

## **CHAPTER 11.**

### **Recommendations**

Study team recommendations emerged from the quantitative and qualitative results of the disparity study, especially through the comments of many individuals inside and outside ODOT who provided input.

First, many of those providing input recognized ODOT's past changes in contracting policies and practices that enhanced access for small businesses. Suggestions for further improvement, as well as Keen Independent's assessment of results, tended to group around a set of desired outcomes regarding ODOT contracting and assistance programs. Simply put, ODOT can continue to do more to ensure that its contracting and assistance is:

1. Open;
2. Simple;
3. Fair;
4. Transparent;
5. Impactful; and
6. Monitored and improving.

ODOT should continue top-to-bottom improvement regarding its contracting and its assistance programs.

Figure 11-1, on the following page, summarizes examples of initiatives ODOT might consider in pursuing these objectives. The initiatives are illustrative and by no means exhaustive. ODOT might find that some are not possible or effective after further review, or might be able to address the identified issue through another approach.

The balance of Chapter 11 examines these potential initiatives.

Figure 11-1.  
Examples of potential ODOT initiatives under each objective

Objectives and recommendations
<p><b>1. Openness</b></p> <ul style="list-style-type: none"> <li>a. Continue outreach to potential bidders, proposers, subcontractors and suppliers</li> <li>b. Disseminate information through an electronic newsletter</li> <li>c. Provide real-time training and assistance on how to win and perform work on ODOT projects</li> </ul>
<p><b>2. Simplicity</b></p> <ul style="list-style-type: none"> <li>a. Simplify learning about, bidding on and performing ODOT work, especially small contracts</li> <li>b. Increase number of certified DBEs through targeted outreach and certification assistance</li> </ul>
<p><b>3. Fairness</b></p> <ul style="list-style-type: none"> <li>a. Review how firm qualifications are assessed in construction and A&amp;E contract awards</li> <li>b. Implement payment notification service for subcontractors and subconsultants</li> <li>c. Explore initiatives to limit opportunities for bid shopping and other unfair contracting practices</li> <li>d. Research other ways to improve treatment of subcontractors on ODOT contracts</li> <li>e. Continue support for apprenticeships and other programs to promote entry and advancement</li> </ul>
<p><b>4. Transparency</b></p> <ul style="list-style-type: none"> <li>a. Expand awareness of construction contract award information</li> <li>b. Provide comprehensive information about consultant contract awards, including subcontractors</li> </ul>
<p><b>5. Impact</b></p> <ul style="list-style-type: none"> <li>a. Continue partnerships to provide general business assistance</li> <li>b. Build stronger DBEs and other small businesses within core transportation contracting disciplines</li> <li>c. Consider an ESB contract goals program for state-funded contracts</li> <li>d. Pursue changes in state law to allow expansion of Small Contracting Program and ESB/SBE Programs</li> <li>e. Consider including each DBE group as eligible for DBE contract goals program</li> </ul>
<p><b>6. Monitored and improving</b></p> <ul style="list-style-type: none"> <li>a. Expand data collection and reporting, including a comprehensive business contact list</li> <li>b. Continue to use external stakeholder groups that include DBEs and ESBs</li> <li>c. Plan future disparity studies</li> </ul>

## 1. Openness

ODOT has made substantial efforts to communicate contracting opportunities to firms in the industry. Based on availability survey results and in-depth interviews, more remains to be done. Among the firms in the transportation contracting industry surveyed as part of this study, more than one in four MBE/WBEs and 18 percent of majority-owned firms reported difficulties learning about ODOT business opportunities. A relatively high percentage of MBE/WBEs also reported difficulties learning about subcontracting opportunities.

Keen Independent discusses three general strategies beginning on the following page.

**(a) Continue outreach to potential bidders, proposers, subcontractors and suppliers.**

ODOT participates in many activities to introduce contracting opportunities to small businesses.

- ODOT provides considerable information about contract opportunities on its website and through electronic notification systems, but firms need to be aware of these information sources to use them. ODOT should increase outreach and education about easy ways to be informed of opportunities as prime contractors and as subcontractors.
- ODOT may need to design better procedures to inform small businesses of prime contract opportunities through the Small Contracting Program and ESB Program.
- The ODOT Office of Civil Rights in partnership with Procurement Office and Project Delivery staff should continue outreach efforts, including specific training on how to learn about prime contract and subcontract opportunities for construction, A&E and other contracts.

