

## **9.0 FINDINGS AND RECOMMENDATIONS**

---

---

## 9.0 FINDINGS AND RECOMMENDATIONS

In May 2008, MGT of America, Inc., (MGT), was retained to conduct Phase I of a minority and female business enterprise disparity study for the City of Tulsa (COT) to determine whether there was a compelling interest to establish narrowly-tailored minority- and female-owned business enterprise (M/FBE) program for COT. The study consisted of fact-finding to examine the extent to which race- and gender-conscious and race- and gender-neutral remedial COT efforts had effectively eliminated ongoing effects of any past discrimination affecting COT's relevant marketplace; analyzing COT procurement trends and practices for the study period FY 2002 through FY 2008 and evaluating various options for future program development.

The purpose of Phase I of this study was to determine if there were disparities in procurement related to the race, ethnicity, or gender of business owners awarded contracts by COT. Phase II of this study added anecdotal and survey evidence, private sector evidence, a legal chapter and a best practices chapter in order to provide a complete factual predicate study and foundations for a comprehensive set of policy recommendations.

The results of this study and conclusions drawn are presented in detail in **Chapters 3.0** through **7.0** of this report. The following sections summarize each of the study's findings.

### 9.1 Findings for M/FBE Utilization and Availability

#### **FINDING 9-1: M/FBE Prime Utilization, Availability and Disparity**

The dollar value and percent of M/FBE prime utilization by COT over the study period is shown in **Exhibits 9-1**. Availability and disparity are also shown in **Exhibits 9-1**.

- Fifteen M/FBEs won 186 prime construction contracts for \$240.8 million (46.03 percent of the total). There was substantial disparity for African American- and Asian American-owned firms.
- Twelve M/FBEs won 117 architecture and engineering (A&E) contracts for \$17.6 million (24.31 percent of the total). There was substantial disparity for African American-owned firms.
- One M/FBEs won one professional services contract for \$46,000 (5.80 percent of the total). There was substantial disparity for African American- and Hispanic American-owned firms.
- Six M/FBEs won nine other services contracts for \$647,767 (6.10 percent of the total). There was substantial disparity for African American, Hispanic American- and Native American-owned firms.
- Four M/FBEs won five goods contracts for \$1.39 million (6.92 percent of the total). There was substantial disparity for African American-owned firms.

**EXHIBIT 9-1  
CITY OF TULSA  
SUMMARY OF PRIME UTILIZATION, AVAILABILITY, AND DISPARITY  
BY BUSINESS CATEGORY  
JULY 1, 2002, THROUGH JUNE 30, 2008**

Business Category	African American	Hispanic American	Asian American	Native American	Nonminority Female	Total M/FBE
<b>Construction Prime Contractors</b>						
Utilization Dollars	\$83,332	\$23,437,772	\$0	\$190,510,854	\$26,799,982	\$240,831,940
Utilization Percent	0.02%	4.48%	0.00%	36.42%	5.12%	46.04%
Availability Percent	2.71%	0.68%	0.23%	4.97%	2.71%	11.30%
Disparity	YES	NO	YES	NO	NO	
<b>Architecture &amp; Engineering Prime Consultants</b>						
Utilization Dollars	\$0	\$0	\$3,809,147	\$5,748,289	\$8,110,282	\$17,667,718
Utilization Percent	0.00%	0.00%	5.24%	7.91%	11.16%	24.31%
Availability Percent	2.53%	0.00%	1.27%	6.33%	3.80%	13.93%
Disparity	YES	N/A	NO	NO	NO	
<b>Professional Services Prime Consultants</b>						
Utilization Dollars	\$0	\$0	\$0	\$46,000	\$0	\$46,000
Utilization Percent	0.00%	0.00%	0.00%	5.80%	0.00%	5.80%
Availability Percent	2.40%	0.80%	0.00%	2.80%	0.00%	6.00%
Disparity	YES	YES	N/A	NO	N/A	
<b>Other Services Firms</b>						
Utilization Dollars	\$175,907	\$0	\$0	\$59,509	\$407,350	\$642,766
Utilization Percent	1.67%	0.00%	0.00%	0.56%	3.87%	6.10%
Availability Percent	2.40%	0.20%	0.00%	0.80%	0.60%	4.00%
Disparity	YES	YES	N/A	YES	NO	
<b>Goods and Supplies Vendors</b>						
Utilization Dollars	\$0	\$0	\$0	\$597,700	\$797,286	\$1,394,986
Utilization Percent	0.00%	0.00%	0.00%	2.97%	3.96%	6.93%
Availability Percent	0.41%	0.00%	0.00%	1.22%	0.10%	1.73%
Disparity	YES	N/A	N/A	NO	NO	

Source: Chapters 4.0 and 5.0, Analysis Results.

