

SECTION ES.

Executive Summary

BBC Research & Consulting (BBC) conducted a *disparity study* to evaluate whether person of color (POC)-, woman-, and service-disabled veteran (SDV)-owned businesses face any barriers in the State of Oregon's (the state's) construction; professional services; and non-professional services, goods, and supplies contracts and procurements. As part of the disparity study, we examined whether there are any disparities, or differences, between:

- The percentage of contract and procurement dollars executive branch agencies awarded to POC-, woman-, and SDV-owned businesses during the *study period*, which was July 1, 2017 to June 30, 2022 (i.e., *utilization, or participation*); and
- The percentage of contract and procurement dollars one might expect executive branch agencies to award to POC-, woman-, and SDV-owned businesses based on their availability to perform specific types and sizes of state contracts and procurements (i.e., *availability*).

Information from the disparity study will help the state better understand outcomes for POC-, woman-, and SDV-owned businesses in its contracting and procurement and help the agency address any substantial disparities between the participation and availability of POC- and woman-owned businesses in agency work. Moreover, if the state determines that it is appropriate to use race- and gender-conscious measures to address substantial disparities (e.g., awarding individual contracts and procurements with the use of POC- and woman-owned business participation goals), then the agency can rely on information from the disparity study to help ensure its use of such measures adheres to the *strict scrutiny* and *intermediate scrutiny* standards of constitutional review, respectively.

A. Disparity Study Results

BBC analyzed \$3.2 billion of worth of contracts and procurements executive branch agencies awarded during the study period to measure the participation and availability of POC- and woman-owned businesses for state work to assess whether any disparities exist between those measures. We summarize key results from those analyses below and identify sections of the report that provide more details about the methodology and results of each analysis.

1. Availability analysis (Chapter 7 and Appendix D of the report). BBC conducted a *custom census availability analysis* to estimate the availability of POC-, woman-, and SDV-owned businesses for state work while accounting for the specific characteristics of relevant businesses that exist in the Oregon marketplace and the specific characteristics of the relevant prime contracts and subcontracts executive branch agencies award. Figure ES-1 presents the availability of each relevant group of POC- and woman-owned businesses for relevant state contracts and procurements overall. The availability of those businesses is 33.9 percent for state work. The business groups that exhibit the greatest availability for state work are white woman-owned businesses (18.6%), Asian American-owned businesses (8.3%), and Hispanic American-owned businesses (5.1%). In addition, the availability of SDV-owned businesses is 3.9 percent for the contracts and procurements the state awards (not shown in Figure ES-1).

Figure ES-1.
Availability estimates for state work

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

Source:

BBC availability analysis.

Business group	Availability
White woman-owned	18.6 %
Asian American-owned	8.3 %
Black American-owned	0.5 %
Hispanic American-owned	5.1 %
<u>Native American-owned</u>	<u>1.5 %</u>
Total POC-owned	15.3 %
Total POC- and woman-owned	33.9 %

2. Utilization analysis (Chapter 8 of the report). BBC also calculated the participation of POC-, woman-, and SDV-owned businesses in relevant contracts and procurements executive branch agencies awarded during the study period. As shown in Figure ES-2, during the study period, the state awarded 10.9 percent of its relevant contract and procurement dollars to POC- and woman-owned businesses. The groups that exhibited the greatest levels of participation in that work were white woman-owned businesses (6.6%), Hispanic American-owned businesses (2.0%), and Native American-owned businesses (1.3%). In addition, the participation of SDV-owned businesses was 1.3 percent in work state executive branch agencies awarded during the study period (not shown in Figure ES-2).

Figure ES-2.
Utilization analysis results for state work

Note:

Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.

Source:

BBC utilization analysis.

Business group	Utilization
White woman-owned	6.6 %
Asian American-owned	1.0 %
Black American-owned	0.1 %
Hispanic American-owned	2.0 %
<u>Native American-owned</u>	<u>1.3 %</u>
Total POC-owned	4.3 %
Total POC- and woman-owned	10.9 %

3. Disparity analysis (Chapter 9 and Appendix E). The crux of the disparity study was to assess whether any disparities exist between the participation of POC-, woman-, and SDV-owned businesses in the state work and the availability of those businesses for that work. A *substantial disparity* between participation and availability—that is, a disparity where participation is 80 percent or less of availability—for a particular racial/ethnic or gender group is interpreted by courts as an inference of discrimination against that group in the marketplace and often serves as evidence that the organization of interest could consider using race- or gender-conscious measures to address barriers for that group (for details, see Chapter 2).

Figure ES-3 presents a visualization of the various sets of state contracts and procurements for which relevant POC- and woman-owned business groups exhibited substantial disparities, as indicated by black circles. Most POC- and woman-owned business groups showed substantial disparities for all the contract and procurement sets shown in Figure ES-3 with the exception of Native American-owned businesses. Native American-owned businesses showed substantial disparities for prime contracts and professional services projects but did not show substantial disparities for any other projects sets presented in Figure 11-3. Those disparities indicate inferences of discrimination against relevant POC-

and woman-owned business groups in the Oregon marketplace and as part of the state’s contracting and procurement. In addition, SDV-owned businesses also showed a substantial disparity for the relevant contracts and procurements state executive branch agencies awarded during the study period (not shown in Figure ES-3).

