



The State of Minority- and Women- Owned Business Enterprise: Evidence from Missouri

Program Recommendations

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Project Team

Jon Wainwright, Senior Vice President, NERA

Abt SRBI, Inc.

Armand Resource Group, Inc.

Colette Holt, Colette Holt & Associates

J&D Data Services

Kirsten Deskins, Research Assistant, NERA

Christie Kirkendall, Research Assistant, NERA

Marilyn Whitehead, Research Assistant, NERA

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NERA Economic Consulting
Barton Creek Plaza Building II, Suite 330
3801 S. Capital of Texas Highway
Austin, Texas 78704
Tel: +1 512 371 8995
Fax: +1 512 371 9612
www.nera.com

About the Project Team—NERA Economic Consulting

NERA Economic Consulting is a global firm of experts dedicated to applying economic, finance, and quantitative principles to complex business and legal challenges. For half a century, NERA's economists have been creating strategies, studies, reports, expert testimony, and policy recommendations for government authorities and the world's leading law firms and corporations. We bring academic rigor, objectivity, and real world industry experience to bear on issues arising from competition, regulation, public policy, strategy, finance, and litigation.

NERA's clients value our ability to apply and communicate state-of-the-art approaches clearly and convincingly, our commitment to deliver unbiased findings, and our reputation for quality and independence. Our clients rely on the integrity and skills of our unparalleled team of economists and other experts backed by the resources and reliability of one of the world's largest economic consultancies. With its main office in New York City, NERA serves clients from over 20 offices across North America, Europe, and Asia Pacific.

NERA's employment and labor experts advise clients on a wide range of issues both inside and outside the courtroom. We have provided expert testimony on statistical issues both at the class certification phase (on issues of commonality and typicality) and at the liability phase (for class or pattern-and-practice cases). Our experts have extensive experience examining issues of statistical liability in discrimination and other wrongful termination claims. We also provide detailed statistical analyses of workforce composition to identify potential disparities in hiring, layoffs, promotions, pay, and performance assessments, and have conducted studies on labor union issues and on affirmative action programs for historically disadvantaged business enterprises.

NERA Senior Vice President Dr. Jon Wainwright led the NERA project team for this Study. Dr. Wainwright heads NERA's disparity study practice and is a nationally recognized expert on business discrimination and affirmative action. He has authored books, papers, and numerous research studies on the subject, and has been repeatedly qualified to testify on these and other issues as an expert in state and federal courts. At NERA, Dr. Wainwright directs and conducts economic and statistical studies of discrimination for attorneys, corporations, governments, and non-profit organizations. He also directs and conducts research and provides clients with advice on adverse impact and economic damage matters arising from their hiring, performance assessment, compensation, promotion, termination, or contracting activities.

About the Project Team—NERA Research Partners

Abt SRBI is a New York-based business with a national reputation for excellence in computer assisted telephone interviewing. Abt SRBI provides analysis in the rapidly evolving markets and public policy areas of communications, financial services, utilities, transportation, media, health and business services. The firm was founded in 1981 for the explicit purpose of combining high quality analytic capabilities with in-house control of the research implementation to ensure accurate, timely and actionable research used by decision makers working in rapidly changing environments. Abt SRBI clients include the Eagleton Institute at Rutgers, the Annenberg Institute at the University of Pennsylvania, and the major networks. Abt SRBI has conducted numerous surveys of DBEs and non-DBEs on behalf of the NERA team. On this Study, Abt SRBI conducted telephone surveys of race and gender misclassification and of mail survey non-response under the supervision of Abt SRBI Project Manager, Andrew Evans.

Armand Resource Group, Inc. (ARG) is a certified DBE. The firm specializes in the design and implementation of comprehensive diversity programs, as well as compliance monitoring and reporting services. ARG has extensive experience assisting transportation systems and state and local government agencies with compliance requirements and goals. On this assignment, ARG assisted with contract data collection and in publicizing and populating all of the focus group sessions.

Colette Holt & Associates is an Oakland, California-based law practice specializing in public sector affirmative action programs. The firm provides legal and consulting services to governments and businesses relating to procurement and contracting; employment discrimination; regulatory compliance; organizational change; program development, evaluation and implementation; and issues relating to inclusion, diversity and affirmative action. On this Study, Colette Holt provided a review of relevant case law, conducted interviews with Department procurement and contract compliance officials and with business owners, and drafted selected study findings and recommendations.

