

AFFIRMATIVE ACTION IN CONSTRUCTION CONTRACTING AND NEW JERSEY'S "EMERGING SMALL BUSINESS ENTERPRISE" PROGRAM

Joseph M. Amico¹

Abstract

The Disadvantaged Business Enterprise ("DBE") program is a federally initiated affirmative-action program imposed on the bidding process for federally funded transportation projects. The program was implemented to create a more level playing-field in construction contracts generally and to ameliorate the adverse effects of racism and inequality on the marketplace.

The program involves an inherently racial bias in its certification requirements by applying a presumption of social disadvantage to business owners of certain minority racial groups. The DBE program requires participants to establish percentage-based goals of money received from the federal government to be put towards bidding involving socially and economically disadvantaged small business. In so doing, the federal program further orders participants to maximize accomplishment of their participation goals through race-neutral means.

These conflicting instructions have produced various state responses of varying degrees of effectiveness. This note compares a series of state programs to highlight their differences, identify their relative shortcomings, and demonstrate how the New Jersey Department of Transportation's ("NJDOT") approach has proven to be one of the most, if not the most, effective system for effectuating a significant portion of its DBE participation goals through race and gender-neutral means.

Section I introduces the DBE program in light of its history and with respect to the surrounding philosophical debate on affirmative action programs generally. Section II describes how the federal DBE program is laid out in the Code of Federal Regulations and concludes with an analysis of some of the criticisms which have been leveled against the program. Section III presents the selected states' programs with an emphasis upon their calculation of available

¹ Joseph M. Amico is a J.D. Candidate for May, 2015 at the Rutgers Newark School of Law. He received a B.A. in Political Science from the Rutgers School of Arts and Sciences Honors Program in May 2012.

DBE firms and race-neutral means employed. Section IV presents a qualitative analysis of the relative strengths and weaknesses of the programs and concludes that NJDOT's Emerging Small Business Enterprise program is the most effective.

I. What is the Disadvantaged Business Enterprise Program?

The DBE program has its origins in Nixon's Executive Order 1165, announced in 1971.² That order explained that "[t]he opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic justice for such persons and improve the functioning of our national economy."³ This executive order was a catalyst for a series of acts which created the modern DBE program in place today which was initiated by the Federal Highway Administration ("FHWA").⁴ The early FHWA regulations set out standards for contractors receiving federal-aid for highway activity to report minority business participation on a quarterly basis.⁵ By 1980, the Department of Transportation ("DOT") issued a comprehensive regulation that required all recipients of federal funding to adopt all [DBE]⁶ participation in Federal-aid contracts and provisions for helping [DBEs] succeed in carrying out the contracts.⁷

The Surface Transportation Assistance Act ("STAA"), introduced in 1982 by House Rep. Parren J. Mitchell, established that a percentage of a state's federally subsidized transportation money must be distributed to businesses "owned and controlled by socially and economically disadvantaged individuals."⁸ Because the Reagan

² See U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., THE ROAD TO CIV. RTS. DISADVANTAGED BUS. ENTERPRISES (October 17, 2013), <https://www.fhwa.dot.gov/highwayhistory/road/s44.cfm> [hereinafter Federal Highway Administration].

³ *Id.*

⁴ See *id.*

⁵ *Id.*

⁶ See generally *id.* (Note that the original text read "minority business enterprise." The acronym "MBE" was later changed to "DBE" by the Surface Transportation Assistance Act).

⁷ *Id.* (noting that the 1980 DOT regulations "extended the definition of 'MBE' to include women's business enterprises").

⁸ Federal Highway Administration, *supra* note 2 (quotations omitted) (note that the federal goal was set at 10 percent).

Administration generally opposed affirmative action mandates, the subsequent DOT interpretation of the amendment might be understood as taking a position of compromise by calling for flexibility in state goal setting.⁹

In the certification process, persons of certain races are presumed to be "socially and economically" disadvantaged, for the purposes of the statute.¹⁰ Though the federal government determined this was an adequate way to ensure that certain racial minorities were afforded equal opportunity in receiving and working on DOT-funded contracts, the threat of reverse-racism loomed. Rep. Mitchell himself was concerned with "racism and economic discrimination" emerging again as a response to the program.¹¹

The program has been criticized as being over-inclusive and under-inclusive.¹² For example, the program might be over-inclusive by presuming every small firm owned by a racial minority was disadvantaged, or under-inclusive by not actually including all of the kinds of minority owned businesses, which bid on state transportation contracts. In *Adarand Constructors, Inc. v. Slater*, the DBE program was challenged on Fifth Amendment grounds.¹³ This case involved a business with a white principal who lost out, despite making the lowest bid, to a DBE certified under the Colorado Department of Transportation ("CODOT").¹⁴ One criticism raised against the DBE program's presumption of social and economic disadvantage by the District Court for the District of Colorado was that such presumptions were both "over-inclusive and under-inclusive, because [these] include[] members of those groups who are not disadvantaged and excludes members of other groups who are."¹⁵

In *Adarand*¹⁶, the Supreme Court addressed the issue of which level of scrutiny to apply to "the Federal Government's practice of giving general contractors on Government projects a financial incentive to hire subcontractors controlled by 'socially and

⁹ See *id.*; see also 49 C.F.R. § 26.41(a) (2011).

¹⁰ See 49 C.F.R. § 26.67 (2011).

¹¹ Federal Highway Administration, *supra* note 2.

¹² *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 219, (2000)(citing *Adarand Constructors, Inc. v. Pena*, 965 F. Supp. 1556, 1580 (1997) [hereinafter *Pena II*]).

¹³ *Slater*, 528 U.S. at 219.

¹⁴ *Id.*

¹⁵ *Id.* (citing *Pena II*, 965 F. Supp. at 1580).

¹⁶ *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) [hereinafter *Pena I*].

economically disadvantaged individuals,' and in particular, the Government's use of race-based presumptions in identifying such individuals. . . ."¹⁷ The Supreme Court had previously dealt with this issue as it related to a local initiative to set aside a certain portion of construction contracts to minority owned businesses and held, in that context, that designating a percentage of federal contract awards to minority contractors did not violate the Fifth Amendment.¹⁸

The contrasting philosophical perspectives expressed by the Supreme Court in response to the program highlight the potential pros and cons of affirmative action in general and as applied to DOT-contracting. One view, announced by Justice Scalia, is that "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."¹⁹ Scalia's position in *Adarand v. Slater* is stronger than what the Court had previously acknowledged in *Croson*, that "[c]lassifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."²⁰ Scalia argues that "[t]o pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred."²¹

Justice Stevens offers a starkly contrasting view:

Indeed, minority subcontractors may face more obstacles than direct, intentional racial prejudice: They may face particular barriers simply because they are more likely to be new in the business and less likely to know others in the business. Given such difficulties, Congress could reasonably find that a minority subcontractor is less likely to receive favors from the entrenched businesspersons who award subcontracts only to people with whom—or with whose friends—they have an existing relationship.

¹⁷ *Id.* at 204 (holding strict scrutiny will be applied to racial classifications).

¹⁸ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477 (1989) (citing *Fullilove v. Klutznick*, 448 U.S. 448 (1980)).

¹⁹ *Pena I*, 515 U.S. at 239 (Scalia, J., concurring) (citing *Croson*, 488 U.S. at 520 (Scalia, J., concurring in judgment)).

²⁰ *Croson*, 488 U.S. at 493-94 (citing *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 298 (1978) (opinion of Powell, J.)).

²¹ *Pena I*, 515 U.S. at 239 (J. Scalia, concurring).

This [DBE] program, then, if in part a remedy for past discrimination, is most importantly a forward-looking response to practical problems faced by minority subcontractors.²²

Scalia's and Stevens' philosophies represent polarized positions on the continuum of opinion circumscribing the DBE program. On one hand, the system moves the issuance of state-funded construction contracts closer to being fair across construction firms. On the other hand, the program runs the risk of bringing about the unintentional consequence of unfairness in favor of groups largely based on race and ethnicity.

II. The Federal Program

The arguments articulated for and against affirmative action are relevant in framing an examination of how the DBE program functions today in its application. State departments of transportation are afforded some degree of flexibility in tailoring their programs to fit their particular demographics. Rather than merely establishing a quota, the Federal Code provisions allow states to address inequality relative to their own environments. With the possibility of the variety also comes the possibility of more or less effective programs. The next section sets out the federal guidelines in detail to give the reader an understanding of the contours of the program. Following this, the programs of the states selected²³ for comparison are explained in detail.

This section lays out the relevant elements of the Federal Code provisions affecting state departments of transportation, 49 C.F.R. § 26, Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs. The statute defines a Disadvantaged Business Enterprise, or DBE, as a for-profit small business concern--

²² *Id.* at 261-62 (J. Stevens, dissenting).

²³ These states were selected primarily to represent a cross-section of the different regions of the United States. Research in this area would benefit through analyses of more States.

