
9.0 FINDINGS AND RECOMMENDATIONS

In January 2007, MGT of America, Inc. (MGT), was retained to conduct a Disadvantaged Business Enterprise Disparity Study for Oregon Department of Transportation (“ODOT”) to determine whether there was a compelling interest to justify a disadvantaged business enterprise (DBE) program for ODOT. The study consisted of fact-finding to determine whether existing ODOT efforts had eliminated active and passive discrimination; analyzing ODOT procurement trends and practices for the study period from October 1, 1999, through September 30, 2007; and evaluating various options for future program development.

The purpose of this study was to determine if there were disparities in procurement related to the race, ethnicity, or gender of businesses utilized by ODOT—and if any disparities were found, to present evidence on various factors that might account for them.

The results of this study and conclusions drawn are presented in detail in chapters 2.0 through 8.0 of this report. MGT found that DBEs were substantially underutilized as prime contractors in construction and construction-related professional services. In addition, African American and Asian-owned firms were under-utilized as construction subcontractors. The study provides factual predicate evidence for the selective use of project goals for African American and Asian construction subcontractors.

The following sections summarize each of the study’s findings, which are followed by related major recommendations.¹ Commendations are also noted in those instances in which ODOT already has procedures, programs, and policies in place that respond to findings. Selected best practices are at the end of this chapter. These best practices expand on recommendations indicated with an asterisk (*).

¹ MGT has not done an analysis, and is not expressing an opinion, concerning whether any of the recommendations or best practices are currently allowed under Oregon law, or whether modifications to Oregon’s statutes or rules, or even constitution, might be necessary to implement them.

9.1 Findings and Recommendations for Prime Contracting

Findings for Prime Contracting

FINDING 9-1: DBE Prime Utilization and Availability

The 1994 disparity study covering ODOT Region 1 FY 1992-FY 1994 found that for federally funded construction prime contracts, three DBEs were awarded \$202,434, or 0.22 percent of total ODOT spending on federally funded contracts. Over the current study period twenty-two DBEs won 77 prime construction contracts for \$109.5 million (5.63 percent of the total). Ninety-two DBEs won 332 prime construction-related professional service contracts for \$47.9 million (3.84 percent of the total) over the study period. The dollar value of DBE prime utilization by ODOT is shown in **Exhibit 9-1** below:

**EXHIBIT 9-1
DBE PRIME UTILIZATION
OREGON DEPARTMENT OF TRANSPORTATION
FY 2000-FY 2007**

Business Category	African American	Hispanic American	Asian American	Native American	Nonminority Women	Total
Construction Prime Contractors	\$0.00 0.00%	\$28,765,101 1.48%	\$1,006,766 0.05%	\$19,116,010 0.98%	\$60,654,778 3.12%	\$109,542,655 5.63%
Construction-Related Professional Services	\$1,653,545 0.13%	\$15,708,559 1.26%	\$4,759,754 0.38%	\$4,203,297 0.34%	\$21,605,340 1.73%	\$47,930,495 3.84%

Source: Utilization findings are taken from the exhibit previously shown in Chapter 4.0.

DBEs constituted 19.15 percent of ODOT prime construction bidders and 47.77 percent of ODOT prime construction-related professional services vendors. DBE prime bidder availability is shown in **Exhibit 9-2** below.

**EXHIBIT 9-2
DBE PRIME CONTRACTOR AVAILABILITY
OREGON DEPARTMENT OF TRANSPORTATION
FY 2000-FY 2007**

Business Category	African American	Hispanic American	Asian American	Native American	Nonminority Women	Total
Percentage of Construction Prime Bidders	0.00%	3.27%	0.93%	1.87%	13.08%	19.15%
Percentage of Construction-Related Professional Services Vendors	3.33%	3.84%	6.15%	0.90%	33.55%	47.77%

Source: ODOT prime bidders and MGT master vendor database.

FINDING 9-2: Disparity in DBE Prime Utilization

As shown in **Exhibit 9-3**, substantial disparity for prime contracting exists for the following underutilized DBE groups:

**EXHIBIT 9-3
DISPARITY IN DBE PRIME UTILIZATION
OREGON DEPARTMENT OF TRANSPORTATION
FY 2000-FY 2007**

Business Category	African American	Hispanic American	Asian American	Native American	Nonminority Women
State of Oregon					
Construction	N/A	Yes	Yes	Yes	Yes
Construction-Related Professional Services Consultants	Yes	Yes	Yes	Yes	Yes
Region 1					
Construction	N/A	Yes	Yes	No	Yes
Construction-Related Professional Services Consultants	Yes	Yes	Yes	Yes	Yes

Source: Disparity findings are taken from the disparity exhibit previously shown in Chapter 5.0.

FINDING 9-3: Anecdotal Comments

The female and minority respondents answering our questions about barriers to doing business with ODOT identified the following key issues:

- bid bond requirements (17.4 percent);
- size of contracts (37.1 percent);
- limited information received on pending projects (37.7 percent);
- time allotted to prepare bids and quotes (34.7 percent);
- expenses associated with bid preparation (33.9 percent);
- pre-qualification requirements (22.7 percent);
- insurance (16.1 percent);
- performance bond requirements (19.7 percent); and
- rigid bid specifications (27.6 percent).