**(b) Disseminate information through an electronic newsletter.** ODOT might consider developing a monthly or quarterly electronic newsletter that could keep DBEs, ESBs and other small businesses informed of ODOT opportunities and assistance, including links to other groups. This also might help ODOT recruit firms to apply for certification (see Recommendation 2-b).

**(c) Provide real-time, web-based training and assistance on how to win and perform work on ODOT projects.** ODOT might expand opportunities for companies that have not had much experience as a subcontractor or prime contractor on ODOT contracts through a web-based “one-stop shop” for information and training. Although ODOT has a consultant portal and contractor portal, its web-based assistance can be substantially improved.<sup>1</sup>

This small business portal would centralize and expand the assistance ODOT provides on its website to DBEs and other business owners who have questions about how to learn about ODOT work, seek subcontract opportunities, become prequalified as a prime contractor, submit bids and proposals, and comply with ODOT requirements as they perform the work. In that way, key questions about working with ODOT can be answered real-time any day of the week, which fits the timing of the business owners’ need for information. An advantage of this approach is that ODOT can consistently direct businesses to this small business portal.

The Arizona Department of Transportation (ADOT) is developing a new small business assistance portal. Once it is live in April or May 2016, it might provide a model for ODOT. The ADOT website will offer round-the-clock virtual coaching for small businesses and DBEs statewide.

The online portal provides guidance on ADOT’s Small and Disadvantaged Business Enterprise Program, DBE certification, prequalification and registration for small business programs. It also walks prime contractors, subcontractors, truckers and suppliers through bid preparation and contract compliance, and addresses issues of licensing and registration, bonding and insurance, prequalification, good faith efforts, Commercially Useful Function and other relevant topics. ADOT’s goal is to provide businesses a one-stop experience.

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<sup>1</sup> Keen Independent found missing information, broken links and other non-user-friendly aspects of both portals.

## 2. Simplicity

A number of business owners interviewed in the study were aware of past ODOT efforts to address some of the specifications, contract processes and other requirements that limit opportunities for smaller and newer firms, as well as companies that have limited ODOT experience. For example:

- Some MBE/WBEs and other firms had positive comments about ODOT's electronic bidding system for construction contracts. (Some professional services firms requested electronic bidding as well.)
- With the advantage of simplified procedures and requirements, ODOT's Small Contracting Program appeared to be effective in encouraging minority- and women-owned business participation as prime contractors and consultants.

**(a) Simplify learning about, bidding on and performing ODOT work, especially small prime contracts and subcontracts.** Many businesses and other groups interviewed in the study encouraged ODOT to continue to seek small business-friendly improvements, and identified remaining barriers. Appendix J discusses the wide range of potential improvements mentioned, including:

- In general, reducing or streamlining paperwork (frequently mentioned by businesses and ODOT staff);
- More strategic unbundling of ODOT contracts to carve out portions of work that can provide prime contracting opportunities to small businesses;
- More use of the Small Contracting Program and the ESB Program for construction, A&E and other contracts through internal education and encouragement; and
- More attention to perceived small business-unfriendly process and requirements in consulting contracts such as excessive insurance requirements.

Appendix J provides business owners' feedback on the wide range of processes and requirements that can negatively affect DBEs and other small businesses. ODOT might conduct further research, including additional industry input, before targeting barriers to be first addressed.

**(b) Increase the number of certified DBEs through targeted outreach and certification assistance.** Several metrics identify the need for targeted outreach to potential DBEs that would encourage more firms to become DBE-certified.

- More than one-third of the dollars going to minority- and women-owned firms on ODOT's FHWA-funded contracts went to non-DBEs (4.4 percentage points of the total 11.8 percent utilization).
- Among the 50 minority- and women-owned firms that received at least \$1 million in ODOT contract dollars during the study period, 20 were not currently DBE certified.
- On a dollar-weighted basis, potential DBEs comprise more than one-third of the 15.84 percent availability of current/potential DBEs for FHWA-funded contracts.

