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April 15, 2008

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VIA FIRST CLASS MAIL AND E-MAIL

Attention: C. Jill Miller
ODOT Office of Civil Rights
800 Airport Road, SE
Salem, Oregon 97301-4798

Re: NAMCO's Comment On Oregon Department Of Transportation Annual DBE Goal For Federal Fiscal Year 2008

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.

**The State of Oregon Department of Transportation
Disparity and Availability Study, Final Report, October
31, 2007 ("Disparity Study"), Page ii-iii.**

INTRODUCTION

Between October 1999 and September 2007 the Oregon Department of Transportation (ODOT) spent just under \$2 billion on construction-related contracts. Not one dollar of this amount went to an African-American prime contractor. *Disparity Study*, page 4-21. During the same period \$711,349,195.00 was paid to construction subcontractors. Of that amount, only .13% or \$928,309.00 – less than one million of the seven hundred million -- went to African-American construction subcontractors. *Id.*

No one looks forward to a day when African-American firms compete on a level playing field with nonminority firms more than African-Americans in Oregon. Discrimination, however, continues to hamper both the creation and growth of firms owned by African-American men and women. NAMCO believes that ODOT's proposed Annual DBE Goal

for Federal Fiscal Year 2008 of 11.26 % fails to properly reflect a realistic assessment of the availability of African-American owned firms, and thus does not accurately reflect the adverse effects of discrimination on ODOT's utilization of DBEs owned by African-Americans. Moreover, because of this failure, the proposed race-conscious goal of 1% African-American-owned DBE firms seems woefully inadequate particularly in light of ODOT's abysmal history of not using these firms and its failure in this instance to realistically assess their availability.

AVAILABILITY – THE KEY QUESTION

One of the tragedies of racism is that the remnants of its public face – discrimination – continue to infect systems and institutions. They run so deep that it is often invisible at first glance unless you look at it from *just* the right angle. It's like one of those 3-D pictures that you have to look at from a *just* the right angle to see what is clearly there. And once you've discovered that angle, subsequent looks at the picture more readily reveal the image. That is the situation NAMCO wants to point out: ODOT needs to look at its dismal African-American DBE firm utilization from a *different* angle.

ODOT's challenge, and that of all public bodies with a goal of seeing that public funds are not used to support a system of discrimination, whether it be public or private, is to identify the effects invidious discrimination has had on its historic utilization of African-American and other minority groups. Oregon has certified firms owned by African-Americans who are ready, willing and able to provide goods and services to ODOT, and the *Disparity Study* does not adequately reflect that.

ODOT's *Disparity Study* suggests that it has assessed the issue of whether a disparity exists in ODOT's use of African-American and other DBE firms. That assessment was based solely on contractor "participation data" provided by ODOT. *See Disparity Study* at page 4-6 and 4-20. The major failing of this data is that it only considers those firms who bid on ODOT projects during the survey period and those who were awarded contracts. This shortcoming also befalls ODOT's Federal Fiscal Year 2008 DBE Goal document ("Federal Goals Document"). Neither accounts for those firms who may have chosen not to bid on ODOT projects, but were otherwise capable of performing such work. Relying on bidder lists can be even less revealing at the subcontractor level because subcontractors, by definition, do not contract directly with ODOT, and discrimination could be more easily concealed from ODOT staff. Moreover, such a narrow assessment of availability is not required.

The DBE regulations challenge ODOT to establish a DBE goal that reflects their determination of the level of DBE participation they would expect absent the effects of discrimination. 49 CFR § 26.45. They provide examples of four methodologies, including the one applied in the *Disparity Study*, vendor data and bidder lists. *Disparity Study* at 4-8. The *Disparity Study* acknowledges how important the issue of availability is. They write:

To evaluate disparate impact, if any, it is necessary to identify available minorities in the relevant market area in each business category. This determination, referred to as "availability," has been an issue in recent court cases. If the availability of minority- and women-owned firms is overstated or understated, a distortion of the disparity determination will result. This distortion occurs because the quantitative measure of disparity is a direct ratio between utilization and availability. *Id.* at 4-8.

Noting the importance of the issue, the *Disparity Study* nevertheless fails to even consider other methodologies. It suggests that the vendor/bidder analysis is more preferable because it focuses on self-selection, firms "have expressed a desire and ability to provide goods and/or services." *Disparity Study* at 4-8. It does not explain what the other methods are nor why one method might be preferred over another. *Disparity Study* at 4-20. The Federal Goal Documents suffers from the same defect.