J&D Data Services is a small business enterprise owned by Mr. Joe Deegan and based in Plano, Texas. After a long career with ScanTron, Mr. Deegan started his own business to offer a solid and proven alternative to the time consuming and expensive job of key data entry long associated with mail surveys. The firm helps its clients conserve their surveying resources by designing and delivering survey instruments that can be electronically and automatically scanned upon return and sent directly to electronic format. J&D Data Services has conducted numerous surveys of DBEs and non-DBEs on behalf of the NERA team. On this assignment, they provided printing, postage, mail-out and mail-back service for the subcontract data collection, and the mail survey.

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Contents

Recommendations for a Revised Disadvantaged Business Enterprise Program	1
A. Augment Race- and Gender-Neutral Initiatives	1
1. Increase Vendor Communication and Outreach to Small Firms	1
2. Increase Certification Outreach and Resources	2
3. Increase Contract “Unbundling”	2
4. Review Surety Bonding, Insurance and Experience Requirements.....	2
5. Ensure Prompt Payments	3
6. Ensure Bidder Non-Discrimination and Fairly Priced Subcontractor Quotations.....	3
7. Enhance the Small Business Element of the DBE Program	4
8. Improve Contract and Subcontract Data Collection and Retention Procedures	7
B. Continue to Implement Narrowly-Tailored DBE Goals for	
Federally-Assisted Contracts	10
1. Use the Study to Set the Overall Annual DBE Goal	10
2. Use the Study to Set DBE Contract Goals.....	11
C. Adopt a DBE Program for State-Funded Contracts.....	11

Recommendations for a Revised Disadvantaged Business Enterprise Program

The Disparity Study for the Missouri Department of Transportation (MoDOT) provides a thorough examination of the evidence regarding the experiences of minority- and women-owned firms in MoDOT's geographic and procurement market areas. As required by strict scrutiny, we analyzed evidence of such firms' utilization by the Department on its prime contracts and associated subcontracts, as well as M/WBEs' experiences in obtaining contracts in the public and private sectors. We gathered statistical and anecdotal data to provide the Department with the evidence necessary to narrowly tailor its Disadvantaged Business Enterprise (DBE) Program for federal-aid contracts, as required by 49 C.F.R. Part 26. We have also provided evidence relevant to whether MoDOT has a compelling interest in remedying identified discrimination in its state-funded contracts for construction and construction-related professional services. Based upon the Study's results, we make the following recommendations.

A. Augment Race- and Gender-Neutral Initiatives

The courts and the DBE Program regulations require that MoDOT use race-neutral approaches to the maximum feasible extent to meet the annual DBE goal. This is a critical element of narrowly tailoring the Program so that the burden on non-DBEs is no more than necessary to achieve the Department's remedial purposes. Increased participation by DBEs through race-neutral measures will also reduce the need to set DBE contract goals. We therefore suggest the following enhancements of MoDOT's current efforts based on the business owner interviews, the input of Department staff, and national best practices for D/M/WBE programs.

1. Increase Vendor Communication and Outreach to Small Firms

Increased communication with the contracting community is critical. Owners of small firms reported difficulties in accessing information about policies and procedures as well as particular solicitations. The Department has made significant strides towards using the Internet to provide access to information, and those efforts should be augmented.

For example, MoDOT requires contractors to submit bids electronically for construction projects on the monthly MoDOT letting schedule. The electronic bidding is through a provider, Bid Express, and the Bid Express system includes a Small Business Network application. The Small Business Network facilitates the interaction between prime contractors and subcontractors. It allows the prime and subcontractors to exchange subquotes and communicate about projects. However, few DBEs have registered for the System. We recommend that information sessions be conducted in the major districts to familiarize firms with the System and seek feedback about any barriers to its utilization by subcontractors.

Another area for additional outreach and education is the Mentor-Protégé Program. While still relatively new, the low participation rate suggests that MoDOT should investigate why so few firms have signed up and take steps to reduce any hurdles reducing interest and applications.

More meetings should be held with the small business community to provide information and address questions regarding upcoming opportunities, as well as facilitating "match making"

Recommendations for a Revised Disadvantaged Business Enterprise Program

sessions between prime contractors and subcontractors, subconsultants, suppliers and truckers (collectively “subcontractors”) to increase familiarity and comfort levels between the firms. Some focus group participants suggested semi-monthly meetings with MoDOT staff and large contractors to introduce themselves and network about upcoming opportunities.

