SETTING GOALS IN THE FEDERAL DISADVANTAGED BUSINESS ENTERPRISE PROGRAMS

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INTRODUCTION

The Disadvantaged Business Enterprise ("DBE") program, administered by the United States Department of Transportation ("USDOT"), has had a long history of controversy. The program has been the subject of six conflicting circuit court decisions, and Congress came close to terminating it in 1997. The judicial and legislative disputes stem from the racial, ethnic, and gender contract goals embedded in the program and the amount of money at stake.

Since 1982, the federal government has required state and local recipients of federal transportation and other funds to operate DBE programs. Under these programs, every recipient that receives at least $250,000 in any fiscal year must set a goal insuring that DBEs receive a certain percentage of the federal funds.

To qualify as a DBE, a firm must be socially and economically disadvantaged. The label "socially disadvantaged" applies to those persons "who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as member of groups..."
All women and minority owners are entitled to the presumption that they are socially disadvantaged. Their personal, educational, political, or social achievements are not considered relevant in considering whether they are “disadvantaged.” To be considered economically disadvantaged, the firm owner’s net worth must be less than $750,000, not including personal residence or the value of the business. While there is uncertainty regarding the number of owners this standard excludes, it appears that most business owners fit comfortably within its limits. Furthermore, for heavy and highway construction firms to qualify for economic disadvantaged status, DBEs must not have gross revenues averaging more that $27.5 million in a three year period. This standard excludes only a tiny fraction of all the construction firms in the United States. So as a practical matter, most minority- and women-owned firms seeking DBE certification could obtain it and the preferences attached to it, though only a small fraction choose to do so.

Despite a substantial amount of governmental and scholarly research about the program’s premises, commentators have ignored the real teeth in the program: the DBE goals and how recipients actually create them. DBE goals are set by determining the proportion of dollars on federally funded contracts that are expected to go to DBE firms as prime and subcontractors. The most recent extension of the

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6 Participation by Disadvantaged Business Enterprises in Department of Transportation Programs, 64 Fed. Reg. 5096 (Feb. 2, 1999).
7 Id.
8 49 C.F.R. § 26.67.
9 In 1995, Philip Lader, Administrator of the Small Business Administration (“SBA”), showed that, even by using family net worth rather than individual net worth, more than 91% of all business owners would have been considered economically disadvantaged because they were below the $750,000 limit. The Small Bus. Admin.’s 8(a) Minority Bus. Dev. Program: Hearing Before the Senate Comm. on Small Bus., 104th Cong., 1st Sess. 103 (April 4, 1995) (S. Hrg. 104-135). Since the limit has not been increased, inflation suggests a larger number of business owners would be excluded.
10 13 C.F.R. § 121.201 (2006).
11 In construction, the firm size limitations in annual revenues for highway contractors would have made 98% of those businesses in the country eligible the last time such figures were calculated. (Size Limitations—13 C.F.R. § 121.201 (2006); Total Number of Establishments—1992 Census of Construction Industries, Preliminary Reports, Industry Series; Number of Establishments above Size Limitations—Census Bureau).
federal transportation programs—the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU")—authorizes $244 billion to be spent between FY 2005 and FY 2010. Therefore, an increase or decrease in overall DBE goals by just 1% would amount to $2.4 billion. How recipients set DBE goals is the focus of this Article.

Recent judicial decisions suggest that the process of setting DBE goals may receive more critical attention. In *Gratz v. Bollinger*, the Supreme Court, applying the narrowly tailored prong of the strict scrutiny test, held that the specific calculations driving a race-conscious admissions program may be fatally flawed. Thereafter, in 2005, the Ninth Circuit in *Western States Paving, Co. v. Washington State Department of Transportation* made administering DBE programs more difficult by deciding that the location and capacity of DBEs had to be considered in calculating the relative availability of DBEs and non-DBEs to do highway work. This decision may require fundamental changes to DBE programs everywhere. In light of the Ninth Circuit’s holding, an investigation into how annual and contract goals are set in DBE programs is quite timely.

This Article describes and critiques the procedures and data used in DBE goal setting. Part I describes disparity studies and their role in defining the concept of availability. Part II discusses the constitutional issues that emerge when state and local governments determine DBE disparities and goals. Part III explores the regulatory rules that influence DBE goals. Part IV examines the process of recipient goals settings in several contexts. Part V analyzes DBE goal setting issues in conjunction with race-neutral requirements. The Article concludes 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 DBEs.

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15 The formal process for goal setting is defined in 49 C.F.R. § 26.45 (2006).


17 *W. States Paving Co. v. Wash. Dep't of Transp.*, 407 F.3d 983, 997–98 (9th Cir. 2005) (holding that state DOT recipient also must make a finding of discrimination for each preferred group in that state before using race-conscious goals).
I. DISPARITY STUDIES AND GOAL SETTING

The legal context for goal setting can best be understood by examining the law developed in evaluating the disparity studies that emerged in the wake of the Supreme Court’s decision in City of Richmond v. Croson. In that case, the Court set a new constitutional standard of review for minority- and women-owned business enterprise (“MWBE”) programs that threatened their future existence. The Court determined that such programs were subject to the strict scrutiny test, thereby requiring that governments both possess a compelling governmental interest for using race to classify contractors and then employ that classification in a narrowly tailored manner. But Justice O’Connor, writing for the majority, did not find MWBE programs unconstitutional per se. “Strict scrutiny,” as she noted later in Adarand, was not “strict in theory, but fatal in fact.” Nevertheless, the Court set the constitutional bar for the use of racial classifications in public contracting very high. Croson held that racial classifications would be constitutionally justified in “the extreme case,” where “some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion. The Court provided a statistical test to serve as a starting point that a government should use to determine whether patterns of discriminatory exclusion exist:

Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.

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19 This Article will use the term “MWBE” to refer to state and locally funded minority and women business enterprise programs and “DBE” to refer federally funded disadvantaged business programs. After Croson and Adarand, both types of programs must meet the strict scrutiny standard of judicial review.
21 Adarand, 515 U.S. at 237.
22 Croson, 488 U.S. at 509.
23 Id.
This test launched a new cottage industry producing disparity studies to develop or maintain MWBE programs.\textsuperscript{24} By the end of 2005, there were almost 200 such disparity studies, costing taxpayers at least $75 million.\textsuperscript{25} Sheer quantity, however, did not ensure quality. Disparity studies have been subjected to a considerable amount of criticism from the courts,\textsuperscript{26} government agencies,\textsuperscript{27} and scholars.\textsuperscript{28} At Congress's request, the General Accountability Office ("GAO") reviewed fourteen disparity studies intended to support DBE goals in federal highway programs and found:

\begin{itemize}
  \item \textsuperscript{24} U.S. Commission on Civil Rights, \textit{Disparity Studies as Evidence of Discrimination in Federal Contracting} (2006) [hereinafter USCCR Report].
  \item \textsuperscript{25} The Project for Civil Rights and Public Contracts at the University of Maryland-Baltimore County has the largest public collection of approximately 135 such studies. See http://www.research.umbc.edu/~glanoue/index.html (last visited June 16, 2007).
  \item \textsuperscript{26} Post-\textit{Croson} courts have generally found serious flaws in the statistical evidence of discrimination presented to them. See O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992) (no strong basis in evidence for the use of 35\% goal); Hersh Gill Consulting Eng'rs, Inc. v. Miami-Dade County, 333 F. Supp. 2d 1305 (S.D. Fla. 2004) (the statistical evidence presented in this case is unreliable and fails to establish the existence of discrimination); L. Tarango Trucking v. County of Contra Costa, 181 F. Supp. 2d 1017 (N.D. Cal. 2001) (no way to tell if MWBEs are underutilized because census data are flawed availability source); BAGC v. Cook County, 123 F. Supp. 1087 (N.D. Ill. 2000), aff'd, 256 F.3d 642 (7th Cir. 2001); Ass'n for Fairness in Bus., Inc. v. New Jersey, 82 F. Supp. 2d 353, 361 (D.N.J. 2000) (Commission's report offers little support for the MWBE program); Webster v. Fulton County, 51 F. Supp. 2d 1359, 1376 (N.D. Ga. 2000) (overall the methods and statistics in the disparity study fail to provide a strong basis in evidence and do justify preferences), aff'd, 218 F.3d 1276 (11th Cir. 2000); Phillips & Jordan, Inc. v. Watts, 13 F. Supp. 2d 1308, 1314 (N.D. Fla. 1999) (the record at best establishes only ill-defined wrongs and that is not enough); AGC v. Drabik, 50 F. Supp. 2d 741 (S.D. Ohio 1999), aff'd, 214 F.3d 730, 735 (6th Cir. 2000) (statistical disparity in the awarding of contracts to a particular group standing alone does not prove discrimination); Eng'g Contractors Ass'n of S. Fla. Inc. v. Metro Dade County, 943 F. Supp. 1546 (S.D. Fla. 1996) (holding that county's statistical evidence is in conflict and not persuasive), aff'd, 122 F.3d 895 (11th Cir. 1997); Contractors Ass'n of E. Pa. v. City of Philadelphia, 893 F. Supp. 419 (E.D. Pa. 1995), aff'd, 91 F.3d 586, 602 (3d Cir. 1996) (city unable to provide evidentiary basis for goals). But see N. Contracting, Inc. v. Illinois, 473 F.3d 715, 723 (7th Cir. 2007) (consultant's methodology arrives at accurate numbers); Concrete Works of Colo., Inc. v. City & County of Denver, 312 F.3d 950, 990 (10th Cir. 2003) (strong evidence in the record suggests that a strong basis in evidence existed).
\end{itemize}
The limited data used to calculate disparities, compounded by the methodological weaknesses, create uncertainties about the studies findings.... While not all studies suffered from every problem, each suffered enough problems to make its findings questionable. We recognize there are difficulties inherent in conducting disparity studies and that such limitations are common to social science research; however, the studies we reviewed did not sufficiently address such problems or disclose their limitations.29

In May 2006, the United States Commission on Civil Rights ("USCCR"), after being briefed by various experts on disparity studies, concluded:

Most current disparity studies are not only outdated, but have common flaws. They fail to measure availability according to requirements to compare qualified, willing, and able businesses that perform similar services. They use simple counts of businesses without taking capacity into account. The researchers (1) use obsolete or incomplete data; (2) report results in ways that exaggerate disparities; (3) fail to test for nondiscriminatory explanations for differences; (4) find purported discrimination without identifying instances of bias or general sources; (5) rely on anecdotal information that they have collected scientifically or verified; (6) do not examine disparities by industry; and (7) neglect to identify which racial and ethnic groups suffer from the disparities.30

But even if they are found to be valid, disparity studies can only create the compelling interest predicate for the use of racial classifications. To put "teeth" into a program, state and local governments set goals for the amount of dollars on their contracts that MWBEs or DBEs should receive. It 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

29 GAO REPORT, supra note 27, at 29, op. cit.
30 USCCR REPORT, supra note 24, at 77, Finding 3.
often cost taxpayers more money than necessary.\textsuperscript{31} If the goals are set too low, it may achieve no purpose but to waste bureaucratic time. Setting appropriate goals, therefore, is an important issue not only for the determination of whether DBE goals meet constitutional muster under the narrowly-tailored analysis, but also for their effect on the efficient expenditure of transportation funds. Despite their legal and fiscal significance, the practices and processes for setting annual aggregate target DBE goals have been largely ignored by courts and scholars, while the process for setting individual contract DBE goals has remained all but invisible to those not in the bureaucratic conference rooms where the goals are set.

After establishing the legal and regulatory context of goal setting, it is the purpose of this Article to describe and critique the actual procedures and data used. The most accessible information for this latter task is the DBE goal setting proposals which must be submitted annually by every state and local recipient of federal transportation funds to USDOT.\textsuperscript{32} For purposes of this Article, a database of more than 125 goal setting proposals submitted from 2005 to 2006 to USDOT has been compiled. This database includes the goal setting proposals made by all fifty state departments of transportation for highway funding as well as scattered proposals from airports, rapid transit districts, and ports.\textsuperscript{33}

II. CONSTITUTIONAL CONTEXT FOR DETERMINING DISPARITIES AND GOALS

It is important to review what courts have said about evaluating the quantitative sections of disparity studies because these pronouncements are also relevant to the process of goal setting.\textsuperscript{34} Both activities

\textsuperscript{31} See, e.g., W. States Paving Co. v. Wash. Dep’t of Transp., 407 F.3d 983, 988 (9th Cir. 2005) (“The prime contractor did not select Western States, even though its bid was $100,000 less than that of the minority firm that was elected. The prime contractor explicitly identified the contract’s minority utilization requirement as the reason that it rejected Western States’ bid.”).

\textsuperscript{32} Highway recipients submit goals to the Federal Highway Administration (“FHWA”), transit districts to the Rapid Transit Administration (“RTA”), and airports to the Federal Airport Administration (“FAA”), all agencies within USDOT.

\textsuperscript{33} While occasional references will be made to goal setting in state and local MWBE programs, as gleaned from litigation discovery or other court records, this non-federal information is extremely difficult to collect or analyze in any systematic way.

\textsuperscript{34} This review will focus on the statistical dimensions of disparity studies because, although they also have anecdotal and sometimes historical sections, the quantitative disparity ratios are the basis for establishing a compelling interest.
begin with the critical step of measuring availability of minority and non-minority businesses. In the case of disparity studies, 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. In both instances, if availability is incorrectly measured, the disparity ratios or the goals will be inaccurate. If DBE availability is inflated, often false disparities will emerge and indicate a non-existent compelling government interest or create non-narrowly tailored utilization expectations. On the other hand, if DBE availability is set too low, a disparity that might be caused by discrimination may not be discovered.

A. Statistics and Discrimination in the DBE Goal Setting Context

For several decades, courts have been examining statistics as an indicator that disparate outcomes in employment, housing, lending, university scholarships, as well as contracting, might be caused by discrimination. For example, in International Brotherhood of Teamsters v. United States, the Supreme Court made this observation about the use of statistics to prove disparities: “Statistics are not irrefutable; they come in an infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.” The Ninth Circuit relied on this language in Coral Construction v. King County, concluding that “the MBE program cannot stand without a proper statistical foundation.”