Some of the business owners interviewed in the study indicated that the hoops to jump through, complexity of the process and amount of paperwork involved discouraged certification as a DBE. There were also barriers due to perceptions by some minority and female business owners that DBE certification carried a negative stereotype among customers and prime contractors.

ODOT might consider the following initiatives:

- Because it is not the certifying agency, ODOT is ideally suited to encourage and assist companies with certification applications (without then having to evaluate those applications). ODOT might target this outreach and assistance in core areas of highway contracting and engineering. Personal communications from ODOT leadership, coupled with tangible benefits from certification, might be necessary. Encouragement from industry associations could also be helpful.
- An additional way of encouraging DBE certification is to help firms obtain other valuable certifications. This should include ESB certification, but might also extend to U.S. Small Business Administration 8(a) Program certification. For example, the Montana Department of Transportation reports that its efforts to assist DBEs obtain 8(a) certification are successful and appreciated. (There are considerable benefits to 8(a) certification beyond DBE certification.)
- ODOT might retain outside consultants to promote certification and walk firms through the certification process. Keen Independent's data identifying non-certified firms can be a starting point for this targeted outreach.
- ODOT will be more successful encouraging DBE certification if there are tangible benefits to that certification for all DBE groups. For many DBE groups, lack of eligibility to participate in meeting contract goals construction contracts has been a factor.
- Local agencies operating the Federal DBE Program might also partner with ODOT in outreach and certification assistance.

### **3. Fairness**

ODOT should review two aspects of fair treatment of minority- and women-owned firms and small businesses in general:

- Whether ODOT unfairly advantages or disadvantages certain prime contractors or consultants; and
- Whether ODOT and prime contractors treat subcontractors fairly.

**(a) Review how firm qualifications are assessed in construction and A&E contract awards.**

ODOT should review how it prequalifies firms as prime contractors for its construction work and awards consultant contracts based on qualifications.

- Because it relies on bonding companies, ODOT no longer considers company financials in its prime contractor review of qualifications, one potential barrier to DBE and other small business participation in ODOT construction contracts. However, ODOT staff might review other aspects of contractor prequalification.
  - ODOT has a Supplemental Question as to whether a firm was denied prequalification by another public sector agency. ODOT prequalification might be adopting other agencies' barriers.
  - ODOT can grant prequalification for a work class based on prequalification for that work in other states. Larger companies, and those located in other states, might be the principal beneficiaries of this "reciprocity." As small businesses based in Oregon might not be as likely to have become prequalified in other states, ODOT should ensure that use of its reciprocity does not disadvantage these firms.
  - ODOT uses years a firm has been in business "as a prime contractor" and "as a subcontractor" in its prequalifications. There are two potential issues with the use of this factor: disadvantaging firms with less time in business, and disadvantaging subcontractors when assessing potential prequalification as a prime contractor.

ODOT might consider experience of the owners and managers of the company as a bigger factor than years in business.

It also might reexamine whether separating years of experience as a prime and as a subcontractor is necessary. (The 2016 Disparity Study identified substantial overlap in prime contract and subcontract work for construction firms, with the role on any given contract largely dependent on market opportunity.)

- Concerning A&E and other professional services contracts, ODOT might review its policies and procedures to ensure that evaluation of qualifications as much as possible focuses on the individuals who will conduct the work rather than the firm as a whole, and that experience with ODOT is not weighted more heavily than other experience. Firm size, financial strength and length of time in business should be discouraged as evaluation factors except in unusual circumstances.

- ODOT also examines “capacity” of consulting firms at different stages of the selection process, including scoring of capacity by evaluators and its use of the Capacity Summary Form in the mini-RFP process. It must be careful not to reinforce any disadvantages in the marketplace affecting minority- and women-owned firms through use of “capacity” in its evaluations. Based on in-depth interviews, A&E firms can quickly expand or shrink staff, or partner with other firms, depending on opportunities. ODOT should build this “elasticity” into any consideration of “capacity” if it continues to use that factor at all.