2. Increase Certification Outreach and Resources

Many business owners praised the Department’s certification process and staff for vigorous enforcement of the standards and procedures. Most firm owners understood that the strict application of rigorous standards was necessary for Program integrity. Vigilance must be maintained to ensure that only those truly disadvantaged by their race or gender receive the benefit of the preference.

However, several participants reported that it took many months to become certified, and some white female applicants stated that they believed they were denied certification unfairly in that higher standards were applied to them than to minority applicants. Additional staff to process applications and educate owners to ensure that applicants are conversant with the criteria and processes to create realistic expectations would reduce these concerns.

To increase the pool of firms that can be used to meet contract goals, MoDOT should conduct additional outreach to uncertified minority- and women-owned firms. The Study identified many businesses owned by minorities and women that are not Department certified. The Department should aggressively pursue firms certified with other governments (cities, counties, etc.), as well as those identified through the Study, to encourage applications.

Finally, it would be useful to research the rates at which certified firms submit bids; their success in receiving contracts; and any barriers to their participation in the Program or on Department contracts. We recommend that a questionnaire be administered at the time of recertification by the Missouri UCP to elicit feedback and suggestions for Program enhancements.

3. Increase Contract “Unbundling”

MoDOT has recognized that the size and complexity of the Department’s contracts is a major impediment to D/M/WBEs and other small firms in obtaining work as prime contractors. “Unbundling” contracts into smaller segments was endorsed by almost all firm owners as one method to provide fair access to MoDOT’s projects. In conjunction with reduced insurance and bonding requirements where possible, smaller contracts should permit smaller firms to move from quoting solely as subcontractors to bidding as prime contractors, as well as enhance their subcontracting opportunities. Unbundling must be conducted, however, within the constraints of the need to ensure efficiency and limit costs to taxpayers. We support the Department’s inclusion of unbundling in the small business elements of the Program.

4. Review Surety Bonding, Insurance and Experience Requirements

MoDOT should review surety bonding, insurance and experience requirements so they are no greater than necessary to protect the Department’s interests. There was widespread agreement amongst D/M/WBEs and Department staff that more particularized requirements would greatly

Recommendations for a Revised Disadvantaged Business Enterprise Program

assist all firms. This might include reducing or eliminating insurance requirements on smaller contracts and removing the cost of the surety bonds from the calculation of lowest apparent bidder on appropriate solicitations. MoDOT should review qualification requirements to ensure that M/WBEs, smaller, and newer firms are not unfairly disadvantaged and that there is adequate competition for Department work. For example, equivalent experience, especially that gained by working for other government agencies, should be permitted to increase access for small firms and guard against unfair incumbent advantages.

5. Ensure Prompt Payments

Despite the Department's prompt payment policies, many firms complained about slow payment by the Department to prime firms and by prime contractors to subcontractors. The Department recently enhanced the contract tracking component of its electronic system, whereby contractors and subcontractors can see where the prime contractor's invoice is in the process and facilitate subcontractors' ability to know whether and when their prime contractor has been paid. This addresses the complaint by subcontractors that prime contractors often withhold payment unnecessarily, despite the requirement that prime contractors "pay when paid."

Further, as suggested by the department personnel, small firms need to become better educated about their payment rights. We recommend that detailed information be provided upon certification or during vendor training sessions.

6. Ensure Bidder Non-Discrimination and Fairly Priced Subcontractor Quotations

Many M/WBEs voiced concerns that prime contractors were not soliciting their subcontractor quotes in good faith on Department projects, and failed to solicit them at all on non-goals projects. Many prime contractors reported that M/WBEs display an "entitlement" attitude, and unfairly increase prices, leading to higher contract prices for the Department. To investigate these claims, MoDOT should require bidders to maintain all subcontractor quotes received on larger projects. The prices and scopes can then be compared to ensure that bidders are in fact soliciting and contracting with subcontractors on a non-discriminatory basis and that M/WBEs are not inflating quotes.¹

Another suggestion was to provide with the invitation for bid or request for proposal the scopes of work used by MoDOT to set the contract goal. This would provide guidance to prime firms on specialties on which to concentrate for making good faith efforts, as well as increase transparency about how the DBE program functions.

¹ A similar approach was part of the court-approved DBE plan for the Illinois Department of Transportation. *Northern Contracting, Inc. v. Illinois Department of Transportation*, 2005 U.S. Dist. LEXIS 19868, at * 87 (Sept. 8, 2005) ("IDOT requires contractors seeking prequalification to maintain and produce solicitation records on all projects... Such evidence will assist IDOT in investigating and evaluating discrimination complaints.").

