



MnDOT Workforce and Contracting Goals

2021
EVALUATION REPORT

Program Evaluation Division

OFFICE OF THE LEGISLATIVE AUDITOR

STATE OF MINNESOTA

Program Evaluation Division

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OFFICE OF THE LEGISLATIVE AUDITOR

STATE OF MINNESOTA • James Nobles, Legislative Auditor

May 2021

Members of the Legislative Audit Commission:

MnDOT's Office of Civil Rights manages various programs designed to increase the diversity of individuals participating on state-funded MnDOT contracts. State *workforce goals* seek to increase the share of on-the-ground workers on state-funded construction contracts who are women and people of color. *Contracting goal and preference programs* seek to increase the share of business owners contracting with MnDOT who are women, people of color, veterans, or people with a substantial physical disability.

We found that state-funded MnDOT construction contracts starting in recent years rarely met state *workforce goals*, and that MnDOT has limited authority in law to enforce these goals. We also found that certain aspects of MnDOT's *contracting goal and preference programs* had minimal effect. We make several recommendations to MnDOT regarding these programs, and suggest that MnDOT and the Legislature jointly consider additional strategies that could enable MnDOT to more effectively fulfill the purpose of these programs.

Our evaluation was conducted by Caitlin Badger (project manager), Lucas Lockhart, and Ivy Marsnik. We received cooperation from MnDOT and from various other state agencies.

Sincerely,

James Nobles
Legislative Auditor

Judy Randall
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Summary

MnDOT Workforce and Contracting Goals

Key Facts and Findings:

- The Minnesota Department of Transportation (MnDOT) administers state workforce goals for the purpose of increasing the participation of *workers* who are women and people of color on state-funded MnDOT construction contracts. (p. 6)
- MnDOT also administers contract preference and goal programs—including the Targeted Group Business and Veteran-Owned Small Business programs—for the purpose of increasing the participation of *businesses* that are owned by women, people of color, people with a substantial physical disability, and veterans on state-funded MnDOT contracts. (pp. 8-10)
- MnDOT construction contracts that started during fiscal years 2018 through 2020 rarely met the state's workforce goals. (p. 40)
- MnDOT has limited authority in law to enforce state workforce goals. (p. 20)
- For the vast majority of its state-funded construction contracts in recent years, MnDOT did not regularly evaluate or monitor contractors' efforts towards meeting the workforce goals. (p. 24)
- One-half of the small number of contracts we reviewed met MnDOT contracting goals; however, MnDOT often did not clearly document how it determined whether contractors met the goals. (p. 86)
- Payments to certified targeted group and veteran-owned businesses comprised 11 percent of total payments for contracts in our review; data suggest that certain demographic groups received

a substantially greater share of payments than others. (pp. 89, 91)

- Although MnDOT made improvements in 2020, its monitoring of the extent to which contractors met contracting goals for state-funded contracts remains limited. (p. 82)
- Contract preferences rarely changed which business won the contract for the MnDOT contracts we reviewed. (p. 55)
- MnDOT limits the maximum dollar value of contract preferences for construction contracts beyond what is required by law. (p. 54)

Key Recommendations:

- The Legislature should consider the extent to which it wants to prioritize the state's workforce goals and clarify the role of contracting state agencies accordingly. (p. 45)
- MnDOT should take a more engaged role in overseeing workforce goals for a greater share of its state-funded contracts. (pp. 34-35)
- MnDOT should better monitor the extent to which contractors are meeting both workforce and contracting goals for state-funded contracts. (pp. 36, 39, 83)
- MnDOT should reconsider its current cap on contract preferences. (p. 60)
- MnDOT and the Legislature should consider additional strategies that could enable MnDOT to more effectively fulfill the purpose of its contracting goal programs, taking into account the state's broader policy priorities. (p. 99)

MnDOT has limited authority to enforce state workforce goals, and certain aspects of the agency's contract preference and goal programs have had minimal effect.

Report Summary

MnDOT's Office of Civil Rights implements **state workforce goals** that seek to increase the diversity of the on-the-ground construction workers who work on state-funded contracts.¹ Whereas workforce goals seek to increase the diversity of *workers* on MnDOT contracts, MnDOT also implements **contracting goal and preference programs** that seek to increase the diversity of *business owners* providing services on MnDOT contracts.

Workforce Goals

State workforce goals specify targets for the share of hours worked (or in training) by women and people of color on state-funded construction projects. The Minnesota Department of Human Rights (MDHR) establishes the goals, which vary by region of the state. Contracting state agencies—including MnDOT—are required by law to include state workforce goals in all state-funded construction contracts exceeding \$100,000.

In recent years, MnDOT's state-funded construction contracts rarely met the state's workforce goals.

Only 6 percent of MnDOT construction contracts over \$100,000 that began in fiscal years 2018 through 2020 met state workforce goals for *both* women and people of color. A greater share (33 percent) of contracts met the workforce goal for *either* women or for people of color. Sixteen percent of contracts met the workforce goal for women, while 23 percent of contracts met the workforce goal for people of color.

State workforce goals apply to all state-funded construction contracts in excess of \$100,000; however, MnDOT has chosen a different threshold—\$5 million—to guide its approach to implementing the workforce goals.

MnDOT staff said that they request that bidders acknowledge various equal opportunity requirements—including the workforce goals—before submitting their bids, regardless of contract cost. Beyond this acknowledgement,

however, MnDOT does little to implement workforce goals for contracts for which the winning bid was \$5 million or less. For example, for these contracts, MnDOT does not determine whether contractors plan to meet state workforce goals, or whether contractors made an adequate effort to meet the goals prior to awarding the contracts. Further, after awarding these contracts, MnDOT does not systematically track contractors' progress towards meeting the workforce goals, or determine whether the contracts ultimately met the goals when the project is complete.

The winning bid for MnDOT contracts that were subject to the workforce goals was \$5 million or less for 93 percent of contracts in our review period.² As a result, MnDOT did little to implement state workforce goals for the vast majority of its state-funded construction contracts in recent years. We recommend that MnDOT take a more engaged approach to overseeing state workforce goals for a greater share of its state-funded contracts.

MnDOT does not have clear authority in law to more actively enforce state workforce goals.

State law gives contracting state agencies such as MnDOT limited authority to enforce the state workforce goals. Generally, the law merely requires contracting state agencies to provide information to MDHR and contractors about the state workforce goals and other equal opportunity-related contract requirements. State law does not clearly give MnDOT the authority to sanction contractors in the event a contractor does not meet the workforce goals.

We recommend that the Legislature consider the extent to which it wants to prioritize the state's workforce goals, and clarify the role of contracting state agencies accordingly.

Contracting Goals and Preferences

MnDOT's two contracting goal and preference programs for state-funded contracts—the Veteran-Owned Small Business (VET) Program and the Targeted Group Business (TGB) Program—seek to increase the

MnDOT contracts we reviewed rarely met state workforce goals.

¹ "State-funded contracts" refers to contracts funded solely by state dollars.

² These contracts accounted for 31 percent of the total cost of the winning bids for contracts starting in fiscal years 2018 through 2020.

participation of business owners who are veterans or members of targeted groups on certain MnDOT contracts.³ As part of these programs, MnDOT may establish targets—referred to as contracting goals—for the amount of spending on a given contract that goes to businesses that are owned and operated by members of these groups.

We confirmed that half of the small number of state-funded contracts we reviewed met MnDOT contracting goals; however, MnDOT often did not clearly document how it determined whether contractors met the goals.

We had hoped to independently verify how often contractors met TGB and VET contracting goals for all contracts in our review period. However, due to MnDOT's manual approach to determining whether contracts met the goals, we were unable to evaluate the extent to which contractors met the contracting goals for all contracts.

Instead, we reviewed eight contracts and found that four contracts met the TGB and VET contracting goals, while one did not, and one went through a separate process. However, official contract files were missing important documents related to contracting goals. As a result, we were unable to confirm whether or not the contractor met the goals for the two remaining contracts in our review. We recommend that MnDOT more thoroughly document contracting goal processes and decisions for each contract.

Payments to certified businesses comprised 11 percent of total contract payments for contracts in our review; data suggest that certain demographic groups received a substantially greater share of payments than others.

We also evaluated what share of MnDOT contract expenditures went to certified businesses. For state-funded construction and professional/technical contracts starting in fiscal years 2018 through 2020, MnDOT's

total contract expenditures were about \$473 million. Approximately \$52 million, or 11 percent, of those contract expenditures went to certified businesses. Of those contracts, payments to certified businesses went overwhelmingly to targeted group rather than veteran-owned businesses—92 percent versus 8 percent, respectively.

Payments to certified businesses were not evenly distributed across the demographic groups eligible for the TGB program. For construction contracts beginning in fiscal years 2018 through 2020, businesses owned by White women received 81 percent of MnDOT payments to prime targeted group-certified contractors, while businesses owned by Native Americans received 19 percent of payments.⁴ In contrast, MnDOT did not make any payments for construction contracts to prime targeted group-certified contractors identifying as Black/African American, Asian, or Hispanic/Latino.

We recommend that MnDOT and the Legislature consider additional strategies that could enable MnDOT to more effectively fulfill the purpose of these programs, while weighing the state's broader policy priorities.

Although MnDOT made improvements in 2020, its monitoring of contractors' progress towards meeting contracting goals for state-funded contracts remains limited.

According to MnDOT staff, prior to 2020, ongoing monitoring of contractor performance on TGB and VET contracting goals took place on an ad hoc basis. In 2020, MnDOT began to increase its monitoring of these contracting goals by tracking whether certified subcontractors were paid in a timely manner.

Despite this change, the agency's monitoring of contracting goals for state-funded contracts remains limited. For example, MnDOT does not have automatic reporting on contracting goals for state-funded projects, such as monthly reports that show contractors'

Data suggest that certain demographic groups benefited from MnDOT's contracting goal programs more than others.

³ Targeted group members include individuals who are women, people of color, or people with a substantial physical disability. Veteran-owned and targeted group businesses—referred to as “certified businesses”—must be certified by the Minnesota Department of Administration or the U.S. Department of Veterans Affairs.

⁴ Prime contractors are businesses that sign a contract directly with MnDOT.

MnDOT's contract preferences did little to increase the number of certified contractors working on MnDOT projects in recent years.

progress towards meeting the goals. For state-funded contracts, MnDOT staff can only monitor contractors' performance manually.

State law does not explicitly require MnDOT to monitor the extent to which contractors meet contracting goals. Nevertheless, we recommend that MnDOT improve its monitoring approach to ensure contractors are meeting the goals or making ongoing good faith efforts to do so.

For recent state-funded MnDOT contracts, contract preferences rarely changed which business won the contract.

In addition to contracting *goals*, MnDOT may apply contract *preferences* for the purpose of increasing the share of targeted group and veteran-owned businesses that participate on MnDOT contracts. For construction contracts, preferences make certified businesses more cost-competitive by effectively reducing the cost of their bids. MnDOT applies this discount, or "preference," to the certified business's bid for the purpose of comparing that bid to the other bids on the contract. Preferences do *not* reduce actual bid amounts or change the amount of money the certified

business would receive should MnDOT award the contract to that business. MnDOT applies the preference amount when it calculates the low (or best) bidder for a given construction or professional/technical contract.

The low bidder switched from a non-certified business to a certified business as a result of a preference for only 3 of MnDOT's 207 construction contracts in our review period (1 percent). Of the 208 professional/technical contracts we reviewed, the winning bidder switched from a non-certified business to a certified business as a result of a preference on 11 contracts (5 percent).

State law limits the preference amount that MnDOT can provide to certified businesses to 6 percent of the certified business's bid amount. However, for some contracts, MnDOT limits the maximum dollar value of contract preferences beyond what is required by law. While MnDOT is legally permitted to establish this lower contract preference, we recommend that MnDOT reconsider its cap on contract preferences to increase the potential impact of the preference and to better align with current Department of Administration practices.