Figure ES-3.
Substantial disparities observed for state work

Contract set	Business group						
	All POC and white woman	All POC	White woman	Asian American	Black American	Hispanic American	Native American
All work	●	●	●	●	●	●	
Construction	●	●	●	●	●	●	
Professional services	●	●	●	●	●	●	●
Non-prof. svcs., goods, supplies	●	●	●	●	●	●	
Prime contracts	●	●	●	●	●	●	●
Subcontracts	●		●	●	●	●	

Notes: ● indicates substantial disparity

Source: BBC disparity analysis.

Further examination of utilization analysis results indicated that a relatively small number of POC- and woman-owned businesses accounted for a notably large proportion of the total dollars the state awarded to all POC- and woman-owned businesses during the study period. BBC examined whether the dollars those businesses, or any other POC- or woman-owned business to which executive branch agencies awarded dollars during the study period, met the definition of being *statistical outliers*—that is, data points that differ in extreme ways from all other data points in a data set (for details, see Chapters 8 and 11). Using a two-and-a-half standard deviation test, we found that the five POC- and woman-owned businesses to which the state awarded the most dollars, and the four POC- and woman-owned businesses to which the organization awarded the least dollars, were statistical outliers.

After accounting for all nine statistical outliers by adjusting their awarded dollars in a manner consistent with best practices in statistics and social science, larger disparities emerged for relevant POC- and woman-owned business groups across key sets of state contracts and procurements. Figure ES-4 presents the substantial disparities we observed for each relevant group on various sets of state contracts and procurements after accounting for statistical outliers. Those results even more clearly indicate that inferences of discrimination exist for all groups of POC- and woman-owned businesses operating in the marketplace.

B. Guidance

BBC observed substantial disparities between the participation and availability of POC-, woman-, and SDV-owned businesses for the contracts and procurements executive branch agencies awarded during the study period. We present guidance on how the state can use that information and other information from the disparity study to further encourage the participation of those businesses in its work and address the disparities we observed effectively and in a legally defensible manner, including potentially using race- and gender-conscious measures to do so. In considering the guidance we provide, the state should be mindful of the legal requirements surrounding the use of race- and gender-conscious measures in particular, including state and federal regulations as well as relevant case law. The

organization should consult closely with its Department of Justice in developing any new policies or programs related to POC-, woman-, and SDV-owned businesses to ensure they are consistent with the requirements of the strict scrutiny, intermediate scrutiny, and *rational basis* standards of constitutional review, respectively. We present key recommendations below and present additional recommendations and more information relevant to those recommendations in Chapter 11 of the report.

Figure ES-4.
Substantial disparities observed for state work after accounting for statistical outliers

Contract set	Business group						
	All POC and white woman	All POC	White woman	Asian American	Black American	Hispanic American	Native American
All work	●	●	●	●	●	●	●
Construction	●	●	●	●	●	●	
Professional services	●	●	●	●	●	●	●
Non-prof. svcs., goods, supplies	●	●	●	●	●	●	
Prime contracts	●	●	●	●	●	●	●
Subcontracts	●		●	●	●	●	

Notes: ● indicates substantial disparity (i.e., disparity index of 80 or less)

Source: BBC disparity analysis.

1. Overall POC-/woman-owned business target. BBC recommends that the state should consider establishing an overall aspirational target for the participation of POC- and woman-owned businesses in the contracting and procurement work it awards (and SDV-owned businesses if the state desires). An overall POC-/woman-owned business target could help create a shared commitment to, and understanding of, the state’s equity objectives among internal and external stakeholders and help guide efforts the agency uses to try to achieve its overall target each year through various measures. If the state establishes an overall POC-/woman-owned business target, it would monitor the participation of POC- and woman-owned businesses in its work each year. If it fails to achieve its target in a particular year, it would assess reasons why it failed to do so and develop plans to achieve its target the following year, including potential refinements to existing program measures and the introduction of new program measures, as necessary.

2. POC-/woman-owned business contract goals. Currently, the state only uses *race- and gender-neutral* measures as part of its contract and procurement processes, which are designed to encourage the participation of all businesses in its work, regardless of the race/ethnicity or gender of business owners. However, despite those efforts, the disparity study shows substantial disparities for all relevant POC- and woman-owned business groups across different sets of contracts and procurements the executive branch agencies award. Based on that and other evidence in the disparity study, BBC recommends that the state should consider whether the use of race- and gender-conscious contract goals would help address the disparities POC- and woman-owned businesses face as part of the state’s contract and procurement processes.