Recommendations for a Revised Disadvantaged Business Enterprise Program

7. Enhance the Small Business Element of the DBE Program

On April 30, 2012, MoDOT submitted to the Federal Highway Administration its small business elements, as required by 49 C.F.R. § 26.39. MoDOT has committed to the following strategies that will be implemented to obtain race-neutral participation:

- Encourage prime contractors to subcontract portions of work normally done by their own forces, when subcontractors submit a lower quote.
- Select solicitations, times for the presentation of bids, quantities and specifications, and delivery schedules to facilitate small business participation.
- Provide technical assistance and other services to increase the number of SBEs competing in the highway industry.
- Provide assistance in overcoming limitations that impede participation in the industry, such as inability to obtain bonding, financing, etc., by providing information on available resources through outreach activities and communications, along with various trainings and workshops.
- Circulate a pamphlet to SBEs that discloses upcoming contracting opportunities, training classes in business management, etc.
- Implement continued supportive services to develop and improve immediate and long-term business management skills, record keeping, and financial and accounting capabilities for SBEs.
- Where feasible, unbundle large contracts to make them accessible to small businesses.
- Maintain and post a directory of certified SBEs on the MoDOT website.
- Continue community outreach, such as “How to Business with MoDOT,” “MoDOT in Your Community,” and annual “Equal Employment Opportunity” workshops to provide information and details on the DBE, SBE and other technical assistance programs.

To become certified as a SBE, a firm must conform to the Small Business Administration (SBA) size standards, contained in 13 C.F.R. § 21.101-201. DBEs are eligible to participate in the SBE elements without a separate application, as by definition they meet the size limit.

While the above elements are important to reducing barriers to small firms participating in MoDOT’s contracts, we recommend that the Department add three enhancements.

Recommendations for a Revised Disadvantaged Business Enterprise Program

a. Adopt a Small Business Set-Aside Element

One of the strategies strongly suggested in 49 C.F.R. § 26.39(b)(1) is the use of race-neutral small business set-asides. In fact, set-asides have always been permitted under the regulations, and their use was clarified and encouraged in guidance from the USDOT General Counsel's office in 2009:

Since the program was substantially revised in 1999, the Department has long recognized that race- and gender-neutral small business set aside programs may be an acceptable means of achieving the objective of § 26.51 without running afoul of the prohibition in § 26.43 against the use of set-asides or quotas. See related Q&A entitled, "Does the rule's limitation on the use of set-asides apply to race-neutral small business set-asides?"²

SBE set-asides have at least three benefits. First, unlike SBE contract goals, they do not diminish opportunities for DBEs on larger projects by putting them in direct competition for available subcontracts with non-DBE subcontractors. Next, awards directly to SBEs that are also DBEs reduces dollar for dollar the necessity to rely on the use of DBE contract goals to achieve the annual goal, thus fulfilling the regulatory mandate to use contract goals only to the extent necessary and the constitutional requirement to narrowly tailor the use of race-based approaches. Finally, and very importantly, this is the only remedy that is available to directly address opportunities for DBEs to perform as prime vendors by ensuring that DBEs and SBEs will receive awards. All other approaches are either subcontracting based (DBE contract goals) or are more general measures that may or may not help DBEs to receive prime awards (outreach, training, etc.). One of the major challenges for the DBE Program nationwide is the development and support of DBE prime contractors. Almost all of the dollars awarded to DBEs are as subcontractors, and often in those sub-industries that, while usually easiest to enter, are also the least profitable and growth oriented.

The set-aside element could be called a Target Market ("TM") element. The term "set-asides," while completely accurate to describe the new element, is often used inaccurately to refer to contract goals, and may also confuse individuals unfamiliar with affirmative action law.

The TM would be limited to only firms certified as SBEs (which by definition includes DBEs) and would be applied only to contracts under a certain threshold. MoDOT will need to determine that level, based upon its contracting history (the regulation lists \$1 million in its discussion). The higher the threshold the more effective the TM will be in ensuring capacity building opportunities. MoDOT should also decide approximately how many contracts per year to include and what total dollar award it seeks to achieve. For example, MoDOT might decide that it seeks to achieve 10 percent of its overall DBE goal through the TM. A numerical objective will serve to meet the regulations requirement that steps be active, not passive, as well as provide a standard for staff to achieve.³ A numerical objective should also inform MoDOT's projection in

² Preamble to 49 C.F.R. § 26.39.

³ 76 Fed. Reg. 5097.