In employment cases where statistical analysis of disparities is commonplace, courts have consistently differentiated between disparity attributed to race or some other improper factor and disparity caused by legitimate differences in qualifications. In 1987, for example, the Court of Appeals for the District of Columbia Circuit stated in Hammon v. Barry:

Under the case law, the critical comparative group is that of the qualified applicant pool, which may or may not be the entire workforce in

35 Whether that utilization was achieved may influence next years goals or even how future individual contract goals within a particular year are set, if bureaucrats are under pressure to meet the annual goal.
37 Coral Constr. v. King County, 941 F.2d 910, 919 (9th Cir. 1991).
the area. 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.\(^{38}\)

As courts have become more aware of the uses and abuses of statistics in measuring availability, they have been willing to consider more detail about what actual qualifications governments use in making selection decisions.\(^{39}\) The District of Columbia Circuit again voiced concern in *O'Donnell Construction Co. v. District of Columbia*, ruling that the District’s MBE program was unconstitutional because of its flawed statistical assumptions.\(^{40}\) The court noted a number of non-discriminatory reasons—why MBEs might not bid for public contracts: 1) they are too small to take on certain projects; 2) they are fully occupied with other projects; 3) they have more lucrative opportunities elsewhere; or 4) they lack the necessary expertise.\(^{41}\) Similarly, in the public contracting context, the Tenth Circuit in *Concrete Works of Colorado, Inc. v. City & County of Denver*\(^{42}\) emphasized the need to consider DBE qualifications. "[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities *qualified to undertake the particular task*."\(^{43}\)

The trend continued in 2006 when the Fifth Circuit, in *Dean v. City of Shreveport*, rejected the availability pool that a consultant established for firefighters consisting of all persons who passed a Civil Service exam.\(^{44}\) The court noted that the City required: 1) an agility test; 2) screening for disqualifying conduct such as drug use; 3) a crim-

\(^{38}\) Hammon v. Barry, 813 F.2d 412, 427 n.31 (D.C. Cir. 1987) (emphasis in original).

\(^{39}\) For example, the Sixth Circuit criticized a city’s proposed statistical pool for police officers drawn from the census because that data did not fit the city’s qualifications and “failed to disclose the constant age, educational background, general physical fitness, and capabilities of its members and other material factors which would have afforded a basis from which meaningful statistical comparisons and inferences could have been fixed . . . .” Long v. City of Saginaw, 911 F.2d 1192, 1199 (6th Cir. 1990); see also Aiken v. City of Memphis, 37 F.3d 1155, 1165 (6th Cir. 1994) (stating that “special qualifications” would “winnow out a large enough portion of the general workforce to create a real possibility that the qualified labor pool for the position will have a materially different racial composition than that of the general workforce”).


\(^{41}\) Id. at 426.

\(^{42}\) 36 F.3d 1513 (10th Cir. 1994).

\(^{43}\) Id. at 1528 (quoting and adding emphasis to City of Richmond v. J. A. Croson Co., 488 U.S. 469, 501–02 (1989)).

\(^{44}\) Dean v. City of Shreveport, 438 F.3d 448 (5th Cir. 2006).
inal background check; 4) a polygraph exam; 5) a psychological exam and interview; and 6) a medical exam. The court concluded that a candidate who received a passing score on the Civil Service exam, but then failed one of the six requirements, was not qualified.\textsuperscript{45} The court then ordered the City to recalculate the number of qualified white and black candidates on that basis.\textsuperscript{46}

Over the years, federal courts have become increasingly sophisticated in demanding that the measurement of availability actually reflect the qualifications of the job or contract being considered before coming to a conclusion about whether discrimination has affected the selection process. Unfortunately, the USDOT regulations and the data and methods recipients use for goal setting fall far short of that sophistication.

\section*{B. \textit{Croson}'s Test Applied}

The most important case in the area of determining through statistical evidence the level of discrimination in public contracting is \textit{City of Richmond v. Croson}.\textsuperscript{47} \textit{Croson} articulates a very clear standard for measuring contracting availability. The District Court for the Eastern District of Pennsylvania summed up the standard thus: "qualified," "willing" and "able" are the three pillars of the of the \textit{Croson} test; \textit{a fortiori}, a municipality may not enact race-based remedial measures unless it determines that qualified, willing and able minority contractors have been excluded from participating in public contracting.\textsuperscript{48} The problem is that the qualified, willing, and able standard is often ignored, misunderstood, or twisted to meet some

\begin{footnotesize}
\begin{enumerate}
\item Id. at 458.
\item Id.
\item 488 U.S. 469 (1989).
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outcome predetermined by the government. For example, three members of the Croson court expressed a concern that MWBE programs might be the result of racial politics.

Of the three Croson “pillars,” courts have been most concerned about ability or the capacity to do work. In Western States, the Washington State Department of Transportation (“WSDOT”) argued that since the proportion of DBE firms in the state was 11.17% and the percentage of contracting funds awarded to them on race-neutral contracts was only 9%, discrimination was demonstrated. The Ninth Circuit disagreed:

This oversimplified statistical evidence is entitled to little weight, however, because it does not account for factors that may affect the relative capacity of DBEs to undertake contracting work. . . . DBE firms may be smaller and less experienced than non-DBE firms (especially if they are new businesses started by recent immigrants) or they may be concentrated in certain geographical areas of the State, rendering them unavailable for a disproportionate amount of work.

Furthermore, there has been a long history of judicial concern about the effect of differences in size of minority- and non-minority-owned firms in determining whether disparities measured in dollars awarded indicate discrimination. Before Croson, the Sixth Circuit rejected a

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See also AGC v. Drabik, 214 F.3d 730, 736 (6th Cir. 2000) (faulting a statistical comparison for not taking into account the percentage of minority-owned businesses that “were qualified, willing, and able to perform state construction contracts”).

49 See, e.g., Eng’g Contractors, 122 F.3d at 928 (“It is clear as window glass that the County gave not the slightest consideration to any alternative to a Hispanic affirmative action program. Awarding construction contracts based on ethnicity is what the County wanted to do, and all it considered doing, insofar as Hispanics were concerned.”).

50 City of Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989) (“Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.”); id. at 516 (“Imposing a common burden on such a disparate class merely because each member of the class is of the same race stems from reliance on a stereotype rather than fact or reason.”) (Stevens, J., concurring); id. at 524 (“The prophecy of these words [from James Madison] came to fruition in Richmond in the enactment of a set-aside clearly and directly beneficial to the dominant political group, which happens also to be the dominant racial group.”) (Scalia, J., concurring) (citing The Federalist No. 10, pp. 82–84 (C. Rossiter ed. 1961)).

finding of a relationship between disparity and discrimination because “[s]mall businesses, as a result of their size, were unable to effectively compete for state contracts. Consequently, most MBEs, as a result of their size, were unable to effectively compete for state contracts.”

Addressing the question of disparity ratios, the Sixth Circuit declared in Associated General Contractors, Inc. v. Drabik:

If MBEs comprise 10% of the total number of contracting firms in the state, but only get 3% of the dollar value of certain contracts, that does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have the resources to complete.

Despite these judicial admonitions, few disparity studies or DBE goal setting exercises take into account the relative size or ability of firms. When this occurs, a disparity study may claim that disparity reflects discrimination when it really only reflects the unsurprising fact that larger firms will be awarded more dollars than smaller firms in a non-discriminatory marketplace.

Courts have also been concerned about whether differences in qualifications between minority and non-minority firms may be the cause of disparities. Public construction contracting greatly values qualifications because awarding contracts based solely on a low bid might result in shoddy work, delays, and cost overruns. Therefore, procurement rules seek to limit competitors for public work to “qualified firms.” For construction work, “qualified” firms usually means firms that have appropriate licenses, bonding, credit, and often statutorily required prequalification. In addition, a particular type of

52 Mich. Road Builders Ass’n, Inc. v. Milliken, 834 F.2d 583, 592 (6th Cir. 1987) (emphasis in original); see also Eng’g Contractors, 122 F.3d at 917.

53 Drabik, 214 F.3d at 736.

54 See Croson, 488 U.S. at 502 (criticizing city for not knowing “how many MBE’s in the relevant market are qualified to undertake prime or subcontracting work in public construction projects”).


56 Prequalification is a process by which governments screen firms to determine the kind of and amount of work they can bid on. It is very common practice in highway contracting. ROBERT W. DORSEY, PROJECT DELIVERY SYSTEMS FOR BUILDING CONSTRUCTION 50-52 (1997).
experience is sometimes mandated.\textsuperscript{57} Governments do not want to have a nuclear reactor, or even a hospital, built by a rookie firm.

Willingness is the third factor in the \textit{Croson} test and in the real world of procurement. In construction, except for very small or emergency jobs, almost all contracts are awarded through a highly regulated public sealed-bid competition. Bidding creates time and money costs and assumes the risks associated with performing the contract if the bid is accepted. Thus, a reliable measure of a firm's "willingness" is whether it makes the effort to bid on the public work offered. As William R. Park has pointed out:

The contractor has the opportunity to bid on hundreds of jobs each year, many more than he has the time to estimate or the capacity to perform. And since bidding a job necessarily entails considerable expense in both time and money, it is imperative that jobs be selected that offer at least a fair chance of earning a profit.\textsuperscript{58}

In other words, a contractor will not likely bid on a project he is unwilling to complete if selected. As Robert Dorsey, Professor of Construction Management at the University of Cincinnati, explained:

[C]ontractors develop strategies to determine which projects to bid and which ones to bypass. The variables they use in devising their strategies include:
• Number of jobs available for bidding;
• Attractiveness of a particular job compared to others;
• Success in bidding on various types of projects;
• Current and projected work load (backlog);
• Bonding limits now and in future;
• Perceived profit potential of particular jobs;
• How prospective jobs fit the capabilities of the contractor;

\textsuperscript{57} For example, the bid specifications for installation of a new Cook County hospital wing required that the primary bidder must: 1) demonstrate that they have been in business ten years or more; 2) provide a list of similar size installations of PACS systems and radiology equipment installations completed in the last three years; 3) have extensive project planning and installations services expertise in projects of similar size and scope; and 4) describe local and factory based service capabilities. \textit{Cook County Bid Specifications Contract No. 00-53-844, S-21}. These specifications effectively limited the competitors to three multi-national corporations.

Desire to keep key personnel employed during down markets (which may lead to bidding on otherwise unattractive projects);

- Characteristics of probable other bidders on a particular job;
- Overall business strategy, including: growth curve vs. consolidation; active marketing vs. bidding only; geographical parameters; diversification vs. specialization; and dependence on financial reserves vs. borrowing.
- Availability of key management personnel for a particular type of project.\(^5^9\)

This list of criteria upon which many contractors rely when deciding on which projects to bid clearly shows that when the decision to bid is finally made, it is a deliberate sign of a willingness to carry out the project.

The number of competing bidders on a particular project depends not only on market conditions, but on the level of specialization required.\(^6^0\) Some firms bid on very few contracts; no firm bids on every contract. As one state highway engineer testified, some general contractors bid frequently because they “specialize in areas where [Minnesota Department of Transportation] does a lot of work,” while

[c]ompanies that bid seldom generally [work on] the types of projects we don’t do a lot of. We infrequently have a project in that area so there isn’t a lot of call for them to bid. There are also some contractors that just choose not to bid in our arena. They prefer to court other markets, local markets, private work, instead of coming into the state contracting area of work.\(^6^1\)

The project’s geographic location, its dollar value, the time of the year, and whether a contractor has approached bonding limits are factors determining whether a contractor submits a bid.\(^6^2\)

The “qualified, willing, and able to perform [the] work” standard and previous court cases suggest that not all construction firms possess those characteristics in equal amounts. This reality ought to eliminate

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\(^5^9\) Dorsey, supra note 56, at 64–65.

\(^6^0\) Id.

\(^6^1\) Deposition of Don Orgeman, Contract Administration Engineer for the Minnesota Department of Transportation, (Mn/DOT), Jan. 17, 2001, at 21. Sherbrooke Turf, Inc. v. Minn. Dep’t of Transp., 345 F.3d 964, 974 (8th Cir. 2003). He also stated that the same factors would affect whether subcontractors quoted work to primes at page 42.

\(^6^2\) Id. at 22–24.
disparity studies or goal setting methodologies which depend on simple headcounts of DBEs and non-DBEs.\textsuperscript{63} Since DBEs are almost always newer smaller businesses,\textsuperscript{64} headcounting creates false disparities and exorbitant goals. Nevertheless, headcount approaches dominate both disparity studies and goal setting methods. Three factors explain this phenomenon. First, headcount approach is less complex and less costly than actually weighing the different qualifications and capacities of DBEs and non-DBEs. Second, disparity study consultants almost never have a background in construction or procurement. Many are economists or statisticians who know little about the construction industry.\textsuperscript{65} Third, the headcount approach will almost always

\textsuperscript{63} Headcounting is simply comparing the number of DBEs and non-DBEs in calculating disparities, while ignoring differences in the size, specializations, experience, and licenses of firms which may provide a non-discriminatory explanation of the disparities.

\textsuperscript{64} The generalization is not only based on the fact that DBE and MWBE firms are generally newer than their peers, but also because, if they grow large enough, they are required to lose their certification and graduate from the preferential programs and, then, are treated legally as non-DBE or non-MWBE firms. When this occurs, the departure of these large DBEs accounting for a disproportionate number of past awards creates difficulty in meeting future DBE goals. In Kentucky, three DBEs that won 31\% of all DBE contracts in FY 2003 left the program, setting off a scramble by the state to add new firms to its DBE pool. Kentucky Transportation Cabinet, FEDERAL FISCAL YEAR 2006 GOAL at 2. In Wyoming, one DBE prime accounted for about 38\% of all DBE dollars. When it grew too large to remain in the program, WYDOT reported that the loss of that contractor would have a major impact on DBE availability “as there are no other DBE firms ready to step into that prime contractor role.” WYDOT, SUBPART C, at 2. In New Hampshire, 56\% of all federal dollars awarded DBEs went to one firm which has since graduated. NH Department of Transportation, NHDOT DBE GOAL METHODOLOGY FOR FY 2006, at 3. While these are comparatively small states, their federal contract base is considerably larger than that of smaller airports or transit districts.

\textsuperscript{65} One of the principal experts for the City of Chicago testified in favor of its MWBE set-aside program despite a lack of knowledge about the construction industry, as evidenced in his deposition:

\begin{quote}
Q. With all your work for the City of Chicago can you name one prime contractor on a construction project where the City of Chicago was the owner who discriminated in some way against a minority-owned or women-owned business?
A. I couldn’t name one contractor, whether they discriminated or not. I couldn’t even name one . . .

Q. I am asking if you have any opinions about the mechanisms how any alleged discrimination by prime contractors on construction projects where the City of Chicago is the owner occurs against minority-owned and women-owned firms?
A. I don’t have a view. I don’t know.

Q. Do you think there is an old boy network in the Chicago construction industry?
A. I have no specific evidence on it. Other people may, but I don’t.

Q. And in your work for the City of Chicago did you identify any City of Chicago official who discriminated against any minority-owned or women-owned construction firms?
A. I have no knowledge of anything to do with that. . .

Q. And do you have any theory or opinion as to how if at all any official of the City of Chicago has discriminated against minority-owned or women-owned construction firms.
\end{quote}
produce a disparity, and that is often the desire of those paying for the study.66

The Fifth Circuit in Jeffrey Todd Dean recently identified the problem of having a disparity analysis conducted by someone who does not understand the relevant qualifications utilized in the selection process at issue. The court said:

First, it is inappropriate to rely on an expert statistician with a Ph.D. in economics to determine what makes an applicant qualified to become a firefighter. The City, its fire department, or a vocational expert should make this determination. . . . A statistician, after he is informed what a qualified applicant is, may then calculate the demographics of the labor pool.67

A. I have no view.
Deposition of David Blanchflower, at 350–54. The District Court later found the City's program not narrowly tailored and Chicago did not appeal. BAGC v. City of Chicago, 298 F. Supp. 2d 725 (N.D. Ill. 2003).

