

# Oregon Department of Transportation BIPOC Contracting Expansion Anti-Oppression Barriers Analysis

October 1, 2021

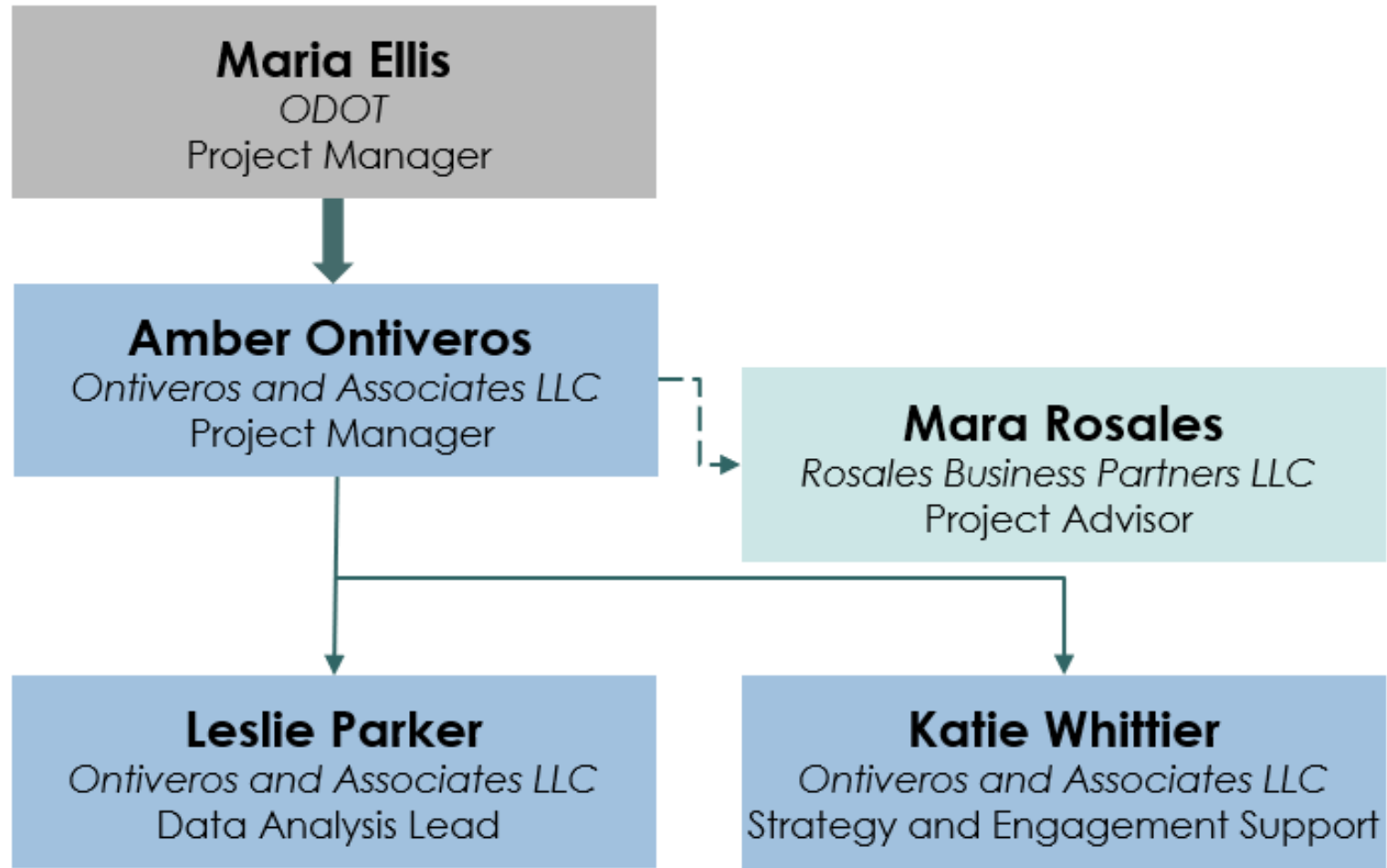


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# 1. Study Background

# Project Team



# Amber Ontiveros



## Civil Rights and Diversity Program Expert

***Amber Ontiveros is a national leader in developing diversity, equity, and inclusion programs and an expert in USDOT civil rights regulation and policy.***

- DBE program innovation, regulation and compliance
- Disparity studies
- Goal-setting and race-neutral programming
- DBE/OJT programming on mega-projects, including Rose Quarter
- DMWBE owner



# Mara Rosales

## Policy and Legal Expert

***Mara Rosales is the Founder and Managing Partner of Rosales Business Partners, a consulting firm, and Rosales Law Partners, a law firm. She has expertise in government law and public policy. Her core practice areas are transportation, public contracts, constitutional/civil rights, and regulatory compliance.***

- Legal expertise
- Federal DBE Program, DMWBE program implementation
- Diversity policy
- DMWBE owner

# Agency Overview



## **ODOT Mission:**

*To provide a safe and reliable multimodal transportation system that connects people and helps Oregon's communities and economy thrive.*

## **ODOT Responsibilities:**

ODOT develops and operates programs related to:

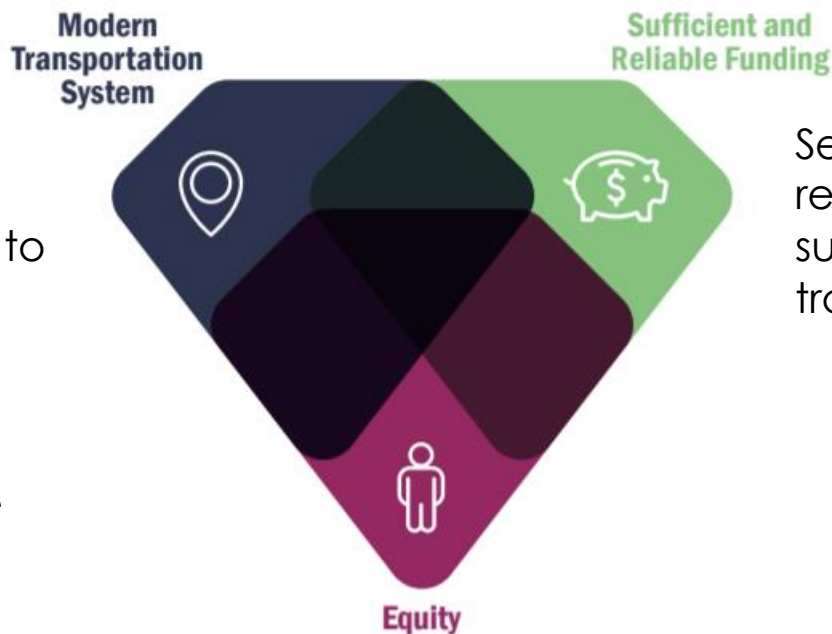
- Highways, roads, bridges, bikeways, & walkways
- Railways
- Public transportation services
- Transportation safety programs
- Driver licensing and vehicle titling / registration
- Motor carrier / trucking regulation

# ODOT Strategic Action Plan Goals

## ODOT Goals (per Strategic Action Plan):

To unite their mission with their responsibilities, ODOT is focusing on:

Building a modern, multimodal transportation system to serve all Oregonians, address climate change, and help Oregon communities and economies thrive



Seeking sufficient and reliable funding to support a modern transportation system

Identifying and addressing systemic barriers to ensure all Oregonians benefit from transportation services and investments