However, nonminority male respondents generally reported the same concerns with the similar frequencies. The most substantial difference was on size of contracts, with 29.9 percent of nonminority males reporting contract size as a barrier, as compared to 37.1 percent of women and minority respondents.

A few firms attributed their negative experiences in the marketplace to discrimination. About 5.0 percent (16 respondents) of the DBE respondents stated that they had experienced discriminatory behavior from ODOT.

Recommendations for Prime Contracting

RECOMMENDATION 9-1: Performance Reviews

ODOT should require employees with procurement authority to be evaluated on their DBE and Emerging Small Business (ESB, discussed below) utilization as part of their performance review. ODOT should also ensure that all personnel with purchasing power are fully trained concerning ODOT's DBE program and that they conform with the program requirements when they solicit bids and make purchases.

RECOMMENDATION 9-2: Fully Operated Rental Agreements

Under these arrangements a firm may bid an hourly rate for using certain equipment and the necessary staff. In these field-let contracts engineers select the firm with the appropriate equipment and the lowest bid rate. If that firm is not available then the engineers select the next lowest hourly rate. This rental agreement technique is used primarily to supplement agency equipment in the event of agency equipment failure or peak demand for agency services. The rental agreement technique is attractive to small contractors because the typical small firm has much better knowledge of its own hourly costs than it does of the costs to complete an entire project.

RECOMMENDATION 9-3: Bidder Rotation*

Some political jurisdictions use bidder rotation schemes to limit habit purchases from majority firms and to ensure that D/MWBEs have an opportunity to bid along with majority firms. While bidder rotation may not be viable for ODOT architecture and engineering projects, ODOT should review areas where bidder rotation may increase DBE prime utilization.

RECOMMENDATION 9-4: Joint Ventures

ODOT should consider adopting a joint venture policy similar to the one implemented by the City of Atlanta. The City of Atlanta requires establishment of joint ventures on large projects of over \$10 million.² Primes are required to joint venture with a firm from a different ethnic/gender group in order to ensure prime contracting opportunities for all businesses. This rule applies to female and minority firms as well as non-minority firms. This rule has resulted in tens of millions of dollars in contract awards to female and minority firms.

² City of Atlanta Ordinance Sec. 2-1450 and Sec. 2-1451.

9.2 Findings and Recommendations for Subcontracting

Findings for Subcontracting

FINDING 9-4: DBE Project Goal Setting

ODOT overall DBE goals have ranged between 10.26 percent and 13.06 percent from FY 2000 through FY 2007. The race neutral portion of the ODOT overall DBE goal has ranged from 4.66 percent to 11.32 percent. The current ODOT DBE goal is 11.32 percent and is entirely race neutral.

Existing evidence indicates that the ODOT DBE project goal setting process has not operated as a rigid quota. In data on 800 federal and state-funded ODOT construction projects, over 53.8 percent of the projects had a DBE project goal of less than 5 percent. Over 40.3 percent of ODOT projects in the data had no DBE goal placed on the project. The highest DBE goal placed on a project in the data was 18 percent.

FINDING 9-5: DBE Subcontractor Utilization and Availability

In a previous disparity study covering Region 1 FY 1992-FY 1994 found that for subcontracts on federally funded contracts, DBEs were awarded 202 contracts for \$33,561,397, or 42.37 percent of subcontract dollars on federally funded contracts.

Over the current disparity study period 175 DBEs won 2,098 construction subcontracts for \$261.2 million, 36.7 percent of ODOT construction subcontractor spending over the period (**Exhibit 9-4**). Over \$152.2 million was awarded to women owned firms, 21.4 percent of ODOT construction subcontractor spending. DBEs won \$29,562 in professional service subcontracts over the study period, but the data was incomplete.

**EXHIBIT 9-4
DBE SUBCONTRACTOR UTILIZATION
OREGON DEPARTMENT OF TRANSPORTATION
FY 2000-FY 2007**

Business Category	African American	Hispanic American	Asian American	Native American	Nonminority Women	Total
Construction Subcontractors	\$928,309	\$43,076,090	\$6,662,421	\$58,325,821	\$152,264,749	\$261,257,390
	0.13%	6.06%	0.94%	8.20%	21.41%	36.7%

Source: Utilization findings are taken from the exhibit previously shown in Chapter 4.0.

DBEs constituted 29.5 percent of ODOT construction subcontractor bidders and submitted 67.94 percent of subcontractor bids. DBEs made up 44.9 percent of ODOT subcontractor construction-related professional services vendors. DBE subcontractor bidder and vendor availability is shown in **Exhibit 9-5** below.