Summary of Agency Response

In a letter dated May 20, 2021, Department of Transportation Commissioner Margaret Anderson Kelliher said that "MnDOT's Office of Civil Rights (OCR) is committed to ensuring equal opportunity for all businesses and personnel on MnDOT projects." She explained that MnDOT has taken recent steps to enhance its workforce and contracting goal programs based on discussions with the Office of the Legislative Auditor (OLA), including revising documentation practices, strengthening contractor accountability, and working with other state agencies on process improvements and enforcement. Commissioner Anderson Kelliher added that MnDOT will conduct a "cost analysis" regarding some of OLA's additional recommendations. The commissioner stated that MnDOT "welcomes any clarity the Legislature can provide relating to priorities and the role of contracting agencies" with regard to the state workforce goals. Further, the commissioner said that "MnDOT is committed to working with the Legislature...on strategies to further our mutual objectives" regarding MnDOT's contracting goals.

The full evaluation report, *MnDOT Workforce and Contracting Goals*, is available at 651-296-4708 or:
www.auditor.leg.state.mn.us/ped/2021/mndotgoals.htm

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Appendix A: Payments to Certified Prime Contractors

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Introduction

State agency contracts often present significant opportunities for Minnesota workers and businesses. For example, in Fiscal Year 2020, the Minnesota Department of Transportation (MnDOT) spent more than \$943 million on contracts for various agency needs.

In April 2020, the Legislative Audit Commission directed the Office of the Legislative Auditor to evaluate MnDOT's workforce and contracting goals. Among other purposes, these goals are meant to increase the diversity of individuals participating on MnDOT contracts. State workforce goals are intended to increase the share of on-the-ground construction workers on MnDOT contracts who are women or people of color. Contracting goals, on the other hand, are intended to provide small business owners who are people of color, people with a substantial physical disability, women, or veterans with increased access to MnDOT contracting opportunities.¹

As part of our evaluation, we addressed the following questions:

- **How well has MnDOT performed with respect to Minnesota's workforce participation goals for state-funded construction projects?**
- **For state-funded contracts, how well has MnDOT performed with respect to its goals and requirements for contracting with businesses owned by women, people of color, people with a physical disability, and veterans?**

During our evaluation, we reviewed relevant state statutes, federal laws, case law, and administrative rules. We also reviewed various documents related to MnDOT's workforce and contracting goals. We analyzed MnDOT financial data from fiscal years 2016 to 2020, and reviewed academic literature to better understand how MnDOT's practices correspond with other common goal-setting and enforcement practices.

Key aspects of our evaluation were to learn more about how MnDOT established and/or enforced the workforce and contracting goals, and how well contractors performed on those goals. To answer these questions, we interviewed numerous MnDOT staff, including an attorney in MnDOT's Office of Chief Counsel, a staff member responsible for bid letting, several staff responsible for setting and/or overseeing the workforce or contracting goals, and others. To gain a deeper understanding of MnDOT's processes on a contract-by-contract basis, we reviewed the contract files for a sample of MnDOT construction contracts.² We also analyzed MnDOT contracting data for contracts starting in fiscal years 2018 through 2020.

¹ To qualify for MnDOT's contracting goal programs for state-funded contracts, businesses must be at least 51 percent owned and operated by individuals belonging to these groups, among other requirements.

² Due to various differences between the workforce and contracting goals, we reviewed two contract samples—one sample specific to state-funded contracts eligible for state workforce goals, and a second sample specific to state-funded contracts eligible for MnDOT's contracting goals. To examine workforce goals, we reviewed a sample of 13 state-funded contracts that started in fiscal years 2018 through 2020. To examine contracting goals, we reviewed a sample of 21 state-funded construction contracts, or 10 percent of contracts that started in fiscal years 2018-2020. We reviewed 31 contracts in total.

We also sought the perspectives of businesses and organizations that are involved in or affected by MnDOT's contracting and workforce goals. We conducted interviews with union representatives, organizations representing contractors, an organization advocating for workforce diversity, and an academic expert. In addition, we regularly attended meetings of an independent advisory counsel that consults with MnDOT about the agency's workforce and contracting goal efforts.

Finally, to learn how MnDOT's goal-related activities fit within the broader context of workforce and contracting goal activities occurring in other state agencies, we interviewed staff from the Minnesota departments of Administration, Human Rights, and Veterans Affairs. We also analyzed data from the Minnesota Department of Administration's directory of certified businesses.

Our evaluation focused on state-funded MnDOT highway construction and professional/technical contracts.³ We focused on programmatic issues and did not evaluate whether MnDOT made appropriate contractor selections for specific projects.

³ For the purposes of this report, "state-funded" refers to contracts funded solely by state dollars.

Chapter 1: Background

The mission of the Minnesota Department of Transportation (MnDOT) is to “plan, build, operate, and maintain a safe, accessible, efficient, and reliable multimodal transportation system.”¹ MnDOT conducts some of this work through contracts with various businesses. According to MnDOT, the agency’s Office of Civil Rights (OCR) works to ensure “equal opportunity for all businesses and personnel” on MnDOT contracts; it does this in part through workforce and contracting goals.²

In this chapter, we provide a brief description of MnDOT contracting before describing the purpose of workforce and contracting goals on MnDOT projects. We then describe the independent group responsible for providing feedback to MnDOT on the workforce and contracting goals, before providing information about program staffing and finances.

Key Findings in This Chapter

- Workforce goals specify targets for the share of hours worked by women and people of color on state-funded construction projects.
- MnDOT administers several contract preference and goal programs with the intent of increasing the participation of specific types of businesses on MnDOT contracts.
- MnDOT’s Office of Civil Rights is responsible for implementing the workforce and contracting goal programs.

MnDOT Contracting

MnDOT uses contracts to procure various goods and services. For example, MnDOT contracts for building and highway construction, materials, and equipment. Throughout this report, we focus on two types of contracts—highway construction contracts, and professional/technical contracts.

Highway construction contracts. According to MnDOT, in Fiscal Year 2019, the agency spent the majority of its money on state roads, including contracts for the construction of Minnesota’s highway system. Contractors typically provide the labor and supplies necessary to do the prescribed work. Highway construction includes more than the construction of roadways and bridges. For example, in 2020, businesses working under a MnDOT construction contract started work on slope stabilization, ravine restoration, and culvert repairs in Blue Earth County.³

Professional/technical contracts. MnDOT also contracts for consulting services to provide expertise that is not available within the agency and to supplement its workforce. MnDOT obtains these consulting services through professional/technical contracts. Professional/technical services are intellectual in character, such as

¹ MnDOT, “MnDOT Vision,” <https://www.dot.state.mn.us/vision/>, accessed December 11, 2020.

² MnDOT, “Civil Rights,” <https://www.dot.state.mn.us/civilrights/>, accessed March 24, 2020.

³ For the remainder of this report, “construction contracts” refers to highway construction contracts, excluding highway maintenance contracts.

evaluation, planning, or programming. For example, in 2020, MnDOT sought contractors to conduct an inspection of roadway lighting and traffic signal poles, and an evaluation of county roadway safety. Many of MnDOT’s professional/technical contracts are with engineering businesses.

In Fiscal Year 2020, about 36 percent of MnDOT expenditures on construction and professional/technical contracts were on contracts funded solely with state dollars.

MnDOT pays for its contracts with funds from various sources. For example, MnDOT pays for some contracts with federal dollars, others with state funds, and still others with a combination of state and federal dollars. In Fiscal Year 2020, MnDOT spent nearly \$714 million on construction and professional/technical contracts overall, about \$254 million of which was on construction and professional/technical contracts funded solely with state dollars. For the remainder of this report, we focus only on state-funded contracts.⁴

Workforce and Contracting Goals

As we discuss below, workforce and contracting goals are separate—but related—efforts to increase the degree to which specific people or businesses participate on MnDOT contracts. Because workforce and contracting goals seek to address different contracting issues, we generally discuss the two goals separately. Exhibit 1.1 on the following page condenses some of the concepts we discuss throughout this report, showing side-by-side some of the ways in which workforce and contracting goals are different, as well as ways in which they are similar. This exhibit may be a helpful point of reference throughout the report.

As we discuss in the following chapters, state agencies other than MnDOT also play an important role in the workforce and contracting goal programs. For example, as we discuss in Chapter 3, businesses owned by women, people of color, veterans, or people with a physical disability must be certified before being eligible for aspects of MnDOT’s contracting goal program. The Minnesota Department of Administration—not MnDOT—is responsible for certifying those businesses. Throughout this report, we refer to businesses certified by the Minnesota Department of Administration for the purpose of MnDOT’s state contracting goal programs as “certified businesses.”

⁴ MnDOT’s contracting goal programs for state-funded projects are distinct from MnDOT’s contracting goal program for federally funded projects. For the purposes of this report, “state-funded” refers to contracts funded solely by state dollars.

Exhibit 1.1: Workforce and contracting goals for state-funded projects differ in several ways.

	Workforce Goals	Contracting Goals ^a
What is the purpose of the goals?	To increase the share of work done by women and people of color on state-funded construction projects ^b	To increase the participation of small businesses owned by people of color, women, veterans, and people with a physical disability on MnDOT contracts ^c
To what people/entities do the goals apply?	<ul style="list-style-type: none"> • Women • People of color 	<ul style="list-style-type: none"> • Targeted Group Businesses (TGBs)^d • Veteran-Owned Businesses (VETs)
What do the goals measure?	The percentage of total hours worked on a contract by women and people of color ^e	The percentage of total contract dollars spent for services or supplies provided by businesses owned by members of the targeted groups or veterans
What contracts are subject to the goals?	State-funded construction contracts in excess of \$100,000 ^f	State-funded contracts, at MnDOT's discretion
Which state agency sets the goals?	Minnesota Department of Human Rights	MnDOT
Must the agency set goals for all contracts subject to the goals?	Yes	No
On what basis are the goals set?	Regional basis	Contract-by-contract basis
Is contract award contingent upon the bidder committing to meeting the goals?	No	Yes ^g
If a bidder does not commit to meeting the goals, must MnDOT evaluate the bidder's efforts to meet the goals before awarding the contract?	No	Yes
Are there criteria by which MnDOT evaluates the bidder's efforts to meet the goals?	No ^h	Yes
Does MnDOT have authority to enforce the goals?	No	MnDOT may sanction contractors that do not make adequate efforts to meet the goals or provide incentives to those that exceed the goals
Does MnDOT sanction contractors that do not meet the goals?	No	No

NOTE: Our evaluation included only state-funded contracts, that is, contracts funded solely by state dollars.

^a Contracting goal practices described here pertain to Minnesota Department of Transportation (MnDOT) highway construction contracts and may or may not apply to MnDOT professional/technical contracts.

^b With regard to workforce goals, "people of color" includes individuals who are "Black, ...Asian and Pacific Islander, ...American Indian or Alaskan Native," as well as people who are "Hispanic...regardless of race." *Minnesota Rules*, 5000.3400, subp. 18, <https://www.revisor.mn.gov/rules/5000/>, accessed July 8, 2020.

^c With regard to contracting goals, "people of color" includes citizens or lawfully admitted permanent residents of the United States who fall into one or more of the following categories: "Alaska Native, ...Black American, ...Hispanic American, ...Native American, ...Asian-Pacific American, ...Subcontinent Asian American, ...Native Hawaiian," and "any additional groups whose members are designated as socially and economically disadvantaged" by the federal Small Business Administration. "Women" means "persons of the female gender." An individual with a "substantial physical disability" is an individual who: (1) has a "physical impairment that substantially limits one or more major life activities," (2) has a record of such an impairment, or (3) is "regarded as having such an impairment." *Minnesota Rules*, 1230.0150, subps. 23-24 and 26a, <https://www.revisor.mn.gov/rules/1230/>, accessed April 27, 2020.