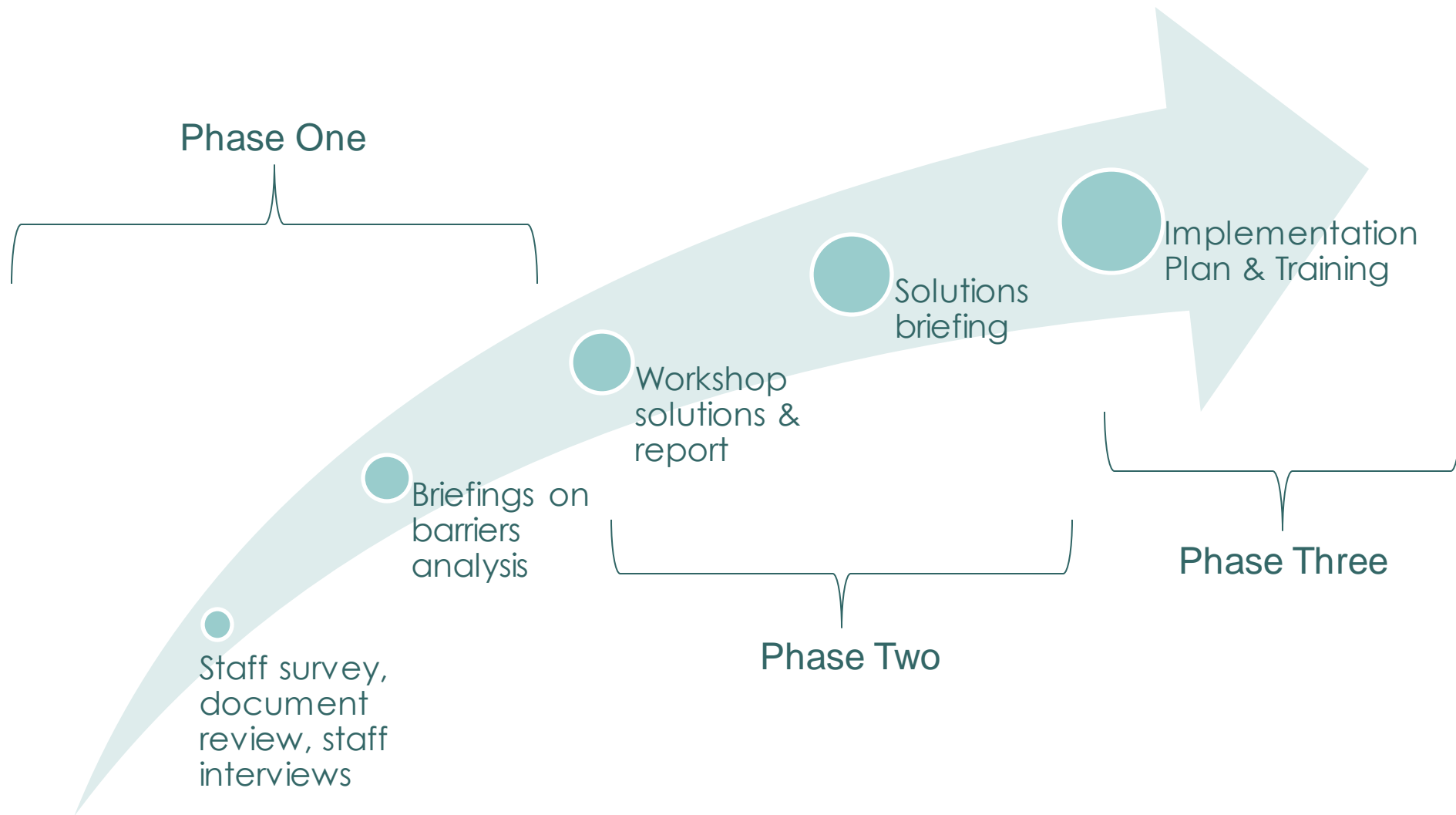


# Study Scope: A Closer Look at the Disadvantaged Business Enterprise (DBE) Program

Disadvantaged Business Enterprise (DBE) certified firms referred to include BIPOC-owned and women-owned firms and act as an illustration of ODOT's implementation of remedial measures.

- Study goals: generally assess barriers to BIPOC contracting expansion
- Agency measures are mostly around DBE Program implementation
- ODOT tracks metrics to meet DBE program requirements, not necessarily to understand its contracting with BIPOC-owned firms

# Study Scope and Sources of Insight



# Phase 1: Study Scope and Sources of Insight

The Study Team conducted a broad review of ODOT programs and activities to assess where unintentional barriers are created for BIPOC firms.

- Document review (list of documents included as Appendix A)
- Targeted ODOT staff survey (see Appendix B)
- Targeted ODOT internal staff interviews (Appendix C)
- Research on, and interviews with other Ninth Circuit State departments of transportations (Arizona, California, Nevada, and Washington)

# Phase 1: Study Scope and Sources of Insight

The targeted ODOT staff survey reviewed participants' perspective and insights on BIPOC contracting-related programs and activities, including information on potential barriers to BIPOC firms.

- Survey recipients included leadership team, plus Office of Civil Rights (OCR) and ODOT Procurement Office (OPO) staff
- Of 131 recipients, 82 started the survey and 60 completed it
- Topics included questions related to the DMWBE marketplace experience, input on potential barriers, familiarity with DMWBE program tracking and analysis tools, prime monitoring

# Phase 1: Study Scope and Sources of Insight

For the ODOT internal systems staff interviews, the Study Team:

***“We deserve the right to get smarter.”***

*SOURCE: ODOT internal systems staff interviews.*

- Held group discussions on BIPOC contracting expansion tools, challenges, and where to focus efforts going forward
- Met with ODOT Procurement Office, Region, Office of Civil Rights, Project Delivery, and Construction team members

## **2. Barriers Related to Resourcing Constraints**

# Equity in the ODOT Strategic Action Plan

- ODOT Strategic Action Plan includes goal to “promote economic opportunity for Oregonians through transportation investments, including working with businesses owned by Black, Indigenous, People of Color (BIPOC), women, and others who have been historically and/or are currently marginalized.”
- The new Office of Social Equity (OSE) includes the Office of Civil Rights (OCR).

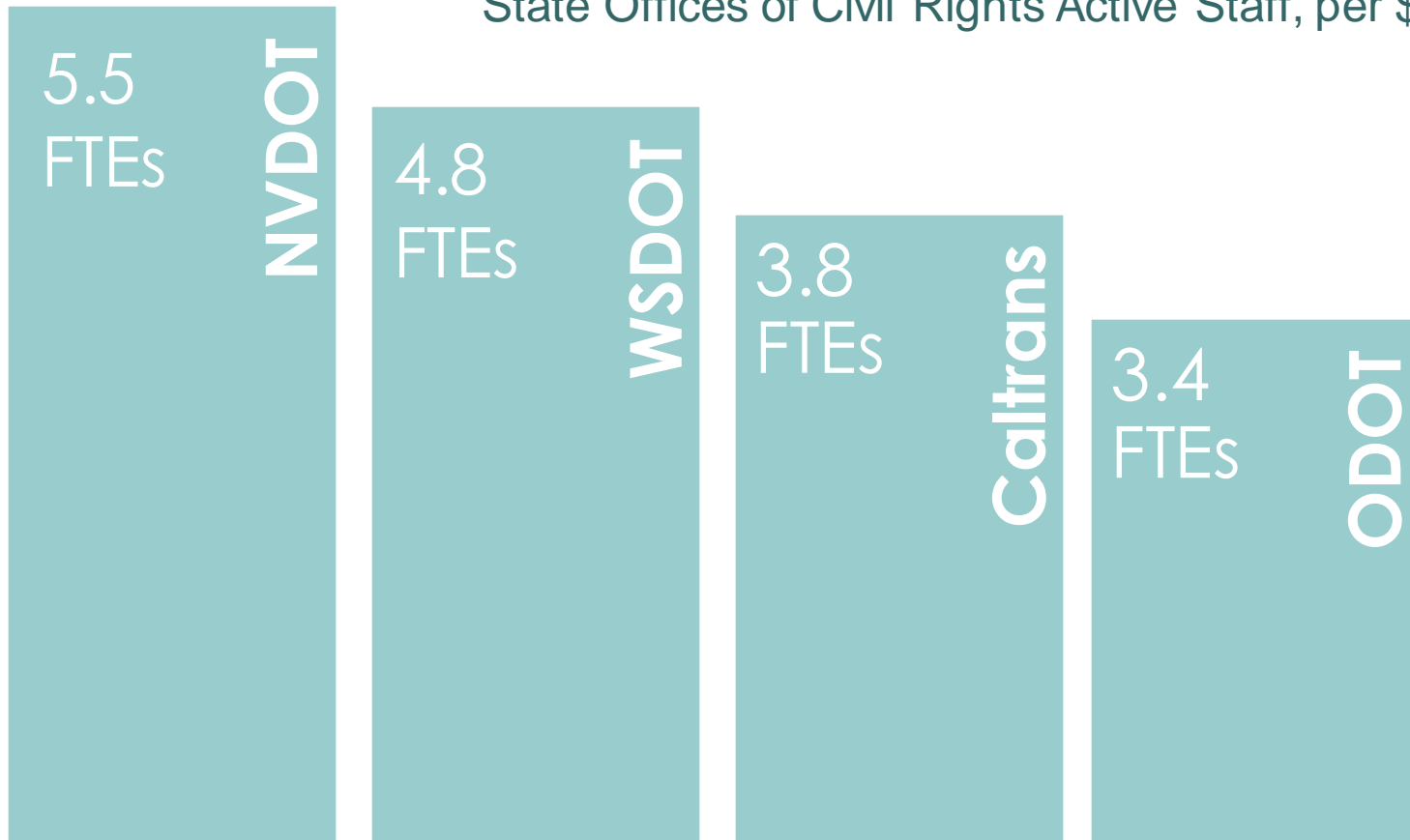


ODOT's Office of Civil Rights role includes oversight and implementation of:

- Small Business Resources
- Disadvantaged Business Enterprise Program (DBE)
- Emerging Small Business Program (ESB)
- Minority/Women Business Enterprise (M/WBE)
- Service Disabled Veteran (SDV)
- Mentor-Protégé Program
- Workforce Development Program

# Resourcing at Peer Agencies – Active Staff

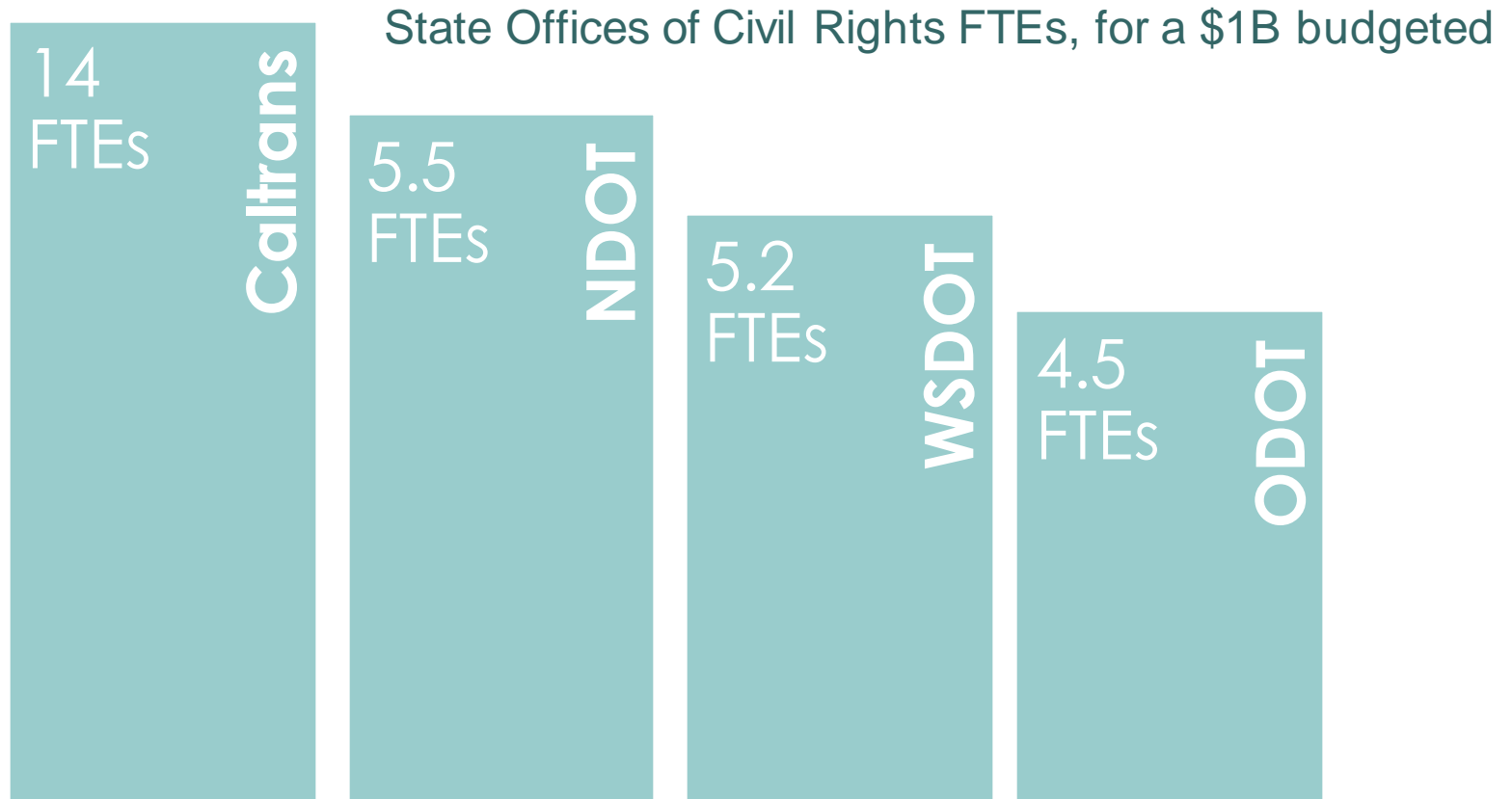
State Offices of Civil Rights Active Staff, per \$1B



**FINDING:** ODOT Office of Civil Rights understaffed compared to other State DOTs.



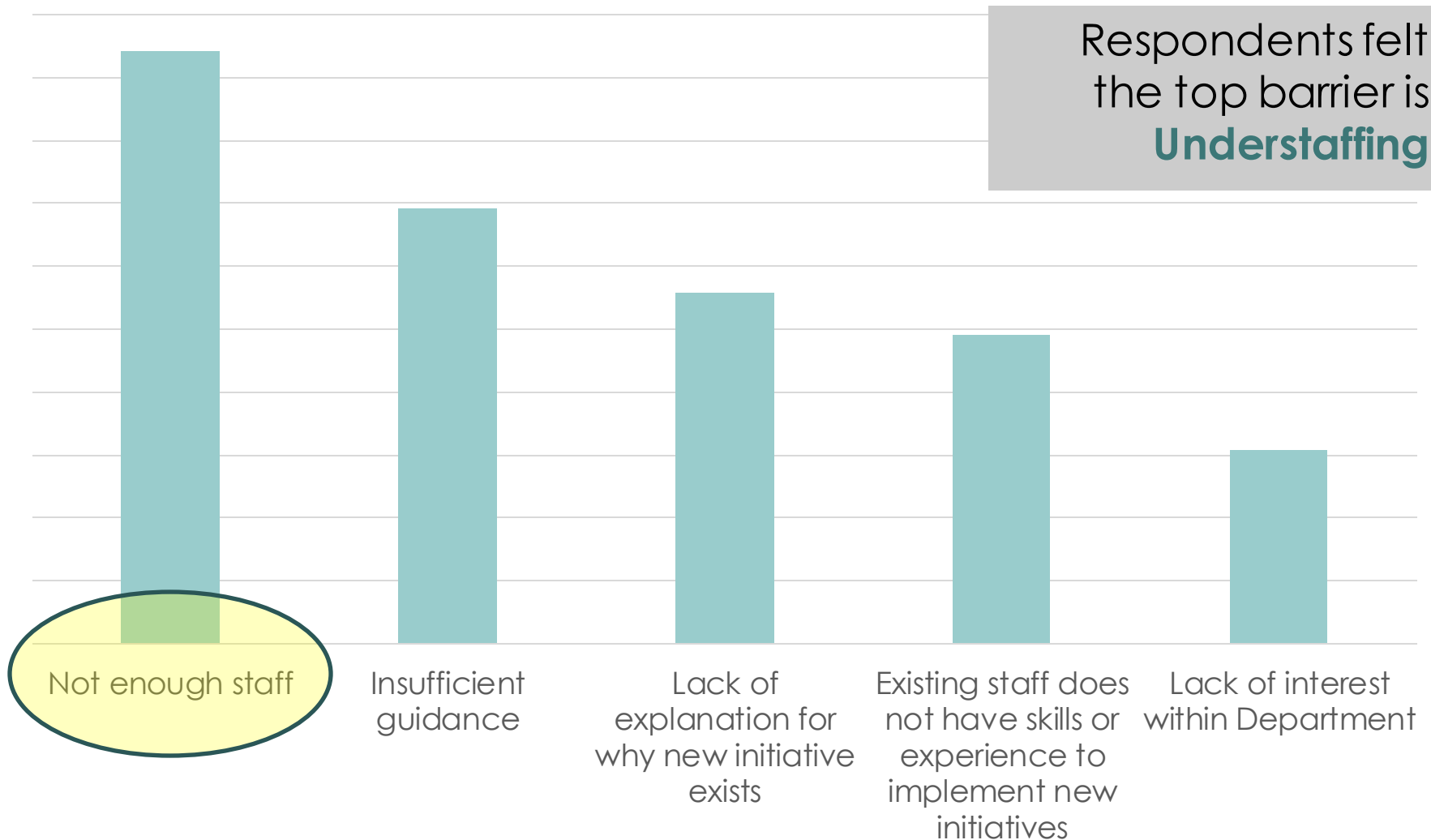
# Resourcing at Peer Agencies – Funded FTEs