**EXHIBIT 9-5
DBE SUBCONTRACTOR AVAILABILITY
OREGON DEPARTMENT OF TRANSPORTATION
FY 2000-FY 2007**

Business Category	African American	Hispanic American	Asian American	Native American	Nonminority Women	Total
Percentage of Construction Subcontractor Bidders	2.28%	3.58%	2.60%	2.82%	18.22%	29.50%
Percentage of Construction Subcontractor Bids Submitted	0.80%	5.02%	1.88%	19.45%	40.80%	67.94%
Percentage of Construction-Related Professional Services Subcontractor Vendors	3.08%	3.55%	5.80%	0.95%	31.60%	44.97%

Source: ODOT Bidders, Master vendor database

FINDING 9-6: Disparity in DBE Subcontractor Utilization

As shown in **Exhibit 9-6**, substantial disparity for construction subcontracting exists for Asians and African Americans as well as for women-owned firms in Region 1:

**EXHIBIT 9-6
SUMMARY OF DBE SUBCONTRACTOR UNDERUTILIZATION
OREGON DEPARTMENT OF TRANSPORTATION
FY 2000-FY 2007**

Business Category	African American	Hispanic American	Asian American	Native American	Nonminority Women
Construction Subcontractors	Yes	No	Yes	No	No
Region 1 Construction Subcontractors	Yes	No	Yes	No	Yes

Source: Disparity findings are taken from the disparity exhibit previously shown in Chapter 5.0.

FINDING 9-7: Anecdotal Comments

The problems reported by women and minority subcontractors were similar to those reported by nonminority males. About 11.0 percent of women and minorities reported being held to a higher standard than other subcontractors, but 17.0 percent of nonminority males reported the same complaint.

One theme in the anecdotal comments was delays in payment. Over 37.2 percent of women and minorities reported waiting over 60 days to be paid on ODOT projects, as compared to 30.4 percent of nonminority males. This compares with 12.4 percent women and minority respondents waiting over 60 days to be paid on private projects (10.9 percent of nonminority males). Over 44.2 percent of women and minorities reported substantial delays in payment from primes, but 50.2 percent of nonminority males reported this problem.

Findings for Non-Goal and Private Sector Analysis

FINDING 9-8: DBE Utilization on Non-Goal Projects

ODOT does not place goals on state-funded projects and on certain federally-funded projects. DBE construction subcontractors won \$33.1 million, 36.5 percent of ODOT spending on state-funded projects between FY 2000 and FY 2007. In FY 1992-94 DBEs were awarded 42 contracts for \$2,805,467, or 38.96 percent of subcontractor spending on state-funded subcontracts.

DBEs won \$65.5 million, 38.3 percent of ODOT spending on federally-funded projects without DBE goals between FY 2000 and FY 2007. On the other hand, in FY 2007, following ODOT's suspension of race- and gender-conscious DBE goals, ODOT DBE construction subcontractor utilization fell almost 30 percent, from 38.3 percent (FY 2000 through FY 2006) to 26.9 percent in FY 2007, moderately below DBE subcontractor bidder availability.

The utilization of African American firms on projects with no DBE goals was different from other women and minority groups. Over the study period African American firms only won one construction subcontract on state-funded projects (in the year 2000), two construction subcontracts on federally-funded projects without DBE goals (in 2005 and a very minor subcontract in 2003), and no construction subcontracts in 2007 following the suspension of race conscious goals by ODOT. Some of the low utilization of African American construction subcontractors was due to lower levels of bidding. Nevertheless, African American construction subcontractor percentage utilization was also below the percentage of bids submitted by African American subcontractors.

FINDING 9-9: Disparities in Self-Employment and Revenue Earnings

In general, findings from the U.S. Bureau of the Census Public Use Micro Sample (PUMS) 2000 data for the state of Oregon indicate that there were statistically significant disparities in entry into and earnings from self-employment by women and minorities after controlling for education, age, wealth, and other variables.

FINDING 9-10: Disparities in Loan Denials and Interest Rates

Approval and denial rates on commercial loans in the survey sample between non-minority males and women and minorities were similar, but the number of respondents was very small. An econometric analysis of data in the 2003 National Survey of Small Business Finance (NSSBF) found a statistically significant positive relationship between the probability of loan denial and African American ownership. The data also found that African American-owned businesses pay approximately 30 percent to 150 percent

(average interest rate charged on approved loan is about 4.5 percent) more in interest than non-African American-owned firms. However, that data also showed that African American-owned firms in the Pacific Division, where the State of Oregon is located, are marginally better off than African American-owned firms in other Divisions in the NSSBF data set.

FINDING 9-11: Regression Analysis on Firm Revenue and Capacity

When controlling for the effects of variables related to company demographics (i.e., company capacity, ownership level of education and experience), ethnic/gender status had a negative effect on 2006 company earnings of all minority groups, except Native Americans. The ethnic/gender variables were not, however, statistically significant.

FINDING 9-12: Anecdotal Comments on the Private Sector

Survey respondents reported some discriminatory behavior in the private sector.