**FINDING 9-2: M/FBE Subcontractor Utilization, Availability, and Disparity**

The dollar value and percent of M/FBE prime utilization by COT over the study period is shown in **Exhibits 9-2**. Availability and disparity are also shown in **Exhibits 9-2**.

- Sixteen M/FBEs won 109 construction subcontracts for \$6.1 million (4.69 percent of the total). M/FBEs were 28.17 percent of construction subcontractors. There was substantial disparity in the underutilization of available of all M/FBE construction subcontractors.
- Four M/FBEs won 21 A&E subcontracts for \$278,785 (46.74 percent of the total). M/FBEs were 28.58 percent of A&E subconsultants. There was substantial disparity in the underutilization of available African American, Asian American, and Native American A&E subconsultants.

**EXHIBIT 9-2  
CITY OF TULSA  
SUMMARY OF SUB UTILIZATION, AVAILABILITY, AND DISPARITY  
BY BUSINESS CATEGORY  
JULY 1, 2002, THROUGH JUNE 30, 2008**

Business Category	African American	Hispanic American	Asian American	Native American	Nonminority Female	Total M/FBE
<b>Construction Subcontractors</b>						
Utilization Dollars	\$456,907.00	\$681,192.00	\$0	\$575,830.00	\$4,452,775.00	\$6,166,704
Utilization Percent	0.34%	0.52%	0.00%	0.44%	3.39%	4.69%
Availability Percent	4.40%	2.46%	0.18%	5.81%	15.32%	28.17%
Disparity	YES	YES	YES	YES	YES	
<b>Architecture &amp; Engineering Subconsultants</b>						
Utilization Dollars	\$0	\$0	\$0	\$25,304	\$253,481	\$278,785
Utilization Percent	0.00%	0.00%	0.00%	4.24%	42.50%	46.74%
Availability Percent	1.79%	0.00%	0.89%	5.36%	20.54%	28.58%
Disparity	YES	N/A	YES	YES	NO	

Source: Chapters 4.0 and 5.0 Analysis Results.

## 9.2 Private Sector Findings

### FINDING 9-3: Disparities in the Survey of Business Owners Data

There was evidence of disparities based on the 2002 Survey of Business Owners from the U.S. Census Bureau for the Tulsa MSA:

- *Construction Firms.* Minority-owned firms had 7.5 percent of sales in the Tulsa MSA and 67.2 percent of the market place average revenue per firm. Women-owned firms had 5.4 percent of sales and 76.9 percent of the market place average revenue per firm.
- *Professional Services Firms.* Minority-owned firms had 5.1 percent of sales in the Tulsa MSA and 65.9 percent of the market place average revenue per firm. Women-owned firms had 7.5 percent of sales and 32.0 percent of the market place average revenue per firm.
- *Other Services Firms.* Minority-owned firms had 3.6 percent of sales in the Tulsa MSA and 33.0 percent of the market place average revenue per firm. Women-owned firms had 8.6 percent of sales and 23.4 percent of the market place average revenue per firm.

### FINDING 9-4: Regression Analysis of Firm Revenue and Capacity

In a statistical analysis of local survey data that controlled for the effects of variables related to firm demographics (such as, firm capacity, ownership level of education, and experience), minority firm status had a negative effect on 2008 earnings of African Americans-owned, Hispanic American-owned and Nonminority Woman-owned firms.

**FINDING 9-5: Private Sector Commercial Construction Evidence**

MGT collected data on private sector commercial construction in the Tulsa MSA. M/FBE subcontractor utilization on private sector commercial construction was quite low. M/FBE subcontractors were 2 percent of the firms utilized on private sector commercial projects.

**FINDING 9-6: Credit Evidence**

An econometric analysis of data in the 2003 National Survey of Small Business Finance (NSSBF) found a statistically significant positive relationship between the probability of loan denial and African American ownership. The data also found that African American-owned businesses paid approximately 30 to 150 percent more in interest than non-African American-owned firms (the average interest rate charged on approved loans was about 4.5 percent). In the local survey data, the denial rates were 50.0 percent for African American-owned firms, 6.9 percent for firms owned by nonminority women, and 0.8 percent for nonminority male-owned firms.