- (1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and
- (2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.²⁴

The statute applies to states who are recipients of "[f]ederal-aid highway funds authorized under . . . the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), [f]ederal transit funds authorized by . . . ISTEA[,] . . . [or] [a]irport funds authorized by 49 U.S.C. 47101."²⁵ States who receive money from the above-mentioned sources "must have a DBE program meeting the [Code's] requirements[.]"²⁶

The Department of Transportation ("DOT") instituted 49 C.F.R. § 26²⁷ and articulated the goals of the program as follows:

- (a) To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs;
- (b) To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
- (c) To ensure that the Department's DBE program is narrowly tailored in accordance with applicable law;
- (d) To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs;

²⁴ 49 C.F.R. § 26.5 (1999).

²⁵ 49 C.F.R. § 26.3 (1999).

²⁶ See 49 C.F.R. § 26.21 (1999)(imposing the DBE program on recipients of FHWA, FTA, and FAA monies); see also U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., SAFE ROUTES TO SCH. (Mar. 2006), http://www.fhwa.dot.gov/environment/safe_routes_to_school/funding/ (exemplifying how the DBE program is essentially obligatory; note that every state receives FHWA funding yearly).

²⁷ See generally Federal Highway Administration, *supra* note 2 (presenting a brief history of the regulation).

- (e) To help remove barriers to the participation of DBEs in DOT–assisted contracts;
- (f) To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and
- (g) To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.²⁸

To further the ends of these goals, the DOT, among other technical requirements, defines "social[] and economic[] disadvantage,"²⁹ establishes a Federal goal limit³⁰ to act as a base figure for states, outlines certification procedures³¹, and outlines compliance procedures.³²

Despite the mandatory imposition of the program, states are given discretion to establish their own objectives and plans for implementation through circulation of a policy statement.³³ This flexibility gives states the ability to tailor their programs according to their unique demographic compositions.

A. Qualification as Socially and Economically Disadvantaged

The certification requirements are laid out in §26.61 and involve requirements as to the size and composition of businesses deemed eligible. DBEs must be owned "at least 51 percent . . . by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals[.]"³⁴ Though a non-minority owned business can apply and certify as a DBE,³⁵ the

²⁸ 49 C.F.R. § 26.1 (1999).

²⁹ 49 C.F.R. § 26.5 (1999).

³⁰ See 49 C.F.R. § 26.41 (1999).

³¹ See 49 C.F.R. § 26.81 (1999).

³² See 49 C.F.R. §§ 26.101, 104, 105, 107, 109 (1999).

³³ See 49 C.F.R. § 26.23 (1999).

³⁴ 49 C.F.R. § 26.5 (1999).

³⁵ See 49 C.F.R. 26.7(d) (1999) (explaining that "[f]irms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged . . . may apply for DBE certification).

DBE program involves an inherently racial component in its certification requirements by applying a presumption of disadvantage to certain groups of people categorized along racial lines.³⁶ Aside from the inclusion of women, the statute primarily contemplates socially and economically disadvantaged individuals as falling within the broad racial categories of “Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the [Small Business Administration.]”³⁷

Though the objectives of the DBE program are ultimately to create a level playing field for DOT-assisted transportation contracts, the danger in applying a presumption of disadvantage based on race is that small businesses owned by racial minority groups might not all have been socially or economically disadvantaged. There is a danger that many DBEs will receive unfair and preferential treatment in the bidding process and thus the program will ultimately create a result that is opposite of the proposed objectives. In contrast to this argument, the drafters of the statute seem to have considered this danger by including 49 C.F.R. §26.67 which allows for individualized business consideration in the certification process. The biggest challenge for the DBE program is to balance fairness for all small businesses but also to account for remedying past discrimination against minority-owned businesses and any corresponding lack of access to federal contracts.

Aside from the identity or background requirement of social and economic disadvantage, the “management and daily business operations [must be] controlled by one or more of the socially and economically disadvantaged individuals who own it.”³⁸ The control requirements interact with satisfaction of DBE goals according to specified requirements. Specifically, a DBE must be shown to exercise a “commercially useful function”³⁹ to be counted toward DBE goals. “A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved.”⁴⁰

³⁶ See generally 49 C.F.R. § 26.67 (utilizing specific racial classifications).

³⁷ 49 C.F.R. 26.67.

³⁸ 49 C.F.R. § 26.5.

³⁹ See 49 C.F.R. § 26.55 (1999).

⁴⁰ *Id.* at (c)(1).

Included in considering whether a DBE performs a commercially useful function, DOTs are called upon to consider “the amount of work subcontracted[.]”⁴¹

If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, [the code] presume[s] that [the DBE] is not performing a commercially useful function.⁴²

B. Goal Setting

Goal setting is quintessential to the functioning of the DBE program because it reflects commitments to the underlying objectives of the program. “[T]he size of the annual goal . . . influence[s] the number of contracts that an agency will set goals on and the vigor with which they insist goals be met, but the key motivator for contractors is the contract specific goal.”⁴³ The DOT's goals seek to, amongst other things, “create a level playing field[,] . . . [and] remove barriers to participation . . . in DOT-assisted contracts [and] . . . [t]o ensure that the Department's DBE program is narrowly tailored.”⁴⁴ Thus, it is particularly relevant for the purposes of this note, to look at the different methods for calculation of goals to determine if they are structured in such a way to both allow for meaningful and fair participation in DOT-funded contracts and realistically reflect the need for affirmative action in the different states' particular demographics.

In order to effectuate these goals,⁴⁵ the Code establishes a limit that “not less than 10 percent of the authorized funds are to be

⁴¹ 49 C.F.R. § 26.55(c)(1).

⁴² 49 C.F.R. § 26.55(c)(3).

⁴³ George R. La Noue, *Setting Goals in the Federal Disadvantaged Business Enterprise Programs*, 17 GEO. MASON U. C.R. L.J. 423, 463 (2007).

⁴⁴ 49 C.F.R. § 26.1 (1999).

⁴⁵ *See id.*

expended with DBEs.”⁴⁶ The goal limit is not to effectuate a quota or set-aside contract system.⁴⁷ In establishing a goal limit, the Code contemplates relative state differences and requires recipients of DOT monies⁴⁸ to base their goals “on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate . . . [in] DOT-assisted contracts[.]”⁴⁹ This requirement typically translates into state departments of transportation looking at the average past rate of participation of DBEs as compared to all potential bidders. State recipients are further precluded from “simply rely[ing] on either the 10 percent national goal . . . [or past goals] without reference to the relative availability of DBEs in [that state’s] market.”⁵⁰ States are ultimately left to articulate their own “objectives . . . [and] responsibilities for . . . implementation”⁵¹ in a “policy statement.”⁵²

The way in which states calculate how many firms are “ready willing and able” is of particular importance. Because the Federal Code provisions only define a DBE in terms of size, composition, and control,⁵³ factors like qualification, experience, and ability are left undefined and thus factor into the determination of whether a company is ready, willing, and able to participate. Different measures for gauging these three undefined features, state departments of transportation and other recipients of FHWA money have to attempt to create as accurate a measure as possible at the risk of unrealistically inflating or deflating the number of minority-owned construction businesses who could fulfill the required work. These goal measurements will become the basis of measuring participation, and so the relative successes of state DBE programs will depend largely upon an accurate measure of readiness, willingness, and ability.

⁴⁶ 49 C.F.R. § 26.41(a)(1999) (the DOT considers this 10 percent goal to be “an aspirational goal at the national level . . . ” 49 C.F.R. § 26.41(b) (1999)).

⁴⁷ See 49 C.F.R. § 26.43 (1999) (allowing for an exception to no-set-aside restriction so that “. . . in limited and extreme circumstances, you may use set-asides when no other method could be reasonably expected to redress egregious instances of discrimination.”).

⁴⁸ Any recipients of DOT monies will hereafter be referred to as recipients.

⁴⁹ 49 C.F.R. § 26.45(b)(1999).

⁵⁰ *Id.*

⁵¹ 49 C.F.R. § 26.23 (1999).

⁵² *Id.*

⁵³ See 49 C.F.R. § 26.5.

The program specifies that the "10 percent goal is an aspirational goal at the national level, which the Department uses as a tool in evaluating and monitoring DBEs' opportunities to participate in DOT-assisted contracts."⁵⁴ There is no specific rationale offered in the Code provision underlying the 10 percent goal and accordingly no explicit requirement of strict adherence. The Code continues that "[t]he national 10 percent goal does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent."⁵⁵ The fact that the Federal guidelines establish no fixed goal reflects sentiment expressed by the Tenth Circuit in a decision preceding *Adarand v. Slater*⁵⁶ that "[a]bsolute proportionality to overall demographics is an unreasonable goal."⁵⁷ Furthermore this emphasizes the degree of flexibility afforded states in setting goals. In very specific and rare circumstances, goal-setting is not required if a state DOT "reasonably anticipates awarding . . . \$250,000 or less . . . in a federal fiscal year."⁵⁸ Additionally, if a recipient fails to meet its own overall goal for participation it will not be found to be in noncompliance with the Code.⁵⁹

C. DBE Availability

While DBE recipients can't be penalized by the federal government for the mere failure to attain a goal,⁶⁰ the relative fairness of the transportation-bidding process can be adversely damaged by inaccurate calculations. Inaccurate calculation of goal setting can lead to adverse results, namely an over or under-inclusive system or in unfair preference for DBEs. For example, if the calculation of available DBEs includes all businesses, irrespective of their ability to work on the particular *type* of contracts (e.g. highway, surface, painting), the ultimate goal number will tend to be inflated and thus

⁵⁴ 49 C.F.R. § 26.41(b).