- Over 26.4 percent of women and minority respondents reported experiencing discriminatory behavior from private sector organizations. The group with the highest percentage reporting discriminatory behavior in the private sector was African Americans (52.2 percent).
- Over 57.1 percent of the DBE respondents believed there was an informal network of primes and subcontractors that had excluded their company from doing business on Oregon private sector commercial projects. However, a larger portion of nonminority males (50.0 percent) had the same opinion.

Recommendations for Subcontracting

RECOMMENDATION 9-5: DBE Subcontractor Project Goals*

The evidence supporting the immediate restoration of race- and gender conscious DBE project goals in construction is limited. Since the suspension of race conscious goals there has been a decline in DBE construction subcontractor utilization, but that decline is thus far not substantially below DBE subcontractor availability. Moreover, utilization of DBEs on state-funded contracts was not significantly different from DBE utilization on federally-funded contracts with DBE goals. In addition, DBE subcontractor utilization of federally-funded construction projects was not significantly different from DBE subcontractor utilization project without goals. The 1994 disparity study also found strong DBE subcontractor utilization on state-funded ODOT projects in Region 1.

ODOT should closely monitor DBE construction subcontractor utilization. ODOT should consider placing race- and gender-conscious goals on projects, particularly large projects in the event that DBE utilization begins to fall significantly below DBE subcontractor availability.

Given the different experience of African American subcontractors on projects without goals ODOT should consider the periodic use of DBE subcontractor goals for African American construction firms in procurement areas and DOT regions where there is

demonstrated African American subcontractor availability. The substantial underutilization of Asian subcontractors also justifies the selective use of project goals for Asian owned firms, although there is less factual predicate evidence for targeted goals for Asian construction subcontractors. Such a policy of targeted project goals is consistent with the recent Appeals Court decision in *Western States Paving*.

ODOT should also interface with agencies in the Portland area that have had greater success with procuring the services of African American construction subcontractors, such as Tri-Met, for strategies for improving ODOT utilization of African American construction subcontractors. On construction projects that are procured through an RFP process and are not purely low bid, ODOT should request bidders' history in contracting with DBEs in general and African American firms in particular.

RECOMMENDATION 9-6: Prompt Payment of Subcontractors

The State of Oregon should be commended for covering subcontractors in its prompt payment statute. Nevertheless, small and DBE vendors still reported problems with prompt payment, particularly payments by prime contractors to subcontractors. ODOT should step up the monitoring and enforcement of the State and federal prompt payment rules for subcontractors.

9.3 Findings and Recommendations for Race-Neutral Alternatives

Findings for Race-Neutral Alternatives

FINDING 9-13: ESB Program and Small Contracting (Pilot) Program

In April 2007 there were 1,241 certified ESBs firms in the ODOT database, of which 19.6 percent were DBEs. Over 41.7 percent of the dollars spent through the ESB program was with DBEs from August 2005 through November 2006. However, there was no spending in the ESB program with African American firms during this time period.

ODOT recently established a Small Contracting (Pilot) Program, which targets small firms in Region I. The program sets aside contracts of less than \$75,000 for competition amongst small firms. The program currently targets construction-related professional services. Thus far, three contracts have been awarded for a total of \$224,700. No DBE has won a contract award under the program to date.

FINDING 9-14: Commercial Antidiscrimination Rules

The State of Oregon does have a formal commercial nondiscrimination statute. Oregon state law forbids discrimination in subcontracting; a contractor may be disbarred or disqualified for violating the state's nondiscrimination rules. Violation of the nondiscrimination certification after contract award may be deemed a breach of contract, which can result in contract termination.

FINDING 9-15: Business Development Assistance

ODOT maintained a supportive services contract through most of the study period. ODOT has suspended its supportive services contract due to the absence of federal funding. ODOT has partnered with Oregon branch of the Procurement Technical Assistance Center and other development assistance organizations in the State. ODOT is currently working on a mentor-protégé program.

FINDING 9-16: Access to Capital, Bonding, and Insurance*

ODOT does not currently have any initiatives covering access to capital, bonding and insurance. ODOT does waive bonds on ESB contracts. There are several financing and bonding assistance programs in the Portland area.

Recommendations for Race-Neutral Alternatives

COMMENDATION AND RECOMMENDATION 9-7: ESB Program for Prime Contracts*

ODOT should be commended for establishing and expanding its ESB program, as well as establishing the Small Contracting (Pilot) Program. ODOT should also be commended for establishing a two-tier ESB size standard in 2006. This approach to size standards is in line with best practices by the federal government as well as several state and local governments.

A strong small business program is central to maintaining a narrowly tailored program to promote DBE utilization. Guidance on small business programs can be found in features of other small business programs around the United States, including:

- setting aside contracts up to \$500,000 for small business;
- modifying prequalification requirements for small contracts;
- lowering bid bonds to a specific amount, rather than a percentages;
- providing bid preferences to small businesses in bidding on contracts;
- setting small businesses goals on formal and informal contracts;
- setting department goals for small businesses;
- access to low cost insurance on small contracts; and
- making small businesses utilization part of department performance review.