**(b) Implement a payment notification service for subcontractors and subconsultants.**

Interviewees from firms that work as subcontractors on public sector projects reported some continued mistreatment due to delayed payment by prime contractors. Currently, subcontractors do not know when ODOT has paid the prime contractor without calling ODOT staff. ODOT should develop a payment notification system for its construction and consultant contracts and any other contracts that might have subcontractors or suppliers.

- One option is to require verification of payment by subcontractors. The advantage of this approach is that ODOT can track whether or not subcontractors are being paid by prime contractors in a timely fashion. However, it places additional administrative burdens on subcontractors to confirm payments each month (or quarter) and requires ODOT staff to review results.
- Another option is to either post notice of ODOT’s payment of the prime contractor on ODOT’s website, or email notice of payment to subcontractors on each contract. An email system places no additional burdens on subcontractors, and if they do not wish to receive those email notices, they can opt out.

The Montana Department of Transportation has recently implemented a payment notification system where subcontractors receive email notification when MDT has paid a prime contractor on a construction contract.

Keen Independent suggests that ODOT begin with a simple notification system, but explore whether it could adopt a verification of subcontractor payment system on a case-by-case basis where there are concerns about prime contractor payment of subcontractors and suppliers.

**(c) Explore initiatives to limit opportunities for bid shopping and other unfair contracting practices.** As discussed in Appendix J, many business owners and managers indicated that bid shopping and bid manipulation regularly occurs in the Oregon construction industry, which negatively affects subcontractors and suppliers. Some interviewees reported that DBEs were singled out for these predatory practices.

One of the consequences of fear of bid shopping is that subcontractors hold their quotes for prime contractors until the last minute, creating more difficulty for primes to develop a bid. According to the Native American owner of a construction firm, “One guy will get ahold of another guy’s number, and next thing you know ... the next morning he cuts his price and he’s just like \$1,000 or \$5,000 underneath the other guy’s price.” He reported that is why subcontractors get their quotes to prime contractors at the last possible moment.

Beyond educating contractors about ethical practices, general approaches to addressing bid shopping include the following:

- **Bid listing and required use unless substitution is approved.** State law requires bidders on ODOT contracts to list subcontractors within two hours of bid closing and use listed subcontractors unless substitution is approved by ODOT.<sup>2</sup>

These practices are among standard approaches to limit bid shopping. ODOT could increase contractor compliance concerning requests for ODOT approval for any substitutions. This provision appears to be consistently applied for DBEs but not for other subcontractors.

- **Bid depository systems.** Another approach to controlling bid shopping is to establish bid depository systems. With a bid depository, a third party collects subcontractor bids and makes them available to prime contractors at a specified time prior to bid closing. However, some programs have come under legal attack when they require prime contractors to use the subcontractor bid provided through the bid depository.
- **Penalties for bid shopping contained in subcontractor quotes.** There are also contractual ways that subcontractors can better protect themselves when offering quotes to prime contractors by placing conditions in those quotes. These sometimes include conditions that the bid price is confidential and any disclosure triggers certain penalties. ODOT would need to further research enforceability of these conditions in Oregon. If they appear to be enforceable and effective, ODOT could provide training to subcontractors about their use.

ODOT might work with industry groups to explore opportunities that can further limit bid shopping on its projects, whether it be submission of subcontract lists with the bid, testing of bid depositories, training of subcontractors concerning submission of quotes or other initiatives.

**(d) Research other ways to improve treatment of subcontractors on ODOT contracts.** The prime contractor, not ODOT, holds the agreement with the subcontractor on an ODOT project. Even so, ODOT is a steward of public funds and has an interest in equitable treatment of DBE and non-DBE subcontractors.

In addition to the payment notification and bid shopping initiatives discussed above, there may be other ways ODOT can help ensure that subcontractors are treated fairly on its contracts. This might include strengthening its role in receiving and addressing any allegations of unfair treatment from firms attempting to compete for subcontract opportunities as well as those listed as subcontractors and subconsultants.

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<sup>2</sup> ORS 279C.585.

**(e) Continue support for apprenticeships and other programs to promote entry and advancement within transportation construction and engineering.** Future availability of minority- and women-owned businesses in the local transportation industry depends upon entry and advancement of minority and female employees. However, there is a long history of discrimination against minorities and women in Oregon, as discussed at the beginning of Chapter 5. Certain effects of that discrimination appear to continue. Based on the results in the 2016 Disparity Study, there is not a level playing field for entry and advancement opportunities for certain minority groups and for women in the local construction and engineering industries.