^d TGBs are "certified businesses...that are at least 51 percent owned and operated by women, persons with substantial physical disabilities, or specific minorities," among other requirements. *Minnesota Rules*, 1230.0150, subp. 23, <https://www.revisor.mn.gov/rules/1230/>, accessed April 27, 2020.

(Continued on next page.)

Exhibit 1.1: Workforce and contracting goals for state-funded projects differ in several ways (continued).

^e Contractors may also count training time for women and people of color towards the goal so long as the contractor employs the individual during the training period, and the contractor makes a commitment to hire the individual upon completion of the training, subject to the availability of job openings.

^f Workforce goals also apply to “state-assisted” construction contracts. *Minnesota Rules*, 5000.3530, <https://www.revisor.mn.gov/rules/5000/>, accessed July 8, 2020.

^g When MnDOT sets contracting goals, the bidder must either commit to meeting the contracting goals or demonstrate adequate efforts to do so.

^h State law identifies a number of activities that can be used to judge a contractor’s efforts to meet broader equal opportunity employment contract requirements; these requirements include, but are not specific to state workforce goals.

SOURCE: Office of the Legislative Auditor.

Workforce Goals

In order for businesses to complete their work, they typically must employ workers to do it. Throughout this report, “workforce” refers to the individual people conducting the work to complete state-funded construction projects. For example, on MnDOT’s construction projects, a worker might drive a truck, pour and smooth concrete surfaces, operate bulldozers or cranes, or install electrical wiring. MnDOT does not necessarily hire these workers directly; rather, the businesses that contract with MnDOT may hire the workers that complete MnDOT’s various projects.

Workforce goals specify targets for the share of hours worked by women and people of color on state-funded construction projects.

Since the mid-1980s, the commissioner of the Minnesota Department of Human Rights has had the authority to issue workforce participation goals to increase the share of work performed by women and people of color on state-funded construction projects.⁵ According to the Minnesota Department of Human Rights, the workforce goals aim to prepare for Minnesota’s emerging workforce shortage by encouraging employers to recruit, train, and retain diverse talent.⁶

There are separate workforce goals for women and people of color, and the goals are expressed as a percentage of total hours worked on each project.⁷ For example, a goal of 9 percent for women and 12 percent for people of color means that the goal is for women to work or train for 9 percent of the total hours needed to complete the project, and for people of color to work or train for 12 percent of the total project hours.

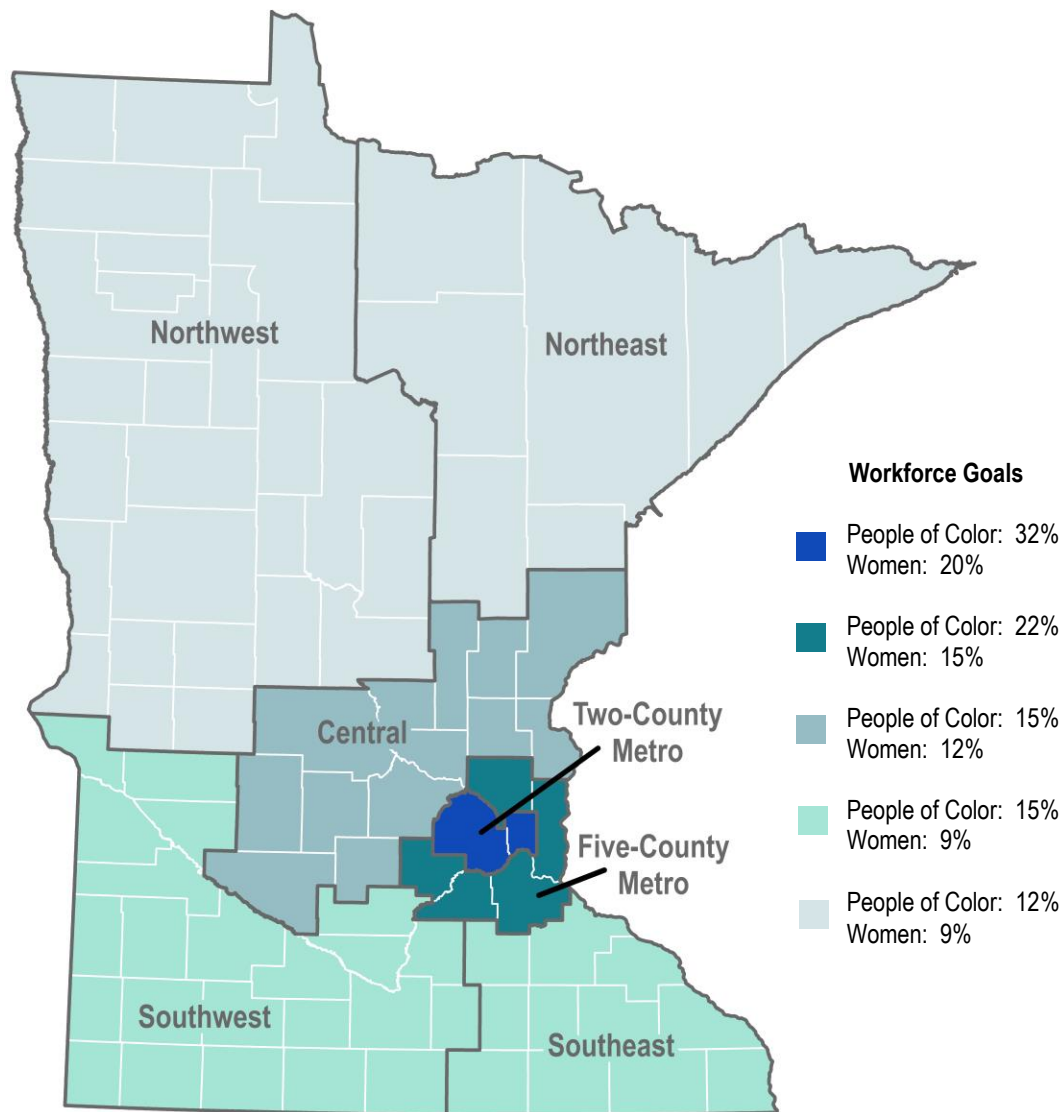
⁵ *Minnesota Rules*, 5000.3520 (1986), https://www.revisor.mn.gov/rules/5000/date/1986?keyword_type=all&format=pdf&#search=%225000.3520%22, accessed January 15, 2021. For state workforce goals, “people of color” includes individuals who are “Black, ...Asian and Pacific Islander, ...American Indian or Alaskan Native,” as well as people who are “Hispanic...regardless of race.” *Minnesota Rules*, 5000.3400, subp. 18, <https://www.revisor.mn.gov/rules/5000/>, accessed July 8, 2020.

⁶ Minnesota Department of Human Rights, “MDHR increases Workforce Participation Goals to reduce barriers for women, people of color” (July 17, 2017), <https://mn.gov/mdhr/news/?id=1061-302848>, accessed November 11, 2020.

⁷ Contractors may also count training time for women and people of color towards the goal so long as the contractor employs the individual during the training period, and the contractor makes a commitment to hire the individual upon completion of the training, subject to the availability of job openings.

As shown in Exhibit 1.2, the workforce goals vary by region of the state.⁸ Because there are separate goals for women and people of color, there are two separate workforce goals per region. For example, the workforce goals for construction projects in the two-county metropolitan region (Hennepin and Ramsey counties) are 32 percent for people of color, and 20 percent for women.

Exhibit 1.2: Workforce goals for state-funded construction contracts vary by region.



NOTES: Percentages show the target share of total contract hours performed by women or people of color on a given contract. Under certain circumstances, contractors may also count training time for women and people of color towards the goals. The Minnesota Department of Human Rights sets state workforce goals.

SOURCE: Office of the Legislative Auditor, review of Minnesota Department of Human Rights, *2017 Minnesota Workforce Goals Report* (St. Paul, July 17, 2017), 7; and *Minnesota Rules*, 5000.3520, <https://www.revisor.mn.gov/rules/5000/>, accessed July 8, 2020.

⁸ There are currently seven workforce goal regions. Regions follow county lines.

By law, state agencies, including MnDOT, are responsible for including workforce goals on all state-funded construction contracts in excess of \$100,000.⁹ We further discuss the legal requirements pertaining to the workforce goals in Chapter 2.

Contract Preferences and Goals

As we discussed at the beginning of this chapter, MnDOT often relies on contracts to procure various goods and services. In these contracts, MnDOT describes the work that it needs completed and then contracts with a business (referred to as a contractor) to complete the work.

In addition to activities related to increasing the diversity of *workers* on MnDOT projects, MnDOT also has programs targeted at increasing the diversity of the *business owners* with whom the agency contracts. Throughout this report, “contract preferences” and “contracting goals” refer to separate, but related, MnDOT strategies that encourage contracting with specific types of small businesses. Specifically, these strategies seek to increase the number of small businesses that participate on MnDOT projects that are owned and operated by people of color, women, people with a physical disability, and veterans.¹⁰ In law, people of color, women, and people with a “substantial physical disability” are referred to as members of a “targeted group.”¹¹

To increase the participation of businesses owned by veterans and members of a targeted group, MnDOT implements two different strategies:

Contract preferences. MnDOT offers contract preferences to certified businesses owned by targeted group members or veterans that bid on a MnDOT contract as a *prime contractor*. (As explained in the box on the following page, prime contractors are business entities that sign a contract directly with MnDOT.) The purpose of contract preferences is to make recipients of the

⁹ *Minnesota Rules*, 5000.3530, <https://www.revisor.mn.gov/rules/5000/>, accessed July 8, 2020. Minnesota Department of Transportation, Office of Civil Rights, *Equal Employment Opportunity (EEO) Special Provisions*, revised July 2017, <https://www.dot.state.mn.us/pre-letting/prov/order/eoo-specprov.pdf>, accessed July 8, 2020, 1 and 16-17.

¹⁰ A “veteran” is defined as “a citizen of the United States or a resident alien who has been separated under honorable conditions from any branch of the armed forces of the United States after having served on active duty for 181 consecutive days or by reason of disability incurred while serving on active duty, or who has met the minimum active duty requirement as defined by Code of Federal Regulations...or who has active military service certified under [federal law].” For the purposes of these strategies, veterans also include veterans with “a service-connected disability, as determined at any time by the United States Department of Veteran Affairs.” *Minnesota Statutes* 2020, 16C.19(d)(2) and 197.447.

¹¹ For the purposes of the Targeted Group Business Program, “people of color” includes citizens or lawfully admitted permanent residents of the United States, who fall into one or more of the following categories: “Alaska Native, ...Black American, ...Hispanic American, ...Native American, ...Asian-Pacific American, ...Subcontinent Asian American, ...Native Hawaiian,” and “any additional groups whose members are designated as socially and economically disadvantaged” by the federal Small Business Administration. Indian tribes and tribally owned businesses are also “people of color” for the purposes of the Targeted Group Business Program. “Women” means “persons of the female gender.” An individual with a “substantial physical disability” is an individual who: (1) has a “physical impairment that substantially limits one or more major life activities,” (2) has a record of such an impairment, or (3) is “regarded as having such an impairment.” For the rest of this report, we refer to these individuals as people with a physical disability. *Minnesota Rules*, 1230.0150, subps. 23-24 and 26a, <https://www.revisor.mn.gov/rules/1230/>, accessed April 27, 2020.

preferences more cost-competitive relative to bidders who do not qualify for the preference. Contract preferences reduce the cost of bids submitted by certified bidders solely for the purpose of comparing those bids to the other bids on the contract. Preferences do *not* reduce actual bid amounts or change the estimated amount of money the bidder would receive should MnDOT award the bidder the contract. We discuss contract preferences in greater detail in Chapter 3.