In particular ODOT should consider raising the set-aside limit from \$50,000 to \$500,000 for the ESB program and the Small Contracting program and changing the pre-qualification requirements for those contracts. The ESB program should increase its focus on African American firm utilization through the ESB program.

COMMENDATION AND RECOMMENDATION 9-8: Commercial Antidiscrimination Rules

The State of Oregon should be commended for having a commercial non-discrimination statute. Some courts have noted that establishing anti-discrimination rules is an important component of race-neutral alternatives.³ Features of antidiscrimination policy selected from other entities include:

- submission of a business utilization report on DBE subcontractor utilization;
- review of the business utilization report for evidence of discrimination;
- a mechanism whereby complaints may be filed against firms that have discriminated in the marketplace;
- due process, in terms of an investigation by agency staff;
- a hearing process before an independent hearing examiner;
- an appeals process to the agency manager and ultimately to a court; and
- imposition of sanctions, including:
 - disqualification from bidding with the agency for up to five years;
 - termination of all existing contracts; and
 - referral for prosecution for fraud.

RECOMMENDATION 9-9: Access to Capital

Other examples of lending assistance programs include linked deposit programs* and collateral enhancement programs.* Agencies use linked deposit programs to subsidize lower rates for business and housing loans by accepting a lower rate on their deposits with participating financial institutions. Under a collateral enhancement program, ODOT would not loan funds directly to businesses, but instead would place a collateral reserve account at a bank. The business would then be required to secure financing from a lending institution, which could be conditioned on receipt of additional collateral supplied by the collateral enhancement program.

³ *Engineering Contractors v. Dade County*, 943 F.Supp. 1546 (SD Fla 1996).

COMMENDATION and RECOMMENDATION 9-10: Supportive Services

ODOT is in the process of reinstating its supportive services contract. ODOT should follow the example of the Port Authority of New York and New Jersey, for which management and technical assistance contracts have been structured to include incentives for producing results, such as the number of DBEs being registered as qualified vendors with ODOT, increasing African American subcontractor utilization and increasing the number of DBEs graduating from subcontract work to prime contracting.

RECOMMENDATION 9-11: Mentor Protégé Program*

The ODOT DBE program has generated several successful DBE subcontractors, some of which have graduated to undertaking prime projects. ODOT should consider a DBE mentor-protégé program where DBE's serve as mentors for other DBE subcontractors. Such an approach has been tried with some success in Florida. ODOT should consider partnering with the Oregon Association of Minority Entrepreneurs (OAME) and the National Association of Minority Contractors in such a program.

RECOMMENDATION 9-12: Bonding* and Insurance*

ODOT should consider adjusting its bonding and insurance requirements to facilitate contracting by smaller firms. A small business surety assistance program should provide technical assistance to small firms; track subcontractor utilization by ethnicity; coordinate existing financial, management, and technical assistance resources; and provide for quality surety companies to participate in the bonding program. ODOT should also permit the waiving of bonds and licensing requirements for small contracts let to ESBs on larger projects. ODOT should consider using wrap-up insurance on large construction projects.

9.4 Organizational Findings and Recommendations

Organizational Findings

FINDING 9-17: DBE Certification

ODOT does not certify DBEs. ODOT has participated in Unified Certification Program since 1987. As of April 2007, there were 497 certified DBEs, of which 282 (56.7 percent) were owned by women.

FINDING 9-18: DBE Program Data

ODOT has a relatively complete reporting system for DBEs in construction, with 105 tables, and includes coverage of DBE utilization at the subcontract and prime contract levels, bidders, ESB utilization, prompt payment, commercially useful function review, complaints against prime contractors, On-The-Job Training, and labor compliance. The system is updated daily. The ODOT system does not track DBE professional services subcontractor utilization.

FINDING 9-19: DBE Program Oversight

ODOT has Small Business Advisory Council, which has been meeting monthly since June 2006.

FINDING 9-20: Performance Measures

At present, ODOT provides tracking of DBE certification and DBE utilization.

FINDING 9-21: ODOT Website

ODOT's Web site contains information on the department's mission, Program Certification, Supportive Services, Resource Documents, Resource Links, vendor outreach, race-neutral programs, contracts, the State procurement code, DBE goals, and DBE utilization, as well as links to certification forms and extensive ODOT contracting information.

Organizational Recommendations

COMMENDATION AND RECOMMENDATION 9-13: DBE Program Data Management

ODOT maintains a best-in-class data tracking system for tracking DBE utilization. The system needs to be expanded to cover DBE professional services subcontract utilization.

COMMENDATION AND RECOMMENDATION 9-14: Oversight Committee

It is important that major stakeholders (including representatives of general contractors and DBE contractor organizations) are a part of discussions about ODOT DBE program. Consequently, ODOT should continue to provide a vehicle for stakeholder input in the review of any reforms of ODOT DBE program.