**FINDING:** ODOT Office of Civil Rights significantly underfunded compared to other State DOTs.

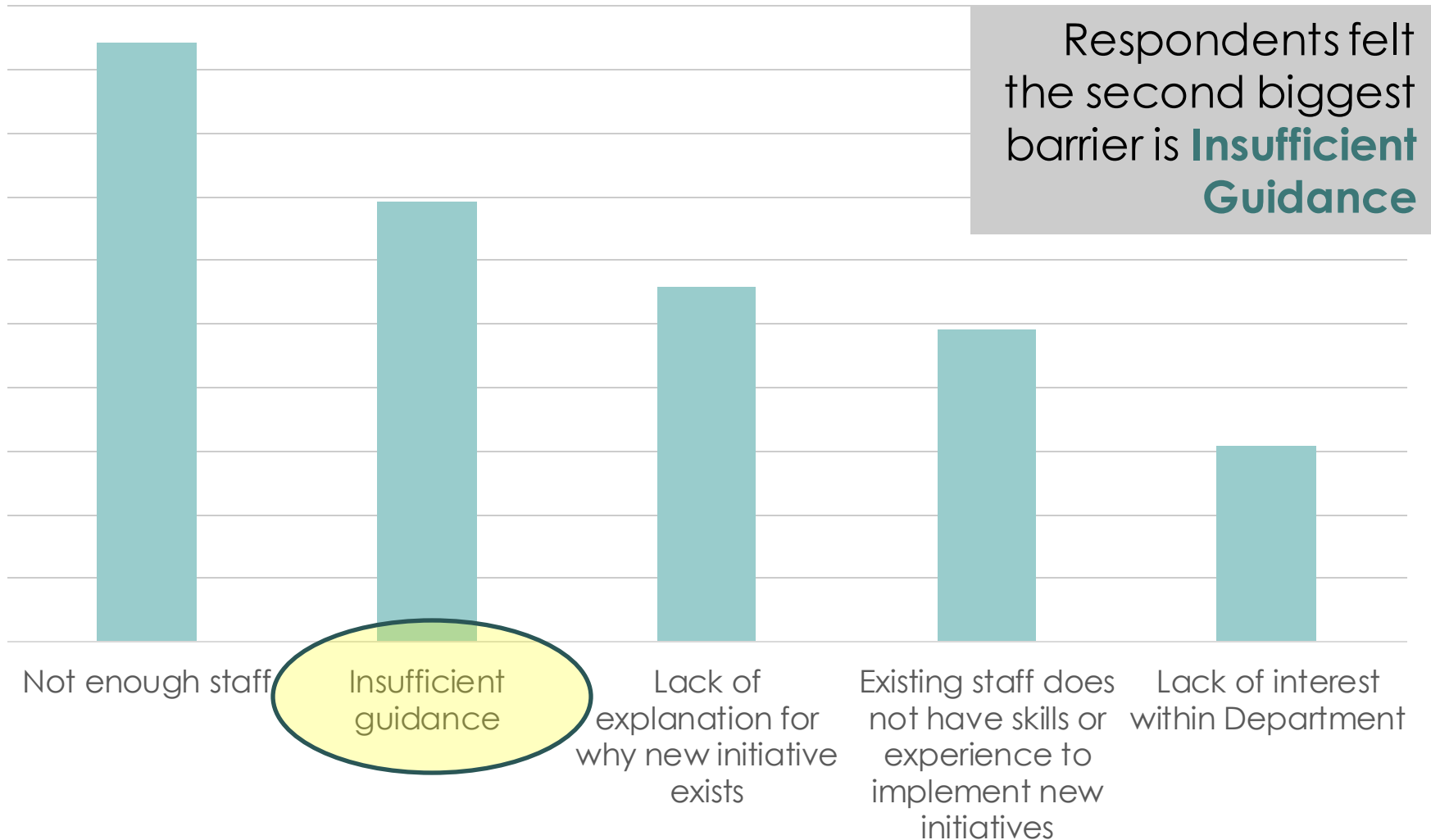
# Staff Survey Confirms Finding

## Top barriers to implementing new initiatives



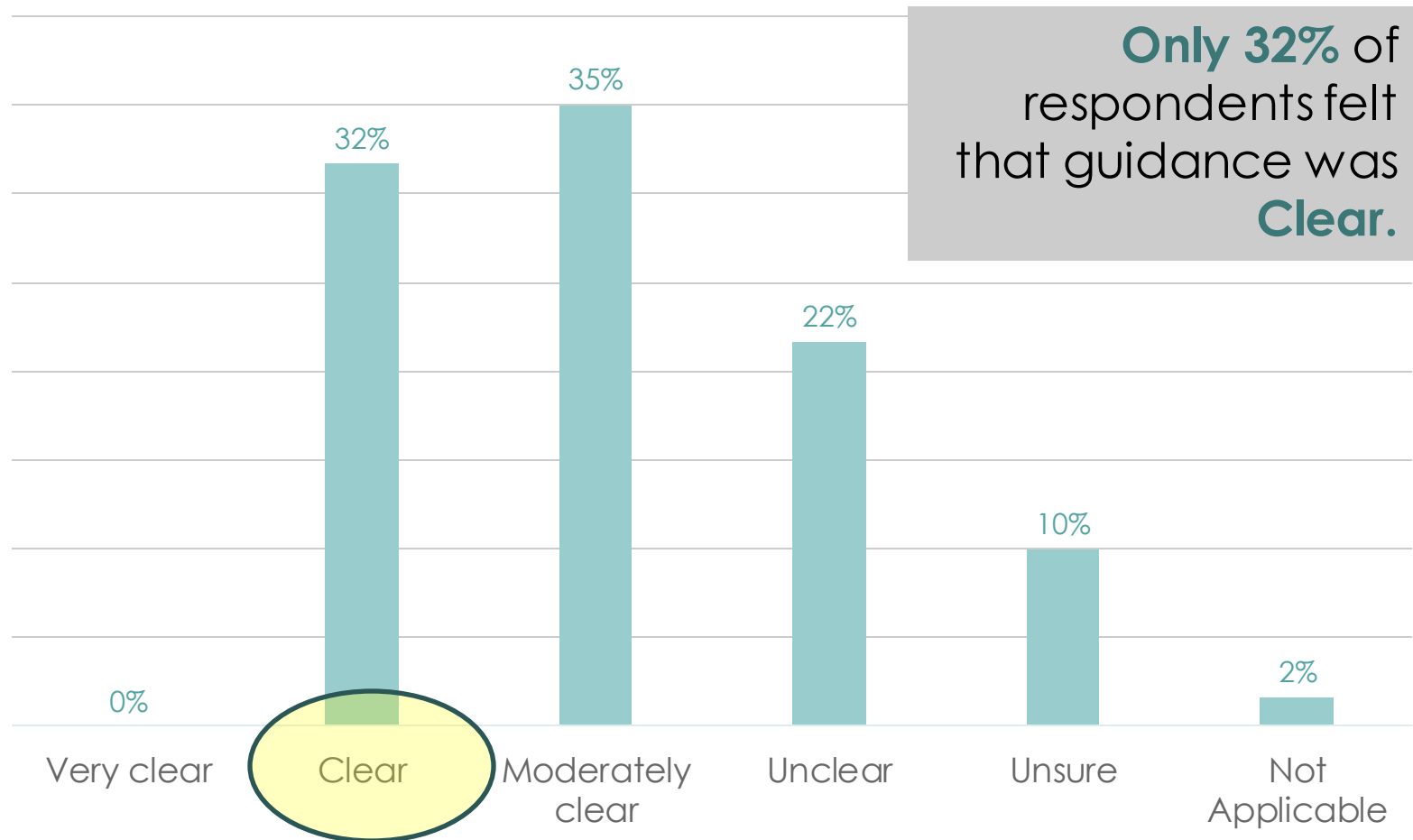
# Staff Lack Guidance

## Top barriers to implementing new initiatives



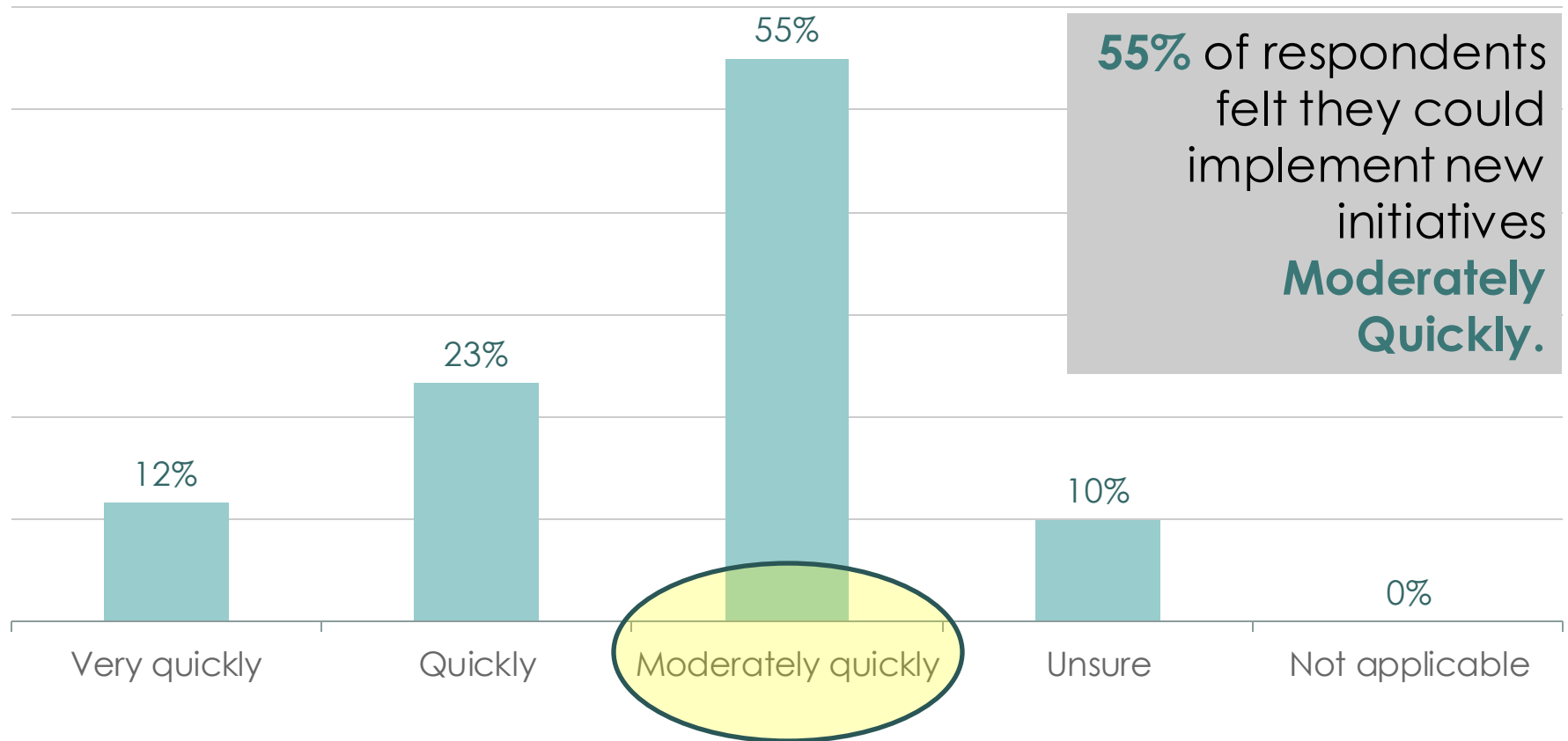
# Staff Lack Guidance

Guidance for the quarterly staff review process to assess performance on equity



# Staff Lack Guidance

In your experience, how quickly can your Department implement new initiatives?





# Agency Change Fatigue

- Survey comments raise concerns about change fatigue
  - Too much change at once
  - Competing change-related priorities



# FINDING:

ODOT has low capacity for new strategies to expand BIPOC contracting.

# Difficulty Strategizing

- ▶ Key DBE/MWBE program implementation functions not within ODOT purview:
  - Certification and directory management with COBID
  - Bids tracking includes formal system and internal Excel tracking process (concurrent processes)



**FINDING:** ODOT procurement, social equity and civil rights staff do not have internal capacity to utilize COBID systems in order to inform engagement, capacity building and contracting strategies.

**ODOT does not understand procurement impact on BIPOC contractors because they lack data to analyze and inform strategies.**





# Diffuse Technical Assistance

Issue	Other State DOT technical assistance programs	ODOT technical assistance program
Provided by	Agency and third party	Third party
Bonding assistance		None
Certification support		
Training on Agency and contract requirements		Unclear
Operations training		
Estimating and pre-bid assistance		Unclear
“Doing Business with” sessions		

# Diffuse Technical Assistance

- Technical assistance program not clearly framed and appears informal rather than a systematized, strategic program
- ODOT utilizes the Port of Portland Mentor-Protégé Program and does not have a formalized program for its own contractors (2020-2023 cohort includes 10 firms)