⁵⁵ 49 C.F.R. § 26.41(c).

⁵⁶ See *Slater*, 528 U.S. 216 (2000).

⁵⁷ *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1181 (10th Cir. 2000).

⁵⁸ See 49 C.F.R. § 26.45(a)(2).

⁵⁹ 49 C.F.R. § 26.47(a).

⁶⁰ Note that failure to attain a goal can lead to penalty if a state DOT has "failed to administer [its] program in good faith." *Id.*

the ensuing percentage of those goals performed, based on the number of actual bidders, will tend to be measured low. The Code attempts to resolve this issue by imposing a certain requirement. In order to gain eligibility, the Code requires that a DBE "be an existing small business, as defined by Small Business Administration . . . standards . . . found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts."⁶¹ Even with this requirement in place, there are various measures that can be employed to determine how many minority-owned firms are able to perform the kind of work sought to be completed. And depending upon the context, certain measures may be more or less effective.

While states do have flexibility in establishing their goal, some procedural elements are pre-determined by the Code.⁶² The federal requirement instructs states to base their overall goal on the "relative availability of DBEs."⁶³ In using this measure, reliance cannot be placed simply on past guidelines or the federal 10 percent aspirational goal.⁶⁴ The Federal Regulations impose two steps which involve establishing "a base figure for the relative availability of DBEs" and then determining, based on "all of the evidence available in [the] jurisdiction to determine what adjustment, if any, is needed to . . . arrive at [the] overall goal."⁶⁵ These steps are general and though they include "examples . . . as a starting point"⁶⁶ for establishing a base figure, they leave it to the states to develop a method "based on demonstrable evidence of local market conditions . . . designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in [that] market."⁶⁷

D. Calculating Race-Neutral Goals

Race is a consideration embedded in the DBE program.⁶⁸ One way the Code guidelines attempt to ameliorate the threat that the

⁶¹ 49 C.F.R. 26.65(a).

⁶² See 49 C.F.R. § 26.45.

⁶³ The relative availability of DBEs is "based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all business ready, willing and able to participate on . . . DOT-assisted contracts . . ." Note that nowhere in the Code is "ready, willing, and able" defined. § 49 C.F.R. § 26.45(b).

⁶⁴ *Id.*

⁶⁵ 49 C.F.R. §§ 26.45(c), (d).

⁶⁶ 49 C.F.R. § 26.45(c).

⁶⁷ *Id.*

⁶⁸ See 49 C.F.R. § 26.67 (outlining the presumption of disadvantage based on race).

program will function like a quota, unfairly biasing DBEs, is to demand that recipients "must meet the maximum feasible portion of [their] overall goal by using race-neutral means of facilitating DBE participation."⁶⁹ At first glance, this seems to be an impossible task. The DBE program essentially asks recipients of federal transportation money to guarantee that a portion of their expenditures will go to bids from socially and economically disadvantaged firms, who are certified as such by way of a presumption of disadvantage, but simultaneously calls on recipients to utilize race-neutral means for encouraging DBE participation.

Specifically, the Code proceeds to specify the types of procedures, which are considered race-neutral, which include, but are not limited to:

- (1) Arranging solicitations ... [to] facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses ... ;
- (2) Providing assistance in overcoming limitations such as inability to obtain bonding or financing ... ;
- (3) Providing technical assistance and other services;
- (4) Carrying out information and communications programs on contracting procedures and specific contract opportunities ... ;
- (5) Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses;
- (6) Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;
- (7) Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;

⁶⁹ 49 C.F.R. § 26.51(a).

- (8) Ensuring distribution of your DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and
- (9) Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media."⁷⁰

The nine suggestions provided are only representative of the many different routes a state might take to ensure their program fulfills the objectives enumerated in 49 C.F.R. § 26.1(a). As another mechanism to avoid discrimination, the Code requires adjustment so that the program's implementation is narrowly tailored.⁷¹ Recipients, in their submission of overall goals,⁷² are called to determine how much of that goal can be accomplished via race neutral means and then establish specific contract goals for that portion of the overall goal which cannot feasibly be completed through race-neutral means.

Some states, like New Jersey and Colorado, have implemented an alternative means to maximize race-neutral participation by way of a parallel goal-setting program.⁷³ These programs lack presumptions of racial disadvantage and focus primarily on economic disadvantage, irrespective of race.⁷⁴ While qualitative outreach programs, like those suggested in the Code provisions,⁷⁵ can support small businesses' abilities to compete in the bidding, these alternative goal-setting systems can be more effective ways of maximizing actual participation in bidding.

⁷⁰ 49 C.F.R. § 26.51(b).

⁷¹ The Court requires narrow tailoring to all governmental classifications based upon race. *See Croson*, 488 U.S. at 520 (Scalia, J., concurring).

⁷² 49 C.F.R. § 26.51(c).

⁷³ *See Emerging Small Business Enterprise Policy Statement*, NEW JERSEY DEP'T OF TRANSP. (Mar. 17, 2011), <http://www.state.nj.us/transportation/business/civilrights/pdf/esbepolicystatement.pdf>;

⁷⁴ *See id.*; *see also* COLO. DEP'T OF TRANSP., CDOT OVERALL ANNUAL DBE GOAL FEDERAL FISCAL YEARS 2013-2015 2, *available at* <http://www.coloradodot.info/business/civilrights/dbe/dbe-documents/cdot-overall-annual-dbe-goal-for-fhwa> (last visited Oct. 7, 2014).

⁷⁵ 49 C.F.R. § 26.51(b).

E. Criticisms of the Federal Program

One criticism of the program is “that the USDOT regulations and the procedures recipients use to set DBE goals do not create a level playing field in competition for federally funded contracts, but instead operate to favor DBE’s.”⁷⁶ Though the federal government established a 10% guideline goal,⁷⁷ it is ultimately up to state and regional governments to establish goals for what percentage of USDOT contract money should be allocated to businesses owned by socially and economically disadvantaged businesses. George La Noue suggests that:

[i]t is the goals themselves that affect the behavior of bureaucrats and contractors and thus remedy or cause discrimination. If a goal is set too high (above availability), then prime contractors will have to pass over non-DBE subcontractors to employ DBEs that are either less qualified or more expensive. In addition to the damage inflicted on non-DBE firms, excessive DBE goals will often cost taxpayers more money than necessary.⁷⁸

La Noue articulates a theory emphasizing cost and qualification and seeks to minimize instances where the DBE program, with the goal of creating a level playing field, functions over or under inclusively.⁷⁹ While La Noue's criticisms are oriented toward the federal program, many of these concerns translate equally to the subject of this note, the maximization of DBE goals through race and gender-neutral measures.

In many respects, DBE goal-setting is “[t]he most accessible information”⁸⁰ in analyzing whether the program is fulfilling its objectives, and so the calculations and measurements involved in goal-setting are of critical importance. Most states rely upon disparity studies for calculating their DBE utilization goal.⁸¹ In these studies,

⁷⁶ La Noue, *supra* note 43, at 425.

⁷⁷ 49 C.F.R. § 26.41(a) (2014).

⁷⁸ La Noue, *supra* note 43, at 428.

⁷⁹ *Id.*

⁸⁰ *Id.* at 429.

⁸¹ *Id.*

“the availability of DBEs and non-DBEs is compared with their respective utilization to determine if a disparity exists. In the case of goal setting, a similar calculation is made to project expected DBE utilization annually or on particular contracts.”⁸² One risk that states run is maintaining an inaccurate list of socially and economically disadvantaged businesses eligible for calculation. Possible outcomes of an inaccurately calculated pool of available DBEs include, “[i]f DBE availability is inflated, . . . false disparities will emerge and indicate a non-existent compelling government interest or create non-narrowly tailored utilization expectations [or] if DBE availability is set too low, a disparity that might be caused by discrimination may not be discovered.”⁸³

Other factors beyond DBE availability are relevant in calculating goals. For example, in *West States Paving Co. v. Wash. State Dep't. of Transp.*, the Ninth Circuit considered capacity, experience, and regional concentration as relevant factors to be considered.⁸⁴ On top of this, DBE contracts are distributed to a particular type of contractors and so, to maximize accuracy, disparity calculations ought further to be confined to those firms capable of performing work under USDOT contracts, especially those involved in construction. Thus, “when the job qualifications involved are ones that relatively few possess, statistical presentations that fail to focus on those qualifications do not have significant probative value.”⁸⁵

It is also true that, “[f]or construction work, ‘qualified’ firms usually means firms that have appropriate licenses, bonding, credit, and often statutorily required prequalification.”⁸⁶ Although the USDOT requirements do not mandate any kind of qualification measurements,⁸⁷ states still have room to tailor their systems within the guidelines set out in the federal statute. Arguably, the lack of generality in the federal statute allows for state flexibility in setting goals relative to diverse populations. On the other hand, one possible criticism is that the breadth of the statute represents a “lack of

⁸² *Id.* at 430.