66 Consultants soon discovered that reports were unwelcome if they conceded that the data were too incomplete or flawed for a proper analysis or if the analysis showed that there was no evidence of public contracting discrimination in general or against particular groups large enough to have powerful political supporters. When the Big Eight accounting firm, Peat Marwick, announced that its disparity study for the city of Miami found white women, but not black or Hispanic contractors underutilized, Mayor Xavier Suarez replied, "We should have never done it [the disparity study]." Dorothy J. Gaiter, Court Ruling Makes Discrimination Suits a Hot New Industry, WALL ST. J., Aug. 13, 1993, at A1. Similarly, the Los Angeles city council refused to accept a disparity study that found Hispanics, but not blacks, underutilized. James Rainey, Council Calls Study of Contracts Inadequate, L.A. TIMES, Dec. 10, 1993, at B4. The states of Florida and Louisiana both rejected studies completed by professors from their major state universities which did not find discrimination in the states' contracting process and then hired consultants to do new studies. Kevin Metz, Discrimination Study Blasted, TAMPA TRIB., Jan. 11, 1996. The lead consultant for the state of New Jersey disparity study warned that more data were needed "for a politically palatable remedy" because existing data showed substantial underutilization for African-Americans, but not for Hispanics or women. Deborah Howlett, No Widespread Bias found in Study of State Contracts, STAR-LEDGER (Newark), July 12, 2005.

67 Dean v. City of Shreveport, 438 F.3d 448, 457 (5th Cir. 2006). Other courts have made similar conclusions about the work of economists who knew little about the construction industry, but still conducted disparity studies about that industry. In Houston Contractors Ass'n v. Houston Metro, the Court said: "Metro hired an expert witness to justify its contracting preferences. David S. Evans illustrates the Daubert dilemma. Evans knows statistics and he has access to complex, voluminous data. The result is not acceptably cogent or substantive." 993 F. Supp. 545, 554. (D. Tex. 1996). In Concrete Works v. City and County of Denver the court said the study done by economists had "a serious flaw in the methodology and impairs the value of the results." 86 F. Supp. 2d 1042, 1068 (D. Colo. 2000). In commenting on the work of two economists in Engineering Contractors Ass'n of South Florida, Inc. v. Metro Dade County, the court said, "Neither the Wainwright study [on business formation rates] nor the Brimmer study is particularly probative on the central issue in this case." 943 F. Supp. 1546, 1573–74 (S.D. Fla. 1996). Similarly the court in Webster v. Fulton County concluded, "There is no evidence in the
This need to conduct disparity analysis in a way that aligns with the relevant qualifications in the bid-selection process found further expression in the *Western States* decision. In that case, the Ninth Circuit held that recipients of federal funds could not use race-conscious methods to meet their DBE goals without a state finding of discrimination, thereby raising the stakes for conducting proper disparity studies. Consequently, USDOT has issued guidance on some standards that recipients should follow in conducting new disparity studies by recipients in the states covered by the Ninth Circuit. The regulations explain these disparity studies "should rigorously determine the effects of factors other than discrimination that may account for statistical disparities between DBE availability and participation. This is likely to require "multivariate/regression analysis." That would seem to preclude the old headcount approaches for disparity studies or goal setting. However, USDOT has given no new guidance on setting goals. Thus many recipients still use a headcount approach to that task.

III. REGULATORY CONTEXT FOR DBE GOAL SETTING

After *Adarand*, the Clinton administration made a number of regulatory changes in the DBE program aimed at making it more narrowly tailored. With regard to goals, the national 10% requirement was abandoned in favor of locally set goals. Under the amended USDOT regulations, recipients of federal highway funds are required to conduct detailed analyses to determine the local availability of DBEs and their expected level of participation absent discrimination. After the recipient establishes an overall goal consistent with

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Brimmer-Marshall Study of discrimination by Fulton County in the award of contracts" and "no attempt to explain whether the disparity is due to discrimination or other neutral reasons, such as firm size and the ability to of a firm to obtain financing and bonding.” 51 F. Supp. 2d 1354, 1368–71 (D. Ga. 2000), aff’d, 218 F.3d 1276 (11th Cir. 2000).

68 USDOT, Questions and Answers Concerning Responses to *Western States Paving Co. v. Washington State Department of Transportation*, at 4. While the term "multivariate/regression analysis" was not further defined by USDOT, it would appear to mean that at least the relative capacity of firms and other characteristics would need to be controlled in order to be statistically certain that disparities were correlated with race and not some legitimate factor such as size, qualifications, etc.

69 The general policy was called "mend don’t end" affirmative action after President Clinton’s address of that name given at the National Archives, July 19, 1995. It was codified in Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26042–50, May 23, 1996.


71 49 C.F.R. § 26.45(b).
that level, the recipient must calculate the goal’s “maximum feasible portion” that can be achieved by race-neutral means.\textsuperscript{72}

On September 30, 1997, before a skeptical Senate Committee, Nancy McFadden, USDOT’s General Counsel, advocated that the reconstituted DBE program be approved.

Our proposed rule corresponds to the narrow tailoring standards set out by the Supreme Court. Specifically, courts have said that specific goals should correspond to the availability of qualified DBEs in a given market. Our proposal would ensure that goals are set to reflect the percentage of qualified disadvantaged businesses available in a given market. The program would provide the same opportunity that they would have received but for discrimination—no more, no less.\textsuperscript{73}

When it came to actually writing regulations,\textsuperscript{74} however, USDOT found that one of the “few universal themes in the goal setting comments was the problem of the availability of reliable data on the number of DBE and non-DBE contractors.”\textsuperscript{75} Faced with a lack of consensus among commentators, many of whom had vested interests in the matter,\textsuperscript{76} the agency adopted a policy that permitted almost any database and methodology the recipients found convenient to determine availability.\textsuperscript{77} Despite McFadden’s assurances to Congress that availability would be based on “qualified” DBE firms, there is no USDOT requirement to define or measure qualified firms.

As a consequence of this lack of specific guidance, the regulations allow recipients to inflate DBE availability. First, in lieu of “qualified,” the regulations use “ready,”\textsuperscript{78} an amorphous term that does not exclude any existing firm, from being considered available, whether or not those firms can meet the extensive requirements of public work.

\textsuperscript{72} 49 C.F.R. § 26.51(a).

\textsuperscript{73} Unconstitutional Set-Asides: ISTEA’s Race-Based Set-Asides After Adarand: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Judiciary Comm., 105th Cong., 1st Sess. 120 (Sept. 30, 1997).


\textsuperscript{75} 64 Fed. Reg. 5096, 5108 (Feb. 2, 1999).

\textsuperscript{76} As will be seen in the subsequent sections, many recipients had invested in particular databases and had negotiated a consensus on level of goals and were reluctant to change.

\textsuperscript{77} 64 Fed. Reg. 5096, 5108 (Feb. 2, 1999).

\textsuperscript{78} Id.
Since DBEs are generally newer, smaller firms than non-DBEs, USDOT’s decision not to require a comparison of DBE and non-DBE qualifications leads to a consistent exaggeration of relative DBE availability. Second, while the regulations preserve Croson’s “willing and able” language, USDOT has not clearly defined these terms, which allows recipients to treat those restrictions very loosely. Consequently, the regulations permit the calculation of goals using of a wide variety of databases that permit only headcount comparisons. Third, USDOT permits the inclusion of firms that are minority-owned or women-owned (including non-DBE-certified contractors) in defining availability for creating a recipient’s annual DBE goal, even though only certified DBEs can be counted in meeting that goal. DBEs are firms that have been awarded government certification because they seek the benefit of being counted to meet DBE goals and must meet net worth ownership, size limitations, and other requirements. Most minority- and women-owned construction firms have not sought or attained DBE certification. These firms may not be interested in highway work; they may not have the qualifications; they may not meet DBE requirements to be considered economically disadvantaged; or they may not believe in obtaining work through racial, ethnic, or gender preferences. Nevertheless, USDOT permits these non-DBE minority- and women-owned firms to be counted in measuring

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79 Deposition of Robert C. Ashby, USDOT Deputy General Counsel for Regulations, Jan. 19, 2001, at 140–41, Sherbrooke Turf, Inc. v. Minn. Dep’t of Transp., 345 F.3d 964, 974 (8th Cir. 2003). The regulations suggest measuring capacity as “the volume of work DBEs have performed in recent years.” 49 C.F.R. § 26.45(d)(1) (2006). But this is a self-fulfilling prophecy, not an independent measurement of capacity. This approach was criticized by the Ninth Circuit because goals create “minority preferences [that] afford DBEs a competitive advantage.” W. States Paving Co. v. Wash. Dep’t of Transp., 407 F.3d 983, 1000 (9th Cir. 2005).

80 Although USDOT continues to use the “ready, willing and able” standard as a qualifier of the firms that should be considered available, it might just as well use “all” firms because census data includes all firms and Dun & Bradstreet (“D&B”) data includes all firms for which that company has gathered data. USDOT actually concedes that point in the Tips guidance, saying that “census data represents all the firms in your area whether or not they are ready, willing and able to perform DOT-assisted contracts.” Tips, supra note 74, at 2. The D&B database contains more than 110 million business reports. http://www.dnb.com/US/about/index.html (last visited May 17, 2007).

81 45 C.F.R. § 26.83 (2006). This permissive arrangement has enormous impact. For example, the recent study done for Caltrans found that the percentage of minority- and women-owned firms in California in relevant construction specialties was about 32%, while the percentage of certified DBEs was 6.8%. Interim Report, Availability and Disparity Study, California Department of Transportation, Feb., 28, 2007, at ES 2.

82 45 C.F.R. § 26.5.
availability, even as it forbids their being counted in utilization. This is obviously a double standard that adds to the unfairness of DBE goals. 83

USDOT also concedes a narrow tailoring problem would be created if, in order to fulfill DBE goals, a small group of DBE firms received most of a particular specialty’s work, thus damaging non-DBE competitors such as guardrail specialist Adarand or landscapers such as Gross Seeds and Sherbrooke. 84 Therefore, the regulations state that, if a recipient performs a study and finds over-concentration of DBE award winners, then it must take steps to mitigate its harmful effects. 85 However, it is USDOT’s position that the recipient’s decision to study the over-concentration problem is voluntary. 86 If such a study is not done, there is no obligation to take any action to mitigate over-concentration, an obvious disincentive to investigate the over-concentration problem. 87 In the 125 goals submission proposals surveyed for this Article, only Rhode Island DOT performed such a study. 88 Maintaining ignorance of a problem does not seem to be an appropriate response to the constitutional duty to narrowly tailor state-sponsored programs that discriminate based upon race or gender.

Overall, the USDOT rules for establishing availability and disparities place a premium on reducing the data burden on recipients, while

83 USDOT recommends adding to the recipient’s DBE list other sources (including vendors list, pre-bid or pre-proposal conference attendance lists and outreach session attendance lists) to increase the “DBEs” considered available. It then, however, points out that these uncertified firms should not be included in the recipient’s directory. Tips, supra note 74, at 2. Of course, they cannot be counted to meet the DBE goal either. To compound the illogic of this policy, Tips states that recipients should subtract from the DBE availability pool firms that have been or will be shortly decertified because their owners no longer meet net worth requirements or other reasons. Id. at 3. Such a practice is inconsistent with the earlier advice to add firms to the availability pool that have never sought certification.

84 49 C.F.R. § 26.33.

85 Id.

86 Id.

87 Ashby deposition, supra note 79, at 145.

88 Rhode Island’s study discovered that “DBE firms are so over concentrated in a certain type of work . . . as to unduly burden the opportunity of non-DBE firms or allow contracting opportunities for other DBEs in other available disciplines to participate in this type of work . . . .” In FY 2005, 34.9% of the state’s total DBE contract dollars went to guardrail contracts and 16.2% to landscaping. Consequently, the overall state goal was adjusted downward by 3%. State of Rhode Island, Disadvantaged Business Enterprise Program Plan, FY 2006 11.
largely ignoring the judicially imposed rules designed to ensure that compared firms are similarly "qualified, willing, and able."

IV. Goal Setting In Practice

The purpose of setting an annual DBE goal is to reflect a recipient's "determination of the level of DBE participation [that] would [be] expected absent the effects of discrimination." In its regulation, USDOT acknowledged that "[i]t is an understatement to say that there was no consensus among commentators as to the best way to set overall goals." Remarkably, in its discussion of goal setting, USDOT completely ignored any of the judicial guidance about accurate and inaccurate methods for comparing the availability of minority and non-minority firms. It treated the issue as though it was solely a matter of bureaucratic efficiency and interest group politics.

USDOT's treatment of the goal setting process in the DBE programs would greatly benefit from careful scrutiny of relevant case law and related research data. This section examines the practice of setting goals based on dollars awarded, the formulation of state DOT goals, the use of alternative data sources, the setting of annual goals, and analysis of contract specific goals.

A. Basing Disparities on Dollars Awarded

Regardless of the method used, the goal must be set in terms of the DBE share of total dollars awarded by a recipient. The percentage of contracts awarded to DBEs—a viable alternative approach to determine whether discrimination had affected a market—is ignored. This critical policy choice was dictated by legislation, though never debated when the post-Adarand revisions were made. Focusing on dollars awarded as the only measure of what the generally smaller DBEs should be awarded in a non-discriminatory market is a seriously flawed technique.

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91 49 C.F.R. § 26.45.
This defect can be illustrated by statistics the Eleventh Circuit examined in deciding whether Dade County, Florida, discriminated in awarding prime contracts.93

Figure A
Outcomes of Prime Construction Awards by Dade County (FY 1989–1991)

<table>
<thead>
<tr>
<th>Category</th>
<th>Black Bid %</th>
<th>Black Contract Awards %</th>
<th>Black Dollar Awards %</th>
</tr>
</thead>
<tbody>
<tr>
<td>SIC 15</td>
<td>13.8</td>
<td>15.0</td>
<td>1.8</td>
</tr>
<tr>
<td>SIC 16</td>
<td>5.2</td>
<td>3.4</td>
<td>0.5</td>
</tr>
<tr>
<td>SIC 17</td>
<td>16.2</td>
<td>13.5</td>
<td>4.8</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Category</th>
<th>Hispanic Bids %</th>
<th>Hispanic Contract Awards %</th>
<th>Hispanic Dollar Awards %</th>
</tr>
</thead>
<tbody>
<tr>
<td>SIC 15</td>
<td>31.0</td>
<td>33.0</td>
<td>15.0</td>
</tr>
<tr>
<td>SIC 16</td>
<td>23.2</td>
<td>21.9</td>
<td>14.2</td>
</tr>
<tr>
<td>SIC 17</td>
<td>28.6</td>
<td>31.1</td>
<td>7.2</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Category</th>
<th>Women Bids %</th>
<th>Women Contract Awards %</th>
<th>Women Dollars Awards %</th>
</tr>
</thead>
<tbody>
<tr>
<td>SIC 15</td>
<td>6.9</td>
<td>6.0</td>
<td>1.0</td>
</tr>
<tr>
<td>SIC 16</td>
<td>3.2</td>
<td>2.2</td>
<td>2.9</td>
</tr>
<tr>
<td>SIC 17</td>
<td>13.3</td>
<td>13.5</td>
<td>4.4</td>
</tr>
</tbody>
</table>

* Standard Industrial Code ("SIC") 15 is building construction, SIC 16 is heavy and highway construction and SIC 17 is special trades.

