

# Update on the 2007 Disparity Study February 2011

## Background

In May 2005, the U.S. Ninth Circuit Court ruled that a state department of transportation could not have a race-conscious disadvantaged business program without evidence showing that inequity had occurred. In response, ODOT suspended its hard goals and retained MGT of America, Inc. to perform a comprehensive disparity study. MGT analyzed ODOT's procurement trends and practices over a seven-year period (October 1999 through September 2007) and performed extensive interviews with contractors, subcontractors and members of the small and minority business communities.

The study showed ODOT's overall use of Disadvantaged Business Enterprises (DBEs) to be positive (DBEs include businesses that are at least 51 percent owned by a woman, minority or other disadvantaged class of people). It also found two areas in construction subcontracting where DBEs were underutilized: African American-owned and Asian American-owned firms.

MGT concluded the study with 17 recommendations. Below is a review of those recommendations and ODOT's responses divided into: 1) recommendations ODOT has addressed; 2) recommendations ODOT is considering; and 3) recommendations ODOT has determined it will not pursue at this time.

### 1. Recommendations ODOT has addressed

#### **Promote joint ventures (Recommendation 9-4)**

**Study finding:** 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. 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.

**ODOT response:** ODOT currently has a procedure for approving joint ventures, with a link to additional information from the Web site. The department will explore ways to expand awareness and participation in cooperative partnerships and encourage pairings between DBE and non-DBE firms. For example, at a mandatory pre-bid meeting for the Highway 217 project, a multi-million dollar project in Region 1, ODOT presented information about joint ventures to the prime contractors and subcontractors present.

#### **Add targeted DBE subcontractor project goals (Recommendation 9-5)**

**Study finding:** 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 on projects 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 American subcontractors also justifies the selective use of project goals for these firms, although there is less factual predicate evidence for targeted goals for Asian American 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.

**ODOT response:** ODOT has revised and resubmitted to the Federal Highway Association (FHWA) its Annual DBE Goal report for federal fiscal year 2008, along with the Annual DBE Goal for Federal Fiscal Year 2009. This revised report amended the race- and gender-neutral breakout to include narrowly targeted race-conscious goals as indicated by the results of the disparity study and based on a methodology suggested by the consultant, MGT of America. Prior to submitting the revised goal, ODOT participated in stakeholder meetings and at least one public meeting. At these meetings, ODOT staff accepted comments regarding the DBE Program (including use of race-conscious, contract-specific goals).

In January 2008, ODOT submitted a request for a waiver from the requirements of 49 CFR 26.55 to the local FHWA District Office. The waiver was approved by the Secretary of Transportation on September 9, 2008. ODOT will continue to closely monitor all DBE participation to identify trends and patterns of usage and will, at least quarterly, evaluate race- and gender-neutral participation.

ODOT is also working to increase the availability of African American and Asian American DBE firms through outreach and supportive services programs. ODOT has reviewed the contracting practices and procedures of Tri-Met and the Port of Portland and had planned to employ a bidding process similar to that used by Tri-Met on the Sandy River Bridge replacement project. Due to the need for more design work, this project has been delayed. ODOT is currently seeking another opportunity to employ the Tri-Met method. With this A + C bidding process, 70 percent of the basis for award will be the lowest price and 30 percent will be based on the contractor's technical proposal. The technical proposal will include how the contractor will address diversity in its workforce, the contractor's use of DBE and MWESB contractors and suppliers on previous projects, and how it will address diversity on the proposed project.

To evaluate progress, ODOT plans to update the disparity study in 2011.

### **Ensure prompt payment of subcontractors (Recommendation 9-6)**

**Study finding:** 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.

**ODOT response:** ODOT will continue to monitor and enforce prompt payment laws and will investigate complaints in a timely manner. ODOT project managers and/or contract managers will

emphasize the importance of prompt payment. An advisory group suggested the agency pay contractors twice a month instead of monthly. The group anticipated that small businesses might be better positioned to participate in ODOT construction programs with twice-monthly payments. In 2008, ODOT tested the concept to evaluate internal costs and the reaction of small business contractors. The results showed the value of the twice-monthly payments does not outweigh the additional cost. ODOT will revisit the twice-monthly payments to contractors if the agency can reduce the costs to administer the second payment each month.