ODOT partners with other organizations to open doors for minorities and women to enter and advance in construction trades in Oregon. This assistance includes traditional pre-apprenticeship and apprenticeship programs, as well as programs to help address long-term retention and workplace culture.

ODOT should continue to invest in these workforce development programs to reduce barriers to entry and advancement in the construction industry, as this will place more minorities and women on a path toward potential ownership of businesses in the Oregon transportation contracting industry.

#### **4. Transparency**

Many of the other recommendations presented in Chapter 11 also serve to increase the transparency of ODOT processes before contract award, during selection and while contracts are underway. For example, distributing notices of when ODOT has paid the prime contractor (Recommendation 3-b) serves a transparency objective.

ODOT is highly transparent in its award process for construction contracts, but it might do more to educate firms about where to find that information. It might be able to increase its transparency concerning A&E and other consultant contracts, as discussed below.

**(a) Expand awareness of information about construction contract awards, including subcontractors.** ODOT provides extensive information about the bids submitted on its construction contracts, including prices from those bidders and the first-tier subcontractors and DBEs involved. It might do more to ensure subcontractors are aware of these processes and know where to look for this information.

**(b) Provide comprehensive information about consultant contract awards, including subconsultants.** It appears that ODOT information about consultant contract awards is not as easy to find on its website as its construction contract awards.

#### **5. Impact**

There are a number of ways for ODOT to increase the impact of its programs for DBEs and other small businesses.

Keen Independent recommends that ODOT tier its levels of outreach and assistance to DBEs, ESBs and other small businesses so that sufficient resources can be devoted to core highway-related businesses.

- When the group of businesses is large and varied across industries, and the types of business needs are very general, ODOT should partner with other groups that specialize in providing that assistance to those types of businesses. When it does not contribute funding, ODOT can at least serve as a referral source.
- For the smaller set of core transportation contracting businesses with highly specific needs, ODOT should make more substantial investments in tailoring assistance to those firms. Its partners might be TriMet, Port of Portland and large cities or counties, plus trade associations and other groups specializing in heavy construction and related engineering.

ODOT does not have the expertise or resources to deliver both types of assistance effectively, so it should focus on core transportation contracting businesses, including related services. In general, any assistance outside this focus should typically be as a partner to another group.

This recommendation is in line with the success of City of Portland, TriMet and Port of Portland with targeted assistance programs.

The other recommendations under “Impact” pertain to improving ODOT’s set-aside and subcontract goals program tools, including the Small Contracting Program, ESB Program (and potential SBE Program) and DBE contract goals program.

**(a) Continue partnerships to provide general business assistance to a broad set of DBEs, ESBs and other small businesses.** ODOT should not become a direct provider of general small business assistance, but rather continue to partner with other organizations that focus on different types of assistance. ODOT should also continue to serve as a small business assistance clearinghouse. For example:

- As part of its ongoing DBE assistance, ODOT should continue to financially support training and other assistance for DBEs provided by other groups.
- ODOT should continue to co-sponsor certain workshops and other training.
- ODOT prepared the Small Business Resources Guide in 2010. ODOT should consider updating this guide and preparing a web-based version of the guide.

**(b) Build stronger DBEs and other small businesses within the core transportation contracting disciplines.** As presented in Chapter 3, most of ODOT contract dollars are in core areas of highway and bridge construction, and engineering services. It will be difficult for ODOT to substantially increase DBE participation through work that is not directly highway-related. Thus, ODOT should focus its efforts on core highway-related businesses.

However, core construction activities are specialized, capital intensive, require larger bonds for the prime contractor (and sometimes as a subcontractor) and often are performed by larger companies. Traditional small business assistance might be ill-suited to address the types of constraints for these contractors.