In almost every cell in Figure A, Black-, Hispanic-, and women-owned firms were awarded low-bid contracts in approximately the same proportion as they bid on them. In a non-discriminatory market, this is the expected outcome because firms rationally consider the costs of bidding versus the chances of winning. However, in all but one cate-

93 The patterns for the 1993 year the Court also examined were quite similar. The Court did not consider FY 1992 due to extraordinary expenditures caused by Hurricane Andrew. Eng’g Contractors Ass’n of S. Fla. Inc. v. Metro Dade County, 122 F.3d 895, 912–13 (11th Cir. 1997).
gory.\textsuperscript{94} MWBEs were awarded far fewer dollars than their proportion of bids.

Non-MWBEs, the residual category in Figure A, followed a different pattern. For example, in SIC 16, heavy and highway construction, where the largest contracts are awarded, non-MWBEs constituted 68.4% of the bidders and won 72.5% of the contracts and 82.4% of the dollars. If judicial examination of this outcome had focused only on dollars awarded, a court might have concluded that Dade County was awarding prime contracts in a discriminatory manner. Analyzing both the contract and dollar awards in this data set, however, the Eleventh Circuit reached the opposite conclusion:

Because they [non-MWBEs] are bigger, bigger firms have a bigger chance to win bigger contracts. It follows that, all other factors being equal, and in a perfectly non-discriminatory market, one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than smaller MWBE firms.\textsuperscript{95}

This problem of focusing only on dollars awarded is exacerbated when the disparity studies or goal setting process combines prime contract and subcontract awards. Indeed, GAO concluded in its analysis of disparity studies:

Because MBE/WBEs are more likely to be awarded subcontracts than prime contracts, MBEs/WBEs may appear to be underutilized when the focus remains on prime contractor data. Furthermore, although some studies did include calculations based on the number of contracts, all but two based their determination of disparities on only the

\textsuperscript{94} Women heavy and highway construction.

\textsuperscript{95} Eng'g Contractors, 122 F.2d at 917. But see Gross Seeds v. Neb. Dep't of Roads, 345 F.3d 964 (8th Cir. 2003) (ignoring capacity of firms because the consultant found some firms won contracts with annual revenues as little as $2,500, while the largest had revenues of $42,000,000). All firms in that range were considered equally available and the Nebraska Department of Roads ("NDOR") uses the same definition in goal setting without any adjustment for capacity today. NDOR FY 2006 PROPOSED DBE GOAL 2. Mississippi stated that it had "collected data on the relative size of DBE and non-DBE firms that appear in the bidders list. Not surprisingly, the DBE firms are considerably smaller, on average. As a result, they may not be able to perform successfully on some of the larger MDOT projects, and they are less likely to bid as prime contractors on large projects or quote on very large subcontracts." Nevertheless MDOT set its annual goal on a headcount of bidders. MISS. DEP'T OF TRANS., SUGGESTED GOAL FOR MDOT BASED ON THE RELATIVE AVAILABILITY OF DISADVANTAGED BUSINESS ENTERPRISES 5 (2002).
dollar amounts of the contracts. Because MBEs/WBEs tend to be smaller than non-MBEs/WBEs, they often are unable to perform on larger contracts. Therefore, it would appear that were awarded a disproportionately smaller amount of contract dollars.\textsuperscript{96}

Furthermore, goals are set on the total dollar amount of the contract, even though almost all transportation prime contracts are awarded on a low-bid system where there is little discretion or opportunity for discrimination. In practice, therefore, the DBE program affects only subcontracts because that is the only discretionary part of the contract. Subcontract dollars, however, are only a fraction of the total contract dollar amount. By setting the goal in terms of the total contract dollars, rather than only the subcontractor portion, non-DBE prime contractors are under even more pressure to prefer DBE firms.

\textit{B. Setting State DOT Goals}

Other DBE goal setting dilemmas arise at the state DOT level. The main problem arises from the kind of data typically used in creating annual and contract goals. USDOT gave recipients a wide variety of options in setting annual DBE goals. Determining the percentage of dollars that should go to DBEs and non-DBEs in a non-discriminatory market is very complex. For example, it is obvious to every state DOT that some firms function only as prime contractors, some as subcontractors, and others as both. Unless the dollars awarded to subcontractors are subtracted from the dollars awarded prime contractors, the actual amount of dollars awarded to prime contractors (most likely non-DBEs), will be exaggerated. Further marketplace complexities exist. Some firms only work in niche specialties (e.g., guardrails), some in much larger specialties (e.g., bridges), and some firms perform multiple specialties. Some firms work only locally, some statewide, some nationally, and a few internationally. Some firms prefer public work, some private, some both. Some firms have many employees, significant amounts of equipment, and substantial bonding and credit capacities, while other firms have none of those characteristics. Some firms are pre-qualified, licensed, and have a substantial track record of experience while many others do not. Some minority- and women-owned firms are certified DBEs, but most are not and, of course, only certified DBEs can be used to meet goals.

\textsuperscript{96} GAO \textit{Report}, \textit{supra} note 27, at 32.
The marketplace complexities presented by a vast number and variety of firms in a particular industry is compounded because each firm has its own calculus for deciding whether to compete for certain types of work.

The database and analytical techniques used by a recipient to set its DBE goal will be critical in determining its size. Figure B demonstrates the complex choices and disparate goal determinations the fifty state departments of transportation made during FY 2005 or FY 2006.

### Figure B

State DBE Goals (FY 2005/FY 2006)\(^n\)

<table>
<thead>
<tr>
<th>State</th>
<th>Year</th>
<th>Goal (%)</th>
<th>Race Conscious (%)</th>
<th>Race Neutral (%)</th>
<th>Availability Sources</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>2005</td>
<td>9.69</td>
<td>8.26</td>
<td>1.43</td>
<td>Headcount of DBE bidders, subcontractor quoters and firms on the pre-qualified contractors list (n) compared to comparable non-DBE firms (d).</td>
</tr>
<tr>
<td>Alaska</td>
<td>2006</td>
<td>7.5</td>
<td>4</td>
<td>3.5</td>
<td>Headcount of DBEs on bidder registration list (n) compared to all firms on the list (d).</td>
</tr>
<tr>
<td>Arizona</td>
<td>2006</td>
<td>10.5</td>
<td>7</td>
<td>3.5</td>
<td>Headcount of DBE pre-qualified prime contractors and quoting subcontractors (n) compared to similar non-DBEs (d).</td>
</tr>
<tr>
<td>Arkansas</td>
<td>2006</td>
<td>8.4</td>
<td>6.4</td>
<td>2</td>
<td>Headcount of DBE bidders/quoters weighted by the amount of dollars expected in work categories scheduled for FY 2006 (n) compared to similar non-DBEs (d).</td>
</tr>
<tr>
<td>California</td>
<td>2006</td>
<td>12</td>
<td>12</td>
<td>0</td>
<td>Headcount of certified DBE firms in selected census categories (n) compared to all firms in those census categories in state (d).</td>
</tr>
<tr>
<td>Colorado</td>
<td>2006</td>
<td>12.19</td>
<td>10.89</td>
<td>1.3</td>
<td>Headcount of DBE pre-qualified firms on bidders list weighted by prime or subcontractor status and dollar awards in each category (n) compared to similar measures for non-DBEs (d).</td>
</tr>
<tr>
<td>Connecticut</td>
<td>2006</td>
<td>15.5</td>
<td>9.5</td>
<td>6</td>
<td>Headcount of DBE firm bidders and consultants (n); headcount of all firms that bid or consult (d).</td>
</tr>
<tr>
<td>Delaware</td>
<td>2006</td>
<td>11.03</td>
<td>9.41</td>
<td>1.62</td>
<td>Headcount of DBE directory firms (n); total construction/professional service firms in census from Delaware (d).</td>
</tr>
<tr>
<td>Florida</td>
<td>2006</td>
<td>7.9</td>
<td>0</td>
<td>7.9</td>
<td>Headcount of actual DBE bidders, contractors, and consultants (2003-2005) weighted by dollars in those categories (n) compared to similar non-DBEs (d).</td>
</tr>
<tr>
<td>Georgia</td>
<td>2006</td>
<td>12</td>
<td>6</td>
<td>6</td>
<td>Not available.</td>
</tr>
<tr>
<td>Hawaii</td>
<td>2006</td>
<td>11</td>
<td>11</td>
<td>0</td>
<td>Headcount of DBE firms (n) compared to firms in relevant highway construction census categories (d).</td>
</tr>
</tbody>
</table>

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\(^n\) These data are gathered from the annual Goals Submission Proposals submitted by each state DOT to USDOT annually as collected by the Project on Civil Rights and Public Contracts.
<table>
<thead>
<tr>
<th>State</th>
<th>Year</th>
<th>Goal (%)</th>
<th>Race Conscious (%)</th>
<th>Race Neutral (%)</th>
<th>Availability Sources</th>
</tr>
</thead>
<tbody>
<tr>
<td>Idaho</td>
<td>2006</td>
<td>11</td>
<td>10.39</td>
<td>.61</td>
<td>Headcount of DBE registered to bid (n) compared to similar data for non-DBEs (d).</td>
</tr>
<tr>
<td>Illinois</td>
<td>2006</td>
<td>22.77</td>
<td>20.74</td>
<td>2.03</td>
<td>Headcounts from D&amp;B data base of firms identified as DBE from directories weighted by dollars in categories (n) compared to similar firms in D&amp;B (d).</td>
</tr>
<tr>
<td>Indiana</td>
<td>2006</td>
<td>9.85</td>
<td>4.97</td>
<td>4.88</td>
<td>Dollar capacity of DBE prime contractors (limited and unlimited bidders), pre-qualified subcontractors and non-pre-qualified subcontractors (n) compared to similar capacities of non-DBEs (d).</td>
</tr>
<tr>
<td>Iowa</td>
<td>2005</td>
<td>5</td>
<td>.5</td>
<td>4.5</td>
<td>Headcount of DBEs requesting job plans since 1999 (n) compared to similar non-DBE firms (d).</td>
</tr>
<tr>
<td>Kansas</td>
<td>2006</td>
<td>9.19</td>
<td>1.7</td>
<td>7.49</td>
<td>Headcount of DBE contractors with updated Equal Employment Opportunity policies (n) compared to similar non-DBE contractors (d).</td>
</tr>
<tr>
<td>Kentucky</td>
<td>2006</td>
<td>7</td>
<td>5</td>
<td>2</td>
<td>Headcount of pre-qualified certified DBEs (n) compared to headcount of pre-qualified non-DBEs (d) decreased by 1% because three active DBEs left the program.</td>
</tr>
<tr>
<td>Louisiana</td>
<td>2005</td>
<td>10</td>
<td>9</td>
<td>1</td>
<td>Headcount of certified DBEs (n) compared to headcount of all firms in state data base (d).</td>
</tr>
<tr>
<td>Maine</td>
<td>2006</td>
<td>6.6</td>
<td>1.6</td>
<td>5</td>
<td>Headcount of DBEs bidding as prime or subcontractors (n) compared to similar non-DBEs (d) adjusted downward because of limited DBE capacity on large projects.</td>
</tr>
<tr>
<td>Maryland</td>
<td>2006</td>
<td>16.1</td>
<td>8.9</td>
<td>7.2</td>
<td>Headcount of firms in MBE/DBE directory weighted by county location and six industry categories (n) compared to all firms in the census weighted by location and industry (d).</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>2006</td>
<td>13.8</td>
<td>8</td>
<td>5.8</td>
<td>Headcount of DBE bidders/quoters (n) compared to similar non-DBE firms (d).</td>
</tr>
<tr>
<td>Michigan</td>
<td>2006</td>
<td>11</td>
<td>8.5</td>
<td>2.5</td>
<td>Headcount of pre-qualified DBE prime and subcontractors and approved suppliers (n) compared to similar non-DBEs weighted in three expenditure categories (d).</td>
</tr>
<tr>
<td>Minnesota</td>
<td>2006</td>
<td>1.5</td>
<td>.5</td>
<td>1</td>
<td>Not available.</td>
</tr>
<tr>
<td>Mississippi</td>
<td>2005</td>
<td>10</td>
<td>6</td>
<td>4</td>
<td>Headcounts of DBE bidders/quoters (n) compared to similar non-DBEs (d).</td>
</tr>
<tr>
<td>Missouri</td>
<td>2005</td>
<td>11</td>
<td>7.7</td>
<td>3.3</td>
<td>Headcounts from D&amp;B data base of firms identified as DBE from directories weighted by dollars in categories (n) compared to similar firms in D&amp;B (d).</td>
</tr>
<tr>
<td>Montana</td>
<td>2005</td>
<td>6.77</td>
<td>1.69</td>
<td>5.08</td>
<td>DBE bidders on federal contracts or has worked on such contracts in the last five years or has submitted a survey response (n) compared to similar non-DBEs (d).</td>
</tr>
<tr>
<td>Nebraska</td>
<td>2006</td>
<td>7.08</td>
<td>4.32</td>
<td>2.76</td>
<td>Headcount of &quot;interested&quot; DBEs from bidders and transport lists (n) compared to similar non-DBEs (d).</td>
</tr>
<tr>
<td>Nevada</td>
<td>2005</td>
<td>6</td>
<td>3</td>
<td>3</td>
<td>Headcount of certified DBEs weighted by license types compared to federal funding in those categories (n) and all census firms similarly weighted (d).</td>
</tr>
<tr>
<td>State</td>
<td>Year</td>
<td>Goal (%)</td>
<td>Race Conscious (%)</td>
<td>Race Neutral (%)</td>
<td>Availability Sources</td>
</tr>
<tr>
<td>---------------</td>
<td>------</td>
<td>----------</td>
<td>--------------------</td>
<td>------------------</td>
<td>-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>2006</td>
<td>5</td>
<td>1</td>
<td>4</td>
<td>Headcount of DBEs bidders/quoters on federally-assisted contracts (n) compared to similar non-DBEs (d).</td>
</tr>
<tr>
<td>New Jersey</td>
<td>2006</td>
<td>15.1</td>
<td>1</td>
<td>14.1</td>
<td>Headcount of certified DBEs (n); all census firms weighted in selected work categories (d).</td>
</tr>
<tr>
<td>New Mexico</td>
<td>2006</td>
<td>9.69</td>
<td>0</td>
<td>9.69</td>
<td>Headcount DBEs in four weighted categories on master bidders list (n); all firms in similar categories (d).</td>
</tr>
<tr>
<td>New York</td>
<td>2005</td>
<td>12</td>
<td>9.2</td>
<td>2.8</td>
<td>Headcount of DBE who won prime or subcontracts, submitted quotes or who expressed interest in engineering contracts (n) compared to all firms in select census SIC codes (d).</td>
</tr>
<tr>
<td>North Carolina</td>
<td>2006</td>
<td>10.4</td>
<td>7.66</td>
<td>2.74</td>
<td>Headcount of DBEs weighted by work codes (n) compared to pre-qualified prime contractors and approved subcontractors in similar codes (d).</td>
</tr>
<tr>
<td>North Dakota</td>
<td>2006</td>
<td>8.12</td>
<td>3.25</td>
<td>4.87</td>
<td>Headcount of DBE bidders, subcontractor, and consultant quoters weighted by dollars awarded in those categories (n) compared to non-DBEs in those categories (d).</td>
</tr>
<tr>
<td>Ohio</td>
<td>2006</td>
<td>6.7</td>
<td>5.6</td>
<td>1.1</td>
<td>Headcount of DBE prime and subcontractor pre-qualified firms weighted by dollars spent in construction and consultation (N) compared to similar non-DBEs (d).</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>2006</td>
<td>8.5</td>
<td>6.5</td>
<td>2</td>
<td>Headcount of DBE bidders/subcontract quoters in past year weighted by dollars awarded in work categories (n) compared to analogous non-DBE firms (d).</td>
</tr>
<tr>
<td>Oregon</td>
<td>2006</td>
<td>13.36</td>
<td>8.48</td>
<td>4.88</td>
<td>Headcount of DBE bidders in selected North American Industry Classification System codes (n) compared to headcount of similar non-DBE bidders (d).</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>2006</td>
<td>9.52</td>
<td>6.88</td>
<td>2.63</td>
<td>Based on different sources for prime contractors, subcontractors, technical and service consultants, researchers, and suppliers. For prime contractors, the median financial capacity of all DBE pre-qualified firms (n) was compared to the same calculation for non-DBE prime contractors (d). For subcontractors, financial capacity not required, so a headcount of pre-qualified DBE subcontractors was compared pre-qualified non-DBE subcontractors.</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>2006</td>
<td>10</td>
<td>Between 0 and 10</td>
<td>Between 0 and 10</td>
<td>Headcount of DBE bidders (n) compared to headcount non-DBE bidders (d) adjusted downward to because of a decrease in certified DBEs, over-concentration of DBEs and large projects. Race-conscious goals set contingent on race-neutral achievement.</td>
</tr>
<tr>
<td>South Carolina</td>
<td>2006</td>
<td>10.5</td>
<td>7.5</td>
<td>3</td>
<td>Headcount of DBE bidders/quoters on construction and pre-construction projects weighted by dollars in each category (n) compared to similar non-DBEs.</td>
</tr>
<tr>
<td>South Dakota</td>
<td>2006</td>
<td>8.24</td>
<td>3.5</td>
<td>4.74</td>
<td>Headcount of DBE bidders/quoters (n) compared to similar non-DBEs (d).</td>
</tr>
<tr>
<td>Tennessee</td>
<td>2006</td>
<td>8.48</td>
<td>6.96</td>
<td>1.52</td>
<td>Headcount of pre-qualified DBEs (n) compared to similar non-DBEs (d).</td>
</tr>
</tbody>
</table>
The first step in the goal setting process requires recipients to calculate DBE availability and then they may or may not adjust that percentage based on a number of considerations. As Figure B demonstrates, state DOTs use a wide variety of data sources and methodologies ranging from simple firm headcounts based on census data to very complex weighting systems based on the capacity of bidders in various work categories. As Figure B shows in measuring availability, less than a quarter of the states control for any firm qualifications and only twenty use actual bidders, but those are often just