### **Continue supporting ODOT's Emerging Small Business program for prime contracts (Recommendation 9-7)**

**Study finding:** ODOT should be commended for establishing and expanding its Emerging Small Business (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;
- allowing 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 firms through the ESB program.

**ODOT response:** ODOT is committed to continuing and improving the ESB Program, and legislation passed in 2007 increased the contracting limit from \$50,000 to \$100,000. ODOT continues to expand the supportive services and resources available to all small businesses, including assistance with management training classes and electronic bidding subscriptions.

In 2006, all certified DBEs, Minority-owned Business Enterprises (MBEs) and Women-owned Business Enterprises (WBEs) who met the eligibility criteria for ESB certification were grandfathered into the program without additional effort from the firm (unless they asked not to be included). Adding the ESB designation to qualified DBE, MBE or WBE certified-firms increases the range of opportunities for their participation. The dollar limit (size criteria) for inclusion in the ESB Program is adjusted annually, so firms are not disqualified solely because of inflation.

In 2008, ODOT signed an agreement with the state's Small Business Development Centers (SBDCs), located at community colleges around the state, to provide business management training for small businesses. The agency began providing small business management training opportunities in September 2008 at SBDCs in five locations across the state to as many as 80 certified ESBs that perform highway road and bridge-related construction and consulting activities.

In addition, ODOT has implemented a new Small Contracting Program that allows small contractors to pre-qualify for selection as prime contractors on ODOT contracts up to \$74,999 for design and \$100,000 for construction .

### **Continue following Oregon's commercial antidiscrimination rules (Recommendation 9-8)**

**Study finding:** 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. 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.

**ODOT response:** ODOT will continue to report use of minority-owned and women-owned businesses in contracting and subcontracting and will provide appeals and/or hearings as needed. The department will continue the appropriate use of sanctions when contractors/vendors are non-compliant.

### **Provide supportive services (Recommendation 9-10)**

**Study finding:** 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.

**ODOT response:** ODOT will fund and manage targeted service contracts in-house. The Office of Civil Rights houses three programs under varying stages of development: the Mentor Protégé Program; targeted marketing training and consultation services; and electronic bidding assistance. More services will be added as needs are identified.

In addition, ODOT is continuing its partnerships with Turner Construction Management School's small business programs, Oregon's Small Business Development Centers, and other training and development organizations throughout the state. The Turner School offers a free, intensive 8-week course in critical business skills. The Small Business Development Centers have 23 offices at community colleges and state universities across the state and offer free or low cost business training. These are just two of the many resources ODOT is making available. A capacity analysis to evaluate and quantify the ability of certified firms to perform on projects was awarded in January 2009. Results are expected in July 2009.

ODOT is exploring options for funding a program that would reimburse firms participating in the Oregon Procurement Information Network's (ORPIN) "push notice" program. The push notice feature of ORPIN automatically sends contract notifications to participating contractors. ODOT is also planning several outreach events aimed at helping firms with certification paperwork and teaching them how to do business with the agency.

The majority of ODOT contracts are mandatory "low-bid" awards and do not provide opportunities for incentives related to DBE use. The results of the Disparity Study have allowed the agency to implement "hard" goals for DBEs as prescribed in the study. In addition, the Small Contracting Program for professional services and construction projects provides opportunities for businesses to participate in ODOT contracts. As mentioned under Recommendation 9-17, ODOT will track information on the use of DBE firms as subcontractors and prime contractors.

### **Implement a Mentor Protégé Program (Recommendation 9-11)**

**Study finding:** ODOT's DBE program has generated several successful DBE subcontractors, some of which have graduated to undertake prime projects. ODOT should consider a DBE mentor-protégé program where DBEs 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.