Types of Contractors

Prime contractors are businesses that sign a contract directly with MnDOT.

Subcontractors are businesses that sign a contract with the prime contractor or another subcontractor on a MnDOT project, as opposed to signing a contract directly with MnDOT.

Contracting goals. MnDOT also sets contracting goals to encourage prime contractors to hire businesses owned by veterans or members of a targeted group as *subcontractors*. Subcontractors are business entities that sign a contract with the prime contractor on a MnDOT project, as opposed to signing a contract directly with MnDOT.¹² We discuss contracting goals in chapters 4 and 5.

MnDOT has had the authority to implement contract preferences and goals for businesses owned by targeted group members since 1990, and for businesses owned by veterans since 2009.¹³

MnDOT administers several contract preference and goal programs with the intent of increasing the participation of specific types of businesses on MnDOT contracts.

These programs include the Disadvantaged Business Enterprise (DBE) Program, the Targeted Group Business (TGB) Program, and the Veteran-Owned Small Business (VET) Program.

Disadvantaged Business Enterprise (DBE) Program: The federal government established the DBE program to promote the participation of businesses owned and operated by women and people of color on contracts financed in whole or in part by the U.S. Department of Transportation. As part of the DBE program, MnDOT may set contract-specific goals for participation by businesses owned by women, people of color, and other socially and economically disadvantaged people. Unlike MnDOT's contracting programs for state-funded projects, the federal DBE program does not include a contract preference component. Federal transportation funding is contingent upon MnDOT implementing the DBE program. MnDOT projects receiving federal

¹² A subcontractor may also enter into a contract with another subcontractor.

¹³ *Laws of Minnesota* 1990, chapter 541, secs. 18-24; *Laws of Minnesota* 2009, chapter 101, art. 2, secs. 56-58 and 69; and *Laws of Minnesota* 2009, chapter 94, art. 3, secs. 3-5 and 8. Prior to 1989, state law required MnDOT to set aside at least 2 percent of construction work for small businesses with at least half of this set-aside targeted to small businesses owned and operated by "socially or economically disadvantaged" individuals or individuals with a physical disability. *Laws of Minnesota* 1989, chapter 352, secs. 14 and 15; and *Minnesota Statutes* 1988, 161.321, subds. 2 and 3.

funding through the U.S. Department of Transportation are subject to the DBE program requirements.

Targeted Group Business (TGB) Program: The TGB program is a state initiative to increase contracting opportunities for small businesses owned by women, people of color, and people with a “substantial” physical disability. The program applies only to state-funded contracts and includes both contract preferences and goals.

Veteran-Owned Small Business (VET) Program: The VET program is a state initiative to increase contracting opportunities for small businesses owned by honorably discharged veterans. The program applies only to state-funded contracts and includes both contract preferences and goals.

While MnDOT’s TGB and VET programs generally align with the federal DBE program, there are differences. For example, the certification process for the DBE program is separate from the certification process for the TGB and VET programs. In addition, the DBE program does not include contract preferences.¹⁴

In addition to the three programs outlined above, MnDOT has other programs focused on increasing the participation of women, people of color, and people with a disability on its contracts. For example, MnDOT’s On-the-Job Training Program and Supportive Services Programs are intended to help recruit and train women and people of color for jobs with highway construction contractors. MnDOT also directly negotiates some maintenance contracts with certified small businesses, which can expand opportunities for those businesses to work on highway projects.

Current Contracting Disparities

As we discussed above, women, people of color, and individuals with a “substantial” physical disability are currently considered members of a “targeted group” as it pertains to state contracting.¹⁵ By law, in order for a group of people to be considered “targeted,” the state must demonstrate that there is a “statistical disparity between the percentage of purchasing from businesses owned by group members and the representation of businesses owned by group members among all businesses in the state in the purchasing category.”¹⁶ In other words, the state must show that there is a significant difference in the extent to which it contracts with targeted group businesses for a specific service compared to the extent to which one would expect the state to contract with targeted group businesses, given the total number of targeted group businesses available in the state that could provide that service.

¹⁴ While OLA did not review the federal DBE program as part of this evaluation, MnDOT’s work pertaining to the DBE program was recently the subject of an independent evaluation. See *MnDOT DBE and OJT/SS Needs Assessment* (The Improve Group, 2020).

¹⁵ The Commissioner of Administration may also designate an individual business as a targeted group business “if the commissioner determines that inclusion is necessary to remedy discrimination against the owner based on race, gender, or disability in attempting to operate a business that would provide goods or services to public agencies.” *Minnesota Statutes* 2020, 16C.16, subd. 5(b).

¹⁶ *Minnesota Statutes* 2020, 16C.16, subd. 5(a).

To meet these requirements, the state periodically contracts with a third-party to conduct a “disparity study” that investigates whether contracting disparities persist for the groups that are currently “targeted.” The most recent disparity study was released in 2018.¹⁷

A recent study of several Minnesota state and local government entities found that MnDOT contracting dollars went to businesses owned by women and people of color less frequently than would be expected, given the number of relevant businesses owned by those individuals.

The disparity study released in 2018 indicated that there continues to be disparities in the extent to which MnDOT contracts with businesses owned by members of targeted groups on state-funded contracts. For example, over the course of its study period, the consultant found that 7 percent of MnDOT contracting dollars went to businesses—both

According to a recent study, there were disparities in MnDOT contracting for all but one targeted group.

Targeted Group	Disparity Index
Asian	133
Hispanic/Latino	80
Black/African American	3
Native American	1
White Woman	45

* A disparity index of 100 indicates contracting parity; under 100 indicates a contracting disparity.

**— 2017 Minnesota Joint Disparity Study,
Minnesota Department of Transportation,
Final Report (Keen Independent Research, 2018)**

certified and non-certified—that were owned by women or people of color.¹⁸ In contrast, the consultant reported it would have expected 20.5 percent of MnDOT’s contracting dollars to go to businesses owned by women or people of color, given the consultant’s calculation of the number of relevant businesses owned by members of these groups.

As part of its review, the consultant calculated a “disparity index” to show the magnitude of contracting disparities at MnDOT.¹⁹ The consultant rated agencies on a scale of 1 to 100, with 100 indicating parity and anything less than 80 showing a “substantial” disparity.²⁰ MnDOT’s overall disparity index was 34, the worst disparity score of all public entities included in the study.²¹

¹⁷ 2017 Minnesota Joint Disparity Study, Minnesota Department of Transportation, Final Report (Keen Independent Research LLC, March 2018).

¹⁸ The study period was July 2011 through June 2016 and included state-funded professional/technical contracts as well as construction contracts.

¹⁹ A disparity index is the ratio of the percentage of total contracting dollars received by businesses owned by members of targeted groups to the percentage of total contracting dollars that businesses owned by members of targeted groups could have received given their availability.

²⁰ Some courts have accepted a disparity index below 80 as evidence of “adverse impact.” See for example, *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation*, 713 F.3d 1187 (9th Cir. 2013). 2017 Minnesota Joint Disparity Study, Minnesota Department of Transportation, Final Report, Appendix B, 9-10.

²¹ The consultant conducted similar studies for eight other public entities: the Minnesota Department of Administration, Minnesota State Colleges and Universities, Metropolitan Airports Commission, Metropolitan Council, Metropolitan Mosquito Control District, City of Minneapolis, City of Saint Paul, and Hennepin County. In contrast to MnDOT’s disparity score of 34, the City of Saint Paul had the best disparity score at 77. 2017 Minnesota Joint Disparity Study, Minnesota Department of Transportation, Final Report, 9-3.

The consultant found that disparities in the amount of MnDOT contracting dollars awarded varied between targeted groups. For example, MnDOT's disparity index was three for businesses owned by individuals who were Black/African American and one for businesses owned by Native Americans. In contrast, MnDOT's disparity index was 45 for businesses owned by women who were White and 80 for businesses owned by individuals who were Hispanic/Latino. The study did not show a disparity for MnDOT contracts with one targeted group—Asian-owned businesses.

External Oversight of Goals

In 2010, the Legislature established a “disadvantaged business enterprise program and workforce inclusion collaborative” to provide external oversight of MnDOT's administration of its contracting and workforce goal programs.²² By law, MnDOT is required to regularly convene the collaborative to “review, evaluate, and recommend program changes.”²³ Among other things, the law requires the collaborative to review and evaluate MnDOT's on-the-job training programs, a working capital fund for certified businesses, and the TGB program.²⁴

The collaborative acts as an independent advisory group to MnDOT; it makes recommendations to the agency about how to increase workforce diversity and examines the extent to which it contracts with certified businesses. In addition to meetings of the full collaborative, committees provide guidance to MnDOT on specific topic areas, including workforce goals and youth education and outreach. For example, one committee regularly reviews MnDOT's reports about the extent to which contracts are meeting workforce goals.

The collaborative is open to the public; any individual or organization that is “committed to the Collaborative mission are welcome to participate.”²⁵ Current collaborative participants include MnDOT staff, prime contractors and subcontractors, union representatives, employment and business advocates, representatives of community organizations, training program representatives, and representatives from other government agencies. While the full collaborative typically meets five or six times per year, some collaborative committees hold meetings nearly every month. According to the collaborative's Fiscal Year 2020 report, attendance at meetings of the full collaborative ranged from about 30 to 45 participants.²⁶

Program Staffing

Staff across MnDOT play a role in workforce and contracting goals. For example, staff in MnDOT's Office of Construction and Innovative Contracting oversee contract preferences, and MnDOT project engineers in MnDOT district offices help to monitor the performance of certified subcontractors on MnDOT contracts. While staff from

²² *Laws of Minnesota* 2010, chapter 351, sec. 41, codified as *Minnesota Statutes* 2020, 174.186.

²³ *Minnesota Statutes* 2020, 174.186, subd. 1(b).

²⁴ *Ibid.*

²⁵ *2019-2020 Annual Report, DBE & Workforce Collaborative* (Zan Associates, 2020), 2.

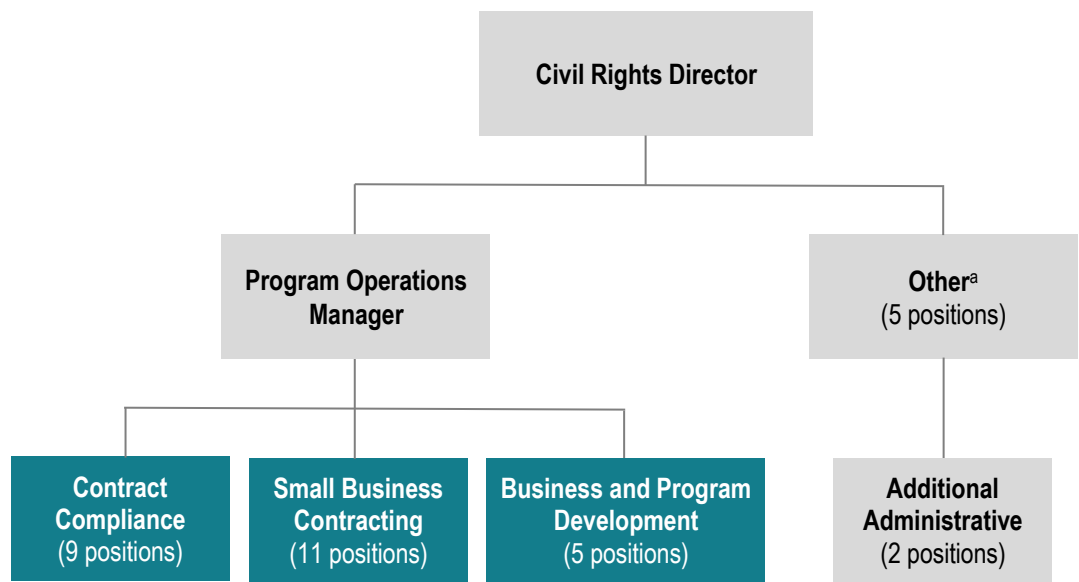
²⁶ *Ibid.*, 1-3.

multiple MnDOT offices are involved in workforce and contracting goals, one office plays a more prominent role.