⁸³ *Id.*

⁸⁴ See *W. States Paving Co. v. Wash. State Dep't. of Transp.*, 407 F.3d 983, 1000-01 (9th Cir. 2005); see La Noue, *supra* note 43, at 433 (considering factors other than statistical availability of DBEs).

⁸⁵ *Hammon v. Barry*, 813 F.2d 412, 427 n.31 (D.C. Cir. 1987) (citing *Hazelwood Sch. Dist. v. U.S.*, 433 U.S. 299, 308 n.13 (1977)).

⁸⁶ La Noue, *supra* note 43, at 434.

⁸⁷ See *id.* at 434-35.

specific guidance [which] allow[s] recipients to inflate DBE availability."⁸⁸

Two of the issues raised in the context of La Noue's criticism of the Federal Program are pertinent to the foregoing analysis and can act as a lens through which to view the selected state programs in relation to their abilities to maximize their goals through race and gender-neutral means. First, the possibility of inaccurate measurements of race-neutral means will result in percentages of goal accomplishment which bear little or no relation to the actual effectiveness of state programs. Second, the ability of recipients to consider the qualification of small businesses for the purposes of race-neutral measures is integral to the functioning of an effective program seeking to provide a balance between competing objectives.

III. State Programs

Because the federal requirements leave much discretion to states in implementing their DBE programs, there are a variety of approaches taken. This section explains the procedures taken by several states against which to compare New Jersey's method, which proportionally has accomplished a greater portion of its DBE goals through race-neutral means. The states selected for the purposes of comparison with New Jersey are California, Florida, Illinois, and Colorado. Though many of the calculation procedures are similar in these states, the variations highlight how different approaches can be stronger or weaker in certain areas of accurately calculating available DBEs, maximizing fairness, and maximizing accomplishment of DBE overall goals by way of race-neutral means.

A. California

The California Department of Transportation's ("Caltrans") base-figure calculation is based on a disparity study.⁸⁹ Caltrans notes that they do not use their entire figure of available minority/women-

⁸⁸ *Id.* at 440.

⁸⁹ CAL. DEPT OF TRANSP., FED. HIGHWAY ADMIN., DISADVANTAGED BUSINESS ENTERPRISE GOAL AND METHODOLOGY, FEDERAL FISCAL YEAR 2013-2015, *available at* http://www.dot.ca.gov/hq/bep/docs/FINAL_G&M_2013-2015.pdf (last visited Nov. 21, 2014).

owned firms because "not all of these firms are available for every type and size of transportation-related work."⁹⁰ This type of practice might tend to avoid an unrealistically inflated ratio of available firms. Caltrans specifically utilized a telephone survey of California business firms related to transportation and successfully interviewed 47 percent of businesses, with valid phone numbers.⁹¹ Of those interviewed, Caltrans determined how many of those firms were, "qualified and interested in performing transportation-related work for Caltrans" as 33 percent.⁹² California then engaged in weighting relative availability of minority/women-owned firms by "examin[ing] the type of work, size, contract role, and location of work involved in federally funded projects and the relative availability of minority/women/majority-owned firms to perform that work."⁹³ Based on this study, Caltrans determined that "12.5 percent of dollars on FHWA-funded contracts would be expected to go to certified DBEs and potential DBE firms based on the type, size, contract role, location, and time frame for these contracts and subcontracts."⁹⁴

In its second step, Caltrans considered possible adjustments to the base figure as recommended by 49 C.F.R. § 26.45(d). They consider that 45 percent of the firms they counted (about 47 percent of available firms) in their base figure were non-certified and so chose not to count them in their utilization report. Based on a statistical analysis considering this and a number of other factors, Caltrans adjusted its base figure for participation to 17.6 percent. However they ultimately chose not to adjust the number and remained at a 12.5 percent goal.⁹⁵

Caltrans' calculation of the percentage of the goal to be achieved by race-neutral measures was a function of the median of past participation. Their projected number was that only 3 percent of the goal (12.5 percent) would be accomplished through race-neutral measures and the remaining 9.5 percent through race-conscious measures.⁹⁶ A crucial point to note is that Caltrans' calculations only considered disparity studies based on White women, African

⁹⁰ *Id.*

⁹¹ *Id.* Caltrans contacted firms based on their listing by Dun & Bradstreet as doing business most pertinent to Caltrans transportation construction and engineering contracts.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ CAL. DEP'T OF TRANSP., FED. HIGHWAY ADMIN., *supra* note 89.

⁹⁶ *Id.*

Americans, Asian-Pacific Americans, Hispanic Americans, and Native Americans.⁹⁷

California's race-neutral measures are grouped into four categories by Caltrans, [1]) “[b]usiness outreach and communication with DBEs and construction industry. [2]) Technical assistance and training via supportive services contracts. [3]) Improved contracting processes. [4]) Data collection, monitoring, and reporting of DBEs.”⁹⁸ California's race-conscious measures, in contrast, involve setting a "goal on individual contracts based upon the type of work included in each contract and on the availability of the five targeted groups capable of performing such work.”⁹⁹ California ultimately places great emphasis on a qualitative approach to achieving the goals and relies heavily on race conscious means to do so.

B. Florida

Florida's DBE goal for, “2010 and 2011 was 8.18 [percent] and proposed” a goal of 8.6 percent for 2012-2014.¹⁰⁰ According to the State of Florida Department of Transportation ("FDOT"), the state "has successfully implemented a 100 percent race neutral DBE program since federal fiscal year 2001.”¹⁰¹ This claim is discussed in more detail below in section IV. Florida's calculation methodology begins with the calculation of a base figure generated from looking at a bidder's list of the last three years.¹⁰² This list includes "those firms that were awarded bids as prime or . . . subcontractor as well as those

⁹⁷ *See id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 11.

¹⁰⁰ STATE OF FLA. DEP'T OF TRANSP. DISADVANTAGED BUS. ENTERPRISE PROGRAM PLAN (2013), *available at* http://www.dot.state.fl.us/equalopportunityoffice/DBEProgram/DBE_Program_Plan9.13.pdf.

¹⁰¹ *Id.* at 12.

¹⁰² FLA. DEP'T OF TRANSP., METHODOLOGY FOR DETERMINING DBE GOAL FEDERAL FISCAL YEAR 2010, *available at* <http://www.dot.state.fl.us/equalopportunityoffice/DBEProgram/Proposed%20Highway%20DBE%20Goal%20for%202009-2010.pdf> (note the most recent data available from Florida Department of Transportation is the 2010 plan).

firms that were not awarded bids, but did bid as a prime or subcontractor on a non-award bid."¹⁰³

FDOT looks at the last three years' median percentage of dollars expended on contractors and consultants, finding that 84.82 percent of federal dollars went to contractors and the remaining 15.18 percent to consultants.¹⁰⁴ Because FDOT does not prequalify or track the types of work performed by all subcontractors, it does not weight the dollars for construction by the kind of work performed.¹⁰⁵ FDOT then takes the percentage of construction money used on bridge construction, where no DBEs are available to perform the work, and subtracts this percent from the total money spent on contractors to determine how much of their money is available for DBE construction contracts.¹⁰⁶ Next FDOT calculates that the percentage of DBEs bidding as either prime or subcontractors on construction contracts (6.72 percent).¹⁰⁷ The last part of the calculation involves multiplying the percentage of DBE construction bidders by the percentage of FDOT's available money to generate the expected amount of all dollars awarded to DBEs for construction (.0772 x 75.18 percent = 5.05 percent).¹⁰⁸ The same formula is applied to consultant availability (calculated at 3.34 percent) and then added to contractor availability to create FDOT's baseline goal, which is 8.39 percent.¹⁰⁹

After establishing its baseline, FDOT looks to its most recent disparity study as well as a measure of past volume of work performed over the last seven years.¹¹⁰ "To incorporate past performance, [FDOT] believes the appropriate adjustment is to average the median past participation . . . and the relative availability . . ." After completing this for both contractors and consultants, FDOT generates its proposed goal of 8.18 percent.¹¹¹

¹⁰³ *Id.* at 2.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *See id.*

¹⁰⁷ *Id.*

¹⁰⁸ FLA. DEP'T OF TRANSP. METHODOLOGY, *supra* note 102.