Recommendations for a Revised Disadvantaged Business Enterprise Program

its next FHWA triennial goal submission of the amount of DBE participation it expects to achieve through race-neutral measures.

Small business owners were enthusiastic about a target market approach, and even several non-DBEs supported efforts to increase prime contract opportunities for DBEs, both to enhance DBEs' capabilities and to reduce the need for contract goals to meet MoDOT's overall, annual goal.

Special efforts will be needed to assist firms in bidding and proposing as prime vendors. We recommend that sessions on the requirements of doing business with the Department be conducted that focus on small firms and smaller contracts. One business owner suggested that MoDOT provide access to "mentors" for this purpose, perhaps utilizing retired MoDOT staff, who would bring a special perspective and knowledge to address the problem of lack of access to agency specific procedures and mindsets, as well as possibly lead to introductions that might increase access to networks.

b. Implement a Bonding and Financing Program for SBEs

Access to bonding and working capital are among the two largest barriers to the development and success of D/M/WBEs and small firms. One approach that has proven to be effective for other agencies is to develop a Department-sponsored bonding and financing program for DBEs and certified SBEs. This goes beyond the current provision of information about bonding resources to provide actual assistance to firms.

One model is the City and County of San Francisco's Surety Bond and Financing Program.⁴ This Program makes bonding, financing and technical assistance available to eligible, certified contractors. The Program targets small contractors and DBEs and includes a guarantee pool that provides collateral for loans and bonds up to \$750,000 on construction projects throughout the City. A separate component targets contractors specifically for upcoming mega-projects. The Program includes:

- Consultative and Technical Assistance;
- Contractor assessments;
- Referrals to qualified partner resources, including surety brokers, lenders and Certified Public Accountants;
- Educational opportunities for contractors (bonding, QuickBooks[®] and other systems training, estimating, marketing, etc.);
- Bond guarantees, when needed as additional collateral;
- Third Party Funds Administration (Payment Management System);

⁴ See www.imwis.com.

Recommendations for a Revised Disadvantaged Business Enterprise Program

- Contract monitoring; and
- Pre-claims resolution.

c. **Require SBEs to be Economically Disadvantaged**

If MoDOT adopts a TM and bonding support program, we recommend that economic disadvantage be added as an eligibility criterion for SBE certification because of the quantifiable value these approaches will provide. Imposing the personal net worth limits of the DBE program is an acceptable requirement for participation in SBE preferences.⁵ It is critical that DBEs not be disadvantaged in the operations of the SBE elements. MoDOT should not advantage small firms owned by non-disadvantaged individuals *vis-à-vis* DBEs by lowering the standards for participation in the SBE Program. To do otherwise would be to perpetuate the very discriminatory barriers the DBE program is designed to redress. It is important to make sure, however, that applicants for SBE certification understand that the SBE Program is truly race-neutral and that there is no requirement to establish the owner's social disadvantage.

8. **Improve Contract and Subcontract Data Collection and Retention Procedures**

a. **Data Collection for Subcontractors, Subconsultants, Suppliers, and Truckers**

MoDOT's tracking of subcontractor and subconsultant activity on its own direct contracts is superior to most other state departments of transportation that we have studied. However, it was still necessary to contact the prime contractors and prime consultants to obtain certain information necessary to the disparity study. Based on this experience, we recommend the following revisions to MoDOT's internal data collection and retention procedures:

For direct consulting contracts:

- The amounts paid to the prime consultant should be tracked in the computerized records in addition to the amounts awarded
- When direct consulting contracts are extended, or "supplemented", it should be noted in the computerized records whether DBE and non-DBE subconsultant amounts have also been supplemented
- The amounts awarded and paid to DBE and non-DBE subconsultants should be tracked in the computerized records addition to the names of these firms
- Computerized direct consulting records should clearly indicate whether the contract is federally-assisted or not

⁵ See U.S. DOT "Questions and Answers," December 6, 2011.