MnDOT’s Office of Civil Rights is responsible for implementing the workforce and contracting goal programs.

As seen in Exhibit 1.3, the majority of OCR employees work in three units—contract compliance, small business contracting, and business and program development. Two of those units—contract compliance and small business contracting—are directly responsible for implementing MnDOT’s workforce and contracting goal programs.

Exhibit 1.3: The majority of staff in MnDOT’s Office of Civil Rights work on three teams.



NOTES: This exhibit reflects positions at MnDOT’s Office of Civil Rights as of September 2020. At that time, MnDOT reported that 8 of the 34 positions (24 percent) were vacant, including 1 position on the contract compliance team, 2 positions on the small business contracting team, and 1 position on the business and program development team.

^a “Other” includes a business coordinator, Title VI coordinator, administrative staff, and others.

SOURCE: Office of the Legislative Auditor, analysis of MnDOT Office of Civil Rights organizational chart, September 2020.

Among other responsibilities, the contract compliance team is responsible for tracking contractors’ efforts to meet workforce goals and ensuring contractors meet equal employment opportunity (EEO) requirements. For example, the contract compliance team monitors contractor progress towards meeting workforce goals, works with contractors on their employee recruitment efforts, and conducts compliance reviews of contractors on federally funded MnDOT contracts to ensure compliance with applicable laws. As of September 2020, there were nine staff positions on this team. Excluding the contract compliance team’s supervisor, four contract compliance specialist positions

oversee contractors' efforts to meet workforce goals, in addition to other responsibilities.²⁷

The small business contracting team oversees the DBE, TGB, and VET programs. Under the management of a team lead and a supervisor, this team sets contracting goals for projects and evaluates contractor efforts to meet the goals. OCR has one staff person responsible for these tasks for all state-funded construction contracts. An additional staff person is responsible for these tasks on professional/technical contracts. As of September 2020, there were 11 staff positions on this team.²⁸

Finally, the business and program development team develops programs, services, and tools to support small businesses. This team also administers on-the-job training services support in response to federal requirements.

Office of Civil Rights Finances

In recent years, OCR received the majority of its revenue from two sources: (1) the state Trunk Highway Fund and (2) the federal government.²⁹ For fiscal years 2016 through 2020, roughly three-fourths of OCR's funding came from Trunk Highway Fund appropriations. Federal grants accounted for nearly all of OCR's remaining revenue, which averaged roughly \$1 million annually in fiscal years 2016 through 2020.

Operational expenditures for MnDOT's Office of Civil Rights averaged \$4.6 million annually for fiscal years 2016 through 2020.

As shown in Exhibit 1.4, there was considerable annual variation in OCR expenditures for fiscal years 2016 through 2020. OCR's annual expenditures ranged from \$3 million in Fiscal Year 2016 to roughly \$7.4 million in Fiscal Year 2018. For most years, payroll expenses comprised roughly half of OCR expenditures.

After payroll, purchased services comprised OCR's next highest area of expenditure.³⁰ Spending related to information technology and computers made up almost half of OCR's purchased service expenditures in fiscal years 2016 through 2020. An additional 8 percent of total OCR expenditures went towards grants, aid, and subsidies to other state agencies, tribal governments, educational institutions, and nongovernmental organizations. While the recipients of OCR's financial assistance varied, most of OCR's grants and aid went toward construction trade job training programs and promoting transportation-related careers among secondary school students.

²⁷ As of September 2020, one of the four contract compliance specialist positions was vacant.

²⁸ As of September 2020, 2 of the 11 positions on this team were vacant.

²⁹ The Minnesota Constitution requires the state to establish a trunk highway system and identifies revenues the state must deposit in a Trunk Highway Fund and use "solely" for constructing, improving, and maintaining the trunk highway system. *Minnesota Constitution*, art. XIV, secs. 2 and 6.

³⁰ "Purchased services" include IT, rent and utilities, employee training and development, communications, printing, and advertising.

Exhibit 1.4: Payroll typically accounted for about half of MnDOT's Office of Civil Rights expenses for fiscal years 2016 through 2020.

	2016	2017	2018	2019	2020
Payroll	\$2.06	\$2.15	\$2.30	\$2.15	\$2.28
Purchased services ^a	0.86	1.51	4.71	0.82	1.63
Grants, aid, and subsidies	0.06	0.25	0.35	0.49	0.61
Other ^b	<u>0.02</u>	<u>0.01</u>	<u>0.01</u>	<u>0.49</u>	<u>0.0</u>
Total	\$3.00	\$3.92	\$7.37	\$3.96	\$4.52

NOTES: Expenditures are reported in millions of dollars. Expenditures by fiscal year may not sum to the total due to rounding.

^a "Purchased services" include IT, rent and utilities, employee training and development, communication, printing, and advertising. MnDOT staff indicated that the significant increase in purchased services in Fiscal Year 2018 resulted from information technology upgrades, most notably the enhancement of a civil rights module in MnDOT's construction contract management software.

^b "Other" includes expenses related to MnDOT's supplies and materials, noncapital assets, and other miscellaneous expenses.

SOURCE: Office of the Legislative Auditor, analysis of MnDOT Office of Civil Rights expenditure data.

Starting in Fiscal Year 2012, the Legislature has appropriated \$130,000 of the Trunk Highway Fund each fiscal year to MnDOT specifically for the administration of the TGB program.³¹ MnDOT staff told us that the agency uses the appropriation for payroll expenses pertaining to the TGB program, but that OCR's total spending on the TGB and VET programs exceeds \$130,000 annually.³² MnDOT staff estimated OCR spent an additional \$1.4 to \$1.8 million per year on expenses related to administering the TGB, VET, and DBE programs for fiscal years 2016 through 2020.³³ These totals do not include any extra contract costs that MnDOT could incur in the event that contract preferences or goals resulted in the selection of higher-cost certified businesses over less costly non-certified businesses. We discuss the costs of MnDOT contract preferences and contracting goals in chapters 3 and 5, respectively.

³¹ *Laws of Minnesota* 2011, First Special Session, chapter 3, art.1, sec. 3, subd. 3(b); *Laws of Minnesota* 2013, chapter 117, art. 1, sec. 3, subd. 3(b); *Laws of Minnesota* 2015, chapter 75, art. 1, sec. 3(b), subd. 3; *Laws of Minnesota* 2017, First Special Session, chapter 3, art. 1, sec. 2, subd. 3(b)(1); and *Laws of Minnesota* 2019, First Special Session, chapter 3, art. 1, sec. 2, subd. 3(b)(1).

³² MnDOT staff stated that once OCR exhausts its \$130,000 appropriation, MnDOT can only estimate additional spending specific to the TGB and VET programs.

³³ This estimation of additional TGB, VET, and DBE program spending does not include related overhead, fringe benefits, and IT costs.



Chapter 2: Workforce Goals

As we discussed in Chapter 1, state workforce goals specify a target for the share of hours on a contract to be worked by women or people of color. For example, a workforce goal of 20 percent for women indicates that the goal is for women to complete 20 percent of the total hours worked on a given project.¹

As we discuss throughout this chapter, workforce goals establish targets that contractors are expected to *strive* to meet; they are not quotas that contractors *must* meet. Workforce goals do not require contractors to fill a specific position with a woman or person of color, and workforce goals do not require a contractor to hire a worker who is not qualified to do the job. Rather, the goals encourage contractors to engage in efforts to broaden the existing pool of workers to include more women and people of color.

In this chapter, we discuss who is responsible for setting state workforce goals and recent updates to those goals. We then discuss how MnDOT oversees the workforce goals on its contracts and the extent to which contractors met the workforce goals on recent MnDOT projects. We conclude with a discussion about some of the current challenges pertaining to state workforce goals.

Key Findings in This Chapter

- Contracting state agencies—such as MnDOT—have limited authority in state law regarding state workforce goals.
- In recent years, MnDOT has improved its efforts to track whether contractors are meeting workforce goals, although its tracking of state-funded contracts remains limited.
- State-funded MnDOT construction contracts that started during fiscal years 2018 through 2020 rarely met the state’s workforce goals.

Establishing State Workforce Goals

As we showed in Exhibit 1.1 in Chapter 1, MnDOT is not responsible for setting the workforce goals that the agency includes in its contracts.

The Minnesota Department of Human Rights establishes workforce goals for state-funded construction projects.

By law, the commissioner of the Minnesota Department of Human Rights (MDHR)—not MnDOT—is responsible for establishing state workforce goals. The law states that MDHR’s commissioner “from time to time, shall issue goals and timetables for

¹ Contractors may also count training time for women and people of color towards the goal as long as the contractor employs the apprentice or trainee during the training period, and the contractor makes a commitment to hire the apprentice or trainee upon completion of the training, subject to the availability of job openings. *Minnesota Rules*, 5000.3535, 3, <https://www.revisor.mn.gov/rules/5000/>, accessed July 8, 2020.

minority and female utilization” on state-funded construction projects.² State law further requires the commissioner to set the workforce goals based on “appropriate workforce, demographic, or other relevant data” and states that the goals must be “applicable to each construction trade.”³

MDHR has periodically updated state workforce goals for the various regions of the state. For example, in 2012, MDHR updated workforce goals for people of color in the seven-county metropolitan area.⁴ MDHR most recently updated the workforce goals in July 2017, at which time the agency adjusted the workforce goals for women for all regions of the state, and for people of color for projects outside of the seven-county metropolitan area. When MDHR updated the goals in 2017, the agency had not updated goals for some areas of the state for over ten years.

When the Minnesota Department of Human Rights updated the state workforce goals in 2017, it increased many goals substantially.

After MDHR increased the goals in 2017, contractors on state-funded construction projects were expected to have women and people of color work a greater share of the total project hours. As shown in Exhibit 2.1, many of the increases to the workforce goals were substantial. For example, for construction projects taking place in the southern part of the state, MDHR increased workforce participation goals for people of color from 4 percent to 15 percent, nearly quadrupling the previous goal. For projects taking place in Hennepin or Ramsey counties, MDHR more than tripled the previous workforce goal for women, increasing the goal from 6 percent to 20 percent.

To inform its goal-setting process, MDHR convened an advisory taskforce composed of individuals representing “contractors, unions, members of the various trades, and the public.”⁵ In its summary of the 2017 goal-setting process, MDHR reported that taskforce members did not reach a consensus on the workforce goals for either women or people of color. For example, MDHR said that the majority of taskforce participants agreed that the workforce goals for women should be increased, but not all participants agreed that the goals should be increased outside of the seven-county metropolitan area.

Because MDHR—not MnDOT—is responsible for setting the workforce goals, we did not evaluate the goal-setting process or the appropriateness of the current workforce goals. However, we heard several comments about the reasonableness of current workforce goals throughout our evaluation, which we discuss towards the end of this chapter.

² *Minnesota Rules*, 5000.3520, <https://www.revisor.mn.gov/rules/5000/>, accessed July 8, 2020. For the purposes of this report, “state-funded” refers to contracts funded solely by state dollars.

³ *Ibid.*

⁴ The seven-county metropolitan area includes Anoka, Carver, Dakota, Hennepin, Ramsey, Scott, and Washington counties.

⁵ Minnesota Department of Human Rights, *2017 Minnesota Workforce Goals Report* (St. Paul, 2017), 36.

Exhibit 2.1: The Minnesota Department of Human Rights increased several workforce goals substantially in 2017.