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98 For example, see entry for Delaware, Figure B supra.
99 For example, see entry for Colorado, Figure B supra.
headcounts of bidding firms in award categories where every firm in a category is considered to have equal capacity. Only three states (Indiana, Pennsylvania, and Virginia) go on to weigh for capacity. Some states make significant adjustments up or down based on previous DBE utilization or other factors such as the location or size of upcoming projects; other states do not. While states may make adjustments based on calculations of the impact of discrimination in their marketplace, only three states (Illinois, Missouri, and Washington) have made such formal findings and none have made any current adjustment.

While it is possible to review the publicly available goals submission statements, it is impossible to examine communications between USDOT and state DOTs or those between state recipients and the DBE and non-DBE stakeholders who may comment on goals submissions. A cynic might believe that despite all the statistics in these submissions, in the end, the goals are a product of political compromise. There is some evidence to support that view. The written goals submission statements process reveals that USDOT policy toward recipient goal setting is "anything goes" regarding data sources and adjustments if the necessary steps are followed or at least referenced.

C. Alternative Data Sources

Given the options USDOT has allowed, it is unsurprising that the states and other local recipients have approached the goal setting process in various ways. There are five readily available data sources

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100 The Vermont submission states, "The final goal for each of our USDOT-assisted contracting programs was established through an ongoing dialogue with all our stakeholders and represents an informed consensus by stakeholder groups." Vt. Agency of Transp., Overall DBE Goals for FY 2006 1 [hereinafter Vermont]. See also Letter from Lisa Worthington, ADOT to Robert Hollis, FWHA, Aug. 31, 2005 ("ADOT uses a team of the Associated General Contractors (AGC) and Associated Minority Contractors of America contractors and representatives to determine ADOT's DBE goal and the race-conscious and race-neutral portions."); Kan. Dep't of Transp., DBE Goal for Fiscal Year 2006 4 ("On June 29, 2005, met with key contractors to participate in the goals-setting process. KDOT Office of Civil Rights selected two contractors to represent DBEs. The Kansas Contractors Association selected two contractors to represent the contractors. In the spirit of partnering, these key contractors and KDOT officials discussed DBE goal setting methods and other issues relative to DBE goal setting and achievement.").

101 The Tips document states "As always, one hallmark of the new DBE rule is flexibility and therefore we will, and you should continue to be, on the lookout for new and innovative goal setting processes. Tips, supra note 74, at 1."
most often used by recipients: 1) census data, 2) Dun & Bradstreet data, 3) prequalification or other lists, 4) bidders, and 5) comparing DBE certification and census data.102

First, USDOT has made census data, broken down by North American Industrial Classification System ("NAICS") categories by county, available to all recipients, thereby making such data cheap and easily accessible.103 But that data cannot be used to consider any of the relevant firm characteristics previously discussed because the Privacy Act prevents the Bureau of the Census from identifying individual firms.104 Census data may only provide the aggregate number of firms by county location105 in various specialties.106 This aggregation permits a comparison of mere headcounts of firms, regardless of whether they are qualified, willing, or able. GAO concluded that census data "cannot adequately indicate whether a firm is truly available, that is, whether it has the qualifications, willingness, or ability to complete contracts. However, in using Census Bureau data, the studies depicted all operational firms as available for contracting."107 This is

102 Occasionally a recipient will add other sources. The Lawton Metropolitan Airport Authority added Superpages.com to DBE directories and census data to create its goals. LAW- TON/FT. SILL REGIONAL AIRPORT FY 2006 DBE GOAL UPDATE. The Yahoo Yellow Pages was used to measure the availability of non-DBE firms by the Bellingham International Airport (Wash.). Firms within twenty miles were weighted at one to one; firms within 20–40 miles were multiplied by 0.75, assuming a decrease in potential bidders at greater distances. PORT OF BEL- LINGHAM, FISCAL YEAR 2005, FAA DBE PLAN 2.


105 County Business Pattern, which covers all establishments with employees, is published annually, while the Survey of Women- and Minority-Owned Businesses is published every five years, most recently using 2002 data.

106 Sometimes those specialties are over-inclusive. For example, NAICS 23731 includes big ticket items such as highway, street, and bridge construction, but also includes low cost grading, striping, and construction management. Occasionally, states make adjustments to these categories. New Jersey decided to add bridge painters to the heavy highway category. N.J. DEPT OF TRANSP., FY 2006 DISADVANTAGED BUSINESS ENTERPRISE GOAL SUBMISSION 4 [hereinafter NJDOT].

107 Id. at 30. See also Phillips & Jordan v. Watts, 13 F. Supp. 1308, 1315 (N.D. Fla. 1998) ("The court is also unconvinced that it was appropriate to assume—as MGT did—that every firm in selected SIC codes was qualified and/or willing and able to bid on an FDOT road maintenance contract."). This concern about overinclusiveness was echoed in AGC v. Drabik, 50 F. Supp. 2d 741, 748 (S.D. Ohio 1999) (finding that census data "probably overstates the percentage of MBEs qualified to provide some of the services covered by the Act. For example, firms seeking prime contracts must be able to provide performance bonds").
obviously imprecise. Florida social scientists came to similar conclusions:

However, there are significant problems and limitations with census data relative to the Croson guidelines that the availability of women and minority owned firms should reflect the number of qualified, willing and able firms. Given the number and difficulty of the required adjustments to the Census data, it is unlikely that these data will provide availability estimates that are accurate enough to allow for valid statistical tests of an inference of discriminatory exclusion. ¹⁰⁸

Second, Dun & Bradstreet (“D&B”) data can identify the individual firms that census data cannot. But even with the names of firms in particular specialties in relevant geographical locations, ¹⁰⁹ the D&B list of firms is still over-inclusive, including many firms that would not be regarded by recipients as qualified, willing, and able to be actual competitors for contracts. Moreover, this data cannot determine which firms are certified DBEs. To obtain that information, researchers must scour local directories of minority- and women-owned firms and try to match them to the D&B list. However, being owned by a minority or woman is not the same as being a certified DBE. ¹¹⁰ Therefore, the D&B approach produces many more firms in both the “DBE” numerator and the non-DBE denominator than are actual competitors for a recipient’s contract and provides no measure


¹⁰⁹ When D&B data is used, consultants will often weigh by industry specialty and geographical location, which is better than a raw headcount. This method still assumes, however, without any empirical evidence, that all firms in a particular NAICS code in a particular county will be equally available.

¹¹⁰ See, e.g., City of McAllen FY 2006 Goals Submission 3. The City of McAllen, Texas, reported a University of Texas estimate that there were over 22,000 minority-owned firms in South Texas, but the City found only 132 certified DBEs in the construction. It concluded that although certification was increasing, there “are certainly plenty of uncertified firms in this area,” but that it was difficult to get uncertified firms certified “because of the complex paperwork and, the fact that non-certification does not exclude a firm from bidding on any DOT assisted contract.” Id. Of course, only certified firms count in meeting goals. When a non-certified minority- or women-owned firm seeks participation on DOT funded projects, it is treated as a non-DBE.
of capacity for either category. Overall, this technique substantially increases estimates of DBE availability.

A third technique influencing DBE availability concerns the common characteristic in highway construction of pre-qualification. State DOTs do not want to award a low bid contract to a firm that does not actually have the bonding capacity, experience, or equipment to build a bridge or a four leaf clover interchange. Thus, the state DOT will often pre-qualify a firm, not only for the type of work it can perform, but often for the amount it can take on at any one time. The pre-qualification process controls which firms are actually qualified, willing, and able: firms that are not pre-qualified ordinarily are not permitted to bid. Thus, in measuring the availability of DBEs and non-DBEs, if that procedure is used, a recipient’s pre-qualification list is a much better data source than the census or D&B.

Pre-qualification has its limits as a measure of availability. Not all pre-qualified firms actually bid in any given year because of the nature of the contracts offered, their location, or other opportunities available. Furthermore, pre-qualification is not usually required of subcontractors, though some form of screening may be used. The greatest problem in using this data is treating all pre-qualified firms as headcount equivalents, even though they are pre-qualified in different fields for different amounts.

A fourth approach to measuring availability is to consider who bids and on what types of contracts. If information on contracting

111 See, e.g., NERA Economic Consulting, Race, Sex, and Business Enterprise: Evidence from the State of Washington, Oct. 20, 2005. The 2006 Washington state disparity study, which is touted as WSDOT’s answer to the Western States’ decision, is based on D&B data and shows 11,412 “DBEs” compared to 29,037 non-DBEs available. In fact, WSDOT has only certified 558 DBEs and some, such as Squeaky Clean Janitorial Service, probably do very little highway work. http://www.omwbe.wa.gov/biznet/was/view_firm.asp (last visited Apr. 23, 2007).

112 For professional firms (architects, engineers, etc.), pre-qualification is not used, but recipients often screen or certify firms prior to letting them submit proposals. This process is described in Hershell Gill Consulting Eng’rs, Inc. v. Miami-Dade County, 333 F. Supp. 2d 1305, 1313 (S.D. Fla. 2004).


114 See, e.g., Wis. DEP’T OF TRANSP., PROPOSED DBE PLAN AND GOALS—PUBLIC NOTICE FOR FEDERAL FISCAL YEAR (FY 2006) 6. Wisconsin essentially based its goal on a headcount of DBE and non-DBE pre-qualified firms, despite the fact that the majority of DBEs were “small firms with limited capacity.” Id.
opportunities is well publicized\(^{115}\) and the bidding process non-dis-discriminatory,\(^{116}\) the best measure of availability is whether a prime contractor submits a bid or a subcontractor submits a quote to a prime contractor. These firms are willing and believe they have the qualifications and ability to do the work. Otherwise they would not waste time and money by estimating a bid or quote.

In an effort to measure availability, USDOT has for a number of years urged recipients to collect information on the firms that bid or quote their jobs.\(^{117}\) Many have not done so despite the fact that bidding data is already in their possession. Although a bidders list\(^{118}\) is better than census or D&B data, due to their lack of information about a firm’s interest in highway contracting, it can also serve merely as another form of headcounting.\(^{119}\) Even worse, some recipients add prime contractors and subcontractors together to create a single headcount bidders list;\(^{120}\) although non-DBE prime contractors almost always will be the most common competitors for the largest dollar amounts.\(^{121}\) In reality, some firms bid frequently, some rarely; some

\(^{115}\) There are commercial sources such as the Dodge report, available at http://dodge.construction.com (last visited June 16, 2007), that list upcoming contracts and many governments now post contract opportunities on websites and advertise in newspapers, including minority-oriented journals.

\(^{116}\) Of course, since a DBE goal distorts the number and percentages of DBE and non-DBE subcontractors willing to compete and who receive awards, past performance will not predict what a race-neutral market would look like. But typically, a recipient will award some contracts without goals and those contracts will be better indicators of availability in a race-neutral market.


