

SOUND TRANSIT
Central Puget Sound Regional Transit Authority
University Link Project DBE Goal

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 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) University Link (U-Link) project goal submittal is based on federally funded contracting pertaining to contracts for the U-Link light rail project and is submitted in accordance with 49 CFR § 26.45(e)(2). U-link will consist of ten (10) contracts estimated by Sound Transit engineers to total \$820.3m and the project is scheduled for completion in 2016. To determine the U-Link project goal, those ten contracts that will be awarded between FFY 2009 and FFY 2013 were analyzed using past contracting results and the most current engineer estimates available.

Three of the ten U-Link contracts, representing 3% (\$24..3m) have been awarded in the latter half of the 2008 calendar year and include DBE commitments; four contract packages comprising 88% (\$727m.) of the total U-Link dollars have been developed based upon detailed engineer's estimates; the remaining three contracts, consisting of approximately 8% (\$69m) of the project, are in the preliminary engineering estimate stage relative to the information available for analysis. Consequently, comprehensive information has been assembled to prepare this U-Link DBE Project Goal.

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

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 and *Western States*

Paving Co. v. Washington State Department of Transportation, 907 F.3d 963 (9th Cir. 2005).

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

Sound Transit's past contracting activity established 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 (MSA).

As previously stated, the U-Link Project will consist of ten contracts, three of which have already been awarded, representing 3% (\$24.3m) of the engineer's estimate for U-Link. The following four currently available contracts for which detailed engineer's estimates have been developed comprise approximately 88% (\$720m) of U-Link:

- 1) U-220 (TBM Tunnel—UWS to CHS); \$382m.
- 2) U-230 (TBM Tunnel—CHS to PSST); \$175m.
- 3) U-240 (Capitol Hill Station Finishes); \$70m.
- 4) U-250 (UW Station Finishes); \$100m.

For these four contracts, Sound Transit identified the subcontractable elements of work by North American Industry Classification System codes and then estimated the total contract dollars of each element. Sound Transit consulted the Directory of Certified Firms of the Washington State Office of Minority and Women's Business Enterprises and determined the availability of certified DBEs for each subcontractable element. Based upon the availability in each of those elements, overall DBE availability was computed and a contract goal was derived. This methodology was replicated for the final three contracts relying upon the best information available, preliminary engineer's estimates.

Sound Transit then factored the actual DBE commitment on the first three contracts awarded (U-210, U-211, U-215), the DBE availability as determined for the above four contracts (U-220, U-230, U-240, U-250) for which detailed engineer's estimate have been developed and the DBE availability for the three remaining contracts (U-260, U-820, U-830) that are in the preliminary engineering estimate stage relative to the information available for analysis. The commitment results and the availability estimates were weighted to reflect the dollar value of the subcontractable elements as a percentage of the total engineer's estimate. The aggregate result for the ten contracts is a baseline estimate of DBE Goal for the U-Link project of 7.4%:

Contract	Engineer's Estimate (\$m)	DBE Availability (%)	DBE Goal (\$m.)
U-210	1.3 m.	2.8 % *	.0364
U-211	3.5 m.	0.0% *	-
U-215	19.5m.	18.0% *	3.51
U-220	382 m.	3.0%	11.46
U-230	175 m.	3.0%	5.25
U-240	70 m.	18.0%	12.6
U-250	100 m.	18.4%	18.4
U-260	16m.	13.6%	2.18
U-820	5m.	13.6%	.68
U-830	48m.	13.6%	6.52
Total	\$820.3m	7.4%	\$60.64m
* Actual Commitment *			

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

Step 2 requires that Sound Transit examine all evidence in its jurisdiction to determine what adjustment, if any, is needed to the base figure to arrive at the overall goal. 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
2004	9.3%
2005	16.1%
2006	6.9%
2007	5.4%
2008	5.5%

2. Evidence from Availability and Disparity Studies

The *Western States Guidance* from the General Counsel to the U.S. Department of Transportation 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*¹ and *Northern Contracting, Inc. v. State of Illinois* decisions². NERA Economic Consulting conducted studies and Colette Holt & Associates provided expert testimonies that were cited in both cases. Sound Transit concluded the NERA Availability Study and the Holt Study for the Washington State Department of Transportation provide evidence of discrimination in both the data and conclusions that is highly relevant and applicable to Sound Transit's consideration of the effects of discrimination on its contracting activities.

a. NERA WSDOT Study

The NERA WSDOT Study³ 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

¹ 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 124 S.Ct. 2158 (2004).