Region	Counties	People of Color Workforce Goal: 2012	People of Color Workforce Goal: 2017	People of Color Workforce Goal: Percentage Increase 2012-2017	Women Workforce Goal: 2012	Women Workforce Goal: 2017	Women Workforce Goal: Percentage Increase 2012-2017
Central	Benton, Chisago, Isanti, Kanabec, Kandiyohi, McLeod, Meeker, Mille Lacs, Pine, Renville, Sherburne, Stearns, Wright	3%	15%	400%	6%	12%	100%
Northeast	Aitkin, Carlton, Cook, Itasca, Koochiching, Lake, St. Louis	5%	12%	140%	6%	9%	50%
Northwest	Becker, Beltrami, Cass, Clay, Clearwater, Crow Wing, Douglas, Grant, Hubbard, Kittson, Lake of the Woods, Mahnommen, Marshall, Morrison, Norman, Otter Tail, Pennington, Polk, Pope, Red Lake, Roseau, Stevens, Todd, Traverse, Wadena, Wilkin	6%	12%	100%	6%	9%	50%
Southeast	Dodge, Fillmore, Freeborn, Goodhue, Houston, Mower, Olmstead, Rice, Steele, Wabasha, Winona	4%	15%	275%	6%	9%	50%
Southwest	Big Stone, Blue Earth, Brown, Chippewa, Cottonwood, Faribault, Jackson, Lac Qui Parle, Le Sueur, Lincoln, Lyon, Martin, Murray, Nicollet, Nobles, Pipestone, Redwood, Rock, Sibley, Swift, Waseca, Watonwan, Yellow Medicine	4%	15%	275%	6%	9%	50%
Five-County Metro	Anoka, Carver, Dakota, Scott, Washington	22%	22%	0%	6%	15%	150%
Two-County Metro	Hennepin, Ramsey	32%	32%	0%	6%	20%	233%

SOURCE: Office of the Legislative Auditor, analysis of the Minnesota Department of Human Rights workforce goal-setting documentation.

Workforce Goal Requirements in Law

State law requires each “contracting state agency”—such as MnDOT—to fulfill certain responsibilities with regard to state workforce goals. For example, state law requires agencies to include a notice of the workforce goals in “all state and state-assisted construction contracts in excess of \$100,000.”⁶

Contracting state agencies—such as MnDOT—have limited authority in state law regarding state workforce goals.

While state law clearly requires each contracting state agency to include state workforce goals in certain contracts, the law requires agencies to take few additional actions to implement the state workforce goals. Generally, the law merely requires contracting state agencies to provide information to MDHR and contractors about the state workforce goals and other equal opportunity employment-related contract requirements.⁷ We provide a list of contracting state agencies’ responsibilities pertaining to state workforce goals in Exhibit 2.2.

Exhibit 2.2: State law gives contracting state agencies—such as MnDOT—few responsibilities regarding state workforce goals.

State contracting agencies *shall*:

- Cooperate with the Commissioner of the Minnesota Department of Human Rights (MDHR) in the performance of responsibilities under certain sections of the Minnesota Human Rights Act and its related rules.
- Provide to MDHR any information and assistance necessary to obtain compliance with certain contracting requirements in the Minnesota Human Rights Act and its related rules, including providing MDHR with information if it appears a contractor is not in compliance with the law.
- Ensure contractors are aware of their obligations under the Minnesota Human Rights Act and its related rules and include language in bid specifications, bid modifications, and contracts to that extent. Include a notice about the state workforce goals and related requirements in all solicitations for offers and bids for state-funded contracts over \$100,000.
- Prior to contract award, submit to MDHR a list of businesses that submitted bids to ensure their compliance with contracting requirements in the Minnesota Human Rights Act.
- Include in each contract an affirmative action clause, equal opportunity clause, and the contractor’s obligation to comply with sections of the Minnesota Human Rights Act and its related rules. Provide documentation describing the law and other information related to MDHR contracting requirements.
- Make a copy of the contracting requirements in the Minnesota Human Rights Act and its related rules available to bidders.

SOURCE: *Minnesota Rules*, 5000.3520-3535 and 5000.3600, <https://www.revisor.mn.gov/rules/5000/>, accessed July 8, 2020.

⁶ *Minnesota Rules*, 5000.3530, <https://www.revisor.mn.gov/rules/5000/>, accessed July 8, 2020.

⁷ *Minnesota Rules*, 5000.3600, <https://www.revisor.mn.gov/rules/5000/>, accessed July 8, 2020.

State law also requires contracting state agencies to “cooperate with the commissioner [of MDHR] in the performance of [the commissioner’s] responsibilities” under sections of the Minnesota Human Rights Act and with regard to the workforce goals and certain state employment requirements.⁸ MDHR and MnDOT have tried to describe more explicitly how the agencies will cooperate through a joint powers agreement signed by both agencies in April 2020.⁹ While this document clarifies some agency responsibilities, several MnDOT staff—including those responsible for administering state workforce goals—told us that MnDOT’s responsibilities and authority in law pertaining to workforce goals remain unclear. Further, we found MnDOT and MDHR staff sometimes interpreted MnDOT’s responsibilities with regard to the workforce goals differently. For example, MDHR told us that MnDOT has the authority to enforce state workforce goals through its contracts, while MnDOT staff indicated the agency does not have enforcement authority. We provide a recommendation about the responsibilities and authority of state contracting agencies with regard to the state workforce goals at the end of this chapter.

Contract Award

As shown in the box at the right, MnDOT’s contract award process involves multiple steps. For most construction contracts, after collecting and reviewing bids from different businesses interested in working on a contract, MnDOT staff determine which business submitted the lowest-cost bid. The business with the lowest-cost bid is referred to as the “apparent low bidder.”

Once MnDOT staff have determined the apparent low bidder, staff in MnDOT’s Office of Civil Rights (OCR) may require the bidder to submit additional information regarding the state workforce goals.¹⁰ For example, OCR may require the bidder to submit information about whether the

MnDOT’s contract award process involves multiple steps.

MnDOT begins accepting bids for the contract.



Interested businesses submit their bids to MnDOT.



MnDOT closes the letting period and reviews the bids.



MnDOT determines and posts the apparent low bidder.



The apparent low bidder may submit a workforce plan to OCR.



OCR reviews the workforce plan and may evaluate contractor good faith efforts.



If the apparent low bidder meets all other contract requirements, MnDOT awards the contract.

* This does not reflect all steps taken for all types of contracts.

⁸ *Minnesota Rules*, 5000.3600, subp. 1, <https://www.revisor.mn.gov/rules/5000/>, accessed July 8, 2020.

⁹ MnDOT staff told us that MDHR and MnDOT have been party to periodic joint powers agreements or memoranda of understanding since the early 1990s.

¹⁰ We discuss the circumstances under which OCR requires additional information in the next section.

contract will meet the workforce goals; however, the bidder's response does not affect whether or not they are awarded the contract.

MnDOT's decision to award state-funded construction contracts is not contingent upon a bidder's intention or efforts to meet the state workforce goals; however, MnDOT does not have clear authority in law to make workforce goal performance a condition of award.

MnDOT construction contracts include "special provisions" that outline various equal employment opportunity and workforce goal requirements for contractors. Before submitting a bid, MnDOT asks bidders to "acknowledge and certify all requirements included in the hardcopy proposal...are a part of this bid and contract."¹¹ In other words, when submitting their bid, MnDOT asks the bidder to acknowledge contract requirements, including the workforce goals.

However, for state-funded construction projects, when bidders submit their bids to MnDOT, they are not required to indicate whether they *plan to meet* the state workforce goals. MnDOT only requests this information from the apparent low bidder, and as we discuss below, MnDOT does not collect this information for all contracts. Most bidders do not provide any information to MnDOT about whether they plan to meet the workforce goals on state-funded MnDOT construction contracts.

Even if MnDOT did collect information from all bidders about whether they planned to meet state workforce goals, MnDOT does not have clear authority to make a contract award contingent upon a bidder's commitment to meeting the goals. As such, MnDOT does not consider whether a bidder plans to meet the workforce goals when making contract award decisions. Further, the agency does not require as a condition of contract award that the apparent low bidder demonstrate that they made an adequate effort to ensure the project meets the goals.¹²

We reviewed the files for the 13 contracts for which MnDOT required information from the apparent low bidder about whether the contract would meet state workforce goals.¹³ The apparent low bidder for most of the contracts we reviewed told MnDOT—before MnDOT awarded the contract—that the contract would not meet the state workforce goals. Of the 13 contracts we reviewed, the apparent low bidder committed to meeting the workforce goals for both women and people of color for only 1 contract, as seen in Exhibit 2.3. Instead, most bidders committed to having women and/or people of color work a lower share of hours on the contract.

¹¹ Susan Walto, MnDOT Office of Financial Management, e-mail attachment to Caitlin Badger, AASHTOWare Project Bids software program excerpt, Officers and Acknowledgements tab, March 11, 2021.

¹² One MnDOT staff person told us that contractors may not know the composition of their workforce for a given MnDOT contract when they submit their bid.

¹³ We reviewed 13 (7 percent) of the 197 state-funded contracts that were subject to state workforce goals (that is, contracts over \$100,000) and that began in fiscal years 2018 through 2020.

Exhibit 2.3: Of the 13 contracts we reviewed, **only 1 committed to meet workforce goals for both women and people of color in advance of contract award.**

	Women Workforce Goal	Women Workforce Commitment	People of Color Workforce Goal	People of Color Workforce Commitment
Contract 1	6%	5.5%	22%	15.8%
Contract 2	9	6.1	12	10.1
Contract 3	9	5.1	12	10.2
Contract 4	9	6.6	15	11.5
Contract 5	9	9.1	12	14.9
Contract 6	9	4	15	16.1
Contract 7	12	5.9	15	13
Contract 8	9	2.7	15	15.2
Contract 9	9	7.3	12	10.1
Contract 10	20	3.6	32	5.3
Contract 11	15	1.8	22	7.3
Contract 12	9	5.5	15	13.1
Contract 13	20	9.5	32	19.7

NOTES: Percentages show the share of total contract hours to be performed by women and people of color on each contract. Under some circumstances, contractors may also count training time for women and people of color towards the goal. For some contracts, MnDOT requests that contractors provide documentation stating the total number of hours they expect to work on a contract, and the share of those hours that will be performed by women or people of color (referred to as the contractor's workforce goal "commitment"). Contractors may indicate that the share of hours worked by women and people of color will meet, exceed, or be less than the goal. We reviewed state-funded contracts beginning in fiscal years 2018 through 2020 that were subject to state workforce goals and for which MnDOT required contractors to provide information about contractor goal commitments.

SOURCE: Office of the Legislative Auditor, review of MnDOT Office of Civil Rights contract files.

Implementing Workforce Goals

In this section, we discuss MnDOT's role in putting the state workforce goals into practice.

MnDOT takes a different approach to implementing the state workforce goals based on the contract's total cost.

As we discussed above, state workforce goals apply to all state-funded construction contracts in excess of \$100,000, and contracting state agencies—such as MnDOT—must include language in their construction contracts notifying bidders of the goals.¹⁴ MnDOT staff said the agency fulfills this requirement by notifying bidders of various equal employment opportunity requirements—which include workforce goals—and requesting that contractors acknowledge those requirements before submitting their bids.

¹⁴ *Minnesota Rules*, 5000.3530, <https://www.revisor.mn.gov/rules/5000/>, accessed July 8, 2020.

However, MnDOT has chosen a different threshold—\$5 million—to guide additional actions it takes to further implement the state workforce goals. Below, we explain how MnDOT staff evaluate contractor efforts to meet the state workforce goals at the time it awards the contract, and how they monitor contractors' progress towards meeting the goals over the course of a contract. We also discuss how the extent to which MnDOT performs these activities varies based on the cost of the contract.