\(^{118}\) Sometimes what is called a bidders list is in fact little more than a mailing list of firms that have signaled an interest in public work whether or not they have actually submitted a bid or a quote. Basing availability on such a list can be subject to manipulation because firms can be recruited at no cost or effort to them to join such a list to inflate or deflate DBE availability. See, e.g., Associated Gen. Contractors of Am. v. Columbus, 936 F. Supp. 1363, 1390 (S.D. Ohio 1996) (finding the city’s MFB Division actively recruited minority firms to submit Bidders Registration Forms while failing to recruit majority firms).

\(^{119}\) See, e.g., UTAH DEPT OF TRANSP., UDOT DBE GOAL SETTING FOR FY 2006 4–5. When Utah compared the number of DBE bidders and quotes to the number of non-DBE bidders and quotes, it calculated a 20.9\% availability. However, when it factored in the number of work classifications in which firms worked, the number of areas in which they were qualified to work and the percentage of federal dollars spent in those areas, DBE availability fell to 8.26\%.

\(^{120}\) Vermont created its availability measure by combining prime bidders and subcontract quoters, thus treating a firm bidding on building a bridge as equally available for the same dollar outcomes as a firm that does the sodding around the bridge. Vermont, supra note 100, at 1.

\(^{121}\) See, e.g., AHTD, FINAL REPORT, DISADVANTAGED BUSINESS ENTERPRISE (DBE) GOALS ON FEDERALLY-ASSISTED HIGHWAY PROJECTS FOR FY 2006 7. The Arkansas State
on large projects, some on small, and some on both; some bid only specialized contracts and some on a wide variety. All these factors can be weighted to create an annual expected goal that will be more accurate and fairer than any other method.\textsuperscript{122}

The fifth data alternative for goal setting is using a recipient’s DBE list as the measure of DBE availability and census data from relevant NAICS classifications for non-DBEs.\textsuperscript{123} Commonly used in setting goals for airports, this approach, unlike other headcount approaches, may actually underestimate DBE availability. Seeking DBE certification means that a firm is willing to do some public contracting, while being included in the census says nothing about that willingness. Being a certified DBE, however, does not mean that a firm has the same qualifications (licensing, bonding, or pre-qualification) as non-DBEs, or the same capacity to perform on large jobs (most DBEs are subcontractors), or is willing to work for any particular recipient or on any particular contract.\textsuperscript{124}

\textsuperscript{122} In an offhand way, USDOT seems to concede this point by stating that it is the bidders list methodology that would permit measures of firm capacity. But, of course, measurement of capacity is only suggestive, and not a USDOT requirement. \textit{Tips}, supra note 74, at 7. Only Indiana seems to have measured bidder capacity. \textit{Ind. Dep’t of Transp.}, 2006 DBE Goals Calculation, July 2005. \textit{See also} George R. La Noue, \textit{Who Counts: Measuring the Availability of Minority Businesses after Croson}, 21 Harv. J.L. \\& Pub. Pol’y 101 (discussing an appropriate methodology based on bidders).

\textsuperscript{123} DBE lists may not reflect active participants. North Carolina reported that after completion of its 2003 disparity study, it pruned its DBE list from 1006 to 682 and rejected the goals model in that study. \textit{N.C. Dep’t of Transp.}, FY 2006 Disadvantaged Business Enterprise Program, Methodology, Vers. 3.11.

The DBE/census comparison method also creates a problem of what to do with out-of-state firms. New Jersey Department of Transportation ("NJDOT") added out-of-state DBEs to its availability pool, but required out-of-state non-DBEs to be pre-qualified. Comparing certified DBEs to all firms in the census underestimates DBE availability for contract dollars, while ignoring whether DBEs are comparably qualified and able overestimates DBE availability. Furthermore, some recipients count DBEs in every category in which they can perform work, thus double or triple counting them. On the other hand, the census NAICS codes (in this instance the source of non-DBE availability) list firms in only one category.

The data source used can make an enormous difference in the final determination of availability. Only rarely will a recipient report measuring availability with different data sources. For New Jersey Transit ("NJT"), however, consultants reported that when census data were considered, DBE availability was 22.20%, D&B data produced 11.82% availability, and measuring the actual numbers of certified DBEs created only 8.64% availability. The NJT consultants solved the problem of the wide variation in availability by averaging the three sources to create a DBE goal of 14.22%. Such attempts at averaging widely varying and inadequate availability sources do not create an accurate DBE goal.

D. Setting Annual Goals

In making its annual DBE goal submission proposal, USDOT regulations permit a recipient to adjust the availability number upward in setting the final goal if the recipient has current evidence about the effects of discrimination that may be limiting DBE avail-

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125 NJDOT, supra note 106, at 9–10.

126 See, e.g., CITY OF SANTA BARBARA, FY 2006, PROPOSED DBE PARTICIPATION GOAL DEVELOPMENT, Attachment 1–2, Aug. 1, 2005. The Santa Barbara airport, by counting the thirty-seven DBEs it thought were available in sixty categories, almost doubled its final goal.


128 NJDOT, supra note 106, at 12. Oregon calculated DBE availability at 12.94% by comparing firms on its DBE list firms to all firms in census data for selected NAICS codes. However, when it compared actual bidders, DBEs were only 8.83% because only eighty-eight of the 382 DBEs listed actually bid in a two-year period. ODOT thought bidder information was the most accurate method of setting availability. OR. DEP'T OF TRANSP., FEDERAL FISCAL YEAR 2006 DBE GOAL 2–3.
bility.\textsuperscript{129} But only two state DOTs (Illinois and Washington) considered such adjustments. Illinois reported availability at 22.7\%, the highest among the 50 states, and had a consultant’s report urging an upward adjustment to 27.51\%, but declined to do so,\textsuperscript{130} while Washington claimed that its finding of discrimination would increase its goal from DBE 12.7\% in FY 2006 to 15.74\% in FY 2007 and to 18.78\% in FY 2008.\textsuperscript{131}

Actually quantifying the effects of discrimination to increase an availability goal is conceptually—and perhaps mathematically—quite complex.\textsuperscript{132} Nevertheless, some recipients have attempted this quantification. For example, the Pangborn Memorial Airport in East Wenatchee made one of the most bizarre calculations in this area.\textsuperscript{133} By using census data, the airport decided that four DBEs of 234 total firms belonged to the business categories that might work on a $3 million, federally funded project.\textsuperscript{134} These numbers would lead to a goal of less than 2\%.\textsuperscript{135} But the Pangborn Airport decided to increase the goal to 4\% in order “to reflect as accurately as possible the DBE participation we would expect in the absence of discrimination.”\textsuperscript{136} The airport, however, conceded that it had no evidence of past discrimination against DBEs within its market.\textsuperscript{137} Despite this lack of evidence, the airport set a goal 100\% above availability and the Federal Aviation Administration (“FAA”) approved the goal.\textsuperscript{138}

\textsuperscript{131} Wash. Dep’t of Transp., FY 2006 Interim Overall DBE Goals 8.
\textsuperscript{132} USDOT Tips states:
If you choose to make adjustments to your base [availability] figure based upon any this evidence of past discrimination, be certain there is a clear and rational relationship between the evidence and the adjustment. This is often very difficult to do and depends entirely on the type of evidence you discover. You may want to contact a consultant or local institution of higher education (departments of economics or statistics) to assist you in making these types of adjustments.

\textsuperscript{134} Letter from Christina Flohr, Operations Superintendent to Russell Brooks, Managing Attorney, Pacific Legal Foundation (Feb. 17, 2006) (on file with author).
\textsuperscript{135} Four DBEs in total of 234 businesses is actually 1.7\%.
\textsuperscript{136} Letter from Christina Flohr, supra note 134.
\textsuperscript{137} Id.
\textsuperscript{138} Id.
Regardless of the availability data used, there are other problems related to goal setting. For example, Alexandria, Louisiana officials intended to build a new hangar at a cost of $8,990,000.\textsuperscript{139} How much of that amount should go to DBEs? Alexandria calculated DBE availability for the various expected thirteen components of the project as follows:

**Figure C**

2005–2006 Goal Setting in the Alexandria Airport\textsuperscript{140}

<table>
<thead>
<tr>
<th>NAIC code</th>
<th>Work</th>
<th>DBE Proportion of Firms</th>
<th>% of Contract Dollars To Be Spent</th>
<th>Weighted Goal</th>
</tr>
</thead>
<tbody>
<tr>
<td>235940</td>
<td>Demolition</td>
<td>2/2</td>
<td>.0083</td>
<td>0.83</td>
</tr>
<tr>
<td>235710</td>
<td>Concrete</td>
<td>1/15</td>
<td>.2119</td>
<td>2.82</td>
</tr>
<tr>
<td>235910</td>
<td>Structural Steel</td>
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\textsuperscript{140} Id.
Alexandria’s annual submission is useful to examine because it is based on a single project and thus illustrates the problems in setting specific contracts goals as well as annual goals. What appears to be a precise mathematical calculation, leading eventually to an overall 11.07% DBE goal, is in fact based on a number of dubious assumptions. First, no part of the project was designated for a prime contractor, although the airport expected that the installer of the structural steel would play that role.\footnote{Telephone Interview with Lynne Eddlemon, DBE Officer, Alexandria Airport (Mar. 20, 2006).} If, as is statistically likely, that low bid prime contract would be won by a non-DBE, then the DBE goal would have to be met in the other much smaller dollar subcontracting categories. DBEs are, however, only a small fraction of the available firms in every other category, except demolition.\footnote{Demolitions were only a tiny fraction of this contract, $75,000 out of $8,990,000.}

Second, almost all of the 11.07% DBE goal would have to come from two categories: concrete (2.82\%) and structural steel (6.73\%).\footnote{See Figure C, supra.} However, in the concrete specialty DBEs comprise only two of fifteen available firms, and in structural steel specialty, DBEs comprise only one of five available firms. In both categories, the odds are unfavorable that a DBE firm will be the lowest qualified bidder for those specialties. If the DBEs fail to win in those categories, then the entire 11.07% goal must be met in other categories where the DBE proportions are generally even lower or non-existent.

Third, if the rule of three\footnote{For an explanation of this rule, see Deposition of Ellsworth E. Wiggins, infra note 168.} had been applied to this contract, then the only categories that would have a DBE goal would have been drainage (four DBEs of twenty-three firms) for .0167\% of the total contract dollars and fencing (four DBEs of nineteen firms) for .0044\% of the total contract dollars. If one could somehow guess that DBEs would win contracts in those categories without the coercive pressure of an 11.07% goal, then adding the demolition category, the DBE goal should have been 1.11\% (0.29\% drainage plus 0.09\% fencing plus .83\% demolition), instead of the ten times larger 11.07\% DBE submitted. Spread over a large number of contracts, predicting that the four DBE fencing firms would win their proportion of contracts (approximately one-fifth) is reasonable, if all firms were equally qualified, willing, and able. But on a much smaller number of prime contracts or subcontracts, the outcomes in a non-discriminatory market
are not so predictable. That leads to pressure on the prime contractor to make the numbers work by selecting more expensive DBE subcontractors in categories where there is some availability and discriminating against cheaper non-DBE subcontractors in those categories.\textsuperscript{145} Nevertheless, with all these problems, the FAA approved Alexandria’s goal submission because it determined that Alexandria’s goal setting methodology conformed to the USDOT regulations.\textsuperscript{146} While that assertion is technically correct, it goes to show how flawed the regulations are.\textsuperscript{147}

Another technique used in setting annual goals is a calculation based on expected DBE participation on anticipated contracts that considers past participation on completed projects and then modifies the projected goal upward or downward. For example, Albuquerque Airport’s calculation for DBE participation in a runway rehabilitation project was calculated at 6.30%.\textsuperscript{148} Upon considering the historical

\begin{itemize}
\item \textsuperscript{145} The court in \textit{Western States} candidly observed: “Implementation of race-conscious goals for which T-21 provides will inevitably result in bids submitted by non-DBE firms being rejected in favor of higher bids from DBEs.” \textit{W. States Paving Co. v. Wash. Dep’t of Transp.}, 407 F.3d 983, 995 (9th Cir. 2005). \textit{Western States} also warned against a program that was not narrowly tailored and delivered unwarranted “windfalls” to minorities. \textit{Id.} at 995, 998. Alexandria was very clear that it had no quantitative evidence of discrimination and did not claim a finding of discrimination influenced its goal, though it did include a few anecdotes reflecting various perspectives and experiences. \textit{Alexandria, supra} note 139, at 3, 8.
\item \textsuperscript{146} Letter from Mel J. Williams, Acting Manager, Civil Rights Staff, Southwest Region, FAA, to Scott Gammell (Aug. 10, 2005) (on file with author). At least in Alexandria, the goal was based on weighting the amount of dollars in each category of the contract. But weighting by contract specialty is not required by USDOT. The \textit{Tips} guidance states, “While weighting is not required by the rule it will make your goal calculation more accurate.” \textit{Tips, supra} note 74. Sometimes the goal is derived from just dividing the total number of DBE firms into the total number of non-DBE firms, regardless of the work they do. Mr. Williams also approved a 10.69% DBE goal for the Lawton-Ft. Sill Regional Airport (Ok) for $1,200,000 taxiway reconstruction where 130 DBEs were considered available. But hauling and dump trucking firms provided 44 firms of the DEB availability, while concrete paving was only 4. \textit{Lawton Metropolitan Airport Authority, FY 2006 DBE Goal Update} 1, approved by Letter from Mel J. Williams, Manager, Civil Rights Staff, Southwest Region, FAA to Mrs. Barbara Whittington (Jan. 9, 2006). It is doubtful that trucking would account for 10 times as many dollars as paving in apron reconstruction. The Lubbock International Airport, Texas also had a similar project and it estimated that 10% of the project dollars would be for trucking, landscaping, utilities and drainage, while 90% would be for heavy construction. \textit{Lubbock Int’l Airport, Overall Goals and Methodology, FY 2006 Update}.
\item \textsuperscript{147} \textit{See} discussion of 49 C.F.R. \textsection 26.45, \textit{supra} Part III.
\item \textsuperscript{148} \textit{City of Albuquerque Aviation Dep’t, Disadvantaged Business Enterprise Plan-FY 2006 Overall Goals [hereinafter City of Albuquerque]; Approval Letter from Mel J. Williams, Manager, Civil Rights Staff, Southwest Region to John D. Rice, Aviation Director, Albuquerque International Sunport (Oct. 17, 2005).}
\end{itemize}
median of 10.82% DBE participation for such projects, the two percentages were averaged to reach a final FY 2006 DBE all-race-conscious goal of 8.56%. Airport authorities submitted this goal to the FAA which subsequently approved it.\(^{149}\) But as a predictor of future DBE participation, this exercise was nonsense. The four projects that Albuquerque deemed relevant to the runway goal yielded 1.39%, 1.3%, 94%, and 20.24% DBE participation respectively.\(^{150}\) Obviously, no pattern existed and the past should have not been considered an accurate predictor of future DBE utilization.\(^{151}\)

This kind of upward adjustment based on past DBE participation was an issue in *Western States*, where WSDOT originally calculated DBE availability to be 11.7% and then adjusted it upward to 14% based on past performance.\(^{152}\) When the State conceded, however, that its “past attainment was driven by the existence of goals on contracts,” the Ninth Circuit concluded that the percentage based on past performance did not “reflect the performance capacity of DBEs in a race neutral market.”\(^{153}\) The Ninth Circuit’s holding against inferring that past DBE utilization when DBE goals have been used is a fair measure of what DBE utilization would be in race-neutral market is persuasive, if goals have inflated DBE awards. The Circuit’s reasoning suggests that the USDOT regulation permitting adjustment for past DBE performance is not valid.