¹⁰⁹ *Id.* at 3 (calculation based on data provided from 2010).

¹¹⁰ *See* STATE OF FLA. DEP'T OF TRANSP. DISADVANTAGED BUS. ENTERPRISE PROGRAM PLAN, *supra* note 100, at 3-4.

¹¹¹ FLA. DEP'T OF TRANSP. METHODOLOGY, *supra* note 102.

C. Illinois

Illinois has established a "Unified Certification Program" which allows a DBE certified under one of five separate agencies to be honored by all participating agencies.¹¹² Like Florida, the Illinois Department of Transportation ("IDOT") opts to use a bidders list to establish their base figure however they limit their bidders list to businesses that bid as prime contractors.¹¹³ IDOT nonetheless acknowledges that no accounting for businesses that bid to prime contractors as subcontractors and suppliers "can understate the availability of DBEs."¹¹⁴

Though they use a bidders list, Illinois's calculation is broader than Florida and considers a DBE as willing "if it had either bid on an IDOT contract, obtained pre-qualification with the State of Illinois, certified with a government agency, or responded to the outreach campaign conducted"¹¹⁵ The IDOT calculation of relative base figure involves dividing the number of DBEs by all market area businesses,¹¹⁶ which includes non-DBEs, producing an 8.2 percent base figure.¹¹⁷ IDOT considers that not all DBEs will actually be able to perform on IDOT contracts (they are "willing," but might not be "able" within the language of 49 C.F.R. § 26.45(b)), so they implement a weighted calculation of availability based on contracts awarded during the previous year.¹¹⁸

¹¹² *DBE Certification*, ILL. DEP'T OF TRANSP., <http://www.idot.illinois.gov/doing-business/certifications/disadvantaged-business-enterprise-certification/index> (last visited Nov. 21, 2014) (The Illinois Department of Transportation, the City of Chicago, Pace (bus), CTA (public transit in Chicago), and Metra (train) all use the same certification process).

¹¹³ ILL. DEP'T OF TRANSP., OVERALL DISADVANTAGED BUS. ENTERPRISE GOAL SETTING METHODOLOGY REPORT FFY 2014-2016 3, *available at* <https://www.teensafedrivingillinois.org/sbe/FAA%20Goal%20Doc%202014-16.pdf>.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 6.

¹¹⁶ *Id.* IDOT utilizes the North American Industry Classification System, which is a census compiling the number of businesses within different categories of a particular industry, which in this case is construction. *See* La Noue, *supra* note 42, at 452; *see also* *North American Industry Classification System*, UNITED STATES CENSUS BUREAU, <http://www.census.gov/eos/www/naics/> (last visited Oct. 7, 2014).

¹¹⁷ *See* ILL. DEP'T OF TRANSP., *supra* note 113, at 6.

¹¹⁸ *See id.* at 7.

The weighting process involves dividing the number of DBEs by the total number of construction businesses, then multiplying those results by the percentage of the budget for each type of field under construction (i.e. highway, commercial, etc.).¹¹⁹ The weighted availability was 26.07 percent for DBEs.¹²⁰ In considering adjustments, IDOT looks at past DBE participation and saturation of a particular market and made an adjustment to 22.77 percent.¹²¹

IDOT also sets out to establish a race and gender-neutral goal based on the median past race and gender-neutral, noting the direction of 49 C.F.R. §26.51 to maximum feasible portion of the overall DBE goal by race and gender-neutral means.¹²² Despite this recognition, IDOT simply looks to its median past race and gender-neutral DBE participation, a meager 0.016 percent of its overall DBE goal.¹²³ After subtracting this from its overall DBE goal of 22.77 percent, IDOT calculates that its race and gender-conscious measures will be 21.09 percent of federal money.¹²⁴

IDOT's predominant efforts to effectuate its race-neutral measures, based on its policy statement, include but are not limited to small business outreach programs ranging from an advisory committee to review the DBE utilization plan, a "concerted effort . . . to unbundle more contracts and identify small businesses with the capacity to perform IDOT contracts" and a small business initiative program.¹²⁵

D. Colorado

Colorado's current DBE goal is 10.25 percent.¹²⁶ Like other states, the Colorado Department of Transportation ("CODOT") identified its own state as the market area for its goal setting based on the high percentage of which contracting dollars were awarded to

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 10 (noting that Illinois's modification is heavily discretionary).

¹²² *Id.* at 11.

¹²³ *See* ILL. DEPT OF TRANSP., *supra* note 113, at 11.

¹²⁴ *See id.*

¹²⁵ *Id.* at 12.

¹²⁶ COLO. DEP'T OF TRANSP., CDOT OVERALL ANNUAL DBE GOAL FEDERAL FISCAL YEARS 2013-2015 2, *available* at <http://www.coloradodot.info/business/civilrights/dbe/dbe-documents/cdot-overall-annual-dbe-goal-for-fhwa> (last visited Oct. 7, 2014).

Colorado-based firms.¹²⁷ Colorado's statistics are based upon a disparity study.¹²⁸

CODOT begins its goal calculation by dividing all "highway contracting opportunities" into two weighted categories, Highway Construction and Highway Design & Engineering.¹²⁹ CODOT calculates the relative availability of ready, willing, and able DBEs by utilizing several pieces of data. First, CODOT utilizes the Federal Census "to estimate the total number of contractors per NAICS code."¹³⁰ To calculate available DBEs, CODOT uses its own DBE certification registry.¹³¹ However, because DBEs aren't assigned a single NAICS code, "an analysis was conducted to determine the primary NAICS for each DBE."¹³² After establishing its total number of DBE's, CODOT divided the number of DBE firms in Colorado from the total of DBE and non-DBE firms listed in the Census, and then "[t]hese percentages were . . . measured against the estimated value per each NAICS code to determine the expected DBE percent participation per NAICS Code", resulting in an overall total of 12.05 percent.¹³³

Curiously, CODOT "does not have the ability to track spending and utilization at the same level of detail for Highway Design [and] Engineering as it does for Highway Construction contracts."¹³⁴ CODOT deals with this lack of information by using a different, simplified calculation of relative availability for all design and engineering companies based on a simple division of design and

¹²⁷ Specifically, 95 percent of highway construction dollars went to contractors and 96 percent of highway designing contracting dollars went to consultants based in Colorado.

¹²⁸ The last disparity study was conducted in 2009. Disparity studies are one measure recommended by the Federal Code. *Id.* at 2; *see also* 49 C.F.R. § 26.45(c).

¹²⁹ COLO. DEP'T OF TRANSP., *supra* note 126 at 3.

¹³⁰ *Id.* at 5.

¹³¹ *Id.*

¹³² This analysis involved a qualitative examination of different registries, past disparity studies, and the company's description of work and past bidding history. If NAICS already assigned a code to a company, that was applied. *Id.* at 5-6.

¹³³ In other words, for each NAICS category, CODOT divides the number of DBE firms from the overall number of firms to determine a "relative availability" percentage. This percentage is then divided by the past three year contract total to get a "weighted availability." After calculating this for each NAICS code, the sum of weighted availability totals the base percentage of availability. *Id.* at 6.

¹³⁴ *Id.* at 7.

engineering companies from the total number of firms to get 3.85 percent.¹³⁵ The last part of CODOT's base figure calculation involves multiplying the weighted availability percentages by the percentage of the total budget, which each category has received and then the two totals are added to determine the overall DBE goal of 10.25 percent.¹³⁶

To determine whether any adjustments should be made, CODOT reviews a past disparity study, the historical DBE participation and public comments.¹³⁷ Additionally, CODOT's goal statement includes a section about how it effectuates the direction from 49 C.F.R. § 26.51(c) to maximize race-neutral means of participation.¹³⁸ CODOT calculates the median past participation by DBE prime contractors and median past participation by DBE subcontractors in excess of goals to get the anticipated race-neutral participation percentage, which is weighted against the anticipated level of spending for highway construction to determine the weighted anticipated race-neutral participation rate of 4.15 percent.¹³⁹

Amongst these factors, CODOT considers that past participation by DBE prime contractors should be considered race-neutral, offering no further explanation as to why this is the case.¹⁴⁰ Colorado includes a number of methods to help raise its percentage of race-neutral participation and these methods include qualitative marketing and outreach programs, supportive services, structuring bids for small business participation, as well as an "Emerging Small Business Program." ("ESB")¹⁴¹ However, unlike New Jersey, CODOT's ESB Program involves restricting bidding on a certain dollar-amount of projects to ESB, approximately half as much as the standard DBE certification limit, and does not count ESBs toward its DBE goals.¹⁴² Instead, the goal sheet comments that "[m]any of the

¹³⁵ COLO. DEP'T OF TRANSP., *supra* note 126, at 7.

¹³⁶ *Id.* at 8.

¹³⁷ Note at the time of this writing, Colorado had not yet completed its public comments and so has yet to determine if adjustment is necessary. *Id.* at 8-9.