Workforce Goals for Contracts Costing \$5 Million or Less

Of MnDOT's 197 state-funded construction contracts that were subject to the workforce goals and began in fiscal years 2018 through 2020, the winning bid totaled \$5 million or less for 184 contracts (93 percent). Contracts with a winning bid that was \$5 million or less accounted for 31 percent of the total cost of the winning bids for contracts starting during this period.

For the vast majority of state-funded construction contracts starting in recent years, MnDOT did not regularly evaluate or monitor contractors' efforts towards meeting the state's workforce goals.

As we described above, after MnDOT staff identify the apparent low bidder on a contract, OCR staff may request additional information from the bidder, including information about whether the bidder expects the contract will meet state workforce goals. Currently, however, MnDOT does not require this information for state-funded contracts if the bid amount is \$5 million or less. In other words, MnDOT does not determine whether—or to what extent—the apparent low bidder plans to meet state workforce goals for any of these contracts. As a result, unless bidders voluntarily submitted the information, MnDOT would not know whether bidders planned to meet workforce goals for 93 percent of the state-funded construction contracts that were subject to workforce goals and started in fiscal years 2018 through 2020.

MnDOT did not require bidders to indicate whether they planned to meet state workforce goals for

93%

of the state-funded contracts in our review period that were subject to workforce goals.

If a bidder does not commit to meeting the workforce goals, MnDOT could assess whether the bidder made an adequate effort to try to meet the goals. However, MnDOT also does not require bidders to submit information about their efforts to meet the workforce goals for bids costing \$5 million or less. As a result, unless bidders voluntarily submitted the information, MnDOT would not have been able to evaluate whether bidders made an acceptable effort to meet workforce goals for 93 percent of the state-funded contracts that were subject to

workforce goals and started in fiscal years 2018 through 2020. Further, if the bid amount for a state-funded construction project is \$5 million or less, MnDOT does not regularly monitor ongoing contractor progress towards meeting the workforce goals, as we discuss in greater detail below.

While MnDOT has taken a limited approach to implementing workforce goals on state-funded contracts for which the bid was \$5 million or less, state law does not require the agency to take a more proactive approach. We provide recommendations regarding MnDOT's implementation of workforce goals later in this chapter.

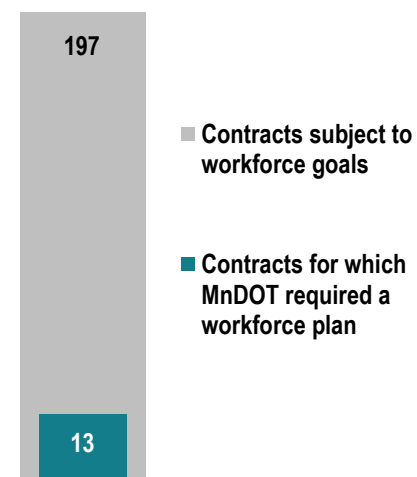
Workforce Goals for Contracts Costing More Than \$5 Million

MnDOT takes a somewhat more engaged approach to implementing state workforce goals on state-funded contracts if the bid is more than \$5 million.¹⁵ Below, we discuss the workforce-related information MnDOT collects for these contracts. We then discuss MnDOT's evaluation of whether contractors made adequate efforts to meet state workforce goals, including the extent to which MnDOT is required by law to evaluate contractors' efforts.

Workforce Plans

If the bid for a state-funded construction contract costs more than \$5 million, MnDOT asks the apparent low bidder to complete a "workforce plan" that indicates if the project's anticipated workforce will meet, exceed, or fall below the contract workforce goals.¹⁶ For example, the bidder might indicate that the project will not meet the state workforce goal that women complete 9 percent of project hours on a contract, but the contractor will commit to women completing 4 percent of total project hours.¹⁷ An excerpt from a workforce plan is included in Exhibit 2.4. Because MnDOT only requires workforce plans for contracts if the bid amount is greater than \$5 million, MnDOT required a workforce plan for only 13 of the 197 state-funded contracts subject to workforce goals in our review period.

MnDOT required workforce plans for few state-funded construction contracts starting in fiscal years 2018 through 2020.



¹⁵ MnDOT set this \$5 million threshold; as noted previously, by law, the workforce goals apply to construction contracts greater than \$100,000.

¹⁶ MnDOT asks the contractor to provide this information after the agency has identified the low bidder, but prior to awarding the contract.

¹⁷ Workforce plans include workforce goal commitments for both the prime contractor and subcontractors on a given project. Prime contractors are businesses that sign a contract directly with MnDOT. In contrast, subcontractors are businesses that sign a contract with the prime contractor or another subcontractor on a MnDOT project, as opposed to signing a contract directly with MnDOT.

Exhibit 2.4: Workforce plans include important information about whether contractors commit to meeting workforce goals.

Workforce Hours – Project Overview

SP Number: 4680-129

Women Goal: 9%

People of Color (POC) Goal: 15%

		Total Labor Hours	Women Labor Hours	Women %	POC Labor Hours	POC %	% Project Hours	Est. Start Date	Est. End Date
Prime Contractor(s):									
1	Prime contractor 1	56,000.0	1,300.0	2.3%	10,350.0	18.5%	60.9%	3/11/19	10/17/20
Subcontractors with Labor Hours:									
1	Subcontractor 1	288.0	0.0	0.0%	43.0	14.9%	0.3%	4/29/19	10/17/20
2	Subcontractor 2	150.0	33.0	22.0%	64.0	42.7%	0.2%	3/11/19	10/17/20
3	Subcontractor 3	1,092.0	0.0	0.0%	82.0	7.5%	1.2%	4/1/19	4/30/19
4	Subcontractor 4	1,000.0	200.0	20.0%	0.0	0.0%	1.1%	3/15/19	10/17/20
5	Subcontractor 5	120.0	0.0	0.0%	0.0	0.0%	0.1%	3/11/19	10/17/20
6	Subcontractor 6	1,100.0	0.0	0.0%	0.0	0.0%	1.2%	3/11/19	10/17/20
7	Subcontractor 7	15,250.0	1,373.0	9.0%	2,288.0	15.0%	16.6%	5/1/19	10/17/20
8	Subcontractor 8	550.0	0.0	0.0%	130.0	23.6%	0.6%	7/19/19	11/19/19
9	Subcontractor 9	1,960.0	0.0	0.0%	588.0	30.0%	2.1%	4/29/19	11/22/19
10	Subcontractor 10	1,440.0	0.0	0.0%	0.0	0.0%	1.6%	3/11/19	10/17/20
11	Subcontractor 11	24.0	0.0	0.0%	0.0	0.0%	0.0%	3/11/19	10/17/20
12	Subcontractor 12	11,600.0	725.0	6.3%	1,255.0	10.8%	12.6%	3/11/19	10/17/20
13	Subcontractor 13	1,343.0	20.0	1.5%	36.0	2.7%	1.5%	3/11/19	10/17/20
Total:		91,917.0	3,651.0	4.0%	14,836.0	16.1%			

NOTES: This exhibit shows an excerpt from a workforce plan for a state-funded construction contract beginning in 2019. The workforce goals for the contract for women and people of color (listed at the top of the excerpt) were 9 percent and 15 percent, respectively. As seen at the bottom of the excerpt, the contract did not commit to meeting the workforce goal for women but committed to exceeding the workforce goal for people of color (4 percent and 16.1 percent, respectively).

SOURCE: MnDOT Office of Civil Rights contract files.

Good Faith Efforts to Meet Workforce Goals

If a state-funded construction project will not meet the state workforce goals outright, contractors can demonstrate instead that they made “good faith efforts” to meet the goals.¹⁸ For the purposes of this chapter, good faith efforts towards meeting workforce goals include the contractor’s initial efforts or activities to meet the workforce goals

¹⁸ By law, a contractor’s compliance with certain employment requirements in the Minnesota Human Rights Act (including the state workforce goals) “shall be based on [the contractor’s]...efforts to meet the goals established for the geographical area where the contract resulting from this solicitation is to be performed,” among other things. *Minnesota Rules*, 5000.3530, 2, <https://www.revisor.mn.gov/rules/5000/>, accessed July 8, 2020.

before the contractor begins work on the project, as well as the contractor’s continuing efforts to meet the goals *after* the contractor begins work on the project.

Below, we discuss the extent to which MnDOT is required by law to evaluate contractors’ good faith efforts to meet the workforce goals. We then describe the extent to which contractors provide information to MnDOT to demonstrate their good faith efforts to meet the workforce goals, and the nature of MnDOT’s evaluations of these efforts.

Good Faith Efforts Requirements in Law

By law, a contractor’s compliance with various equal opportunity employment and affirmative action-related contracting requirements is based on the extent to which the contractor either meets the requirements, or makes “good faith efforts” to do so.¹⁹ State law identifies a number of activities that can be used to judge a contractor’s good faith efforts to meet these requirements, which include—but are more expansive than—the workforce goal requirements.²⁰ For example, a contractor’s good faith efforts are judged in part based on whether the contractor took “prompt corrective action” in the event it found an “inadequate display of equal employment opportunity posters” or that “managers, supervisors, or employees lack interest in company equal employment opportunity policies.”²¹

While these criteria may be important to judge a business’s efforts to meet equal employment opportunity requirements broadly, it is not clear how those criteria relate specifically to a contractor’s efforts to diversify its workforce or meet the state’s workforce goals on a given contract.²²

State law does not explicitly require MnDOT to evaluate contractors’ good faith efforts to meet state workforce goals.

State law does not explicitly require agencies (such as MnDOT) that contract for construction projects to evaluate contractors’ good faith efforts to meet the state workforce goals. Rather, MDHR is responsible in law for evaluating whether

¹⁹ *Minnesota Rules*, 5000.3570, subp. 1, <https://www.revisor.mn.gov/rules/5000/>, accessed July 8, 2020.

²⁰ By law, a contractor’s compliance with many employment requirements in the Minnesota Human Rights Act (including state workforce goals) is based on the contractor’s “implementation of the equal opportunity clause, specific affirmative action obligations required...[by law], and its efforts to meet the goals.” For these broader requirements, the law defines good faith efforts as “a reasonable effort undertaken by a contractor to accomplish the goals and implement the corrections identified in [the contractor’s] self-analysis.” *Minnesota Rules*, 5000.3400, subp. 14; and 5000.3530, 2, <https://www.revisor.mn.gov/rules/5000/>, accessed July 8, 2020.

²¹ *Minnesota Rules*, 5000.3570, subp. 2, <https://www.revisor.mn.gov/rules/5000/>, accessed July 8, 2020.

²² MnDOT and MDHR have a joint powers agreement that states that MnDOT will confer with MDHR when a contractor fails to demonstrate good faith efforts to meet the workforce goals. However, the agreement does not provide any further guidance for MnDOT regarding good faith efforts evaluations. State of Minnesota Joint Powers Agreement for Contract Compliance Activities, effective April 17, 2020, <https://www.dot.state.mn.us/civilrights/pdf/joint-powers-agreement.pdf>, accessed June 9, 2020.

contractors are in compliance with the various contracting requirements, including the workforce goals.²³

Further, state law does not clearly describe what criteria MnDOT or MDHR should use to determine whether contractors made good faith efforts to meet the workforce goals specifically. Good faith efforts could include targeted recruitment strategies, or training collaborations with organizations that are likely to generate qualified graduates who are women or people of color. However, without clear direction in law or in MnDOT's contract provisions, it is difficult for contractors to know how to demonstrate that they have made good faith efforts to meet state workforce goals, and it is difficult for MnDOT staff to know how to assess contractors' efforts.

State law also does not indicate when MnDOT or MDHR should evaluate contractors' good faith efforts to meet the workforce goals. For example, the law does not indicate whether an agency should evaluate good faith efforts to meet the workforce goals before awarding a contract to a bidder, after selecting a contractor but before work on the project begins, in the middle of a project, or at a contract's conclusion.