**FINDING 9-7: Self-Employment Evidence**

Analysis of American Community Survey data from 2007 found statistically significant disparities in earnings from and entry into self employment for women and minorities in the Tulsa MSA after controlling for education, age, wealth, and other variables as compared to nonminority males. The percentage of the self-employed nonminority male was generally three times that of self-employed African Americans, Hispanic Americans, and women. After controlling for education, age, wealth, and other determinants of self-employment, there were statistically significant differences for entry into self-employment for African Americans, Hispanic Americans, and women for all industries.

**9.3 Anecdotal and Survey Findings**

**FINDING 9-8: Anecdotal Evidence**

Major themes in the public hearings and focus groups included: concerns about favoritism shown to incumbent vendors, “fronts” (firms purporting to be M/FBEs that are not truly M/FBEs), slow pay, competing with large firms, red tape and concerns about bid specifications.

**FINDING 9-9: Survey Evidence**

Among the M/FBEs who responded to survey questions about barriers to doing business, the biggest concern was competing with large firms (123 respondents, 58.6% of M/FBEs). Other key issues noted were as follows:

- Limited time to prepare bids (76 M/FBEs, 36.2%).
- Selection process (70 M/FBEs, 33.3%).
- Bid specifications (63 M/FBEs, 30.0%).

- Size of contracts (51 M/FBEs, 24.5%).
- Thirteen M/FBEs (6.2% of M/FBE respondents) reported discriminatory experiences with city of Tulsa departments over the past three years.
- Forty-one M/FBEs (19.5%) reported discriminatory experiences in the private sector over the past three years. Fifty-six M/FBEs (26.7% of M/FBEs) felt that an informal network had excluded them from work on COT projects.

#### **9.4 Findings for COT M/FBE Policy**

##### **FINDING 9-10: M/FBE Policy**

COT has had an M/FBE business program since 1988. The COT Minority Women Business Development program was changed to the Building Resources in Developing and Growing Enterprises (BRIDGE) program on January 30, 2007. The BRIDGE program is essentially a race neutral small business program with subcontractor goals and good faith efforts. There are no set-asides or bid preferences in the BRIDGE program. The COT maintains a disadvantaged business enterprise (DBE) program for federally-funded projects at the Tulsa Airport Authority.

##### **FINDING 9-11: M/FBE Outreach**

COT has less extensive M/FBE outreach efforts than COT in the past when it sponsored outreach conferences. The current COT outreach efforts include a department newsletter, holding a BRIDGE Networking Expos, partnerships with business chambers of commerce, distributing project information to plan rooms and posting opportunities on the Web.

##### **FINDING 9-12: M/FBE Information on COT Web Site**

COT has the following information relevant to M/FBE on its Web sites: bid opportunities, directory of certified firms, certification application, BRIDGE program description, vendor forms, M/FBE ordinance, how to do business information, bid results, and links to management and technical assistance providers.

##### **FINDING 9-13: Business Development**

COT has provided training on how to do business with COT as well as technical assistance referrals. A number of business organizations and local centers also provide management and technical assistance in the Tulsa metro area.

##### **FINDING 9-14: Access to Capital Assistance**

The COT BRIDGE program does not have an access to capital or a bonding assistance component. Several local institutions and agencies do provide some bonding and lending assistance.

**FINDING 9-15: M/FBE Program Data**

COT had not conducted a disparity study prior to this study.. COT has continued to report M/F/DBE utilization. The Department of Human Rights has obtained tracking software to monitor M/F/DBE utilization. COT tracks M/FBE prime and subcontractor spending, in dollar and percentage terms, and by procurement type. The capture of second tier payments has been inconsistent. The tracking of subcontracting information only covers M/FBE subcontractors. There are a number of limitations to COT M/FBE data:

- Absence of a unique linking field between the vendor table and the contracts and purchase orders.
- Lack of uniformity between COT department's in maintaining contracts and purchase order information. While all department data is kept at the City Clerk's office, the format is not uniform.
- The M/FBE databases have inaccurate vendor IDs and/or vendor names and missing telephone information.