Overall, the USDOT regulations controlling annual goal setting do not require an accurate measuring of DBE and non-DBE availability or a determination of whether any discrimination has actually occurred.

\(^{149}\) Approval Letter from Mel J. Williams, *supra* note 148.

\(^{150}\) *City of Albuquerque, supra* note 148, at 6.

\(^{151}\) Even on a much larger contracting base, past DBE participation varies substantially from year to year. For example, the Airports Division of the State of Hawaii receives about $50,000,000 in federal dollars a year and its past DBE awards ranged over a four-year period from 57% in FY 2003 to 10.5% in FY 2002. It is not plausible to think that the difference in those numbers reflects changes in discrimination affecting Airport contracts. *Hawaii DOT-Airports Divisions, DBE Goal Methodology FY 2006*.

\(^{152}\) W. States Paving Co. v. Wash. Dep’t of Transp., 407 F.3d 983 (9th Cir. 2005). This system means that the higher the DBE goal was in the previous year and the more rigorously it was enforced, then the next year goal can be set even higher above availability because it has been shown that high goals can be obtained.

\(^{153}\) *Western States*, 407 F.3d at 1000.
E. Specific Contract Goals

While annual goals are important in setting a publicly visible benchmark that the bureaucracy then seeks to meet, it is the setting of the goal on a particular contract that has the most preferential impact on firms seeking to do business with the recipient. That goal is the number that will drive prime contractor behavior in determining how much and what kind of work to subcontract and how to deal with potential subcontractors. Of course, the size of the annual goal continues to influence 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.

Although treating goals as quotas is forbidden by statute and regulation,154 the practice in the field is often different.155 According to the Ninth Circuit in Western States, WSDOT'S DBE program operated as follows:

In order to comply with TEA-21's minority utilization requirements, the State mandated that the city obtain 14% minority participation on the project. The prime contractor was bound by this requirement and rejected Western States' bid in favor of a higher bid from a minority-owned firm.156

In theory, to meet the contract goal, the non-DBE prime contractor must only make a good faith effort to award a certain portion of subcontract dollars to DBEs. However, MWBE prime contractors may count their own work in meeting the goal, thereby freeing them

155 Once the annual goal is set, recipient will often adjust individual contract goals to assure the annual goal is met in a quota-like fashion. For example, San Jose stated its policy as follows:

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

CITY OF SAN JOSE, FY 2004/2006 OVERALL GOAL INFORMATION FOR FEDERALLY FUNDED CONSTRUCTION PROJECTS, § XI.1. CONTRACT GOALS, Mar. 29, 2005; see also NJDOT, supra note 106, at 1-2 (“Race and gender neutral participation and race and gender conscious DBE participation is monitored by the Division of Civil Rights on a monthly basis and adjustments are made accordingly to ensure that the NJDOT neither exceeds nor falls short of meeting its annual overall goal.”). This behavior is encouraged at 49 C.F.R. § 26.51 (f)(2).
156 Western States, 407 F.3d at 987 (emphasis added); see also supra Part II.
from further obligation.\textsuperscript{157} For non-DBEs, good faith can be demonstrated either by meeting the goal or by following a number of additional steps that may satisfy recipient bureaucrats.\textsuperscript{158} There is strong incentive to meet the goal, once a firm has incurred the cost of bidding. The discretion agencies have in deciding whether a prime contractor has made the good faith effort is considerable; in fact, agencies often encourage such devices as post-bid negotiations to see that the goal is met.

Compliance with regulatory requirements of good faith in the realm of contract-specific goals can be elusive for the typical contractor. For example, while the regulations specifically prohibit a recipient from ignoring “bona fide” good faith efforts, how is the contractor who installs electrical equipment or paves roads for a living supposed to know exactly what qualifies as a “bona fide” effort? The regulations are little help when they state that good faith efforts are those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal.\textsuperscript{159} The Appendix warns against pro forma efforts and suggests recipients judge the efforts by their scope and intensity, but concedes that in the end the sufficiency of a firm’s good faith efforts is “a judgment call.”\textsuperscript{160}

In addition to being highly discretionary, the good faith effort rules are overtly preferential in their treatment of DBEs over non-DBEs. They require the prime contractor to solicit DBEs with certain specialties; provide DBEs with contract information; select portions of the work for DBEs; provide evidence why additional work for DBEs could not be arranged; ignore the additional costs in finding and using DBEs if the costs are “reasonable”; not reject DBEs as unqualified without “thorough investigation” of their capabilities; assist DBEs in obtaining bonding, lines of credit, and insurance, equipment, and supplies; and use the services of minority/women community and government organizations effectively to recruit and place DBEs.\textsuperscript{161} There are no similar responsibilities placed on bidders for the treatment of non-DBEs.

\textsuperscript{157} DBEs, then, have a very significant advantage because they can meet the goal with their own workforce, thus eliminating the necessity of subcontracting and also increasing their profits.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
If any of these steps are not completed, or if the agency (usually the DBE officer) decides that the prime contractor did not “actively and aggressively” seek DBEs, the contract may be lost. In short, meeting the good faith requirements force a prime contractor to interpret a number of subjective requirements which may not be interpreted consistently by a bureaucracy committed to increasing DBE utilization. However interpreted, the good faith rules on their face create an unlevel playing field for DBE and non-DBE prime contractors and subcontractors.\textsuperscript{162}

The “good faith” efforts required of prime contractors in fulfilling contract specific goals hurts non-DBE contractors in more subtle ways. For example, the more work on the contract a non-DBE prime contractor self-performs, the more determined he must be to use DBEs as subcontractors in the rest of the contract areas. Thus, to meet the goals, a non-DBE prime contractor may have to reduce the work performed by his own work force and aggressively seek out DBE subcontractors to the potential disadvantage of his own company and non-DBE subcontractors. The Ninth Circuit discussed this problem in \textit{Monterey Mechanical v. Wilson}\textsuperscript{163} and agreed with the Tenth Circuit’s opinion in \textit{Concrete Works of Colorado, Inc. v. City and County of Denver}\textsuperscript{164} about the harm a “good faith” effort program inflicts on bidders. The Ninth Circuit paraphrased \textit{Concrete Works} to say that:

[B]ecause minority and women business enterprises could use their own work to satisfy goals for their classes while firms not in these classes would have to subcontract the work out or show “good faith,” non-minority and non-women bidder satisfied all elements of the standing requirement. The injury in fact was that “the extra requirements imposed costs and burdens on non-minority firms that preclude them from competing with MBEs and WBEs on an equal basis.”\textsuperscript{165}

\textsuperscript{162} The regulations also require that contractor who needs to replace a DBE subcontractor on a project must make a “good faith” effort to replace with another certified DBE (to the extent needed to meet the contract goal). 49 C.F.R. § 26.53 (f)(2) (2006). The recipient must approve the DBE replacement. \textit{Id.} at (b)(1).

\textsuperscript{163} \textit{Monterey Mech. Co. v. Wilson,} 125 F.3d 702 (9th Cir. 1997).

\textsuperscript{164} \textit{Concrete Works of Colo., Inc. v. City and County of Denver,} 36 F.3d 1513 (10th Cir. 1994).

\textsuperscript{165} \textit{Monterey Mech.,} 125 F.3d at 707 (quoting \textit{Concrete Works,} 36 F.3d at 1518–19).
The Ninth Circuit separately articulated another harm caused by goals programs driven by the "good faith" requirement. It recognized that the requirements of a good faith goals system cause the non-MWBE prime contractor to incur expenses and uncertainty that may lead him to discriminate against non-MWBE subcontractors to meet the goal. The court observed:

Even if a general contractor suffers no discrimination itself, it is hurt by a law requiring it to discriminate against others on the basis of ethnicity or sex . . . . A person suffers injury in fact if the government requires or encourages as a condition of granting him a benefit that he discriminate against others based on their race or sex.\(^{166}\)

Contract goal setting and the administration of the good faith rules, then, provide the key to determining the degree to which the system will be preferential or quota-like.

Courts have paid some attention to annual goals, but what little focus there has been on contract goals comes from the executive branch. After Adarand, as a concession to narrow tailoring, the Clinton Administration suspended the "rule of two" in federal defense contracting which required that, if two DBEs were available for a particular contract, competition should be limited to those two firms.\(^{167}\) Its cousin, the "rule of three," however, is a common method of setting transportation goals and it is only slightly less coercive and preferential. The rule of three works as follows.\(^{168}\) Agencies will often have goal setting committees, usually including representatives from procurement, engineering, and the DBE or MWBE office. Their first task is to estimate the contract's cost, i.e., the likely low bid amount, the number of subcontracting opportunities and their respective estimated dollar values. After some negotiation with the DBE office

\(^{166}\) Id.


\(^{168}\) Deposition of Ellsworth E. Wiggins, Senior Director of Business Diversity, NJT, GEOD Corp. v. N.J. Transit Corp., Civ. Action No. 01-2656, at 34-35 (D.N.J. July 6, 2005) (describing the operation of the rule of three). See also testimony of Emmett Lewis, Manager of Contract Compliance, NJT, GEOD Corp. v. N.J. Transit Corp., Civ. Action No. 01-2656, at 119 (D.N.J. Aug. 25, 2005) (testifying that the rule was required by NJT and federal regulations and responding, when asked whether in establishing a goal any consideration was given as to how many non-DBEs were in the relevant NAICS code, "We wouldn't track non-DBEs in our data base").
(which often wants substantial subcontracting at a high dollar portion of the total contract) and procurement/engineering (which may want fewer subcontractors for reasons of cost and efficiency), the subcontracting opportunities will be delineated. As in most bureaucratic procedures, rules of thumb, such as the rule of three, develop to minimize negotiation time. The rule usually followed is that in any subcontracting category where there are three or more certified DBEs or MWBEs, the total dollar amount anticipated for each of those categories will contribute to the final DBE goal.

The rule of three system can be illustrated as follows. Imagine a contract worth $1,000,000, with eight subcontracting categories worth $50,000 each. Further, assume that three DBEs are "available" for four of the subcontracting categories. The goals committee may have only sketchy information about the workload or other factors that might affect actual DBE availability and they cannot be certain which firms will eventually supply subcontractor quotes or what their prices will be.\textsuperscript{169} So the concept of DBE availability in each category is largely speculative. Nevertheless, this rule of three will be used to set a goal of 20\% (4 x $50,000 or $200,000) on the $1,000,000 contract.

This 20\% goal will drive DBE preferences in several ways that are not reflective of the amount of DBE participation that would exist in a non-discriminatory market. First, the goals, like the good faith rules, are established without any consideration of the number and availability of non-DBE subcontractors. The fact that there are three DBEs in a particular category would not predict their non-discriminatory utilization, if there are twenty-seven non-DBEs in that same category. If all the firms in that category were equally qualified, willing, and able, then the probability that a DBE would provide the low quote would be one in ten. Second, the goal is set not as a proportion of the subcontracting dollars expected, but as a proportion of the total contract dollars. Thus, if the prime contractor is a non-DBE and performs $600,000 worth of the work, under the above scenario, the prime contractor must award 50\% of the $400,000 subcontracting work to DBEs to meet the 20\% overall goal. Third, most subcontract-

\textsuperscript{169} Deposition of Ernest C. Williams, Outreach Manager, Office of Business Diversity, GEOD Corp. v. N.J. Transit Corp., Civ. Action No. 01-2656, at 39–40 (D.N.J. Aug. 29, 2005) (answering that no one at NJT makes an assessment of whether a certified DBE is available to work on NJT projects generally or on specific contracts, nor does anyone make an assessment of whether a DBE is financially capable of performing either a prime or subcontract contract for NJT, unless the DBE wins a prime contract).
tor quotes come to the prime contractor at the last minute to avoid bid shopping, so the prime contractor cannot know for certain that a satisfactory quote will come from a DBE, even if there are three "available" in that category. Thus the prime contractor may have to bump a non-DBE with the low quote from a category without three DBEs to meet the goal because of the lack of a usable quote in the categories where three DBEs existed.

Finally, predicting outcomes in a small number of competitions is mathematically difficult, even among identical competitors. The ability to accurately predict the percentage of heads and tails in any series of coin tosses increases with the number of tosses. Predicting the outcome of non-discriminatory contract competition where there are only a few subcontracts cannot be done with any precision, even if the competing firms were all equally qualified, willing, and able, which is never the case. Consequently, annual goals reflecting an accurate measure of availability based on a large number of contracts might create a reasonable basis for evaluating annual outcomes. But goals based solely on a few contracts awarded annually or on a specific contract will be highly inexact as predictors of non-discriminatory behavior and more often than not will be used to encourage preferential treatment of DBEs.

V. Race-Neutral Alternatives

Judicial decisions and USDOT regulations require consideration of race-neutral alternatives before race-conscious means are used in the DBE goal setting context. The concept of using race-neutral alternatives to solving problems related to MWBE participation in public contracting first surfaced in Croson when the Court analyzed the concept using the narrowly tailored prong of the strict scrutiny test. In Croson, the majority stated: "In determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies."170 The Court then discussed three principal factors.

The first factor concerns those market barriers that might keep all small firms from competing for public work, but might affect DBEs disproportionately. Justice O'Connor noted for the majority that

any of the barriers to minority participation in the construction industry relied upon by the city to justify a racial classification appear to be race-neutral. If MBEs disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of financing for small firms would, a fortiori, lead to greater minority participation.\textsuperscript{171}

The first obligation of a recipient, then, is to analyze the market barriers to contract participation and to initiate race-neutral programs to overcome them.