COMMENDATION AND RECOMMENDATION 9-15: ODOT Website

ODOT has a good DBE website. A survey of agencies has found the following information on their D/MWBE Web sites, which serves as a source of additional ideas for ODOT: bid opportunities, vendor application and information on the loan programs, directory of certified firms, uniform certification application, DBE program description, SBE program description, comprehensive contracting guides, DBE ordinance, how to do business information, bid tabulations, status of certification applications, links to management and technical assistance providers, newsletters, data on SBE and DBE utilization, annual D/MWBE program reports, direct links to on-line purchasing manuals, capacity, bonding, qualifications and experience data on certified firms, and 90-day forecasts of business opportunities.

RECOMMENDATION 9-16: Staffing and Reporting

Commitment from the top leadership is a core element of most summaries of best practices in DBE programs. The federal DBE regulations requirement that the DBE

Liaison Officer “have direct, independent access to [ODOT’s] Chief Executive Officer concerning DBE program matters.”⁴ ODOT must insure that this is the case.

RECOMMENDATION 9-17: Performance Measures*

ODOT should add performance measures other than DBE percentage utilization. Some suggested measures come from Florida DOT’s Small Business Initiative (discussed with best practices). ODOT should develop additional measures to gauge the effectiveness of its efforts. Possible measures include:

- growth in the number of DBEs winning their first award from ODOT;
- growth in percentage of DBE utilization by ODOT;
- growth in DBE prime contracting;
- growth in DBE subcontractors to prime contractors;
- number of firms that receive bonding;
- number of firms that successfully graduate from the ESB program;
- number of graduated firms that successfully win ODOT projects;
- percentage of DBE utilization for contracts not subject to competitive bidding requirements;
- growth in the number of DBEs utilized by ODOT;
- number of joint ventures involving DBEs; and
- largest contract won by a DBE.

9.5 Selected Best Practices

9.5.1 Bidder Rotation

A number of agencies, including the (City of Indianapolis, Fairfax County, Virginia, the Port Authority of New York and New Jersey and Miami-Dade County), use bid rotation to encourage D/MWBE utilization, particularly in A&E. Some examples of bidder rotation from other agencies include:

Miami. Miami-Dade County uses small purchase orders for the Community Business Enterprise program and rotates on that basis. In addition, Miami-Dade County

⁴ 49 CFR Section 26.25.

utilizes an Equitable Distribution Program, whereby a pool of qualified architecture and engineering (A&E) professionals are rotated awards of county miscellaneous A&E services as prime contractors and subcontractors.

DeKalb. DeKalb County, Georgia has used a form of bidder rotation called a bidder box system to promote D/MWBE utilization. This system selects a group of bidders from the list of county registered vendors to participate in open market procurements. Under the bidder rotation system, the buyer identifies the commodity or service by entering an item box number. Using this item box, the computer selects five or six firms. The lowest responsible bidder is awarded the contract. D/MWBEs were afforded an increased number of bid opportunities than would ordinarily be the case with a sequential selection process.

Port Authority. The Port Authority of New York and New Jersey has a Quick Bid rotation system for small contracts less than \$500,000. In this program, the agency solicits bids via telephone and fax from a minimum of six contractors on a rotating basis. The period between bid, award, and contract start is generally not more than six weeks. Bidders are provided free construction documents with which to prepare their bids.⁵

9.5.2 DBE Project Goal Setting

North Carolina DOT. The NCDOT regulations emphasize that goals should be set on projects “determined appropriate by the Department [of Transportation].”⁶ Individual goals are set based on a project’s geographic location, characteristics of the project, the percentage of that type of work that is typically performed by D/MWBEs, the areas in which D/MWBEs are known to provide services, and the goals set by the North Carolina General Assembly.⁷ The NCDOT D/MWBE regulations specify (although they

⁵ Port Authority of NY & NJ, Engineering Department, *2002 Construction Program*, at 9.

⁶ 19A NCAC 02D.1108(a).

⁷ 19A NCAC 02D.1108(a).

do not limit to) particular areas for D/MWBE goals: clearing and grubbing, hauling and trucking, storm drainage, concrete and masonry construction, guardrail, landscaping, erosion control, reinforcing steel, utility construction, and pavement marking.

The NCDOT goal setting process begins with an engineering estimate of the project to determine what items might reasonably be subcontracted out. Next estimates of the percentage of work that could be potentially performed by DBEs and D/MWBEs are developed.⁸ These estimates are confidential and made available only to the Estimator (and staff), the Provisions Engineer in the Proposals and Contracts Section (and staff), and members of the DBE/D/MWBE Committee at the DBE/D/MWBE Committee meetings.

Next NCDOT looks at whether there are D/MWBEs available based on the NCDOT DBE/D/MWBE directory and the location of the project. The NCDOT Directory is a searchable database that classifies firms by location, prime contractor/subcontractor status and six-digit work type.⁹ The Goal Setting Committee is assisted in this process by EEO Compliance staff in the Office of Civil Rights. .

Prime contractors then submit documentation of good faith efforts to achieve the individual project goal. A statement of how they will make efforts to achieve the goal satisfies the good faith effort requirements.