**FINDING 9-16: Commercial Anti-Discrimination Rules**

COT does not expressly mention discrimination in subcontracting in its anti-discrimination language in the COT ordinance establishing the Human Rights Commission. However, the ordinance does address M/FBE subcontractor utilization.

**9.5 Commendations and Recommendations**

Commendations and recommendations that follow are broken into race neutral and M/FBE policy proposals. Most of the following commendations and recommendation are based on multiple findings and do not necessarily tie to one finding,

**Commendations and Recommendations for Race-Neutral Alternatives**

**RECOMMENDATION 9-1: Outreach**

COT should add resources and activities to strengthen or improve outreach to M/FBEs. There are a significant number of large M/FBEs in the Tulsa area. For example, there are 280 MBEs and 278 FBEs registered in the federal Central Contract Registry (CCR) in the Tulsa MSA. COT should insure that as many firms from these lists as is reasonable are on COT's certification list. While a number of these firms perform specialized work, some may be available for City projects as well.

**RECOMMENDATION 9-2: Professionals Services and Other Services**

COT should consider the selective use of vendor rotation to expand utilization of underutilized M/FBE groups. Some political jurisdictions use vendor rotation arrangements to limit habitual repetitive purchases from incumbent majority firms and to ensure that M/FBEs have an opportunity to bid along with majority firms. Generally, a diverse team of firms are prequalified for work and then teams alternate undertaking

projects. A number of agencies, including the Port Authority of New York and New Jersey; the city of Indianapolis; Fairfax County, Virginia; and Miami-Dade County use vendor rotation to encourage utilization of underutilized M/FBE groups, particularly in professional services.

**RECOMMENDATION 9-3: Goods**

**Small Purchases**

COT should require the solicitation of M/FBEs for small purchases. In addition, the use of new M/FBE vendors could be an element in buyer evaluations.

**State Contracts, Master Contracts, and Cooperative Agreements**

COT should institute a policy of encouraging purchasing staff to use M/FBEs that are on state contracts and identified as such when COT uses state term contracts in purchasing. COT should also ask vendors on state contracts, master contracts and cooperative contracts, to report their M/FBE utilization.

**RECOMMENDATION 9-4: Construction**

**Construction Management, Requests for Proposals, and Design-Build**

One method of debundling in construction is to use multi-prime construction contracts in which a construction project is divided into several prime contracts that are then overseen by a construction manager. For example, this approach has been used on projects where each prime contractor is responsible for installation and repair in particular areas. The construction manager is responsible for obtaining materials at volume discounts based upon total agency purchases. If one contractor defaults, a change order is issued to another prime contractor working in an adjacent area.

Construction management also facilitates the rotation of contracts within an area of work. For example, if several subcontractors have the capacity to bid on an extended work activity (e.g., concrete flat work, traffic control, hauling), the construction manager can rotate contracting opportunities over the duration of the activity.

Using a request for proposal (RFP) process can provide the flexibility for including M/FBE participation in prime contractor requirements and selection. One of the nonfinancial criteria can be the proposer's approach to and past history with M/FBE subcontractor utilization as well as female and minority workforce participation. A number of universities around the country, the Charlotte-Mecklenburg School System in North Carolina, and the Tri-County Metropolitan Transportation District of Oregon have had success with this approach.<sup>1</sup>

---

<sup>1</sup> Federal Transit Administration, *Lessons Learned #45* (May 2002).  
[www.fta.dot.gov/library/program/ll/man/ll45.html](http://www.fta.dot.gov/library/program/ll/man/ll45.html)

## **Joint Ventures**

COT should adopt a joint venture policy similar to the one implemented by the city of Atlanta, which requires establishment of joint ventures on projects of over \$10 million.<sup>2</sup> Primes are required to joint venture with a firm from a different ethnic/gender group in order to ensure prime contracting opportunities for all businesses. This rule applies to female and minority firms as well as nonminority firms. It has resulted in tens of millions of dollars in contract awards to female and minority firms.