Recommendations for a Revised Disadvantaged Business Enterprise Program

For direct construction contracts:

- Prime contractors should be required to report awards and payments to non-DBE suppliers and truckers, in addition to the reporting of awards and payments they already provide for non-DBE subcontractors and subconsultants and to DBE subcontractors, subconsultants, suppliers, and truckers.
- The race, ethnicity, and gender of DBE and non-DBE subcontractors should be tracked in the computerized records

The most effective and least burdensome method to accomplish this additional data collection is to require prime contractors and consultants to submit, either as part of their bid packages or at some other point prior to the purchase or contract award, a standardized form listing all proposed first-tier subcontractors, subconsultants, suppliers, and truckers, including non-DBEs as well as DBEs. This form should clearly identify the prime contract and the prime contractor or consultant, and should include, at a minimum, the following information:

- Unique prime contract/purchase order identification number or code for which the subcontract is related.
- Full legal name of each subcontractor, subconsultant, supplier, and trucker.
- Business address of each subcontractor, subconsultant, supplier, and trucker (street, city, state, zip code).
- Business area code and telephone number of each subcontractor, subconsultant, supplier, and trucker.
- Contact person at each subcontractor, subconsultant, supplier, and trucker (name, title, telephone, e-mail address).
- Original dollar amount of each subcontractor, subconsultant, supplier, and trucker award.
- Brief description of the nature/type of work of to be performed or materials to be provided by each subcontractor, subconsultant, supplier, and trucker.
- Indicator for whether or not each subcontractor, subconsultant, supplier, and trucker is a DBE (including certification status).
- If a subcontractor, subconsultant, supplier or trucker is a minority-owned and/or female-owned, provide an indicator for primary race/sex of owner(s) (i.e., African American, Asian and Pacific Islander, Hispanic, Native American, white female).

Additionally, the prime contractor or consultant should be periodically required during contract performance to certify that no material changes have been made to the proposed roster of subcontractors or subcontract amounts. This could be done at each pay application or each calendar or fiscal quarter. If change orders have been issued to any subcontractors, if new subcontractors have been added, or if original subcontractors have been dropped, then this should be noted and the pertinent details provided. At the final pay application, the prime contractor should be required to certify the final amounts actually paid to each subcontractor. If

Recommendations for a Revised Disadvantaged Business Enterprise Program

this is done, then the following items of information can also be included in the computerized records:

- Cumulative dollar amount of all change orders to each subcontractor, subconsultant, supplier, and trucker subcontract.
- Total dollar payments to each subcontractor, subconsultant, supplier, and trucker through contract completion date.

All of the above data should be maintained for all contracts and purchases greater than the Department's small purchase threshold. Beyond this, MoDOT may wish to consider working with its IT personnel or engage an outside consultant to develop methods to maintain this data electronically for general program management use. The collected information can be integrated into existing data collection systems or, alternately, there are several specialized software products on the market designed to facilitate this process for public agencies.⁶

b. Subrecipient Data Collection

MoDOT's ability to track prime contractor, prime consultant, subcontractor, subconsultant, supplier, and trucker activity on contracts for which it passes through federal assistance dollars (i.e. "subrecipient" contracts, also referred to at MoDOT as "offsystems" contracts), is limited. Since the obligation to report DBE participation on such contracts, as well as to include such activity in future disparity studies, generally falls to MoDOT rather than to the subrecipients, this is an area for improvement.

Currently, computerized records for offsystems consulting contracts contain no information on what firm the subrecipient sponsor agency hired as a prime consultant, nor any information on what firms, if any, the prime consultant hired as subconsultants, subcontractors, suppliers or truckers. This information should be collected by each subrecipient sponsor and provided to MoDOT in a regularized and systematic manner.

Currently, computerized records for offsystems construction contracts contain no information on non-DBE subcontractors, subconsultants, suppliers or truckers. Nor do they contain any information on change orders, payments to primes, or payments to subcontractors, subconsultants, suppliers, or truckers. This information should be collected by each subrecipient sponsor and provided to MoDOT in a regularized and systematic manner.

At a minimum, for each subrecipient contract for which MoDOT provides federal assistance, whether for consulting or construction, records should be maintained specifying:

- The subrecipient sponsor agency.
- Contact person and contact information at the subrecipient agency.

⁶ For additional information and tips on collecting and maintaining subcontract data, see Jon Wainwright and Colette Holt. 2010. *Guidelines for Conducting a Disparity and Availability Study for the Federal DBE Program*. National Cooperative Highway Research Program Report 644. Washington, D.C.: Transportation Research Board, Appendix A.

Recommendations for a Revised Disadvantaged Business Enterprise Program

- Unique prime contract identifying number.
- Full legal name of the prime contractor or consultant.
- Business address of prime contractor or consultant (street, city, state, zip code).
- Business area code and telephone number of prime contractor or consultant.
- Contact person at prime contractor or consultant (name, title, telephone, e-mail address).
- Original dollar amount of prime contractor or consultant award.
- Brief description of the nature/type of work of the prime contract.
- Cumulative dollar amount of all change orders to the prime contracts.
- Indicator for whether or not the prime contractor or consultant is minority-owned or female-owned (including DBE certification status).
- If the prime contractor or consultant is a minority-owned and/or female-owned, indicator for primary race/sex of owner(s) (i.e., African American, Asian and Pacific Islander, Hispanic, Native American, nonminority female);
- Total dollar payments to prime contractor or consultant through contract completion date.