As part of a POC-/woman-owned business contract goals program, the state would set percentage goals for the participation of those businesses on individual contracts and procurements executive branch agencies award. Those goals would be based on the availability of eligible POC- and woman-owned businesses for the types of work involved in the project and other relevant factors. Based on that

information, goals would vary from project to project, and sometimes they might be 0 percent. As a condition of contract or procurement award, prime contractors would have to meet contract goals as part of their bids, quotes, or proposals by making participation commitments with eligible, certified POC- and woman-owned businesses or by demonstrating they made genuine and sufficient good faith efforts (GFEs) to do so. Prime contractors that fail to meet contract goals—either by participation commitments or by demonstrating GFEs—would be considered non-responsive and their bids, quotes, or proposals would be considered ineligible for award.

There are various considerations the state would have to make as part of using race- and gender-conscious contract goals, particularly around using race-conscious goals, including:

- Determining which business groups are eligible to participate in a race- and gender-conscious contract goals program based on evidence of substantial disparities between the participation and availability of each group for agency work; and
- Assessing whether it is maximizing its use of race-neutral measures before considering the use of race-conscious measures.

3. New businesses. Utilization analysis results indicate that the vast majority of the contract and procurement dollars the state awarded to POC- and woman-owned businesses during the study period went to a relatively small number of businesses, to each of which the organization awarded multiple projects. To expand the number of POC- and woman-owned businesses that participate in state work, the agency could consider using bid, quote, and Request for Proposal requirements to encourage prime contractors to partner with subcontractors and suppliers with which they have never worked in the past. For example, as part of the bid process, the state could ask prime contractors to submit information about the efforts they made to identify and team with businesses with which they have not worked in the past. The organization could award evaluation points or price preferences based on the degree to which prime contractors partner or attempt to partner with subcontractors with which they have not previously worked.

4. Alternative teaming arrangements. Anecdotal evidence the study team collected as part of the disparity study indicated that many business representatives are interested in working as prime contractors but are often only able to work as subcontractors due to capacity limitations and lack of opportunities. They discussed various barriers to obtaining prime contract work, including their inability to gain the experience or capital to bid on prime contract opportunities. The state could better support business growth by identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or alternative teaming arrangements—such as joint ventures or co-prime relationships—to compete for and perform prime contracts. Encouraging alternative teaming arrangements could allow small businesses, including many POC-, woman-, and SDV-owned businesses, to build their capacities for larger projects and gain experience working as prime contractors while mitigating some of the difficulties and costs of doing so.

5. Subcontracting minimums. Subcontracts often represent accessible opportunities for small businesses to become involved in an organization’s contracting and procurement. To increase subcontract opportunities, the state could consider implementing a program that requires prime contractors to subcontract a minimum amount of projects. For specific projects where subcontracting opportunities might exist, the state could set minimum percentages of work to be subcontracted. Prime

contractors would have to meet or exceed those minimums in order for their bids or proposals to be considered responsive. If the state were to implement such a program, it should include GFE provisions that would require prime contractors to document their efforts to identify and include potential subcontractors in their bids or proposals if they fail to make subcontract commitments.

6. Small business contract goals. The state currently does not use contract goals to encourage the participation of small businesses in its work, although it encourages the participation of businesses certified by the Certification Office for Business Inclusion and Diversity through various executive orders and policies. The state could consider establishing contract goals for certified Emerging Small Businesses on certain contracts and procurements in a manner similar to the one outlined for POC- and woman-owned businesses earlier in this section, but for which the race/ethnicity or gender of business owners would not be a factor.

7. Small business set-asides. The state might consider reserving certain, small prime contracts exclusively for small business bidding to encourage the participation of those businesses—including many POC-, woman-, and SDV-owned businesses—as prime contractors. As part of the anecdotal evidence process, business representatives identified many advantages of set-aside programs for small businesses such as fostering familiarity with an organization’s contracting and bidding processes; experience working as prime contractors; and growth through winning larger, steadier projects.

8. Prompt payment. Anecdotal evidence indicates that delayed payments are an issue for many businesses, but it disproportionately affects small businesses, including many POC-, woman-, and SDV-owned businesses. In addition, businesses that perform work as subcontractors highlighted difficulties obtaining payments from prime contractors, with some noting that delays associated with prime contractors receiving payments trickle down to subcontractors, and others indicating that prime contractors sometimes withhold payment entirely. The state could consider inserting prompt payment language in its contracts and solicitations and implementing a system to track payments to subcontractors to ensure prompt payment.

9. Disparity studies. The state should consider conducting disparity studies on a regular basis, particularly if it decides to implement race- or gender-conscious measures. Many organizations conduct studies every three to five years to understand changes in their marketplaces, refine program measures, and ensure up-to-date information on the participation and availability of small and disadvantaged businesses in their work, including identifying which groups are substantially underutilized in their contracts and procurements. Codifying the intervals at which it commissions disparity studies will help ensure the state has up-to-date information about outcomes for POC-, woman-, and SDV-owned businesses in its work, regardless of changes in the political climate or the individuals in leadership positions. In addition, the state should establish provisions that limit the use of any race- or gender-conscious measures contingent on disparity study results. For example, the state could set sunset provisions on race- or gender-conscious contract goals program to expire after five years if disparity study results do not show substantial disparities for relevant business groups after that time.