¹³⁸ *Id.* at 10.

¹³⁹ *Id.* at 13.

¹⁴⁰ *Id.* at 11.

¹⁴¹ COLO. DEP'T OF TRANSP., *supra* note 126, at 14-17; note that the ESB program is completely unto Colorado and limits the eligibility to half that of its DBE program, thus disqualifying many DBE firms who would qualify. Ultimately the program seems to function independently of DBE goal setting.

¹⁴² *Id.* at 15.

small firms participating in the ESB Program are also certified DBEs."¹⁴³

E. New Jersey

In its most recent goal narrative, the New Jersey Department of Transportation ("NJDOT") determined that 7.97 percent of its total 12.13 percent goal could be accomplished through race and gender neutral means. Within its market area,¹⁴⁴ NJDOT calculates its base figure by calculating, of all firms able to perform the kind of work funded within the year, the percentage of DBEs "ready, willing, and able to perform the types of work that NJDOT will fund this year."¹⁴⁵ "Ready, willing, and able DBEs "are determined based upon a firm's voluntary certification within the state and their listing in the North American Industry Classification System ("NAICS") under categories where NJDOT actually contracts.¹⁴⁶ NJDOT determined it was not necessary to modify the base figure of 12.13 percent because the median past participation percentage was not substantial enough to warrant modification.¹⁴⁷

Though it is possible that goal setting in terms of contract dollars might put a burden on non-DBE prime contractors to select DBE subcontractors, New Jersey's program makes efforts to maximize fairness in subcontracting by establishing a DBE Utilization Incentive Program. Under the this program,

NJDOT has established a DBE Utilization Incentive Program, in order to encourage prime contractors to utilize the services of DBEs that have never been

¹⁴³ *Id.*

¹⁴⁴ Though New Jersey has issued, between 2010 and 2012, four contracts to New York-based contractors and six to Pennsylvania-based contractors, the fact that that approximately 96 percent of the contracts went to New Jersey-based contractors, NJDOT identified the state of N.J. as its "market area" pursuant to 49 C.F.R. § 26.45(c). *See* N.J. DEP'T OF TRANSP. DISADVANTAGED BUS. ENTERPRISE GOAL SUBMISSION FEDERAL FISCAL YEARS 2014 THROUGH 2016, *available at* <http://www.state.nj.us/transportation/business/civilrights/pdf/dbegoalnarrativeFFY2014.pdf> (last visited Nov. 21, 2014).

¹⁴⁵ *Id.* at 2.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 3.

subcontractors on NJDOT projects. The purpose of this program is to ensure that DBEs have the maximum opportunity to compete for and perform on NJDOT construction projects.¹⁴⁸

New Jersey developed the Emerging Small Business Enterprise ("ESBE") program as a compliment to the DBE program. This program was implemented in 2003-2004 as a response to a constitutional challenge to a regional DBE program.¹⁴⁹ An outstanding and related criticism of the Federal DBE program is that it is preferential for minority firms but "could become a race-neutral program if USDOT encouraged recipients to define eligible businesses by the size of the firm and the income of the owner, while eliminating the racial and gender presumptions."¹⁵⁰ In one respect, eliminating racial and gender presumptions of disadvantage would change the entire landscape of the program. Rather than doing this, New Jersey's ESBE program maintains the racial and gender presumptions of disadvantage for DBEs but has incorporated a parallel certification system to incorporate non-racial or gender-based calculations into goal setting. New Jersey's ESBE program has enabled the state "to meet almost all of its . . . highway goal through a race-neutral . . . program."¹⁵¹

NJDOT explains that "[t]o ensure that the maximum feasible portion of the overall DBE goal is met by using race-neutral means of facilitating DBE participation, NJDOT will establish ESBE goals on its contracts . . . [a]ll DBEs are considered to be ESBEs for the purposes of goal setting."¹⁵² "ESBE certification exists solely for the benefit of the DBE program."¹⁵³ NJ's recognition of the fact that small firms, regardless of race, are in similar positions is reflected

¹⁴⁸ *New Jersey Department of Transportation DBE Program* (Nov. 21, 2010), <http://www.state.nj.us/transportation/business/civilrights/pdf/dbeprogram2011.pdf> (last visited Oct. 9, 2014).

¹⁴⁹ Rodrigo Lovaton Davila, Inhyuck "Steve" Ha, Samuel L. Myers, Jr., *Affirmative Action Retrenchment in Public Procurement and Contracting*, (Jan. 7, 2011), <http://www.hhh.umn.edu/centers/rwc/pdf/TheEffectofAffirmativeActionRetrenchmentinPublicProcurementandContracting.pdf>.

¹⁵⁰ La Noue, *supra* note 43, at 472.

¹⁵¹ *Id.*

¹⁵² N.J. DEP'T OF TRANSP., *supra* note 144, at 4; *see also* 49 C.F.R. § 26.51 (discussing race neutrality guideline).

¹⁵³ N.J. DEP'T OF TRANSP., DISADVANTAGED BUSINESS ENTERPRISE GOAL SUBMISSION FEDERAL FISCAL YEARS 2014 THROUGH 2016, *supra* note 144, at 5.

through the ESBE program which in effect maximizes the state's ability "[t]o create a level playing field on which DBEs can compete fairly for DOT-assisted contracts"¹⁵⁴ because it is able to avoid reverse discrimination through broader inclusion.

ESBE certification calls for essentially the same requisites as DBE certification, except it does not require "social" disadvantage¹⁵⁵ like DBE. Just like DBE eligibility, eligibility for ESBE certification requires that "the firm must be a for-profit business located in the State of New Jersey, meet the SBA size standards in its industry as defined in 13 CFR Part 121.201 and be 51 percent owned and controlled by one or more *economically disadvantaged* individuals who are citizens of the United States or lawfully admitted permanent residents whose personal net worth does not exceed \$1.32 million."¹⁵⁶

An ESBE contracting goal is "calculated [based on] the median past percentage of the goal that was achieved through race neutral means from [the past four years]."¹⁵⁷ The ESBE program maximizes fair goal setting by broadening the pool from which goals are calculated. For the purposes of contracting goals, all DBEs are considered ESBEs.¹⁵⁸ ESBE goals are developed on a contract-by-contract basis through the assistance of the NJDOT Contractor Compliance Unit and NJDOT Bureau of Construction services.¹⁵⁹ Prime Contractors can use DBE and/or ESBE firms to satisfy ESBE goals, but only DBE participation will be counted toward meeting DBE goals.¹⁶⁰ Ultimately, the program promotes participation by both DBE and ESBE firms toward a goal based on participation by both

¹⁵⁴ 49 C.F.R. § 26.1(b)(2014).

¹⁵⁵ See 49 C.F.R. § 26(a)(2014) (requiring social and economic disadvantage).

¹⁵⁶ N.J. DEP'T OF TRANSP., *supra* note 143, at 5 (emphasis added).

¹⁵⁷ *Id.* at 5 ("ESBE contracting goals for USDOT federally funded construction projects are determined by the NJDOT Contractor Compliance Unit with the help of the NJDOT Bureau of Construction Services. The NJDOT Bureau of Construction Services conducts a review of a construction firm's Engineer's Estimate for a specific project and identifies the items typically subcontracted by a prime contractor on similar projects. This review will determine the approximate percentage of the project that will be subcontracted to other firms.") (alteration in original).

¹⁵⁸ *Id.*

¹⁵⁹ N.J. DEP'T OF TRANSP., EMERGING SMALL BUSINESS ENTERPRISE POLICY STATEMENT, *available* at <http://www.state.nj.us/transportation/business/civilrights/pdf/esbepolicystatement.pdf> (revised Mar. 17, 2011).

¹⁶⁰ *Id.*

categories. That portion of participation toward ESBE goals made by DBEs thus becomes the percentage of race-neutral participation toward the DBE goals, because that participation was inclusive of a class not limited to certification involving a presumption of racial or gender disadvantage.

IV. Analysis

The DBE program, which applies a presumption of disadvantage based upon racial background, is necessarily race-conscious. The tension involved in the federal instructions is especially prominent when recipients of DOT money have to balance the conflicting requirements of implementing a race-conscious program by way of means which are predominately race and gender-neutral. Of the different varieties of state approaches, the most effective program is that belonging to New Jersey. New Jersey's program combines incentives for participation, a bid-system calculation, certification requirements, and an ESBE program, which allows the state to consider the broadest possible pool of small businesses generally, and promotes their participation in contracting for federally-funded construction contracts. New Jersey's ESBE system allows for more relative accuracy in measuring race-neutral participation through the alternate certification system.

Inaccurate formulations of what constitutes a race-neutral measure can result in the program creating unfairness categorically and operationally. One commentator has weighed that "[t]he data source used can make an enormous difference in the final determination of availability [and] attempts at averaging widely varying and inadequate availability sources do not create an accurate DBE goal."¹⁶¹ Inaccuracy in calculating company availability might further affect how states maximize their race-neutral methods for maximizing their goals.