The NCDOT Goal Setting Committee (in collaboration with the EEO Compliance staff) seeks to set goals relative to where there is interest, availability and capacity, beyond mere looking at the certification lists. NCDOT relies on the EEO Compliance staff to provide input on whether existing businesses are fully occupied. However, if EEO Compliance says D/MWBES are not fully occupied, but prime contractors submit

⁸ NCDOT, Division of Highways, Roadway Design and Design Services Unit, *Policy and Procedure Manual*, Chapter 10, at 4.

⁹ <http://apps.dot.state.nc.us/constructionunit/directory/>.

evidence that D/MWBEs are fully occupied (for example, with invoices), then NCDOT accepts those explanations.

As part of goal setting goals NCDOT regulations provide that:

- A documented excessive subcontractor bid constitutes a basis for not subcontracting with a D/MWBE.
- A documented record of poor experience constitutes a basis for not subcontracting with a D/MWBE.¹⁰

In addition, a review of NCDOT DBE and D/MWBE goals has been a regular topic at the Associated General Contractors (AGC)-DOT Joint Cooperative Committee meetings.¹¹

9.5.3 Small Business Programs

Florida DOT Business Development Initiative. The Florida DOT has just undertaken a stepped up small business initiative with the following principal components:

- reserving certain construction, maintenance, and professional services contracts for small businesses;
- providing bid preference points to small businesses and to firms offering subcontracts to small businesses on professional services contracts;
- waiving performance and bid bond requirements for contracts under \$250,000; and
- using a modified pre-qualification process for certain construction and maintenance projects.

9.5.4 Collateral Enhancement Programs

Phoenix. Other agencies offer collateral enhancement. For example, since 1992 the City of Phoenix Expansion Assistance and Development Program (EXPAND) program has allowed businesses to secure financing from traditional lending institutions

¹⁰ The last two elements are adopted by the North Carolina DOT. 19A NCAC 02D.1110(7).

¹¹ AGC-DOT Joint Cooperative Committee Meeting Minutes, February 2001 through August 2003.

with collateral offered by EXPAND. EXPAND is not a substitute for conventional loans. The City does not loan funds directly to businesses, rather, it places a collateral reserve account at a bank. The business is then required to secure financing from a lending institution, which may be conditioned on receipt of additional collateral supplied by EXPAND. EXPAND maintains a collateral reserve account, and offers businesses collateral enhancement, which is generally 25 percent of the loan amount (up to \$150,000). EXPAND funds may be used for new construction, to purchase existing buildings (including land), to remodel an existing building, revolving lines of credit, for working capital, equipment and machinery, and leasehold improvements.

In order to be eligible for the program, a business must be located within the City of Phoenix, owned by a citizen or lawful permanent resident of the United States, have a net worth of less than \$7.5 million, and profits (after federal income tax) of less than \$2.5 million (averaged over the last two-year period). It also must have at least two years of operating history and be a for-profit retail, manufacturing, wholesale, or service company. Priority is given to businesses in the City's redevelopment areas and for economic development projects.

9.5.5 Linked Deposit Programs

New York. For example, a number of local agencies participate in the New York State Linked Deposit program. The program uses the leverage of public agency deposits to encourage participating banks to loan money to small, female and minority firms at favorable rates. The benefit to lenders is that they have a new loan product resulting from public agency deposits at a reduced rate. The Linked Deposit program makes loans of up to \$10 million to certified SBE/M/WBEs that have been awarded Port Authority contracts. The program provides two-year financing at reduced rates to small and minority businesses. Businesses in economic development zones, highly distressed

areas, defense, and certified SBE/M/WBEs are eligible for a three percent interest rate reduction. Manufacturing businesses must have fewer than 500 employees, and service businesses must have fewer than 100 employees and not be dominant in their field of operation. The program started in 1993.

9.5.6 Bonding Programs

North Carolina DOT. The North Carolina Department of Transportation (NCDOT), through its supportive services contract, has funded a DBE Pilot Bonding Assistance Program since 2000. The bonding program is open to any DBE that holds or is in the process of obtaining a NCDOT contract. The program is for bid, payment, and performance bonds of up to \$1 million. The program is administered through the U.S. DOT Office of Small and Disadvantaged Business Utilization, the Minority Business Resource Center, and participating sureties.

Tennessee DOT. TDOT guarantees up to 90 percent of a surety bond of \$250,000 or less.¹² For a bond greater than \$250,000, TDOT guarantee 90 percent of the first \$250,000 and 80 percent of the next \$250,000.

Maryland. The State of Maryland, through its Surety Bonding Program, assists small contractors in bonding with government and public utility contracts that require bid, performance, and payment bonds. Maryland Small Business Development Financing Authority (MSBDFFA) has the authority to directly issue, bid, performance, or payment bonds up to \$750,000. MSBDFFA can also guarantee up to 90 percent of a surety's losses on bid, performance, or payment bonds up to \$900,000. This assistance is available to firms that have been denied bonds, but have not defaulted on loans or financial assistance from MSBDFFA.