² 473 F.3d 715 (7th Cir. 2007).

³ Attachment A.

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.⁴ 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."⁵

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).

i. 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

⁴ *Concrete Works of Colorado Inc. v. City and County of Denver*, 321 F.3d 950, 977 (10th Cir. 2003), *cert. denied*, 540 U.S. 1027 (2003) (Denver's program was constitutional based upon a similar methodology by the same consultant).

⁵ *City of Richmond v J.A. Croson Co.*, 488 U.S. 469, 492 (1989).

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).⁶ 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.⁷

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:

- 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:

⁶ Attachment B.

⁷ Holt Study at p.2.

- 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 FFY 2007, Sound Transit reported 5.47% DBE awards/commitments compared to the 15% goal. For FFY 2008, Sound Transit reported 5.5% DBE awards/commitments compared to the 13% 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."⁸ 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 *Builders Association of Greater Chicago v. City of Chicago*⁹ 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.

C. STEP 2 ADJUSTMENT EVALUATION

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 7.4 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

⁸ 407 F.3d at 992.

⁹ 298 F.Supp.2d 725 (N.D. Ill. 2003).

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 U-Link construction project, in view of the low utilization of DBEs in FFYs 2006, 2007 and FFY 2008.

Sound Transit therefore adopts an adjusted base figure of 7.4 percent as its DBE goal for the U-Link construction project.

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

Sound Transit will meet the maximum feasible portion of its U-Link project 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 goal for DBE participation as prime contractors and subcontractors and to increase race-neutral participation on its contracts.

A. 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.

- Including additional incentives for the participation of small businesses above the small business and DBE contract goals established for various U-Link construction contracts.¹⁰

B. Projection of Race-Neutral versus Race-Conscious Participation

Sound Transit will meet the maximum feasible portion of the U-Link project 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 project 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	\$74,194,780	5.50% (\$4,081,553)

The median of Sound Transit’s DBE achievement through race-neutral means for FFY 2006-2008 was 5.32%. Therefore, Sound Transit projects that it will meet 5.32% of its overall goal of 7.4% for the U-Link project through race-neutral measures and 2.08% 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 individuals and community organizations about its DBE goal, its race-

¹⁰ Sound Transit is considering inclusion of an incentive pool for the four major construction contracts for the University Link Light Rail Project. The incentive program is not intended to replace the basic contractual requirements that the construction contractors must meet as part of their contract price. The specific areas of work which Sound Transit sees tangible and direct benefits include the following: Safety and Security; Environmental Compliance; Community Relations; Environmental Stewardship; Small Business Participation and Apprentice Utilization; and Contract Interface Management.

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 its Chief Executive Officer (CEO), and to report periodically to the CEO and the Sound Transit Board regarding compliance with its diversity policies and programs. Appointed in January 2007, the Committee 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 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 DBE utilization; DBE compliance; and issues affecting the ability of DBEs 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. The Committee was consulted in the initial preparation of Sound Transit's U-Link project DBE goal. This submittal will be presented to the Committee for advice and comment, and the Committee may convene to receive comments from interested stakeholders as a part of the public comment process.

B. Public Notice of Proposed U-Link Project Goal

Sound Transit will advertise the proposed goal on its website and in various newspapers throughout the Central Puget Sound Region and in interstate publications, including newspapers with a target minority population readership. All advertisements will include the Sound Transit website address to facilitate public access to the submittal. The submittal will be sent via e-mail to interested stakeholder groups for public comment. All registrants on Sound Transit's E-Bid bidders list will also be notified of the U-Link Construction Project DBE Goal, the commencement of a public comment period and the availability of the submittal on the Sound Transit website.

The Appendix attached to this submittal is a representation of the notice that will be 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

- **Sample Notice of Sound Transit University Link Project DBE Goal for Public Comment**

**Sample Notice
of
Sound Transit
U-Link Project DBE Goal**

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 University Link Project:

**Federal Transit Administration
University Link Construction
Federally Assisted Project:
7.4%**

Sound Transit has submitted the above-referenced DBE utilization goal to the Federal Transit Administration. The submittal is available for review until February 20, 2009 during normal business days from 9:00 a. m. until 4:00 p. m. at Sound Transit's address shown below. 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.

Sound Transit will accept written comments on the DBE program and University Link DBE goal until February 27, 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.

Comments may also be directed to the Federal Transit Administration, Region X, 915 Second Avenue, Suite 3142, Seattle, WA 98174-1002, Attention: Regional Administrator.

Joni Earl
Chief Executive Officer