Some race and gender-neutral suggestions are outlined in federal requirements,¹⁶² but they are ultimately determined by state recipients. "Race-neutral measure[s] or program[s] [are those that are], or can be, used to assist all small businesses."¹⁶³ Though the DBE program is supposed to reduce inequality for historically disadvantaged minorities and implement measures beneficial for all

¹⁶¹ La Noue, *supra* note 43, at 457.

¹⁶² 49 C.F.R. § 26.51(a)(2014).

¹⁶³ 49 C.F.R. § 26.5 (2014) (alteration in original).

small businesses, the Supreme Court has criticized attempts to rationalize programs seeking to remedy past forms of social discrimination that coincide with "nonracial factors which would seem to face a member of any racial group seeking to establish a new business enterprise".¹⁶⁴ Despite the Supreme Court's commentary in this respect, recipients are essentially required to implement the kinds of programs that would benefit all small-businesses, irrespective of racial considerations.

One commentator argued that "[t]he DBE program could become a race-neutral program if USDOT encouraged recipients to define eligible businesses by the size of the firm and the income of the owner, while eliminating the racial and gender presumptions."¹⁶⁵ If recipients were to implement a system like this, they would arguably have implemented a race-neutral program, however, based on the underlying rationales of the program,¹⁶⁶ this would circumvent a crucial purpose of the program. New Jersey's answer adopts the suggestion of the above commentary while preserving race-consciousness in its certification. Through a parallel certification system which incorporates both subsets of firms (i.e. those who have been certified through race-conscious measures and those who have not), New Jersey has accomplished a significant portion of its overall goal through race-neutral means.

The chart below is based on the goal narratives of the states selected for this note. The chart presents the state, its overall goal, the years in which that goal applies, the percentage of participation based on race-neutral means, and the percentage of the overall goal which is accomplished by that race-neutral past participation. While more extensive empirical research should be conducted to generate more determinative data, this chart is simply intended to present the variety of performance of some states with different DBE programs as a visual supplement to the qualitative analysis, which follows.

¹⁶⁴ *Croson*, 488 U.S. at 470 (1989) (listing factors including "deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures," etc).

¹⁶⁵ La Noue, *supra* note 43, at 472.

¹⁶⁶ See U.S. DEP'T OF TRANSP., *supra* note 2.

Race-Neutral Percentage of Overall State Goal:

State	Goal	Years	Neutral	Overall Goal
California	12.50%	2013-2015	3%	24%
Colorado	12.05%	2013-2015	4.15%	34%
Florida	8.18%	2012-2014	100%	100%
Illinois	22.77%	2014-2016	1.68%	7%
New Jersey	12.13%	2014-2017	7.97%	66%

*Note that this chart reflects the projected percentages of the DBE goal percent that each state anticipates being able to accomplish via race-neutral means.¹⁶⁷

Of the surveyed states, there is tremendous contrast in the percentages of DBE goals that the states contemplate accomplishing through race-neutral measures. Most stark is Florida's 100 percent rate. According to Florida's most recently available DBE Program Plan, they claim that "[t]he Department has successfully implemented a 100 percent race-neutral DBE Program since federal fiscal year 2001."¹⁶⁸ However, the accompanying FDOT document identifying its goal-calculating methodology does not specify race-neutral or race-conscious measures. Another page on the FDOT website explains that:

[t]he Department's DBE Program is implemented through race and gender neutral means. Ultimately,

¹⁶⁷ This data was pulled from each state department of transportation's most recent goal narrative. See CAL. DEP'T OF TRANSP., FED. HIGHWAY ADMIN, DISADVANTAGED BUS. ENTERPRISE GOAL & METHODOLOGY, FEDERAL FISCAL YEAR 2013-2015, *supra* note 88; See FLA. DEP'T OF TRANSP. METHODOLOGY FOR DETERMINING DBE GOAL FEDERAL FISCAL YEAR (2010), *supra* note 101; see ILL. DEP'T OF TRANSP., OVERALL DISADVANTAGED BUS. ENTERPRISE GOAL SETTING METHODOLOGY REPORT FFY 2014-2016, *supra* note 112; see COLO. DEP'T OF TRANSP., CDOT OVERALL ANNUAL DBE GOAL FEDERAL FISCAL YEARS 2013-2015, *supra* note 125; see N.J. DEP'T OF TRANSP., *supra* note 143.

¹⁶⁸ STATE OF FLA. DEP'T OF TRANSP. DISADVANTAGED BUS. ENTERPRISE PROGRAM PLAN, *supra* note 102.

we believe our DBE goal can be achieved under the normal competitive process. Prime contractors and Prime consultants submit voluntary commitments and actual expenditures with DBEs. Race neutral under the construction program is defined as not setting race or gender specific goals on the individual projects, but counting all participation of DBE subcontractors utilized by contractors on projects. Race neutral under the consultant or professional services program is defined as not assigning race or gender preference points on projects for prime consultants who were either DBEs or who utilized DBEs for a certain percentage of work but counting all participation of DBE sub-consultants utilized by consultants on projects.¹⁶⁹

How is this possible? FDOT articulates a theory that it can achieve its goals for DBE participation based on the normal competitive bidding process. However, FDOT ultimately sets those goals based on past participation, which is a product of the "competitive process." In this respect, Florida's 100 percent calculation is completely based on the theory its free-market theory.

In terms of goal-setting, FDOT is essentially taking the percentage of past DBE construction bidders, either as prime or subcontractors, and multiplying it by the percentage of FDOT money available for projects where DBEs can perform.¹⁷⁰ Ironically, the most accurate element of this methodology is how neatly it fits into FDOT's motto, visible at the bottom of its webpage: "consistent, predictable, repeatable."¹⁷¹ Of the listed benefits of DBE certification, FDOT advertises that "DBEs may be used to satisfy a DBE goal" and that "DBEs receive statewide exposure for contracting opportunities."¹⁷² The inevitable question is, if DBEs are competing

¹⁶⁹ *BE Program FAQs*, FLA. DEP'T OF TRANSP. EQUAL OPPORTUNITY OFFICE, <http://www.dot.state.fl.us/equalopportunityoffice/dbeprogramfaq.shtm> (last visited Oct. 9, 2014).

¹⁷⁰ FLA. DEP'T OF TRANSP., METHODOLOGY FOR DETERMINING DBE GOAL FEDERAL FISCAL YEAR 2010, *supra* note 102.

¹⁷¹ *DBE Program FAQs*, *supra* note 191.

¹⁷² *Id.*

equally amongst non-DBEs for these contracting opportunities, how are these "benefits" unique at all?

Ultimately, Florida's fend-for-yourself approach appears to do very little to empirically justify its bold assertion of 100 percent race neutral distribution. Ultimately, the provision of supportive services (i.e. training and technical services), via FDOT, seem to be some of the only observable efforts by the department to effectuate the goals of the DBE program.¹⁷³ Other than this, Florida's program does nothing to prevent the possibility, as observed by Justice Stevens, that past inability to gather enough resources might render minority-owned businesses unable to compete on an equal playing field.¹⁷⁴ Arguably Florida's program is not narrowly tailored.¹⁷⁵ In another respect, the effectiveness of the FDOT program will really depend upon the effectiveness of its qualitative programs, the success of which is not immediately measurable in its goal statement. Florida might improve its system by linking its calculation of available DBEs to participation in FDOT's support programs or alternatively requiring that participation in said programs become mandatory. Absent such effort, the success of FDOT's DBE program is entirely at the mercy of the market for construction bidders.

In comparison to Florida's crushingly 100 percent race-neutral method, Illinois calculates that a very low percentage of its overall goal will be accomplished through race-neutral measures. Illinois's calculation of ready, willing and available DBEs considers all bidders, all those qualified, and all those who have responded to one of their outreach programs.¹⁷⁶ Arguably this is a comprehensive calculation. IDOT's criteria for race and gender-conscious goals are "limited to contracts with subcontracting opportunities,"¹⁷⁷ presumably because a prime contractor, if not a DBE, will have to satisfy a certain percentage of that contract's goal of DBE participation through subcontracting.¹⁷⁸

The downside of this type of calculation is that only contracts to be completed by a single contracting firm are counted towards race-neutral measures. There are two serious flaws to this model. The

¹⁷³ See *id.*

¹⁷⁴ See *Pena I*, 515 U.S. 200, 261-62 (1995) (Stevens, J., dissenting).

¹⁷⁵ The Court applies strict scrutiny to all governmental classifications based upon race. *Croson*, 488 U.S. at 520.

¹⁷⁶ See ILL. DEP'T OF TRANSP., *supra* at note 113, at 6.

¹⁷⁷ *Id.* at 13.