**ODOT response:** ODOT has identified funding for two separate mentor protégé programs: a general mentor-protégé program and a project-specific program. For the general mentor-protégé program, funded at \$100,000 from Transportation Operating Funds, ODOT is partnering with the Port of Portland. The program focuses on overall good business practices and how to compete effectively in the highway construction industry. In June 2008, the first three protégés were selected for the general program and began monthly meetings with their assigned mentors. The project-specific program is funded at \$200,000 using ESB program funds. This program will focus on project-related skills and good business practices and will be executed on actual construction projects. Final agreements between contractors, subcontractors and mentors are under development and will be implemented as part of the Highway 217 project in the Portland area.

### **Adjust bonding and insurance requirements (Recommendation 9-12)**

**Study finding:** 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.

**ODOT response:** Since the 2007 Disparity Study, the ODOT Procurement Office has been assessing bonding and insurance policies and requirements based on actual risk, rather than "one-size-fits-all" regulations. As a result, contracts awarded through the Small Contracting Program frequently have bonding and insurance requirements lowered or eliminated, depending on actual risk to the agency. The risks of traditional projects are also being evaluated to see if bonding and insurance requirements can be reduced or eliminated. As part of this effort, Procurement provides technical assistance and educational opportunities to small firms in the area of insurance and bonding. One example is a video training session, available in small business courses, that helps small businesses 1) select the right insurance agent; 2) understand what their insurance covers; 3) assess business risks; and

4) understand the types and limits of insurance needed for ODOT projects. In addition, Procurement is compiling a directory of insurance agents and bonding companies specializing in small business risks. The directory will be available in summer 2009. Other projects aimed at furthering this effort include Owner Controlled Insurance and Programs and alternatives to traditional bonding that also ensure contractor performance.

### **Expand management of DBE program data (Recommendation 9-13)**

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

**ODOT response:** ODOT has established links that allow Personal Service Contract data to be integrated into ODOT's Civil Rights Compliance Tracking (CRCT) database. To facilitate reporting to regulatory entities, ODOT has also revised specifications and tracking forms and is working to streamline processes for contractors/vendors. ODOT has also set up training sessions to ensure consistent compliance and oversight. ODOT's Information Technology Division completed the upgrade of CRCT capabilities in February 2009.

### **Implement a DBE Oversight Committee (Recommendation 9-14)**

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

**ODOT response:** Although ODOT has not established a single Disadvantaged Business Enterprise (DBE) Oversight Committee, the department, through its Office of Civil Rights, provides multiple vehicles for stakeholder input that meet the intent of the recommendation.

For example, ODOT's Office of Civil Rights hosts quarterly public workshops and participates in the Governor's Marketplace, Oregon Association of Minority Entrepreneurs (OAME) trade show, Hispanic Chamber trade show and other similar events. ODOT also attends meetings sponsored by stakeholder organizations, such as OAME's monthly meetings with architects, engineers and contractors, OAME's *Coffee and Issues*, monthly industry leadership meetings and others. The department also organizes public meetings to address specific DBE issues and convenes stakeholder advisory committees when there are significant policy or procedural changes. Finally, ODOT accepts comments or suggestions on an ongoing basis and considers stakeholder input a continuing process.

### **Continue enhancing ODOT's DBE Web site (Recommendation 9-15)**

**Study finding:** ODOT has a good DBE Web site. A survey of agencies has found the following information on these 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; links to on-line purchasing manuals; capacity, bonding, qualifications and experience data on certified firms; and 90-day forecasts of business opportunities.

**ODOT response:** ODOT will continue to improve and update its Web site in an effort to optimize information and resources for contractors, vendors and stakeholders. Dedicated efforts will ensure

information is easily accessible, navigation is intuitive and information is up-to-date. Recent updates include:

- a new, shorter Web address: [www.odotSmallBusinessSupport.org](http://www.odotSmallBusinessSupport.org);
- new interactive search capabilities that allow a small business owner to input the desired location, category of work (guardrail, striping, etc), and/or dollar value, and see contracting opportunities for the next six months;
- links to several existing sites beneficial to small business users;
- a new shortcut link from ODOT's home page;
- continual posting of items of interest; and
- listserv information for informing small businesses of upcoming contracts.