The second factor involves the proper response to a finding of discriminatory exclusion. \textit{Croson} held that "the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria."\textsuperscript{172} More specifically, \textit{Croson} stated that the "local government [is not] powerless to deal with individual instances of racially motivated refusals to employ minority contractors. When such discrimination occurs, a city would be justified in penalizing the discriminator and providing appropriate relief to the victim."\textsuperscript{173}

The third \textit{Croson} factor provides for reducing governmental procedural barriers that might otherwise inhibit DBEs from obtaining contracts. O'Connor mentioned only a few of "a whole array of race-neutral devises" aimed at increasing "accessibility of city contracting opportunities to small entrepreneurs of all races."\textsuperscript{174}

Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect. Many of the formal barriers to new entrants may be the product of bureaucratic inertia more than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms.

\begin{footnotesize}
\textsuperscript{171} \textit{Id.} at 507.
\textsuperscript{172} \textit{Id.} at 509.
\textsuperscript{173} \textit{Id.; see also} Eng'g Contractors Ass'n of S. Fla. Inc. v. Metro Dade County, 122 F.3d 895, 928 (11th Cir. 1997) (criticizing the county for not ferreting out and responding to instances of discrimination, if and when they had occurred, in the county's own contracting process by educating, disciplining, or penalizing its own officials and employees responsible for the misconduct). The court noted, "The first measure every government ought to undertake to eradicate discrimination is to clean its own house and to ensure that its own operations are run on a strictly race- and ethnicity-neutral basis." \textit{Id.}
\textsuperscript{174} \textit{Croson}, 488 U.S. at 509.
\end{footnotesize}
Their elimination or modification would have little detrimental effect on the city's interests and would serve to increase the opportunities available to minority business without classifying individuals on the basis of race. The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks. Business as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards.\textsuperscript{175}

From this language it is clear that the first step a government should take in considering race-neutral alternatives is identification of the particular type of problem impeding access to contracting opportunities, followed by programs fashioned to eradicate those problems. The DBE goals program, however, is not based on identifying any particular problem or any discriminator. It makes \textit{Croson}'s "extreme measure" concept of using a racial preference the first government option, not the last.

On the surface, USDOT regulations respond to the judiciary's race-neutral requirement because recipients are required to "meet to the maximum feasible portion of [its] overall goal by using race-neutral means."\textsuperscript{176} Determining the amount of the goal to be achieved through race-neutral or race-conscious means is an important recipient decision because it will control how many specific contracts will have DBE goals attached to them. Some recipients will begin a year with few DBE contract goals and then begin to attach them to contracts as the year progresses if it does not look like the overall annual goal is being met. In such circumstances, the distinction between the permissible goal and the forbidden quota is exceedingly fine.

In practice, USDOT has permitted recipients to meet the race-neutral requirement with a simple bureaucratic mechanism that

\textsuperscript{175} \textit{Id.} at 509–10; see also Contractors Ass'n of E. Pa. v. City of Philadelphia, 91 F.3d 586, 608–09 (3d Cir. 1996) (affirming the district court's decision striking down the city's MWBE contracting program in part because the city had not considered or implemented race-neutral policies lowering administrative barriers and creating training and financial assistance programs).

\textsuperscript{176} 49 C.F.R. § 26.51(a) (2006). In the U.S Department of Justice brief in \textit{Western States}, the government stated: "Recipients must consider arranging solicitations that facilitate participation by small businesses, including providing race- and gender-neutral assistance in overcoming inability to obtain bonding or financing offering technical assistance and services to small businesses and engaging in outreach efforts." Brief of Dep't of Justice at 7, W. States Paving Co. v. United States, No. 03-35783 (9th Cir. Apr. 23, 2004). The more commonly used accounting mechanisms used by recipients described in this Article are not mentioned at all.
requires no problem identification. In calculating how much of the overall goal should be divided between race-conscious and race-neutral means, most recipients begin, and many end, with designating as the race-neutral proportion the amount DBEs are awarded on low-bid prime contracts. The size of the race-conscious goal which controls the DBE subcontracting share in a given year will be altered by how many prime contract dollars DBEs won in the previous year. Thus, if a recipient awards $100 million in prime contracts in a year and DBEs win $5 million of those contracts, then the next year, if a recipient sets a goal of 15%, that goal will be divided into 10% race-conscious and 5% race-neutral portions. It is strictly an accounting procedure and no problem identification takes place. Further, because it is very hard to predict from one year to another how many dollars DBE will win in low-bid prime contract competition, race-conscious goals can swing widely from year to year, regardless of whether that swing reflect changes in discrimination in the marketplace.\footnote{For example, the Port of Oakland calculated a weighted DBE availability of 21.9%. But in 2005, it had two runway apron widening projects which it considered relevant to the $18,000,000 federally funded project it had planned for FY 2006. One project had a DBE goal of 7.7% and achieved 7.8%, while the other project had no goal. A DBE nevertheless won the prime contract, so the DBE achievement was 87.8% or an average of 47.8% for the two projects. Then the Port took the 21.9% availability it had calculated and added the 47.8% it had achieved and averaged the two to create a new DBE availability of 34.9%. However, since the Port estimated that DBEs had received 44% of the dollars in the two relevant projects awarded in 2005 in a race-neutral way, it decided that the 2006 34.9% DBE goal could be achieved race neutrally. Obviously, this whole scenario—which has an appearance of precision and objectivity—is dependent on just two previous contracts and the fact that a DBE won a single prime contract the year before. The decision to have a very substantial race-neutral goal for 2006 had nothing to do with any changes in the Port’s findings about the existence of discrimination. Should a DBE not win the prime contract in 2006, a very substantial DBE race-conscious goal would be likely for 2007. \textit{Port of Oakland Disadvantaged Business Enterprise, FY 2006 Overall Annual Goal Report to the Federal Aviation Administration} (2006), \textit{available at www.portofoakland.com/pdf/dbe_report.pdf} (last visited Apr. 24, 2007).}

In calculating the race-neutral share, some recipients supplement the prime contract dollars awarded DBEs with the dollars awarded to DBE subcontractors on contracts where no goals are set, the amount awarded DBEs exceeded the subcontracting goal, or the prime contractor did not consider the DBE status in making the award.\footnote{\textit{Alexandria, supra} note 139, at 5.} This obviously is a fairer way to set an annual goal, but it is still strictly an accounting method with no problem identification. Furthermore, in a sample of one hundred goals submissions screened for this research, recipients rarely indicated how many of the race-neutral goals are met...
by the various accounting mechanisms. In fact, some recipients apparently did not even investigate beyond the prime contractor DBE awards.\textsuperscript{179} A few recipients also noted in their goal submission statements that they engage in a laundry list of efforts to increase DBE participation without using goals, though those activities are often not really race-neutral. But they do not indicate whether these efforts have been evaluated,\textsuperscript{180} and they do not appear to affect the final proportion of the goal to met race neutrally. That proportion is almost always based on the accounting methods described previously.

The 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.\textsuperscript{181} Alternatively, the good faith efforts could be made race-neutral by requiring prime contractors to engage in outreach and treat all firms fairly, not just DBEs. Neither is likely to happen under the current legislation. Another option, assuming recipients have the will or USDOT orders it, is to require prime contractors to submit information regarding their outreach efforts, the quotes they received from subcontractors, and their justification of selecting any subcontractor that did submit the low quote.\textsuperscript{182} That step would directly address the most commonly perceived problem that prime contractors' proclivity towards discrimination\textsuperscript{183} dis-

\textsuperscript{179} It is rare for recipients to have information about which firms submit subcontractor quotes, so having data about "DBE participation through a subcontract from a prime contractor that did not consider a firm's DBE status in making the award" is an unlikely factor to be reflected in the goals submission calculations. 49 C.F.R. § 26.51 (2006).

\textsuperscript{180} Without careful problem identification and evaluation procedures, listing potential race-neutral alternatives will not be a meaningful solution to anything.

\textsuperscript{181} One state, New Jersey, is now able to meet almost all of its 15.1% highway goal through a race-neutral Emerging Small Business Enterprise (ESBE) program which has attracted substantial participation of firms that are also DBEs, but is also open to white contractors who meet size and other requirements. The state has concluded: "The ESBE program enabled both DBE and non-DBE firms to participate on NJDOT contracts without discrimination." NJDOT, supra note 106, at 17.

\textsuperscript{182} This information could be submitted shortly after the bid opening or stored for future audit. Currently, policies require that prime contractors keep payment records for DBEs for three years after the performance of the contract. San Jose, Section XVII, Information Collecting and Reporting.

\textsuperscript{183} The Eagle County Regional Airport expressed the perceived problem in this manner: "It is anticipated that non-DBE prime contractors will only obtain DBE participation if it is a stated goal and that they will meet that goal by subcontracting with a DBE firm." Whether the airport based that assumption on the belief that all the non-DBE primes in their market area were bigots or that no DBE subcontractor would ever submit the lowest quote is not certain.
courages them from using minority- and women-owned subcontractors even when that option would be efficient and cheaper.

There are other race-neutral alternatives. The USCCR has discussed five race-neutral contracting objectives: to 1) enforce non-discrimination laws; 2) increase knowledge about opportunities to contract with the federal government; 3) provide education or technical assistance to improve business skills, increase knowledge of federal procurement, and teach the art of winning contracts; 4) give financial assistance or adjustments to offset the difficulties some struggling firms encounter; and 5) expand contracting opportunities and promote business development in underutilized geographic regions.\(^\text{184}\) Far too often, jurisdictions believe they have a contracting disparity, but will admit to having only the vaguest notion of what caused it and indeed will deny in litigation discovery that they can identify any specific discrimination affecting their contracting process.\(^\text{185}\) The necessary beginning point of any serious consideration of race-neutral programs is always to identify the problem, whether discriminatory or non-discriminatory, before investing in a solution.\(^\text{186}\)

**CONCLUSION**

The Clinton Administration’s “mend don’t end” affirmative action policies as applied to the DBE programs have not ended the controversy.\(^\text{187}\) The compelling governmental interest documents on which these policies are based are becoming older and the data more obsolete.\(^\text{188}\) Nonetheless, courts are still deferring to reports with information about discrimination and the economy that are now at least a decade or two old. But as *Western States* shows, the major

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\(^{185}\) See, e.g., Answer to Request for Admissions, GEOD Corp. v. N.J. Transit Corp., Civ. Action No. 04-2425 (D.N.J. July 14, 2006) (admitting NJT had not identified any prime contract or subcontract where discrimination had occurred, or any pattern of discrimination against DBEs or any discrimination by a lender, surety, or union).

\(^{186}\) See USCCR REPORT, supra note 24, at 49–51.

\(^{187}\) Id. at 17.

\(^{188}\) Id. at 80 (Finding No. 4) (finding that “The three national studies of disparities—the Department of Justice’s 1996 appendix A to its guidance, the Urban Institute’s meta-analysis, and the Department of Commerce’s benchmark studies—are outdated and inappropriate to serve as a basis for federal policy.”).
obstacle in DBE programs is the second prong of the strict scrutiny test applicable to race-conscious government programs: how to narrowly tailor them. The 10% national DBE quota was abandoned during the Clinton presidency in favor of requiring every state and local recipient to set its own goals based on local market availability of DBEs and non-DBEs and estimates about the effects of local discrimination, if any.\(^\text{189}\) But now, the United States Department of Justice and the Ninth Circuit have agreed in \textit{Western States} that local recipients must make their own findings of discrimination before using race-conscious means to fill their annual goals.\(^\text{190}\) The Ninth Circuit has gone further to require that recipients find discrimination against each principal racial, ethnic, and gender group in the DBE program and has set tough standards for the criteria that must be examined in such analysis. This will mean every state DOT in the Ninth Circuit and many local recipients will have to complete new disparity studies.\(^\text{191}\) USDOT has promised federal funds to subsidize these new studies which include new and higher standards such as the multivariate analysis.\(^\text{192}\) In the interim, almost all recipients of federal transportation funds are fulfilling their DBE goals through race-neutral means.

Even if new disparity studies convince courts that remediable problems of discrimination still exist in the construction industry, as the older versions overwhelmingly have not, the setting of annual and contract goals still creates serious narrow-tailoring problems. USDOT regulations on goal setting reflect efforts more aimed at easing administrative burdens than at meeting existing legal requirements. In the goal setting process, for example, these regulations allow the use of databases that often are not limited to those firms generally regarded as qualified, willing and able, ignoring altogether requirements recipients have set for licensing, bonding, pre-qualifica-

\(^{190}\) W. States Paving Co. v. Wash. Dep't of Transp., 407 F.3d 983, 998 (9th Cir. 2005).
\(^{192}\) \textit{Q&A, supra} note 191, at 4. In \textit{Tips}, USDOT treated weighing capacity as optional and stated that if a recipient wanted to control the capacity of firms, "[t]hese type of adjustments usually involve quite difficult calculations and will likely involve using regression analysis." \textit{Tips}, \textit{supra} note 74, at 7. In the Ninth Circuit at least, measuring the relative capacity of DBEs and non-DBEs is required.
This failure to consider the relative ability or capacity of DBEs and non-DBEs through headcount measures of availability is compounded when goals are set in terms of the dollars awarded. It is unrealistic to expect smaller and newer DBEs to be awarded a proportionate amount of dollars as larger and more experienced non-DBEs, unless the contract goal setting process is rigged in favor of DBEs. As long as the calculations of availability inflate the actual capacity of DBEs to perform in a non-discriminatory market, race-neutral measures will fail to fulfill the unrealistic goals set.

Western States illustrates how unwarranted preferences based on race may result from the federal DBE program. As this Article has demonstrated, these preferences are often encouraged by the goal setting process itself. Since the DBE goal is set on the total dollars in a contract, not just the subcontracting dollars, a non-DBE prime contractor must often either reduce his work and/or seek out higher cost DBE subcontractors to meet the goal. While the good faith rules theoretically provide flexibility, they are skewed to favor DBEs and are quite subjective facially and as applied by DBE bureaucracies. Annual goals set on a large number of contracts might provide a reasonable aspirational target, if availability is measured properly. But a goal set on a single or a few projects, using mechanical formulas for availability, cannot realistically predict what DBE utilization would be in race-neutral market because the goal setters have imperfect information about which firms will bid and at what prices. When setting contract goals, the rule of three is particularly unrealistic and coercive, when DBEs are only a small fraction of the total number of firms available.

Finally, the required maximization of the race-neutral share of the annual goal in submissions to USDOT has been divorced from identification of problems that may affect DBEs. Instead, the calculation is based on accounting mechanisms that, particularly for smaller

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193 See supra Part II.B.
194 These bureaucracies are often under pressure to achieve measurable results. The official policy of San Joaquin County (Stockton, Cal.) is “to utilize Disadvantaged Business Enterprises (DBE) in all aspects of purchases and contracting to the maximum extent feasible.” Board Order Approving the Disadvantaged Business Enterprise Program for Federally Funded Transportation Projects (Sept. 27, 2005). When the City of Fresno held hearings on its DBE goals, Stan Moy, member of the Asian-American Architects & Engineers, testified, “... whatever goal an agency sets, it is never high enough; it should be higher.” City of Fresno, DBE Goals for Fiscal Year 2005–2006.
recipients, will vary widely from year-to-year and have nothing to do with remedying discrimination. Other problem-centered race-neutral approaches are likely much more effective in eliminating discrimination and increasing opportunities for firms that are actually small and disadvantaged.

A decade after *Adarand*, federal DBE programs appeared to have escaped the kind of judicial scrutiny that has so dramatically impacted other state and local MWBE programs. But after *Western States*, that immunity is likely to disappear. The vast majority of DBE programs are not based on any finding of contracting discrimination in their market place. All recipients must affirm that they will not discriminate based on race, national origin, or gender. Yet the methods used and approved by USDOT to set annual and contract goals do not create a level playing field, but instead systematically create preferences for DBEs. These goal setting mechanisms will surely play a large role in future litigation.