**FINDING:** BIPOC contractors do not know how to access the technical assistance and mentor protégé program systems. BIPOC firms' participation in ODOT programs is limited, and do not allow ODOT to build availability and expand BIPOC firms' capacity.

# Ineffective Procurement Forecast and Diffuse Outreach

- Lack of strategy behind procurement forecasting and BIPOC- and women-owned firm programming.
- Outreach conducted is opportunistic and based on events occurring in marketplace. No engagement strategy related to BIPOC firms.



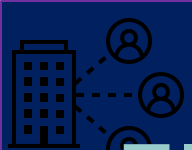
**FINDING:** BIPOC firms are not informed about upcoming opportunities, thus reducing their ability to bid on ODOT work or reducing their interest in seeking certification.

# Key Functions Outsourced

- Certification



**FINDING:** Certification access is through COBID and the application process is complex.\* BIPOC firms find certification process burdensome, time consuming, and lengthy. Facilitating access to certification increases likelihood of BIPOC firms to be certified.\*\*



# FINDING:

ODOT lacks internal systems to assess contracting diversity and depends on other institutional bodies for program implementation.

# 3. Systemic Barriers

# Barriers to Entry for Potential Contractors: Opportunities

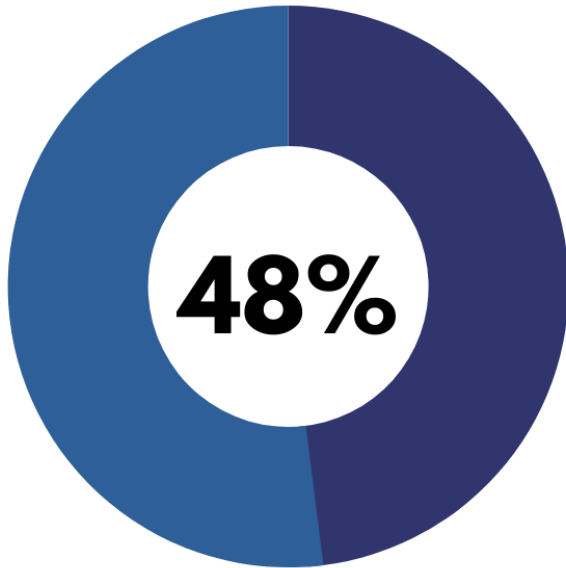
“It does not appear difficult to learn of ODOT contract opportunities if potential bidders are familiar with ODOT’s process for communicating those opportunities.”

*2016 ODOT Availability and Disparity Study*

# Barriers to Entry for Potential Contractors: Opportunities

I-5 Rose Quarter Improvement Project DBE and Small Business Survey Result:

- Not enough time for new opportunities
- Lack of opportunities
- Lack of understanding of the procurement process
- Outbid in opportunities



48% picked access to and winning opportunities as top barrier

DBE survey answers reveal systems for obtaining and winning opportunities, including ODOT's, are not accessible to DBEs, including BIPOC contractors.



# Barriers to Entry for Potential Contractors: Opportunities

- 2021 ODOT Staff Survey confirms agency belief that firms need prior ODOT experience to succeed

Based on your experience, what do you see as the biggest challenges to minority- and women-owned businesses, certified or not, to succeed on ODOT contracts?