The goal of all the Web site innovations is to increase awareness of opportunities for bidding on ODOT contracts by small businesses. Information about ODOT's Small Business Initiative program is also available as well as other small business news and opportunities.

### **Organize staffing and reporting in the DBE Program (Recommendation 9-16)**

**Study finding:** Commitment from top leadership is a core element of most best practices in DBE programs. The federal DBE regulations require that the DBE Liaison Officer "have direct, independent access to the Chief Executive Officer concerning DBE program matters." ODOT must insure that this is the case.

**ODOT response:** The manager of ODOT's Office of Civil Rights, who is the DBE Liaison Officer for the state, reports directly to the ODOT Director's Office.

### **Enhance performance measures (Recommendation 9-17)**

**Study finding:** ODOT should add performance measures other than DBE percentage utilization. Some suggested measures come from Florida DOT's Small Business Initiative. 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.

**ODOT response:** The department tracks much of this information, but it is not included in performance measures or other reports. To improve accountability, the ODOT Office of Civil Rights will include the following items in its year-end achievements report: First DBE Award, DBE Utilization (in dollars), Number of DBE firms Utilized, DBE Contracts Awarded, Sub-to-Prime Awarded, ESB Grads, and Largest DBE Award. The data for these measures will more accurately reflect the results of ODOT's efforts to improve supportive services and outreach to firms.

## 2. Recommendations ODOT is considering

### Add DBE and ESB goals to performance reviews (Recommendation 9-1)

**Study finding:** ODOT should require employees with procurement authority to be evaluated on their DBE and Emerging Small Business 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.

**ODOT response:** In 2008, ODOT's director launched the Workforce and Small Business Development Team, consisting of representatives from throughout the agency, to ensure it is working across business lines to meet small business involvement goals. One of the first steps is making sure processes are in place to track the agency's progress. As these processes are confirmed, the team will work with Human Resources, Highway Contract Administration and Procurement to institutionalize required actions. This includes training on DBE and ESB program requirements for procurement specialists, contract administrators and project managers and encouraging open communications between the Office of Civil Rights (as managers of these programs) and anyone with procurement authority. OCR will develop and administer appropriate training. Following full implementation, the agency will reconsider whether to evaluate employees on their DBE and ESB utilization as part of their performance reviews.

## 3. Recommendations ODOT is not considering

### Implement fully operated rental agreements (Recommendation 9-2)

**Study finding:** 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.

**ODOT response:** ODOT believes any benefit to small contractors would be minimal, and the potential costs to ODOT and prime contractors, including substantial administration and monitoring costs, would not be proportional to those limited benefits. There also would be substantial practical limitations to any individual arrangement, including limitations on geographic range and scope of rental options. Statutory restrictions, both state and federal, would likely prohibit ODOT from implementing such an exclusive arrangement with selected contractors.

### Use a bidder rotation approach (Recommendation 9-3)

**Study finding:** 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.

**ODOT response:** Construction prime contracts are awarded by low bid, so this is not a practical approach for ODOT. For subcontractors or sub-consultants, there could be an issue of "restriction of trade" or other interference with business if ODOT attempted to require primes to use specific subs or

otherwise limited whom they can hire. Projects included in the Small Business Contracting Programs are offered on a rotational basis.

### **Provide access to capital (Recommendation 9-9)**

**Study finding:** 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.

**ODOT response:** The state has considered and rejected this option in the past due to lack of funding, increased risk and other factors.

### **Conclusion**

ODOT is on the path to improving the way it does business with disadvantaged, minority-, women-owned and emerging small businesses — and is making strides. The agency is implementing or considering implementing nearly every recommendation resulting from the Disparity Study. With a renewed commitment to supporting Oregon small businesses, ODOT looks forward to working with partners to continually monitor progress, improve programs and contribute to a safe, reliable state-wide transportation system.