## **Fully Operated Rental Agreements**

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

## **COMMENDATION AND RECOMMENDATION 9-5: Small Business Enterprise (SBE) Program**

COT should be commended for establishing the BRIDGE program. A strong SBE program is central to maintaining a narrowly tailored program to promote M/FBE utilization. In particular, COT should focus on increasing M/FBE utilization through the BRIDGE program. COT does not face constitutional restrictions on its SBE program, only those procurement restrictions imposed by State law. Specific suggestions for a city SBE program can be found in features of other SBE programs around the United States, including:

- Setting aside contracts for SBEs. The North Carolina Department of Transportation (DOT) sets aside contracts up to \$500,000 for SBEs.
- Granting financial incentives for prime contractors using SBEs that have never worked on an agency project (Colorado DOT).
- Setting aside small financial consulting projects (Port Authority of New York and New Jersey SBE Program).
- Granting financial incentives for training SBEs (Colorado DOT).
- Providing bid preferences to SBEs in bidding on contracts (Port Authority of New York and New Jersey SBE Program; Miami-Dade County, Florida, Community SBE Program; East Bay Municipal Utility District Contract Equity Program, Port of Portland).<sup>3</sup>

---

<sup>2</sup> City of Atlanta Ordinance Sec. 2-1450 and Sec. 2-1451.

<sup>3</sup> The Port of Portland found that 10 percent bid preferences were more effective than 5 percent bid preferences.

- Financial incentives for a prime that waives bonding requirements for a SBE (Colorado DOT).
- Setting SBE goals on formal and informal contracts (City of Charlotte, North Carolina, SBE Program).
- Setting department goals for SBE utilization (City of Charlotte, North Carolina, SBE Program).
- Funding access to low cost insurance on small projects (City of San Diego, California, Minor Construction Program).
- Providing bid preferences to SBEs on tax-assisted projects (City of Oakland, California, Local Small Business Enterprise Program, and Port of Portland Emerging Small Business Program).
- Making SBE utilization part of department performance reviews (City of Charlotte, North Carolina, SBE Program).
- Establishing mentor-protégé programs for small businesses (Port of Portland Emerging Small Business Program).

**RECOMMENDATION 9-6: SBE Program for Subcontracts**

Small business programs are an important component of race-neutral alternatives to address identified disparities in purchasing. COT should consider imposing mandatory subcontracting clauses on contracts where there are subcontracting opportunities and such clauses would promote M/FBE utilization.<sup>4</sup>

**RECOMMENDATION 9-7: Geographical Preferences and HUBZones**

The federal HUBZone program is another variant of an SBE program that provides incentives for SBEs located in distressed areas. For example, under the 1997 Small Business Reauthorization Act, the federal government started the federal HUBZone program. To qualify as a HUBZone firm, a small business must meet the following criteria: (1) it must be owned and controlled by U.S. citizens; (2) at least 35 percent of its employees must reside in a HUBZone; and (3) its principal place of business must be located in a HUBZone.<sup>5</sup> The same preferences that can be given to SBEs can be given to HUBZone firms, such as contract set-asides. The New York Locally Based Enterprise program is similar in that there is a preference for subcontractors (with less than \$2 million in revenue) that perform 25 percent of their work in disadvantaged areas, or whose workforce is made up of at least 25 percent disadvantaged persons.

There are presently 179 firms that are or were previously certified HUBZone firms in the Tulsa MSA. Of these firms, 62.5 percent are M/FBEs. There are 84 HUBZone certified firms in the Tulsa MSA with revenue in excess of \$1 million.

---

<sup>4</sup> San Diego as part of its Subcontractor Outreach Program (SCOPE) has mandatory outreach, mandatory use of subcontractors, and mandatory submission of an outreach document. Whether a contract has subcontracting is determined by the engineer on the project.

<sup>5</sup> 13 C.F.R. 126.200 (1999).

### **RECOMMENDATION 9-8: Commercial Anti-discrimination Rules**

The COT needs to establish a commercial anti-discrimination policy. Some courts have noted that establishing anti-discrimination rules is an important component of race-neutral alternatives. Features of a complete anti-discrimination policy selected from other entities include:

- Submission of a business utilization report on M/FBE subcontractor utilization.
- Review of the business utilization report for evidence of discrimination.
- A mechanism whereby complaints may be filed against firms that have discriminated in the marketplace.
- Due process, in terms of an investigation by agency staff.
- A hearing process before an independent hearing examiner.
- An appeals process to the agency manager and ultimately to a court.
- Imposition of sanctions, including:
  - Disqualification from bidding with the agency for up to five years.
  - Termination of all existing contracts.
  - Referral for prosecution for fraud.