- **Specialized assistance.** ODOT might research providing more specialized assistance for DBEs in core highway construction disciplines than is offered through its current programs. It might target mentor-protégé efforts for these types of businesses. Another tool is individualized Business Development Plans and customized assistance designed for each firm.
- **Bonding and access to capital.** Interviews with businesses, trade associations, ODOT staff and other local agencies identified bonding assistance and access to capital as two areas where more assistance was needed in Oregon. ODOT might partner with other organizations to increase assistance for core highway construction disciplines.
- **Monitoring how contractors meet DBE contract goals.** If it continues to use DBE contract goals, ODOT should continue to monitor whether prime contractors on construction contracts meet those goals primarily through disciplines such as traffic control, trucking, fencing and guardrail and supplies. ODOT will need to ensure that non-DBEs are not unduly burdened by DBE contract goals (see Chapter 4). The DBE contract goals might also have maximum long-term impact if core highway construction disciplines are involved as well.

**(c) Developing an ESB contract goals program for state-funded contracts.** ODOT appears to have the authority to set ESB contract goals on its state-funded contracts. It might further research whether it could operate such a program in parallel with the DBE contract goals program.

ODOT might also consider developing a Small Business Enterprise (SBE) contract goals program for FHWA- and FTA-funded contracts.

- As the size limits for ESBs are smaller than the U.S. Small Business Administration definitions of small businesses, ODOT would need to consult with FHWA to determine whether the revenue limits in the ESB Program can be used for an SBE Program on federally-funded contracts.
- ODOT would need to develop a mechanism for SBEs from outside Oregon to be certified for participation in the program (required when federal dollars are used in these contracts).
- ODOT would operate the SBE contract goals program for certain contracts where it would not set DBE contract goals (DBE and SBE goals would not be combined on a single contract).

**(d) Pursue changes in state law to allow expansion of Small Contracting Program and ESB Program.** ODOT and other groups might pursue changes in state statutes that might allow larger construction, consulting and other contracts to be included under the Small Contracting Program and the ESB Program.

ODOT might learn from the success of the City of Portland with its Prime Contractor Development Program, which builds on the ESB Program. The City of Portland includes contracts up to \$350,000 in Tier 2 of its Program. MBEs, WBEs and ESBs with annual gross receipts of more than

\$1.7 million that also meet other program eligibility rules can compete for those contracts. The City has a larger tier of contracts (up to \$500,000) and MBE/WBE/ESB participants as well.

ODOT, and perhaps other state agencies, might consider pursuing legislative authority to operate a Small Contracting Program and an ESB Program that include contracts up to \$350,000 or \$500,000.

**(e) Consider including each DBE group as eligible for DBE contract goals program.** ODOT might operate its DBE contract program differently in the future based on its consideration of 2016 Disparity Study results.

The evidence suggests that ODOT will need to continue to use DBE contract goals to meet its overall DBE goal. The information in Chapter 10 indicates that ODOT will need to continue to use DBE contract goals to meet an overall DBE goal in the range of 11.63 percent or more.

ODOT might consider the evidence for the Oregon transportation contracting industry as a whole. If it chooses to continue to use DBE contract goals on its FHWA-funded contracts, Keen Independent recommends that it consider the evidence of disparities for each MBE group and for white women-owned firms for its overall transportation contracts. In the past, ODOT separately examined results for construction and for engineering-related contracts; however, a review of the Oregon transportation contracting industry as a whole may be more consistent with guidance from the Ninth Circuit in *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*<sup>3</sup>

ODOT should consider the evidence of disparities between the utilization and availability for WBEs and each MBE group for ODOT contracts, as well as other quantitative and qualitative information. As discussed in Chapter 7, there is evidence of disparities in ODOT transportation contracting for firms owned by African American, Asian-Pacific American-, Subcontinent Asian American-, Hispanic American-, Native American- and white women-owned firms. The evidence of disparities in ODOT contracting for Hispanic American-owned firms is for FFY 2013 and FFY 2014, as discussed in detail in Chapter 7. For the reasons discussed in Chapter 7, these two years are more indicative of current and future conditions regarding Hispanic American-owned firms than results for FFY 2011 and FFY 2012.

**Effect of including all DBE groups as eligible to meet DBE contract goals.** The DBE contract goals program will be a stronger tool in meeting ODOT's overall DBE goal with inclusion of more DBE groups. ODOT can set higher DBE contract goals as there will be a larger pool of DBEs in more disciplines available to work on those contracts across the state. This may also avoid potential overconcentration of DBE participation in only a few specialty fields.