Experience on ODOT contracts

Burdensome contractual and submittal requirements

Access to financial resources to sustain business

Scope sizes

Access to primes

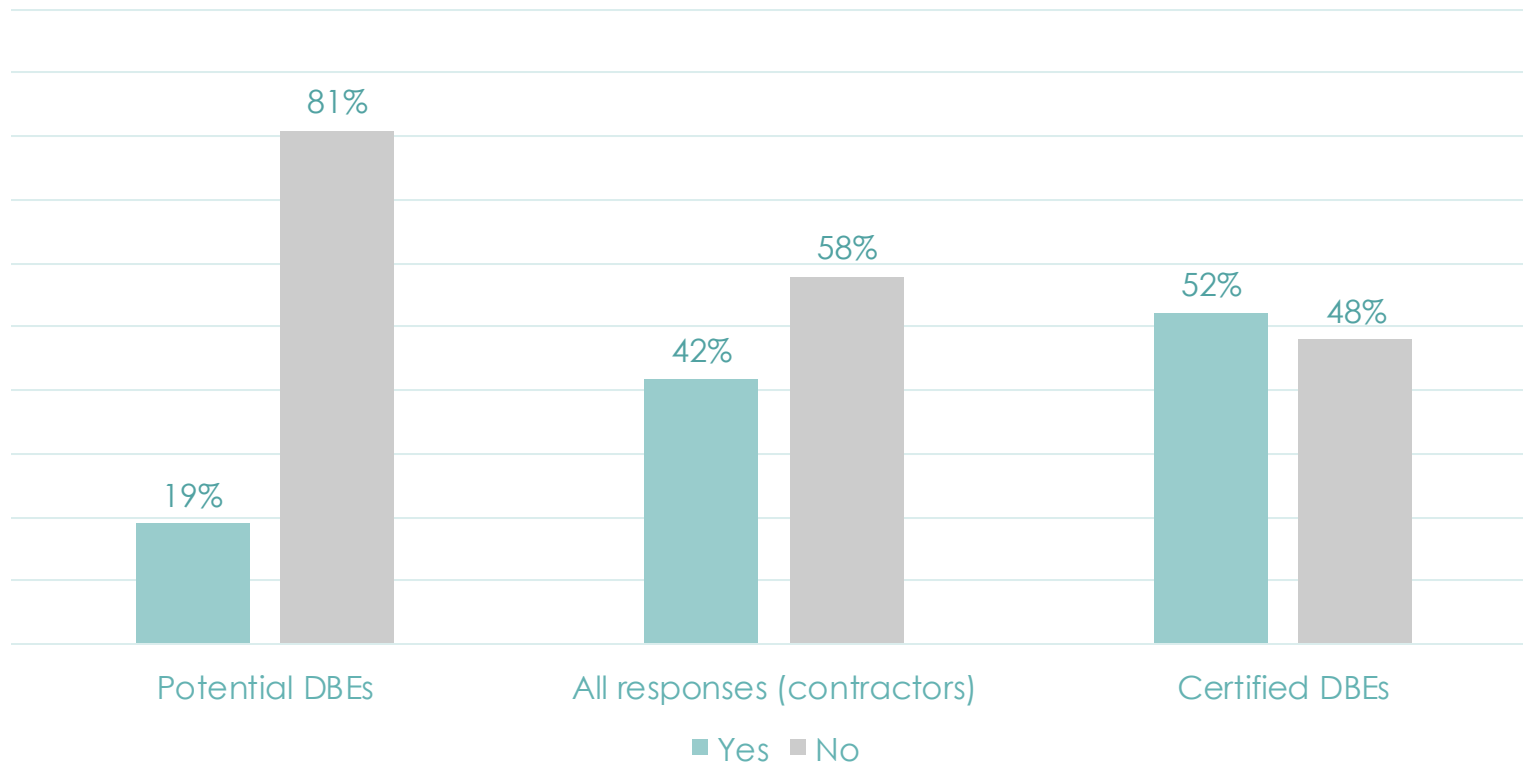
Prompt payment by primes

Prompt payment by ODOT

# Barriers to Entry for Potential Contractors: Opportunities

I-5 Rose Quarter Improvement Project DBE and Small Business Survey result: In 2019, over 80% of potential DBE survey respondents had not done ODOT work.

Have done ODOT work



# Barriers to Entry for Potential Contractors: Bonding



**FINDING:** ODOT does not have a systematized bonding program nor a clear bond waiving policy (i.e. like State laws which allow bonding requirements to be waived on contracts of up to \$50,000.)

Bond waiving criteria all pertain to cashflow and do not take into consideration unequal access to financial resources and discrimination in the capital market.

ODOT appears to allow exceptional waivers to be granted.

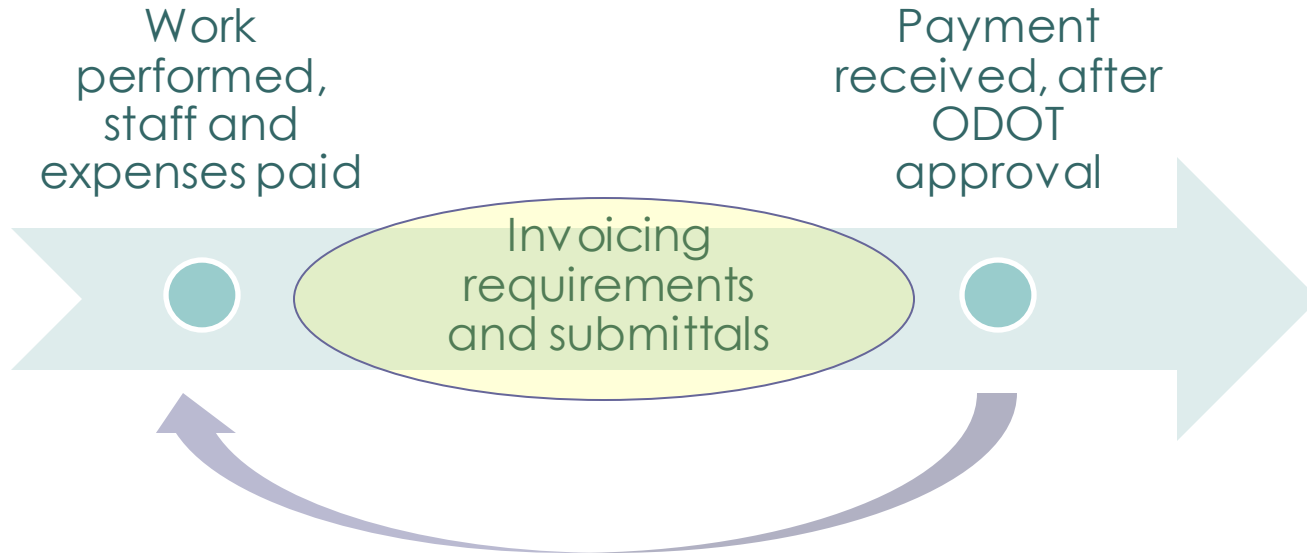
# Barriers to Entry for Potential Contractors: Slow Pay

- ▶ ODOT vendors need cashflow to cover first six months of ODOT work because ODOT is known to not pay quickly enough



**FINDING:** ODOT payment reputation reduces BIPOC firms' interest in bidding or doing ODOT work.

# Barriers to Succeed for Current Contractors: Slow Pay



**FINDING:** Submittal and invoicing requirements in contracts and as applied by primes stretch beyond ODOT policy, delaying subcontractors from submitting invoices and getting paid, thus impacting cashflow. Prime agreement requirements are burdensome, and ODOT approval process lengthy.

# Barriers to Succeed for Current Contractors: Slow Pay

- Even under \$150,000, which are considered small contracts at ODOT, ODOT staff include Time and Materials/Cost Plus Fixed Fee equivalent invoicing requirements in some fixed price agreements



**FINDING:** Fixed price contracts that include time and materials requirements result in time-consuming, costly reporting.

# Barriers to Succeed for Current Contractors: Slow Pay

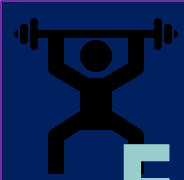
- ORS 279C.580 and ODOT policy require primes to pay subcontractors within 10 calendar days of Agency payment
- [49 CFR Part 26.29](#) requires ODOT to monitor payments by primes to subconsultants within 30 days or less
- ODOT paid summary reports (PSRs) track payments made to subs within 20 days; quarterly audits prepared by OCR



**FINDING:** Mechanisms analyzing prompt pay to ensure compliance are absent.

Agencywide analysis of prompt payment issues not currently available and depends on understaffed OCR team to perform manually. Unclear whether it applies to all contracts with DBEs.

ODOT 2020 partial pay policy does not apply to contractors.



# FINDING:

ODOT has burdensome requirements and policies, pre- to post-bid.



# **4. Misinterpretation of Legal Framework Impacts Innovation**

# Understanding the Data

2019 Firms in Project Database, Statewide	Count
African American-owned	60
Asian Pacific American-owned	16
Caucasian (female)-owned	87
Hispanic American-owned	35
Native American-owned	23
Subcontinent Asian American-owned	3
<b>TOTAL CERTIFIED DBEs IN PROJECT SCOPES</b>	224

2019 Disparity Study Firms in Availability Benchmark, Statewide	Count
African American-owned	19
Asian Pacific American-owned	22
Subcontinent Asian American-owned	10
Hispanic American-owned	43
Native American-owned	27
<b>TOTAL MBE</b>	<b>121</b>
WBE (white women-owned)	192
<b>TOTAL MBE/WBE</b>	<b>313</b>
<b>Total majority-owned firms</b>	<b>825</b>
<b>TOTAL FIRMS</b>	<b>1,138</b>



**FINDING:** Methodology used to determine availability in disparity studies can yield artificially low BIPOC firm availability.



# Availability vs. Capacity

- Approach to determining availability includes “capacity” and goes beyond requirements included in *AGC v. Caltrans*
- “Capacity” as defined by historical bidding and award history in construction incorporates discrimination



# FINDING:

ODOT applies a self-limiting approach when evaluating DBE firm availability.