¹² TN State Section 4-3-2305.

9.5.7 Insurance Programs

Port Authority. The Port Authority of New York and New Jersey uses a Contractor Insurance Program (CIP), a form of wrap-up insurance under which the Port Authority provides various insurance coverages to approved on-site contractors and subcontractors for construction contracts. In particular, the Port Authority buys and pays the premiums on public liability insurance (\$25 million per occurrence), builders' risk insurance, and workers' compensation and employers' liability insurance. In general, the CIP can reduce an owner's project costs by an average of 1 to 2 percent compared to traditional contractor procured insurance programs. The Port Authority CIP does help alleviate barriers from insurance costs to D/MWBE participation in Port Authority construction projects.

San Diego. The City of San Diego Minor Construction Program also provides access to low cost insurance on small projects.

9.5.8 Mentor Protégé Programs

Texas DOT. Texas DOT developed a mentoring program called L.I.N.C. (Learning, Information, Networking and Collaboration) in which the TxDOT's Business Opportunity Program Section serves as the mentor to selected S/D/MWBE firms. The focus of the program is to prepare the LINC Protégé firms to bid and perform on TxDOT contracts. The Business Opportunity Program section introduces the Protégés to key TxDOT staff and to prime contractors. LINC mentors, TxDOT staff, business providers, bonding agents and trainers, meet with LINC Protégés in scheduled meetings and work individually with the LINC Protégés. The selected LINC Protégés sign an agreement committing to the time and effort needed for a successful mentor-protégé relationship. The duration of the LINC mentorship arrangement is one year.

Florida Business Round Table. An interesting variant of mentor-protégé program is the Business Roundtable. The Florida African American Business Investment Fund (BBIF) Roundtable Technical and Financial Assistance Program helps build management capacity within firms through an interactive management group that allows for firms to benefit from consulting with qualified advisors and to interface with their peers. The BBIF Roundtable is funded by governmental and quasi-governmental entities.

The Roundtable is a management development tool that utilizes the results of a gap assessment and recommendations from the plan established with the business to develop the management capacity of business owners and the growth capacity of their businesses. In the Roundtable, business owners meet once a month and function as resources to one another. They develop creative solutions by collaborating on common obstacles. The Roundtable is an interactive management development tool, not a training course. In Roundtable sessions, principals present the real issues that they are dealing with in their businesses and work with a paid consultant advisors and their peers to develop action plans to resolve those issues.

An additional sub-group of the program is the Construction Roundtable. Construction specialists provide technical and operations guidance to construction firms. Members of the construction industry participate in Roundtable sessions, as mentors, with clients. The purpose of this group is to expose Roundtable participants to business techniques, business opportunities and professional relationships in the construction industry

Business challenges are then monitored on a month-to-month basis by advisors. Accountability that is encouraged by developing work plans; and tracking and sharing progress toward established goals. Financial ratios are used as baseline measures of

business performance. Firms are graduated from the Roundtable when their ratio performance has met pre-determined standards and the firms have become “bankable.”

9.5.9 DBE Web Sites

Illinois DOT. A more ambitious web site is the Illinois Department of Transportation (IDOT) *Contractor Marketplace* electronic bulletin board that allows prime and subcontractors to post information on bid opportunities and solicitations of D/MWBE subcontractors.¹³ IDOT is planning to give subcontractors and suppliers the ability to transmit quotes to prime contractors in specific work categories. The IDOT *Contractor Marketplace* also posts a *Small Contracts List* and *Pay Items* on-line. This procedure facilitates contractor identification of bid opportunities from the detailed Pay Item reports.

Regional Alliance. The Regional Alliance of Small Contractors Opportunities Clearinghouse in New York provides a Web-based forum for small contractors to interact with large construction firms and public development agencies.

9.5.10 Performance Measures

Florida Department of Transportation. The Evaluation Plan for Florida Department of Transportation Small Business Initiative has the following performance measures:

1. What specific action(s) were identified that the Department could implement or continue to help small businesses increase their capacity to bid as a prime?
2. Which of the identified strategies resulted in new businesses becoming interested in a long term partnership with the Department as a prime?
3. What are the success stories?
4. How many businesses that were identified have the desire and ability to grow from a sub to a prime?
5. How many businesses are bidding on reserved contracts compared to those that are not reserved?

¹³ <http://www.dot.state.il.us/const/wrkcat.html>.

6. How many businesses that never bid as primes are now bidding on reserved contracts as primes?
7. How many businesses that were subcontractors or subconsultants have been awarded contracts as a prime?
8. How many businesses, awarded a reserved contract, bid on contracts that were not reserved?
9. How many businesses were able to take advantage of the waiver of the bonding requirements? What is the size of the businesses that took advantage of the waiver?
10. How many contracts resulted in a default? What was the dispute?
11. How many 'problem' contracts adversely affected the end product? What was the issue, i.e., product, time or cost?
12. How many protests were filed? What was the protest issue?