### **RECOMMENDATION 9-9: Business Development Assistance**

The COT needs to devote more resources to business development assistance. COT should review examples of other agencies with substantial business development initiatives. COT should evaluate the impact of these initiatives on M/FBE utilization. COT should follow the example of the Port Authority of New York and New Jersey, for which management and technical assistance contracts have been structured to include incentives for producing results, such as increasing the number of M/FBEs being registered as qualified vendors with the Port Authority, and increasing the number M/FBEs graduating from subcontract work to prime contracting.

### **M/FBE Policy Commendations and Recommendations**

### **RECOMMENDATION 9-10: Narrowly Tailored M/FBE Program**

This study provides evidence to support the reestablishment of a M/FBE program. This conclusion is based primarily on some statistical disparities in current M/FBE utilization, particularly in subcontracting; substantial disparities in the private marketplace; evidence of discrimination in business formation and revenue earned from self-employment; some evidence of passive participation in private sector disparities; and some anecdotal evidence of discrimination. COT should tailor its women and minority participation policy to remedy each of these specific disparities.

The case law involving federal Disadvantaged Business Enterprise (DBE) programs provide important insight into the design of local M/FBE programs. In January 1999, the United States Department of Transportation (USDOT) published its final DBE rule in Title 49, Code of Federal Regulations, Part 26 (49 CFR 26). The federal courts have consistently found the DBE regulations to be narrowly tailored.<sup>6</sup> The federal DBE program has the features in **Exhibit 9-3** that contribute to this characterization as a narrowly tailored remedial procurement preference program. City should adopt these features in any new narrowly tailored M/FBE program.

**EXHIBIT 9-3  
NARROWLY TAILORED M/FBE PROGRAM FEATURES**

Narrowly Tailored Goal-Setting Features	DBE Regulations
COT should not use quotas.	49 CFR 26(43)(a)
COT should use race- or gender-conscious set-asides only in cases where other methods are inadequate to address the disparity.	49 CFR 26(43)(b)
COT should meet the maximum amount of its M/FBE goals through race-neutral means.	49 CFR 26(51)(a)
COT should use M/FBE contract goals only where race-neutral means are not sufficient.	49 CFR 26(51)(d)
COT should use M/FBE goals only where there are subcontracting possibilities.	49 CFR 26(51)(e)(1)
If COT estimates that it can meet the entire M/FBE goal with race-neutral means, then COT should not use contract goals.	49 CFR 26(51)(f)(1)
If it is determined that COT is exceeding its goal, then COT should reduce the use of M/FBE contract goals.	49 CFR 26(51)(f)(2)
If COT exceeds goals with race-neutral means for two years, then COT should not set contract goals the next year.	49 CFR 26(51)(f)(3)
If COT exceeds M/FBE goals with contract goals for two years, then COT should reduce use of contract goals the next year.	49 CFR 26(51)(f)(4)
If COT uses M/FBE goals, then COT should award only to firms that made good faith efforts.	49 CFR 26(53)(a)
COT should give bidders an opportunity to cure defects in good faith efforts.	49 CFR 26(53)(d)

**RECOMMENDATION 9-11: Annual Aspirational M/FBE Goals**

The study provides strong evidence to support the setting of annual aspirational goals by business category, not rigid project goals. To establish a benchmark for goal setting, aspirational goals should be based on relative M/FBE availability. The primary means for achieving these aspirational goals should be the BRIDGE program, race-neutral joint ventures, outreach, and adjustments in City procurement policy. As in the DOT DBE program goals on particular projects should, in general, vary from overall aspirational goals.

Possible revised aspirational goals based on M/FBE availability are proposed below in **Exhibit 9-4**. These proposed goals are similar to in structure to the DBE goal setting process in that the goals are a weighted average of estimated M/FBE availability and prior M/FBE utilization.

<sup>6</sup> *Adarand v. Slater*, 228 F.3d 1147 (10<sup>th</sup> Cir. 2000), *Gross Seed. v. City of Nebraska*, 345 F.3d 968 (8<sup>th</sup> Cir. 2003); cert denied, 158 L.Ed. 2d 729 (2004), *Northern Contracting v. Illinois DOT*, 2005 U.S. Dist. LEXIS 19868 (ND IL 2005).