A key reason for not limiting the assessment of availability to participation data is that it potentially "fixes" discrimination into the problem. In other words, if discrimination occurred in any of the subcontracting processes, you would not see it in the availability analysis because individual firms have been excluded from the outset. An analogy would be if one were trying to figure out how many blue-eyed people there were in a city, but only counted those in the room; the total number of blue-eyed people would be under-counted because those knocking at the door were left out.

A Broader Availability Analysis

The *Disparity Study* could have and should have used a method that NAMCO believes a more accurate reflection of availability, Oregon's DBE Directory and Census Bureau Data. While potentially more time consuming to analyze, we believe it a more accurate representation of availability. Moreover, it is also a method specifically sanctioned by the regulations. *See* 49 CFR § 26.45(c)(1). As explained in the regulations, ODOT would simply use the Census Bureau's County Business Pattern (CBP) database to determine the number of all ready, willing and able businesses available in the market that perform work in the same NAICS codes covered by ODOT's projects. They would then divide the number of DBEs by the number of all businesses to derive a base figure for the relative availability of DBEs in ODOT's market. 49 CFR § 26.45(c) (1).

Relying on past bid and award information in assessing whether firms are ready, willing and able fails to recognize that a construction firm's capacity is elastic; firms can and do hire additional employees or subcontract based on need, thus enabling them to take on bigger jobs when the opportunity presents itself, while minimizing operating expenses during slow periods. This very basic construction industry concept raises serious questions as to why the *Disparity Study* would limit it's analysis to such a narrow assessment of the firms ready, willing and able to provide work on ODOT projects.

The Tenth Circuit Court of Appeals in the case of *Concrete Works of Colorado v. City and County of Denver*, 321 F3d 950 (10th Cir 2003), recognized the soundness of using a

broader, more searching concept of availability than that used in the *Disparity Study*. The City of Denver's study conducted by National Economic Research Associates, Inc. ("NERA") used SIC Codes and Census data, among other information, to assess availability. *See Id* at 966-969.

Indeed, the 10th Circuit Court of Appeals has criticized such a narrow analysis of availability similar to that applied in the Federal Goals Document and the *Disparity Study*. They write:

[The plaintiff] contends that the M/WBE availability data used in Denver's disparity studies is unreliable because it is not a measure of only those firms *actually* bidding on City construction projects. . . . To calculate availability at the level of certainty urged by [the plaintiff], Denver would be compelled to survey each MBE, WBE, and majority firm each time bids are sought for a construction project to determine which firms actually bid on the project, either as a prime contractor or as a subcontractor. While this approach may provide an accurate count of available firms, it says nothing about whether those firms are qualified. If availability is calculated on an *individual* basis using [the plaintiff's expert's] approach, it is possible that unqualified firms would be included in the availability figure simply because they bid on a particular project. Conversely, qualified firms would not be included if, for any reason, they chose not to bid on the project. *Concrete Works of Colorado v. City and County of Denver, Colorado*, 321 F3d 950, 983 (10th Cir 2003).

So sound was the 10th Circuit Court of Appeals reasoning, the United States Supreme Court refused to review the case, despite strong dissent from Justice Antonin Scalia, who was joined in his dissent by one other member of the Court. *See Concrete Works of Colorado v. City and County of Denver, Colorado*, 540 U.S. 1027, 124 S. Ct. 556 (November 17, 2003).

The *Disparity Study* and ODOT's reliance on it in assessing African-American-owned firm's availability creates a self-fulfilling prophecy. If we assess the disparity by relying solely on those firms who have either received a contract, or bid on an ODOT project in the past, we risk underestimating the devastating effect that discrimination has had, and continues to have, on ODOT's utilization of African-American-owned firms.