For each prime contract, MoDOT should also maintain all of the subcontractor, subconsultant, supplier, and trucker information listed above under Section 8.a. If this is not possible, MoDOT should at a minimum require that each subrecipient agency maintain this data itself in a suitable and electronically retrievable format.

B. Continue to Implement Narrowly-Tailored DBE Goals for Federally-Assisted Contracts

1. Use the Study to Set the Overall Annual DBE Goal

49 C.F.R. Part 26 requires that MoDOT adopt an annual overall goal for DBE participation in its federally-funded projects covering a three-year period. This Study's availability estimates in Chapter IV should be consulted to determine the Step 1 base figure for the relative availability of DBEs required by § 26.45(c). NERA's custom census is an alternative method permitted under § 26.45(c)(5), and is the only approach that has received repeated judicial approval.

The statistical disparities in Chapter V in the rates at which DBEs form businesses can serve as the basis for a Step 2 in § 26.45(d) adjustment to reflect the level of DBE availability that would be expected in the absence of discrimination. This is "demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought."⁷

⁷ 49 CFR § 26.45(d)(3); *see also* §23.51.

2. Use the Study to Set DBE Contract Goals

As discussed in Chapter III of the Study, the Department's constitutional responsibility is to ensure that its implementation of 49 C.F.R. Part 26 is narrowly tailored to its geographic and procurement marketplace. The highly detailed DBE availability estimates in the Study produced by the custom census can serve as the starting point for contract goal setting. MoDOT can weigh the estimated scopes of the contract by the availability of DBEs in those scopes.

C. Adopt a DBE Program for State-Funded Contracts

a. Evidence of Barriers to State-Funded Contracts

The Study's results support the determination that MoDOT has a strong basis in evidence to implement a M/WBE Program for its non-federal-aid construction and consulting contracts. The record establishes that M/WBEs in the Department's market area continue to experience statistically significant disparities in their access to the Department's state-funded contracts and private sector contracts and to those factors necessary for business success, leading to the inference that discrimination is a significant cause of those disparities. This conclusion is supported by quantitative and anecdotal evidence. This strong evidence would support the adoption of a M/WBE program for state-funded contracts.

Study Table 7.15 shows utilization, availability, and disparity results based on dollars paid for state-funded contracts. For construction, overall DBE utilization was 6.49 percent compared to estimated DBE availability of 20.20 percent. This yields an adverse disparity ratio of 32.15, which is both large and statistically significant. Large and statistically significant disparity ratios were also observed for African Americans, Hispanics, Asian/Pacific Islanders, minorities as a group, and nonminority women. The disparity ratio for Native Americans was large and adverse, but was not statistically significant. Among DBEs, nonminority women accounted for 5.93 percent out of a total of 6.49 percent. Native American utilization accounted for the other 0.56 percent. There was no utilization among African Americans, Asians/Pacific Islanders, or Hispanics. For construction related services, overall DBE utilization was 12.28 percent compared to estimated DBE availability of 21.48 percent. This yields an adverse disparity ratio of 57.16, which is both large and statistically significant. Large and statistically significant disparity ratios were also observed for Hispanics, Native Americans, minorities as a group, and nonminority women. The disparity ratio for Asians/Pacific Islanders was large and adverse, but was not statistically significant.

Recommendations for a Revised Disadvantaged Business Enterprise Program

Table 7.15. Utilization, Availability, and Disparity Results for MoDOT Contracting, Overall and by Contracting Category (Dollars Paid) (State-Funded Contracts)

Contracting Category/DBE Type	Utilization	Availability	Disparity Ratio
Construction			
African American	0.00	2.31	0.14 ***
Hispanic	0.00	0.60	0.00 ***
Asian/Pacific Islander	0.00	0.25	0.00 ***
Native American	0.56	1.26	44.20
Minority-owned	0.56	4.42	12.68 ***
Nonminority female	5.93	15.78	37.61 ***
DBE total	6.49	20.19	32.16 ***
CRS			
African American	2.05	2.38	86.11
Hispanic	0.01	1.05	0.68 ***
Asian/Pacific Islander	0.93	2.66	35.14
Native American	0.00	0.37	0.40 ***
Minority-owned	2.99	6.46	46.34 *
Nonminority female	9.29	15.02	61.81 *
DBE total	12.28	21.48	57.16 **
All Contracting			
African American	0.58	2.54	22.95 **
Hispanic	0.00	0.73	0.27 ***
Asian/Pacific Islander	0.26	0.62	42.83
Native American	0.40	0.91	44.12
Minority-owned	1.25	4.79	26.04 ***
Nonminority female	6.88	15.70	43.85 ***
DBE total	8.13	20.49	39.68 ***

Source and Notes: See Table 7.6.

