2019	5.60%	6.40%	12.00%	0.1%	12.2%	12.3%
2020	5.60%	6.40%	12.00%	0.7%	9.0%	9.7%

TxDOT also considered the amount by which its past goals were exceeded, as well as any past history of its inability to achieve the triennial goal, in determining the race-neutral and race-conscious proportion consistent with the *DOT Tips*. Specifically, DOT recommends increasing the race-conscious portion of the annual goal to account for the proportion of previous years’ goals that were not met or increasing the race-neutral portion to account for exceeding goals.<sup>26</sup> Given the very low RN DBE participation, TxDOT does not propose any further adjustment.

## Race-Neutral Measures Implemented by TxDOT

TxDOT encourages race-neutral DBE participation and avails itself of an array of outreach, training, assistance, and toolkits through its Civil Rights Division. It fosters small business participation through certifying small business entities in the Small Business Enterprise (“SBE”) Program. This program applies whenever there is neither a federal goal nor state Historically Underutilized Business goal that is required for a contract. The SBE program allows SBE firms to work as subcontractors or as prime contractors.

<sup>24</sup>Race-neutral measures benefit DBEs and other small businesses. Section 26.51(b) provides a non-exhaustive list of race-neutral means which include, but are not limited to, providing assistance in overcoming limitations such as the inability to obtain bonding or financing; providing technical assistance and other services; implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial capability for DBEs and other small businesses; ensuring distribution of the statewide DBE directory through print and electronic means to the widest, feasible universe of potential prime contractors; and establishing a program to assist new, start-up firms.

<sup>25</sup>49 C.F.R. §26.51(d).

<sup>26</sup>*DOT Tips*: IV. Calculating the Race/Gender-Neutral and Race/Gender-Conscious Split; A. Consider the Amount by Which You Exceeded Your Goals in the Past. & F. Consider Past History of Inability to Achieve Goals. (<http://www.dot.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>).

TxDOT also administers supportive services programs, such as the *Alliance Program*, that provide training, assistance, and services to certified DBEs to facilitate firms' development into viable, self-sufficient businesses capable of competing for and performing on federally assisted contracts. The supportive services programs include firm-specific training and guidance that helps them become competitive within the heavy highway or construction industry. These programs provide networking opportunities, project-management assistance between subcontractors and primes, and access to training in the areas of business development, business management, and construction management. These services include classroom instruction, technical assistance, vendor events, and industry partnering at the local, state and federal level. The Civil Rights business and community engagement team coordinates and arranges appointments with businesses interested in working with TxDOT and assists them with customized support and recommendations.

TxDOT has also participated in the DOT OSDBU Access to Capital Conferences for Small Businesses in multiple locations throughout the state of Texas. The conferences provide tools and resource for small businesses seeking growth opportunities in a TxDOT district.

TxDOT also provides training guides on its website that educate participants on its DBE program. Contractor manuals are available through the TxDOT Diversity Management System. They include the:

- DBE Contractors' Guide
- The Prime Contractors DBE Guide
- The Local Government DBE Compliance and Monitoring Guide
- The District DBE Compliance and Monitoring Guide
- Civil Rights DBE Compliance and Monitoring Guide

TxDOT also conducts substantive webinars for prime contractors and DBEs. These include demonstrations on how to submit monthly project information on progress reports and verify progress payments.

TxDOT has also partnered with stakeholders in significant outreach programs across the state to encourage eligible firms to become certified DBEs. This serves as a means to increase reported DBE participation through race-neutral means, since some of these firms may be already being doing business with TxDOT. Certification allows the firms' participation to count toward TxDOT's overall DBE goal.

TxDOT has expanded and improved business resources online. It created the *BOSS Guide, Working with TxDOT as a Small Business* as a resource guide for small, disadvantaged, and historically underutilized businesses looking for opportunities to perform work for TxDOT. The *BOSS Guide* provides information; identifies appropriate certifications for specific types of work; breaks down small, medium, and large contracts; qualification requirements; and provides contact information for the relevant TxDOT division.