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<sup>3</sup> *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F. 3d 1187 (9<sup>th</sup> Cir. 2013). The Court rejected the AGC contention that the DBE program is not narrowly tailored because it creates race-based preferences for all transportation-related contracts rather than distinguishing between construction and engineering contracts. *Id.* at 1199. The Court stated that AGC cited no case that requires a state preference program to provide separate goals for disadvantaged business participation on construction and engineering contracts. *Id.* The Court noted that to the contrary, the federal guidelines for implementing the federal program instruct states *not* to separate different types of contracts. *Id.* The Court found there are “sound policy reasons to not require such parsing, including the fact that there is substantial overlap in firms competing for construction and engineering contracts, as prime *and* subcontractors.” *Id.*

If ODOT chooses to include more groups, it will need to monitor any negative effects on the sole groups now eligible to meet DBE contract goals on its FHWA-funded construction contracts: DBEs owned by African Americans and by Subcontinent Asian Americans. Even with eligibility to meet DBE contract goals for FFY 2010 through FFY 2014, there was a disparity in the utilization of African American-owned firms in ODOT transportation contracts. The targeted assistance efforts and other programs described elsewhere in Chapter 11 will be needed to further build opportunities for African American-owned DBEs as well as other DBEs.

## **6. Monitored and improving**

ODOT will need to consider the results of the 2016 Disparity Study, plan for future studies and expand its contract and bidders list-related data collection and reporting. Recommendations for these three components are addressed below.

### **(a) Expanded data collection and reporting, including a comprehensive business contact list.**

ODOT can expand its efforts to collect and report utilization data. It can also build a more comprehensive business contact list.

**Utilization data collection and tracking.** ODOT has a sophisticated, internally-developed tracking system for not only DBE but also MBE/WBE participation in its FHWA- and state-funded construction contracts. Keen Independent recommends that ODOT expand that system to include FHWA- and state-funded engineering and related services contracts. ODOT has not successfully tracked utilization on FHWA- or state-funded engineering-related contracts. This will require expanded efforts to capture information about subcontracts on engineering contracts.

ODOT might also research whether it can better gauge participation of non-DBEs in trucking and supplies to monitor potential future overconcentration of DBE participation in those types of work.

**Separate ongoing analysis of participation of former DBEs and other MBE/WBEs.** Keen Independent recommends that ODOT continue to prepare reports on MBE/WBE participation parallel to reports on DBE participation, including review of the participation of former DBEs in ODOT contracts.

- One of the reasons that ODOT might not have met its overall DBE goal in past years, and might not meet it in the future, is that its measurement of DBE participation is properly limited to businesses that are DBE-certified at the time of a contract. Potential DBEs are accounted for in ODOT's overall DBE goal but not in its participation reports (currently and as proposed in the 2016 Disparity Study). Based on past Keen Independent communications with USDOT, analysis of the utilization of potential DBEs might be a valid reason to submit to FHWA when explaining any shortfalls in DBE participation.

- In addition, state DOTs such as ODOT would benefit from information about the success or failure of former DBEs; that can provide a roadmap for ODOT programs to assist DBEs currently in the Federal DBE Program or those that might enter the program. And, one measure of whether ODOT is successful in operating the Federal DBE Program is whether DBEs grow to the level that they no longer qualify for certification.
- Ongoing collection of prime contract and subcontract data also expedites completion of future ODOT disparity studies.

**Monitoring of DBE participation by discipline.** ODOT should continue to monitor any potential overconcentration of DBEs by developing a system to code and report types of work performed by non-DBEs as well as DBEs. With this information, ODOT can report DBE and non-DBE dollars by type of work and update the analyses of potential overconcentration that appear in Chapter 8 of this report.

**Comprehensive bidders list.** Keen Independent's availability database can be the start of a new ODOT bidders list (in compliance with 49 CFR Section 26.11), which ODOT can periodically update through surveys and other means (at least with each disparity study). When doing so, Keen Independent recommends that ODOT compile ownership information (beyond DBE status) to include race, ethnicity and gender ownership status of non-DBEs. It should also include information about ESB certification.