African-American Prime Contractors and Subcontractors Are Available

Based on the *Disparity Study* ODOT has determined that from October 1999 through September 2007 there were zero (0) African-American prime contractors ready, willing, and able to work on ODOT projects. *Id.* at 4-25, Ex 4-11. They have also determined that during the same period the number of African-American subcontractors ready, willing and able to work on ODOT projects was twenty-one (21). *Id.* at 4-24, Ex 4-12. However, a review of the DBE Directory maintained by the Office of Minority, Women and Emerging Small Business shows us that under a more relaxed idea of availability, the

number of African-American owned firms is much greater, for both potential prime contractors and subcontractors

As of this writing there are at least eight (8) African-American owned DBE firms in the Portland Metropolitan area that are licensed with the Construction Contractors Board as general contractors, meaning that they can “supervise, arrange, and perform an unlimited amount of trades on all structures”, including public works projects. This is the same license category that includes such construction firms as Stacy & Witbeck, Inc., Hoffman Construction, Inc., Walsh Construction, and similar firms working on ODOT projects. Under the *Disparity Study*'s analysis, whether past or present discrimination keeps the African-American DBE firms from working as prime contractors on ODOT's projects is not even considered because in order to be considered available as a prime contractor the firm had to be on ODOT's Bidder List. *See Disparity Study* at page 4-58; *see also* Federal Goals Document. Based on this, the *Disparity Study* determined that during the study period no DBE firms owned by African-Americans were available to work as prime contractors on ODOT projects, thus there was no disparity in their utilization. *Id.* at page 5-6, Exhibit 5-1. That, however, is not the end of the story.

A review of the DBE Directory shows that African-American DBE firms provide services in at least 37 of ODOT's code areas and in 18 of the 35 NAICS code categories most commonly used with highway-related construction and professional services. As of this writing there are at least 49 active DBE firms owned by African-Americans in the Portland Metropolitan area alone. ODOT's *Disparity Study* says that only 21 African-American owned firms were available to perform work on ODOT projects as subcontractor in the entire state. *Disparity Study* at page 4-25. ODOT's numbers are in stark contrast to what the public record shows.

Applying the *Disparity Study*'s analysis with the numbers obtained by reviewing the DBE Directory shows an even greater disparity than that identified in the *Disparity Study*. The *Disparity Study* explains that under its analysis firms within a business category are underutilized if they have a disparity index less than 100, and that an index less than 80 indicates that the disparity is significant enough to warrant further investigation. *See Disparity Study*, page 5-2. For prime contractors, if the number of African-American firms was 8 instead of “0”, the disparity index would still be zero because no African-American firms were utilized as a prime contractor.¹ However, knowing that these firms were available gives that “0” greater significance. And given that a disparity index of 80 warrants further investigation, a disparity index of “0” should warrant something *more* on ODOT's part.

For subcontractors, if the number of available African-American firms is 49 instead of 21, then the disparity index would be around 2.5 instead of 5.73, reflecting an even greater underutilization than that found by the *Disparity Study*.²

¹ Availability = 8/222 = 3.6%; Utilization = 0.00%. Disparity index = (0.00/3.6) x 100 = 0

² Availability = 49/950 = 5.2%; Utilization = .13%. Disparity index = (.13/5.2) x 100 = 2.5

Why the *Disparity Study* chose to limit itself to a narrow assessment of availability eventhough the United States Supreme Court has essentially approved a broader assessment is anyone's guess, as well as the question of why no *other* methodology was even considered or compared. As it stands, they were not, and that makes a bad situation worse. Ultimately ODOT's responsibility is to identify a methodology for assessing availability that provides demonstrable evidence of local market conditions and that is designed to ultimately establish a goal that is "rationally-related" to the relative availability of DBEs in ODOT's market. NAMCO does not believe ODOT has achieved that.

EMERGING SMALL BUSINESS PROGRAM – GOOD OR BAD OR BETTER?

The Emerging Small Business program, to the extent it is seen as a race-neutral measure to increase utilization has been a failure as currently implemented. Here again is another missed opportunity. With 244 (19.15%) of the 1,241 ESBs certified as DBEs, there is potential with this program to increase capacity for DBE firms, including firms owned and operated by African-Americans. The *Disparity Study* reports that during the period from August 2005 through November 2006 over \$1.6 million has been paid to ESB firms; over 58% of that (\$947,800 – an amount almost equal to that paid to African-American subcontractors between 2000 and September 2007) was paid to nonminority-owned ESB firms. *Disparity Study* page 3-25 to 26. African-Americans were not utilized in the ESB program. *Id.* The *Disparity Study* contractor commends ODOT for establishing the ESB Program and makes several recommendations, which NAMCO supports. The *Disparity Study*, however, fails to elaborate on a few important points in terms of the effectiveness of the program.