TxDOT also publishes a bi-monthly online newsletter with more than 6000 external subscribers. The monthly electronic mail newsletter informs the business community about TxDOT and includes features on important

updates on federal and state programs, upcoming contracting opportunities, events, available resources, and other helpful tips.

TxDOT has also supported the Prime Time Series conducted by the Associated General Contractors in Dallas, Houston, and San Antonio. Training is provided to DBE participants and educates them on working with prime contractors and how to navigate TxDOT contracts. This knowledge enables DBEs looking to grow their business as prime contractors.

During FFYs 2022-2024, TxDOT plans to work with industry partners as well as the FAA to provide resources and assistance to increase DBE utilization. TxDOT intends to renew its efforts to increase RN participation.

## **Public Participation: Review and Comment**

In accordance with §26.45(f), TxDOT published a notice announcing the proposed overall goal on its official Internet Webpage web site and allowed a 30-day public comment period.<sup>27</sup>

TxDOT held five virtual public consultation meetings between July 7, 2021, and July 14, 2021, to actively solicit input from stakeholders including community organizations and other officials or organizations that can be expected to have information relative to the availability of disadvantaged and non-disadvantaged businesses; the effects of discrimination on opportunities for DBEs; and TxDOT's efforts to establish a level playing field for the participation of DBEs in FAA assisted, transportation-related contracting.<sup>28</sup> These meetings were facilitated by CHA to inform and engage with the public on its proposed goal and the methodology used to determine the goal. TxDOT invited 4319 members of the public through two electronic invitation mailings. Invitees included minority- and woman-owned businesses; minority, woman, and general contractor groups; community organizations; public officials; and small and minority-focused business development organizations. Staff members from the Civil Rights Division were present to answer questions. A total of 8 people participated in the five sessions.

TxDOT received no comments on the goal during the sessions. It did receive one written comment through the website. This commentator presented his opinion that TxDOT's method for selecting design professionals is weighted so heavily on past and similar project experience that smaller companies and start-up firms are excluded from ever gaining the necessary experience to be considered for projects. He cited his firm's first-hand experience with an airport project for Angelina County Airport.

This comment did not require any adjustments to the overall DBE goal and/or individual RN and RC components.

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<sup>27</sup>Under Part 26, §26.51(g) (2), a DOT recipient has the discretion to offer the public a 30-day comment period. Notice of the comment period must include addresses to which comments may be sent.

<sup>28</sup>Official institutional guidance from USDOT states that the consultation process with knowledgeable stakeholders facilitates information concerning the availability of DBEs and non-DBEs. It indicates that by definition, the process of consultation involves a scheduled face-to-face conference or meeting of some kind with individuals or groups of interested persons for the purpose of developing and/or assessing a proposed goal and methodology and seeking information and advice before a decision is made. See <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/official-questions-and-answers-qas-disadvantaged>.

## **Final Adjusted DBE Goal**

The recommended DBE Goal for FFYs 2022 through 2024 is 11.5%. TxDOT projects it will meet 11.5% of this goal through race-conscious contract goal measures and 0.0% through race-neutral measures. The Proposed FAA DBE Goal is the sum of the race-neutral participation and the race-conscious participation.

TxDOT will use contract goals to meet any portion of the overall goal it does not project being able to meet using race-neutral means. Contract goals are established so that over the period to which the overall goal applies, they will cumulatively result in meeting any portion of the overall goal that is not projected to be met through the use of race-neutral means.

DBE participation for FAA projects will be evaluated annually to determine whether market conditions warrant adjustments to the overall DBE goal and/or individual RN and RC components. While TxDOT's FAA DBE goal and methodology are established every three years, TxDOT will conduct interim reviews or mid-course inline adjustments annually to assess market conditions and ensure that its goal remains legally defensible.

As required by FAA, through a Memorandum of Understanding, subrecipients of FAA funds must adopt TxDOT's federally approved DBE program. As part of this requirement, subrecipients must adopt TxDOT's methods to establish the DBE goal and are required to report DBE awards, commitments and payments.