ODOT might also, on an annual basis, update its list of firms interested in ODOT prime contracts and subcontracts. ODOT staff and Keen Independent developed such a list as part of this disparity study. Components might include the following:

- **Continued identification of bidders on construction contracts.** ODOT should continue to compile data on construction bidders and to request prime contractors to prepare lists of firms providing subcontract and supply quotes on construction contracts (perhaps on an annual basis rather than with each bid to reduce the burden on prime contractors and ODOT staff). It can also incorporate firms receiving notices of opportunities through eBIDS.
- **Identification of proposers on engineering and other consulting contracts.** ODOT should also systematically collect information on firms competing as prime consultants on its consulting contracts. It might also collect data on firms registered for certain types of bid notices through the ORPIN system.

**(b) Continued use of external stakeholder groups that include DBEs and ESBs.** ODOT works closely with several external groups, including Oregon chapters of the Associated General Contractors (AGC) and American Council of Engineering Companies (ACEC), as well as its Workforce and Small Business Advisory Council (WSBAC).

As it continues to work with AGC and ACEC leadership regarding DBE and small business issues, ODOT should expand inclusion of DBEs and other small businesses in those AGC and ACEC groups. If this is not possible, ODOT should consider forming other working groups for construction and consulting that are inclusive.

ODOT might also set a regular calendar of WSBAC meetings (perhaps quarterly meetings) and encourage members to take an active role in ODOT's ongoing contracting and assistance improvement efforts.

**(c) Future disparity studies.** The time between the last full disparity study for ODOT and the present study is five years. Keen Independent recommends that ODOT conduct certain updates within a shorter time frame.

**Potential disparity study update by 2019.** ODOT might consider conducting a utilization update prior to its 2019 submission of a DBE goal and projection for its FHWA-funded contracts for FFY 2020 through FFY 2022. That study would need to start in 2018 and be accepted by spring 2019. The update would analyze:

- Utilization of minority- and women-owned firms (by group) for ODOT FHWA- and state-funded contracts from October 2014 through September 2017, or perhaps a longer time period;
- Comparison of that utilization with availability benchmarks that could be developed from the availability data collected in the 2016 Disparity Study;
- Updates to the analysis of current and potential DBEs in the 2016 Disparity Study based on the new DBE Directory at that time, and up-to-date information about any denials of DBE certification and changes to the BOLI list;
- Analysis of the effectiveness of any new or expanded race- and gender-neutral programs, which would assist ODOT when projecting the portion of its future overall DBE goal to be met through new means;
- Updates to the base figure and potential step 2 adjustments; and
- Other aspects of ODOT's operation of the Federal DBE Program, including review of compliance with any changes in federal regulations or guidance concerning the Program.

The 2019 study might not require an update to the comprehensive collection and analysis of quantitative and qualitative information about the local marketplace contained in the 2016 Disparity Study. However, ODOT could conduct public meetings and request public comments to obtain new information about local marketplace conditions and ODOT contracting.

**Potential full disparity study within 5-6 years, or before.** With or without an intervening study update, ODOT might consider a full disparity study within the next five to six years that would include each of the components listed above, and quantitative and qualitative information about the local marketplace. It might also be timed to support setting an overall DBE goal (perhaps FFY 2023 through FFY 2025), projecting the portion of the goal to be met through neutral means, and other aspects of a three-year plan for operating the Federal DBE Program for FHWA-funded contracts.

## **Summary**

The challenges facing minority- and women-owned firms and other small businesses are long-standing and not easily addressed. ODOT will need to continue to work on long-term solutions. Therefore, ODOT should take the time to perform a thorough review of its processes and programs to ensure that improvements will be effective and long-lasting. Common threads throughout the above recommendations are that ODOT needs:

- Better tools;
- More use of existing tools;
- Willingness to change processes;
- Broader partnerships with other organizations;
- Expanded measurement and reporting of outcomes; and
- Sufficient resources to execute this long-term strategy.

Foremost, ODOT will need to continue to build long-term, organization-wide commitment to encouraging participation of DBEs and other small businesses. Based on the extensive involvement of its leadership in this disparity study, Keen Independent concludes that ODOT can be successful in meeting these challenges.