Economically Depressed Areas Should Benefit More From ESB Program

The first issue is that ODOT has statutory authority to implement the ESB Program to address community economic issues. ORS 279A.105 permits contracting agencies to require prime contractors to contract with ESBs in economically distressed areas. It provides in relevant part that:

A contracting agency may require a contractor to subcontract some part of a contract to, or to obtain materials to be used in performing the contract from, a business enterprise that is certified under ORS 200.055 as an emerging small business *and that. . . is located in or draws its workforce from economically distressed areas. . .* (Emphasis added.).

NAMCO supports the implementation of this portion of ORS 279A.105. Such a targeted use of the ESB program would enhance this race-neutral program and increase the ODOT dollars that find their way into economically distressed areas, which tend to have higher minority populations.

ESB Fraud Unchallenged

The next issue is the evidence of potential fraud in the ESB Program. The *Disparity Study* raises the issue of abuse within the ESB Program. This is an issue NAMCO has raised with ODOT and other contracting agencies on many occasions. The *Disparity Study* notes that their review of ODOT files reveals abuses in the form of new ESB firms being created by old ESB firms as their time in the program draws to an end. See *Disparity Study* at 3-22. The *Disparity Study* also notes that firms have changed their names to remain in the program longer. *Id.* Noticeably absent from the *Disparity Study* is any mention of any ongoing efforts to address these abuses, or the results of any investigations. It seems important information to include.

THE ECONOMIC IMPARITIVE

While the African-American population in Oregon is not large, the benefits of eliminating the disparity in ODOT's utilization of African-American owned firms are more than obvious. The heavy construction industry in Oregon has payrolls of over \$85 million a year. Oregon Employment Department. The average wage for workers in the construction industry in 2006 was just over \$86,000.00 per year, well above the \$41,200.00 median income in Multnomah County and the \$71,500.00 median income of Lake Oswego. Oregon Employment Department; U.S. Census Bureau.

ODOT has one of the largest construction budgets in the state: \$2 Billion over the past eight years. In 2003 the legislature approved \$2.46 Billion in transportation expenditures, \$1.3 Billion was allocated to ODOT specifically for bridge repair and replacement projects alone. All citizens of the state pay taxes that support these expenditures, including African-Americans.

While Oregon's economy is being driven by the growth of minority business ownership, African-Americans business ownership continues to lag. Oregon showed a business ownership increase of 2.7% between 1997 and 2002, which was lead by growth in firms owned by minorities: Hispanics (5.6%), American Indians (7%), and Asian-American (20.7%). Oregon's Growth Driven By Diverse Populations, by Jessica Nelson, Oct-24-2007. Business ownership among African-Americans, however, has remained at the same level during that time. *Id.* Given the amount of money ODOT will be spending over the next few years on construction projects, they are uniquely positioned to be a catalyst for growth in African-American business ownership.

CONCLUSION

African-Americans have long been disproportionately excluded from contracting opportunities with ODOT. ODOT's narrow assessment of availability based on ODOT's Bidder List excludes African-American firms who might be otherwise qualified to work on its projects. This exclusion has the effect of masking the true disparity in ODOT's contracting. ODOT can and should do a better job of assessing the availability of African-American owned firms to discern the true disparity.

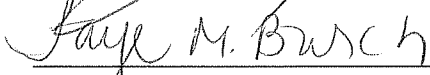
Former U.S. Supreme Court Justice Sandra Day O'Connor has written, "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *City of Richmond v. J.A. Croson*, 488 U.S. 469, 492, 109 S. Ct 706 (1989). NAMCO agrees with that statement and looks forward to continuing to work with ODOT, other government bodies and the construction community, including NAMCO's community partners like Kaiser Permanente and Legacy Emmanuel hospital, to look at the utilization of African-American owned firms from a different angle and making Justice O'Connor's words a reality in Oregon.

Respectfully Submitted,

NAMCO Board of Directors



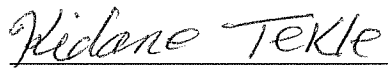
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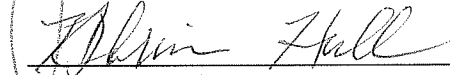
Noni Causey, Director



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Ms. Gail Achterman, Chair Transportation Commission
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