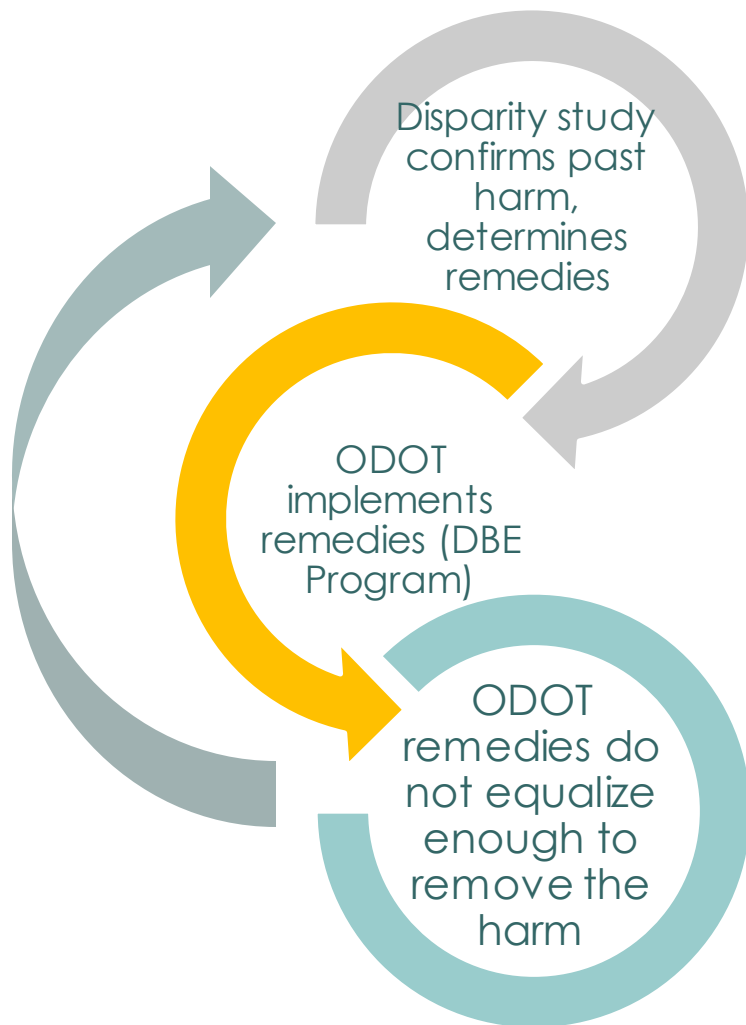


# Status Quo: Unequal Access to Contracting Opportunities

ODOT contract awards to  
BIPOC and women-owned  
firms

ODOT contract awards,  
other firms

# Agencies Must Implement DBE Program Measures, Including Innovations



**FINDING:** DBE Program is a remedial program. Maximizing opportunities for DBEs is not contrary to equal protection law; equal protection is the *purpose* of implementing remedies within the DBE program.

Misinterpretations of DBE legal framework limits remedy opportunities.

# Equal Opportunity is the Purpose of the DBE Program

Disparity in contract awards



DBE Program,  
Supportive services  
remove barriers

Parity in contract awards



# Implementation of Limited Remedies Allows Harm to Continue

- Misapplication of DBE program features allows harm to continue unmitigated.
- Legal or administrative misinterpretation of DBE program provisions lead to undermining the remedial benefits of the DBE Program.



**FINDING:** DBE program activities limit remedies which would address/mitigate identified harm.





# FINDING:

Case law permits more implementation strategies than ODOT believes it can use.

# Procurement Methods Review

	Under \$10,000	\$10,001 to \$100,000	\$100,000 or More	Price agreements
Issued by	ODOT divisions or ODOT Procurement Office	ODOT divisions or ODOT Procurement Office	ODOT Procurement Office	ODOT divisions or ODOT Procurement Office
Solicitation requirements	Quotes not required but encouraged	Three quotes required	Publicly advertised	Pre-qualified vendors
Outreach to DBE firms	Possible, Not formalized	Possible, Not formalized	Through OregonBuys, adv. In newspaper if >\$125k	Possible, Not formalized
Bonding required for construction*	Can be waived	Can be waived under \$50,000	Max 10% of bid	Unclear
Award typically based on	Cost (low bid)	Cost (low bid)	Cost (low bid)	Cost (low bid)

\*Per ORS 279C.380(5)

# DMWESB Programming Review

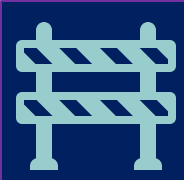
Program or Policy	Mechanisms to increase BIPOC participation	Successfully lead to BIPOC participation? (Per 2016 Disparity Study)	Impact on BIPOC participation
Federal DBE Program	Goals, supportive services, techn. assist., etc.	Yes, but not as much as ESB Program or Small Contracting	Allows firm growth opportunities
Oregon State M/WBE policy	Aspirational goals	Yes, but not as much as ESB Program or Small Contracting	Stepping stool to DBE Program
ESB Program	Set aside	Yes	Allows firm growth opportunities
Small Contracting Program	Works like a set aside	Yes, but only on small contracts, and only for registered firms	Limits firm growth opportunities

# Procurement Methods Limit Firm Growth

- 2016 ODOT Availability and Disparity Study shows majority of DBE contract awards are through smaller procurements (e.g., in Small Contracting Program).
- Direct appointments, including with State funds, allowed only under \$100,000.



**FINDING:** Growth opportunities for BIPOC firms are limited under existing procurement methods.



# Underutilization of Expansion Strategies

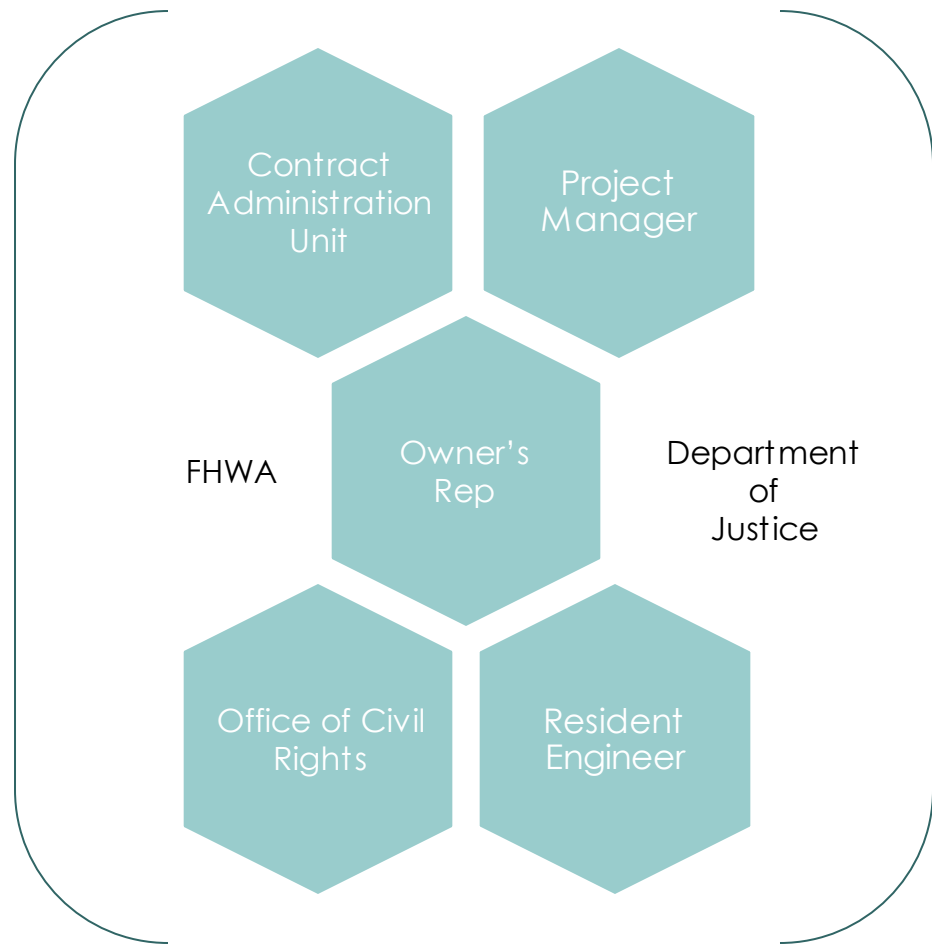
- Underutilization of CM/GC for larger projects
- Limited implementation of CM/GC mechanisms
- Overutilization of low-bid procurement methods without consideration of factors other than price allowed per [ORS 279A.010\(1\)\(r\)](#) and [ORS 279B.110\(2\)](#)



# Culture, Compounded with Resourcing Constraints, Results in Limited Innovation



**FINDING:**  
Approval process to review BIPOC contracting innovation reveals risk adverse culture.



# Weak Workforce Programming

**SUPPORT  
IS AVAILABLE TO HELP  
APPRENTICES**



- ▶ Lack of workforce pipeline building due to nominal workforce spending at Agency



**FINDING:** ORS caps amount to spend on workforce program, keeping it to a nominal \$2.1M (0.5% of federal funds received).