These disparities establish that the use of DBE contract goals on federal-aid contracts reduced disparities and led to opportunities. In contrast, the results of the analyses of state-funded contracts makes clear that without the use of contract remedies, minorities and women are denied equal access to contracting opportunities. This “unremediated markets” evidence suggests the market failure of continuing discrimination and its effects.

Minorities and women also experienced large and statistically significant disparities in their access to opportunities in the overall construction economy. The analysis in Chapter VII of the market for commercial credit for construction firms revealed that minorities were substantially more likely to be denied a loan, even after accounting for differences in factors like size and credit history, and when they did receive a loan, they paid higher interest rates than comparable nonminority-owned firms. Further, individuals recounted their experiences in Chapter IX with discriminatory barriers to their full and fair participation in MoDOT’s contracting activities. The Study provides quantitative and qualitative evidence of discriminatory practices and attitudes that impede opportunities for minorities and women on all Department projects, regardless of the

Recommendations for a Revised Disadvantaged Business Enterprise Program

funding source. In sum, there is ample evidence that MoDOT can choose to intervene affirmatively to reduce racial and gender barriers to participation in its state-funded contracting opportunities. We therefore make the following suggestions for a narrowly tailored M/WBE Program.

b. Implement a Narrowly Tailored DBE Program

We suggest that MoDOT adopt the elements of the DBE program for federally-assisted contracts for state-funded jobs. In particular, MoDOT should adopt the eligibility standards of Part 26, and recognize MoUCP-certified firms for the State program that have their principal place of business in MoDOT's market, established by the Study as the State of Missouri plus the Kansas portion of the Kansas City, MO-KS Metropolitan Statistical Area, and the Illinois portion of the St. Louis, MO-IL Metropolitan Statistical Area.⁸ MoDOT could also choose to limit the Program to only Missouri-based firms. Other applicants should be able to participate if they can demonstrate on an individual basis that they have done or are actively attempting to do business in this market area.

The Department should also adopt the federal DBE annual goal, and utilize the same approach for setting contract goals. Likewise, program implementation standards such as permitting the demonstration of good faith efforts to meet contract goals; strong monitoring of contract performance, including the requirement that the certified firm perform a commercially useful function and that substitutions must meet certain standards; prompt payment; and other requirements should be adopted.

We urge MoDOT to bid some state-funded contracts that it determines have significant opportunities for M/WBE participation without any M/WBE goals. These "control contracts" can illuminate whether M/WBEs are used or even solicited in the absence of goals, as suggested by the Study data. The development of some unremediated markets data will be probative of whether the new Program remains in order needed to level the playing field for state-funded contracts.

c. Mandate Program Review and Sunset

To meet the requirements of strict constitutional scrutiny, MoDOT should require that the evidentiary basis for the Program for state-funded contracts be reviewed approximately every five years, and that only if there is strong evidence of discrimination should it be reauthorized. The Program's goals and operations must also be evaluated to ensure that they remain narrowly tailored to current evidence. A sunset date for the Program, when it will end unless reauthorized, is required to meet the constitutional requirement of narrow tailoring that race-conscious measures be used only when necessary. A new disparity or other applicable study should be commissioned in time to meet the sunset date.

⁸ The Kansas portion of the Kansas City, MO-KS Metropolitan Statistical Area includes the following counties: Franklin, Johnson, Leavenworth, Linn, Miami, and Wyandotte. The Illinois portion of the St. Louis, MO-IL Metropolitan Statistical Area includes the following counties: Bond, Calhoun, Clinton, Jersey, Macoupin, Madison, Monroe, and St. Clair.

Recommendations for a Revised Disadvantaged Business Enterprise Program



NERA Economic Consulting
Barton Creek Plaza Building II, Suite 330
3801 S. Capital of Texas Highway
Austin, Texas 78704
Tel: +1 512 371 8995
Fax: +1 512 371 9612
www.nera.com