**EXHIBIT 9-4  
CITY OF TULSA  
PROPOSED M/FBE ASPIRATIONAL GOALS  
BY PROCUREMENT CATEGORY**

Procurement Category	Proposed Goal
Construction	26%
Architecture & Engineering	21%
Professional Services	12%
Other Services	13%
Goods	12%
Construction Subcontracting*	10%
Architecture & Engineering Subcontracting*	35%

\*Subcontractor goals are the percentage of subcontract dollars to be awarded to M/FBEs, not the percentage of the total prime contract.

**RECOMMENDATION 9-12: M/FBE Subcontractor Plans**

The basis for reestablishing good faith efforts M/FBE subcontractor requirements is disparities in construction subcontracting, the very low utilization in private sector commercial construction and other evidence of private sector disparities, even after controlling for capacity and other race-neutral variables. The core theme should be that prime contractors should document their outreach efforts and the reasons why they may have rejected qualified M/FBEs that were the low-bidding subcontractors. Accordingly, the following narrow tailoring elements must be considered:

1. Good faith effort requirements should apply to both M/FBE and non-M/FBE prime contractors.
2. Projects goals should vary by project and reflect realistic M/FBE availability for particular projects.
3. A documented excessive subcontractor bid can be a basis for not subcontracting with an M/FBE.
4. A documented record of poor performance can be a basis for not subcontracting with an M/FBE.<sup>7</sup>
5. Prime contractors should have to submit final payment affidavits to document their M/FBE subcontractor payments.

A stronger M/FBE subcontractor program will require more resources for monitoring contract compliance.

**RECOMMENDATION 9-13: Certification**

**Enforcement.** As noted above complaints about fronts were a common theme in the anecdotal testimony. A stronger S/M/FBE program must be accompanied by more

<sup>7</sup> The last two elements were adopted by the North Carolina Department of Transportation (NCDOT). 19A NCAC 02D.1110(7).

resources, including staff, devoted to weeding out “fronts” from program participation. Finally, there should be stiffer penalties on fronts.

**Socially and Economically Disadvantaged Firms.** COT should consider adding socially and economically disadvantaged firms to its definition of M/FBEs. The North Carolina Historically Underutilized Business (M/FBE) program has this feature. Federally certified DBE, HUBZone and Small Disadvantaged Businesses (SDB) located in COT should automatically qualify for M/FBE status.

**Program Participation Limits.** Another graduation provision is to restrict the overall amount of dollars a program participant can receive. For example, the city of New York graduates firms that have received more than \$15 million in prime contracts within the past three years.<sup>8</sup>

#### **RECOMMENDATION 9-14: RFP Language**

COT should put in their RFPs, particularly for large projects, language asking proposers about their strategies for M/FBE inclusion on the project. A number of agencies, including the Port Authority of New York and New Jersey and the car rental component of the federal DBE program, have had success in soliciting creative responses to these requests, even in areas such as large-scale insurance contracts.

#### **COMMENDATION AND RECOMMENDATION 9-15: Economic Development Projects**

COT should be commended for seeking and achieving inclusion of M/FBEs on the BOK Center project. At this point data tracking of M/FBE utilization on economic development projects has been very limited. This study provides a basis for more aggressive subcontractor goal setting on economic development projects.

#### **COMMENDATION AND RECOMMENDATION 9-16: M/FBE Program Data Management**

COT should be commended for continuing to track M/FBE utilization after establishing the BRIDGE program. It is important for COT to closely monitor the utilization of all businesses by race, ethnicity, and gender, and by prime and subcontractor utilization, over time to determine whether City’s BRIDGE has the potential to eliminate race and gender disparities. COT should consider implementing a centralized vendor database that tracks ethnicity data and telephone numbers in addition to the address information currently kept for all vendors and bidders. COT should also consider installing a unique linking field between the vendor table and the contracts and tracking nonminority male subcontractor utilization.

#### **COMMENDATION AND RECOMMENDATION 9-17: M/FBE Information on City Web Site**

COT should be commended for having important information relevant too M/FBEs on its web site. A survey of agencies has found the following additional information on their M/FBE Web sites: information on the loan programs, comprehensive contracting guides, M/FBE ordinance, status of certification applications, data on SBE and M/FBE utilization, annual M/FBE program reports, direct links to online purchasing manuals, capacity, bonding, qualifications and experience data on certified firms, and 90-day forecasts of business opportunities. COT should consider incorporating some of this information into its Web site.

---

<sup>8</sup> Local Laws of New York, Section 9-1292 (c) (17).