# FINDING:

ODOT underutilizes strategies that would encourage BIPOC firm participation.

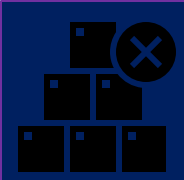


# Exclusion

- Regardless of whether an Agency meets its DBE goal or not, reductions in scopes of work for committed amounts to DBEs after contract award are considered partial terminations
- When multiple DBEs have been partially terminated by primes on ODOT contracts, it could be considered a pattern of practice of discrimination
- This could be violation of both ODOT policy and the regulation



**FINDING:** Failure to monitor primes results in partial terminations of DBEs.



# FINDING:

Practices of  
exclusion.

# 5. Stakeholder Input and Next Steps



# Internal and External Stakeholder Engagement

- In Fall 2021, the Project Team organized briefings with a group of minority contractors and the ODOT ALT.
- After the briefings, questions were posed to participants using Mentimeter, which allowed participants to respond in real time and provide insight on the barriers.

# Key Take Aways

- Overall, the contractors group were impressed by ODOT's approach to tackling this work with transparency, appreciated ODOT's honesty, and supported further resourcing at ODOT to address these barriers.
- Overall, both the contractors group and ODOT ALT requested an implementation plan, identifying and prioritizing barriers and solutions, cost and resourcing for each, with a touch of reality.

# Key Take Aways

Minority contractors wanted more information on:

- Partial termination of DBEs
- Audits
- Impact of bias at gatekeeper roles
- Innovative procurement processes
- How to determine firm competency vs. capacity
- Analysis of firm participation on traditional bid procurement, CM/GC or progressive design-build procurement
- Data from subcontractors about how certified firms working on ODOT projects fared from the contracts (profitability, capacities, jobs)

**External Stakeholders (Minority Contractors)**

# Key Take Aways

Minority contractors provided preliminary solutions to the barriers:

- Organize barriers and rank them
- Establish performance measures for transparency
- Empower ODOT staff at lower levels to make decisions and be supported by their managers
- The entire contracting ecosystem needs support
- Develop an implementation plan addressing barriers and solutions, with associated cost

**External Stakeholders (Minority Contractors)**

# Key Take Aways

- Internal stakeholders were most eager to receive further information and training on how contracting barriers impact BIPOC firm participation, as well as on the legal framework interpretation and best practices.
- Some requested a class or webinar to establish a basic understanding of these barriers and why they must be addressed.



# Please rank the barriers we discussed based on your experience.

- When asked to rank the barriers based on whether they agreed with them or not, internal stakeholders confirmed that low capacity internally is a concern

1st



2nd



3rd



4th



ODOT lacks in strategize

5th



Self-limiting approach to availability

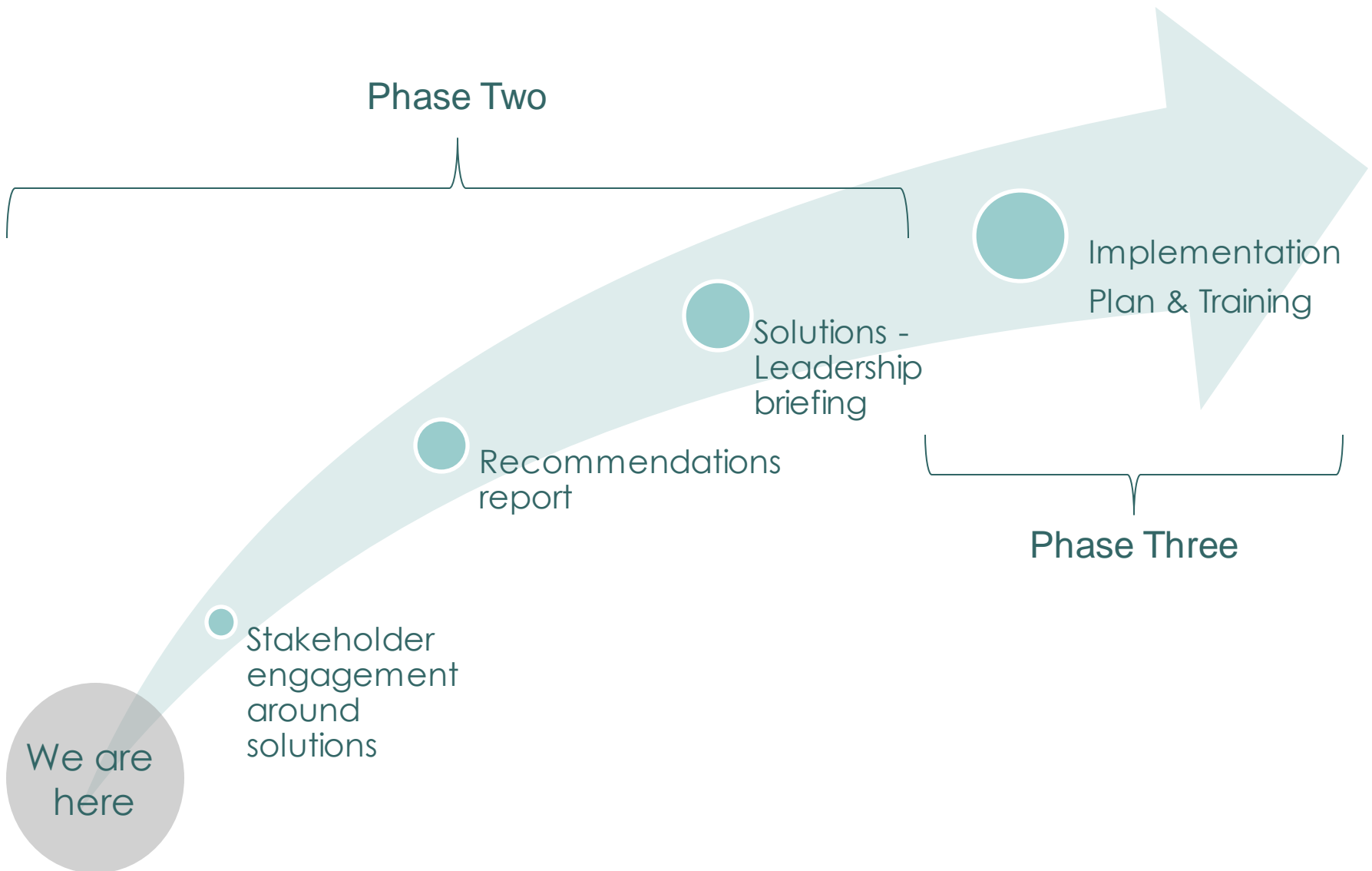
Internal Stakeholders (ODOT ALT)

# Key Take Aways

ALT staff also provided preliminary solutions to the barriers:

- Clarity of information and communication around these barriers and BIPOC firms' experience
- Integrate firm support when starting contracting process with OPO
- Need more information on DBE availability and how to support DBE contractors
- Prioritize strategies and tactics – identify where ODOT can unilaterally change v. not, and where there is greatest potential impact
- Additional staffing and resources
- Clarity around legal allowability of solutions, how federal resources can be used

# Study Next Steps



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- Appendix A\_List of selected documents reviewed
- Appendix B\_Targeted ODOT staff survey results
- Appendix C\_ODOT Internal systems staff interviews\_themes
- Appendix D\_ODOT Office of Civil Rights organizational chart
- Appendix E\_ODOT Office of Civil Rights expenditures 2019\_2021
- Appendix F\_Sample fixed price contract
- Appendix G\_Minority Contractors Task Force priority list

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- Appendix H\_ODOT and ORS language on prompt pay
- Appendix I\_RBP memo on capacity
- Appendix J\_ODOT procurement standards for invoice requirements
- Appendix K\_FHWA\_WSDOT\_conciliation agreement
- Appendix L\_AGC v. Caltrans
- Appendix M\_Lowest responsible bidder in ORS research findings
- Appendix N\_ODOT 2021 BOLI partners list

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## Additional Resources:

- ODOT Construction Manual:  
<https://www.oregon.gov/ODOT/Construction/Pages/Construction-Manual.aspx>
- ODOT Standard Specifications:  
[https://www.oregon.gov/odot/Business/Pages/Standard\\_Specifications.aspx](https://www.oregon.gov/odot/Business/Pages/Standard_Specifications.aspx)