¹⁷⁸ "[S]ubcontracting goals [are] set on a contract-by-contract basis." *Id.*

first flaw is that, if IDOT predominately issues contracts with subcontracting possibilities, there will be few opportunities for DBEs to be selected as bidders on a race-neutral basis and so the number will be significantly understated. The second flaw is that, in supposing an IDOT contract is race-conscious purely because it involves subcontracting possibilities, it puts a pejorative symbolic stamp on the DBE program generally which works against the proposed goals of the federal program. Another argument is that IDOT's calculation, involving participation in IDOT contracts with subcontracting possibilities, reflects the economic reality that many DBEs are not equipped to act as prime contractors and thus their participation will be predominately through subcontracted portions of IDOT projects.

In its effort to create a base figure more representative of the actual ability of firms to perform Caltrans's work, California utilizes a telephone survey. Though this process enables Caltrans to determine business qualification more accurately, it runs the risk of misrepresenting the actual total applicant pool. For example, because less than half of Caltrans-listed firms had valid phone numbers, one might reasonably infer that their directory is adequately updated. Nonetheless, Caltrans's process of reaching out to individual firms to determine their interest and ability to participate in FHWA-funded contracts is an effective way of gauging readiness, willingness, and ability. The inevitable shortcoming of the program is that many listed firms do not have accessible phone numbers. More effort on the part of Caltrans could arguably increase the accuracy of their process in this respect.

In their adjustment stage, Caltrans eliminates, of the contacted companies, those who are not pre-certified as DBEs. This results in a substantially lower percentage of firms calculated for its base figure. Insofar as it is plausible that there are certified DBEs without valid phone numbers, Caltrans might create a more accurate calculation by first considering all certified DBEs and from those, determining which are able to perform the work required.

Caltrans's four race-neutral measures are largely qualitative. Insofar as their calculation of race-neutral participation is based on participation in these four programs, there is the possibility of a disconnect between the ready, willing, and available firms, and their participation in any of these additional outreach efforts by Caltrans. For example, one Caltrans race-neutral measure involves data

collection, monitoring, and reporting of DBEs, yet, their telephone survey was only able to reach 47 percent of firms.¹⁷⁹ One possible explanation for such an outcome is lack of awareness of such programs.

Crucial to note is that these qualitative outreach programs are only race-neutral insofar as they do not involve the presumption of racial disadvantage that plays into determining contract percentages. One way that Caltrans might increase its race-neutral participation, based on its current calculation, is by making these programs mandatory for all businesses considered at an economic disadvantage, inclusive of DBEs. Such an approach would provide additional assistance to disadvantaged firms generally in such a way that would maximize participation based upon the actual need of businesses for additional support.

The Colorado Department of Transportation's efforts to divide DBE firms based on their kind of work, either as constructors or consultants, is an effective way of limiting the measurement's from which calculations are based to more accurately reflect available firms. However, the shortcomings of this approach are recognizable insofar as CODOT lacks the resources to actually measure the spending of design and engineering as it does for construction contracts.¹⁸⁰ This relative lack of resources amounts to an increased likelihood of an inaccurate calculation of the base figure of consultant companies. However, the isolation of the two categories of DBE firms might nonetheless make the calculation of construction firms more accurate. Balancing the relative calculations is something CODOT should seek to pursue because the relative normalization of their base figures will result in more accurate goal-setting.

CODOT's calculation of race-neutral means as a function of excess of past median participation by DBEs is somewhat lacking in rationale. Logically, it seems unsound to conclude that an excess of DBE race-conscious participation that exceeds the goal amounts to race-neutrality, because presumably a race-conscious consideration was factored into participation by all participation exceeding the goal. This calculation perhaps better represents the ability of CODOT's race-conscious measures in accomplishing its goals, but it does little to articulate a rationale as to how the underlying measures are race-neutral.

¹⁷⁹ CAL. DEP'T OF TRANSP., *supra* note 89.

¹⁸⁰ COLO. DEP'T OF TRANSP., *supra* note 126, at 7.

Similar to New Jersey, Colorado implements an Emerging Small Business Program, however this program is limited to bids under a certain dollar amount.¹⁸¹ The benefit of this program is that, because many of the participating firms are also DBEs, CODOT can contribute towards maximizing its race neutral participation.¹⁸² The cap on a certain dollar amount also tapers the size of projects on which DBEs will be performing. One positive outcome from this is the possibility that smaller firms who are in fact disadvantaged can take advantage of a bidding pool structured around relatively similarly equipped firms. However, absent safeguards, larger DBEs could nonetheless bid on ESB contracts and dominate smaller DBEs. Even if this was the case, the active competition between DBEs, of whatever size, would be a positive step toward effectuating the goals of 49 C.F.R. § 26.1(a). In this respect, CODOT's ESB program is a good step toward the maximization of race-neutral means for setting DBE goals on a state-wide level.

Excluding Florida's peculiar calculation, New Jersey fares comparably better in maximizing a high portion of its DBE goals through race-neutral measures. This is largely a function of the ESBE program. The ESBE program essentially splits DBEs into two pools, those certified under race-conscious criteria (specifically, the presumption of disadvantage), and those certified only under the requirement of economic disadvantage. By including both of these categories in the same calculation of a base figure, NJDOT has effectively broadened its participation pool. Furthermore, by counting all DBEs as ESBEs, NJDOT has effectively ensured that, at least as to economic disadvantage, all small contractors are considered equally toward the DBE goals.

Such a program, while effectuating the overall purposes of the program, runs the risk of actually putting minority owned businesses at a disadvantage. For example, one empirical study, conducted for the years of 2003-2004, concluded that "although women- and minority-owned firms conceptually benefit from ESBE set-asides, they do not benefit as much as non-DBEs, resulting in a reduced share of total contract dollars awarded to DBEs."¹⁸³

¹⁸¹ *Id.* at 15.

¹⁸² *Id.*

¹⁸³ Rodrigo Lovaton Davila, Inhyuck "Steve" Ha, Samuel L. Myers, Jr., *Affirmative Action Retrenchment in Public Procurement and Contracting* 1, (Jan. 7, 2011),

However, this might simply be a function of there being less ESBEs who are not also DBEs.

Conclusion

Recently the DOT has engaged in rulemaking to attempt to clarify certain portions of the DBE program.¹⁸⁴ While the recent final rule clarifies the code language and examples related to overall goal setting requirements and race-neutral DBE participation¹⁸⁵, states are still left with a tremendous amount of discretion in implementing their individualized programs. Despite the seemingly contradictory requirements imposed by the DOT, New Jersey's ESBE program functions effectively in balancing the implementation of a race-conscious affirmative action program with the competing interest in maintaining as much of a race-neutral approach as possible. Unlike Florida's free market approach which essentially abandons any race-conscious measure in goals setting, NJDOT's ESBE program preserves race-conscious factors while eliciting broad participation of all disadvantaged firms who choose to participate in the program. Unlike Colorado, New Jersey counts every DBE as an ESBE, instead of requiring separate certification. By doing this, NJDOT maximizes the amount of disadvantaged firms that will be considered in bidding, inclusive of racial and nonracial considerations. And unlike California, NJDOT's ESBE program is not limited to qualitative programs but is supplemented by them and as such establishes incentive programs as well as cognizable and numerical goals from which contractors are required to subcontract.

While the NJDOT ESBE program does not necessarily remedy all of the flaws inherent in the DBE program, it ameliorates some concerns that the program will function to disadvantage minorities or unfairly prefer them as against other disadvantaged non-minority owned firms. Compared to the states evaluated in this note, New Jersey is comparatively better-situated to accomplish a significant portion of its goals through sound race-neutral means.

As the federally initiated DBE program continues to develop, we should ideally see *less* DBE participation and correspondingly smaller expenditure goals. Hypothetically, and supposing the federal

<http://www.hhh.umn.edu/centers/rwc/pdf/TheEffectofAffirmativeActionRetrenchmentinPublicProcurementandContracting.pdf>.

¹⁸⁴ See Disadvantaged Business Enterprise: Program Implementation Modifications, 79 Fed. Reg. 59566-01, 59566 (Oct. 2, 2014).

¹⁸⁵ See *id.* at 5980-983.

program fulfills its goals, formerly disadvantaged firms should eventually become non-disadvantaged and be able to compete for state contracts independently of DBE certification. As a corollary, previously disadvantaged firms who are unable to develop will still be guaranteed a means to partake in in Federal Department of Transportation-funded construction contracts. The ongoing effectiveness (or lack of effectiveness) of this federal program begs the looming question of when and at what point does this federal program cease to be necessary.

Insofar as an ESBE program like New Jersey's considers and seeks to effectuate participation by all economically disadvantaged construction firms, the program might effectively persist even in a state where presumptions of racial disadvantage are no longer relevant and continue to promote the construction market overall. While the concept of a level-playing field is not an easily measurable concept, especially given the competitive nature of bidding on construction contracts, a DBE program which assists all disadvantaged competitors will simultaneously assist all competitors who have been disadvantaged as a result of their social or racial experiences. In this respect, more state recipients of DOT money should consider implementing programs similar to NJDOT's ESBE program.