Evaluating Good Faith Efforts Before Contract Work Begins

While MnDOT is not explicitly required by law to evaluate contractors' good faith efforts to meet workforce goals, agency staff told us they do so before work begins for contracts when the bid amount is more than \$5 million.

Many contractors in our file review provided limited information about their good faith efforts to meet the workforce goals before work on the project began.

MnDOT's workforce plans require all prime contractors and subcontractors that do not commit to meeting the workforce goals to "describe specific actions your company will take within the next year to recruit, hire, train, and retain" women and people of color.²⁴ MnDOT further clarifies that "Actions may include, but are not limited to, targeted advertising, career fairs, referral programs, union collaboration, community-based organization outreach, etc."²⁵

For the 13 contracts in our review period with workforce plans, we found that the information contractors provided about their workforce efforts was often limited. For example, one subcontractor that committed to 0 percent workforce participation for women and did not commit to meeting the workforce goal for people of color said, "We anticipate working with the union to recruit or hire more women operators and/or drivers to better help obtained [*sic*] the workforce goal."²⁶ The contractor provided no additional information about how it planned to meet the goals. Another subcontractor that committed to 0 percent participation for both women and people of color merely

²³ *Minnesota Rules*, 5000.3570, subp. 1, <https://www.revisor.mn.gov/rules/5000/>, accessed July 8, 2020.

²⁴ MnDOT, Office of Civil Rights, *Workforce Plan*, Contractor Workforce Commitment Form (January 2018).

²⁵ *Ibid.*

²⁶ The workforce goals on this project were 12 percent for women and 15 percent for people of color.

said, “We are currently in contact with the workforce center in hopes of finding employees to reach our goal.”²⁷

While many contractors in our file review provided limited information about their good faith efforts to meet the workforce goals, a few contractors provided more substantive information. For example, one subcontractor provided a list of recruitment and educational events they had attended. A prime contractor submitted a “work plan” for meeting workforce goals that described its recruitment efforts; training programs; and contact information for various recruitment organizations, including unions and a workforce center.

Among the contracts we reviewed, MnDOT’s evaluation of contractors’ good faith efforts to meet state workforce goals before work on the contract began was limited.

Despite the limited information provided by many contractors, MnDOT often did not follow up with contractors about their initial good faith efforts for the contracts we reviewed. For some contractors, MnDOT staff requested that the contractor provide limited information, such as data on the demographics of their existing workforce or whether the contractor planned on hiring additional workers for the contract.

Some MnDOT staff described how the extent to which they follow up on good faith efforts is influenced by the number of hours a prime contractor or subcontractor is scheduled to work on a contract. These staff explained that the fewer hours a prime contractor or subcontractor is scheduled to work on a project, the less MnDOT tends to scrutinize their good faith efforts to meet the workforce goals. Conversely, one OCR supervisor said that staff take a “deeper dive” in following up with the prime contractors and subcontractors scheduled to work the most hours on the contracts. However, based on the contract files we reviewed, we did not find this to be consistently true. MnDOT did not follow up with some contractors for more information about their workforce efforts, despite the fact that these contractors contributed a significant number of the work hours on the project.

Staff also did not use consistent criteria to evaluate contractors’ good faith efforts to meet the workforce goals before project work began. In the absence of clear guidelines in law about how to evaluate contractors’ good faith efforts to meet workforce goals, MnDOT could on its own—or in collaboration with MDHR—establish guidance about how to evaluate good faith efforts before work on a project begins. MnDOT has not done so. MnDOT staff told us that it is difficult to establish good faith efforts criteria because of the unique nature of each contract. Another staff member said each MnDOT evaluation of contractor good faith efforts is “purely subjective, and it has to be.”

Contractor Performance Monitoring

After contractors begin work on a project, MnDOT’s approach to monitoring those contractors’ performance with regard to the state workforce goals can take different forms. For example, MnDOT could evaluate whether a contractor’s actions and

²⁷ The workforce goals on this project were 9 percent for women and 12 percent for people of color.

practices demonstrate that the contractor continues to make adequate *good faith efforts* to meet the workforce goals. MnDOT could also regularly track the extent to which contractors are *actually* meeting the contract's specific goals. We discuss these two monitoring approaches below.

Evaluating Good Faith Efforts After Contract Work Begins

OCR leadership told us that after a project has begun, they may evaluate factors related to contractors' ongoing good faith efforts to meet the workforce goals through OCR's "annual compliance reviews." Annual compliance reviews include both a review of the contractor's relevant policies and procedures and an on-site visit. If at the end of the review MnDOT staff identify deficiencies, they may place the contractor on a voluntary corrective action plan. In 2020, MnDOT conducted compliance reviews of 15 contractors.

While MnDOT uses "annual compliance reviews" to evaluate contractors' good faith efforts to meet workforce goals after a project begins, the reviews are broad and do not target state-funded contracts.

The purpose of an annual compliance review is "to ensure contractors are in compliance with equal opportunity requirements established under federal and state laws. . . ."²⁸ As a result, MnDOT's annual compliance reviews include an examination of equal employment opportunity requirements that are broader than state workforce goal requirements. For example, as part of a compliance review, MnDOT asks contractors to submit a copy of the company's equal employment opportunity policy and employee manual. As we discussed above, state law outlines various actions contractors must take to demonstrate their efforts to meet state equal employment opportunity requirements. MnDOT staff told us that their compliance reviews are guided by these broader standards required in state law.

While the compliance reviews are broad, they do include some factors related to workforce goals. For example, MnDOT requests that contractors provide a list of recruitment sources used by the company. However, the protocol does not instruct staff to ask the contractor to



OCR's annual compliance reviews include a broad evaluation of contractor equal employment opportunity activities.

Among other things, MnDOT requests that contractors provide:

- A workforce analysis that describes the company's workforce on the contract by job classification, race/ethnicity, and gender.
- A list and copy of all current bargaining agreements.
- A copy of the company's equal employment opportunity policy, affirmative action plan, and employee manual.
- A copy of the company's discrimination complaint procedure and form.
- A list of the recruitment sources used by the company.
- A list of the hire date, layoff, rehire, termination, and/or demotion of all employees within the last year, including job classification, race, national origin, and sex.

— OCR Compliance Review Procedure,
July 2020

²⁸ MnDOT, Office of Civil Rights, *2019 Annual Compliance Overview* (St. Paul, February 26, 2020), 1.

indicate whether it is meeting the workforce goals or its commitments on a given project, or what efforts the contractor has made to do so if it is falling short. In the case of prime contractors, the protocol does not instruct MnDOT staff to request evidence about the efforts the prime contractor has made to ensure its subcontractors are meeting the workforce goals.

Further, MnDOT staff told us that OCR does not conduct annual compliance reviews for contracts funded solely with state dollars. Rather, MnDOT conducts compliance reviews only for contracts funded with both federal and state dollars.²⁹ An OCR supervisor told us that, while the agency does not select state-funded contracts for annual compliance reviews, many of the contractors subject to compliance reviews on federally funded contracts also work on MnDOT's state-funded contracts. Many of the factors included in the compliance review are *contractor*-based, rather than *contract*-based; as a result, another supervisor reasoned that contractors on state-funded contracts are still subject to MnDOT's review.³⁰

While MnDOT may review the good faith efforts of some contractors that work on state-funded contracts as a result of their work on federally funded contracts, MnDOT does not specifically evaluate contractors' good faith efforts to meet the workforce goals *for state-funded contracts* after work on the project has begun. We provide recommendations regarding MnDOT's evaluations of good faith efforts later in this chapter.

Determining Ongoing Contractor Performance

In addition to its activities to evaluate contractor *efforts* to meet the goals, MnDOT has implemented several methods to track whether contractors are *actually meeting* workforce goals over the life of a contract. For example, a committee of MnDOT's DBE and Workforce Collaborative meets most months to review reports and discuss whether contractors are on track to meet the workforce goals for various contracts. In conjunction with the committee, MnDOT conducts ongoing internal tracking of contractor performance.

In recent years, MnDOT has improved its efforts to track whether contractors are meeting workforce goals, although its tracking of state-funded contracts remains limited.

Over the last four years, MnDOT has increased its reporting capacity with regard to workforce goals. The agency regularly shares reports with a committee of the DBE and

²⁹ According to MnDOT's compliance review protocol, MnDOT selects contractors for an annual compliance review based on several factors, such as whether the contractor has undergone a compliance review recently, or if they "engage in conduct otherwise demonstrating a lack of commitment to meeting Workforce Participation Goals and/or EEO principles." MnDOT staff told us that the agency also considers the information contractors provide in their workforce plans when selecting contractors for a compliance review. MnDOT, Office of Civil Rights, Contract Compliance Team, *Compliance Review Procedure* (July 2020), Attachment A.

³⁰ About 80 percent of the contractors that were subject to an annual compliance review in fiscal years 2018 through 2020 worked on at least one MnDOT state-funded construction contract that started in fiscal years 2018 through 2020.

Workforce Collaborative that detail the extent to which contracts are meeting state workforce goals. Further, in 2017, MnDOT started regularly sharing workforce reports with MDHR. For contracts with over 10,000 hours worked, MnDOT provides MDHR with data on the location of the project, and how close each contract is to meeting the state workforce goals.

In addition to the aggregate reports described above, in 2019, MnDOT created project-specific reports that show the extent to which contractors on a given project are meeting the workforce goals. These reports show workforce goal performance by the individual prime contractor and subcontractors. Contractors can request these progress reports at any time, and a MnDOT staff person said they try to send these project-specific progress reports to prime contractors at least once per year for each contract over \$5 million. Exhibit 2.5 includes an example of a project-specific workforce progress report.

While MnDOT has increased its monitoring of contractors' progress toward meeting workforce goals overall, we found its ongoing monitoring of workforce goals on *state-funded* construction projects was limited. A MnDOT staff person told us that lower-cost contracts have fewer employment opportunities, so the agency has chosen to monitor workforce progress primarily on higher-cost contracts. Because state-funded contracts are often a lower dollar value, MnDOT excluded the majority of state-funded contracts from its monitoring efforts. MnDOT staff said they do not regularly monitor contractor workforce performance for contracts under \$5 million, if they monitor performance for those contracts at all.³¹

In addition, MnDOT frequently excluded state-funded contracts from the workforce reports provided to both the DBE and Workforce Collaborative committee and to MDHR. There were 197 state-funded construction contracts that began in fiscal years 2018 through 2020 that were subject to state workforce goals. Of those contracts, MnDOT included only 12 contracts (6 percent) in the workforce reports provided to the DBE and Workforce Collaborative committee. Similarly, MnDOT included only 20 of the 197 contracts (10 percent) in reports to MDHR.

Through our review of contract files, we also looked at how frequently MnDOT provided prime contractors with project-specific reports regarding the extent to which the contract was meeting state workforce goals. These project-specific progress reports are currently MnDOT's primary method of sharing information about the performance of all contractors working on a specific project.³² We were unable to find any evidence

**MnDOT did not provide
a workforce goal
progress report for**

4

**of the 13 contracts we
reviewed.**

³¹ As we noted above, only 7 percent of state-funded construction contracts that started in fiscal years 2018 through 2020 and were subject to workforce goals (that is, contracts over \$100,000) had winning bids that exceeded \$5 million.

³² MnDOT requires each prime contractor and subcontractor on a project to submit regular reports to the agency regarding their workforce, including the total number of hours worked by employees who are women and people of color. While a contractor may track its own workforce goal performance—aside from MnDOT's project-specific progress reports—MnDOT does not provide a way for the prime contractor to monitor the performance of the subcontractors on the project. Without knowing subcontractor performance on a contract, it is not possible for the prime contractor to know whether the contract as a whole is on track to meet the overall workforce goals.

Exhibit 2.5: MnDOT's workforce goal progress reports show contractors' progress towards meeting state workforce goals on a given MnDOT contract.

Workforce Plan Progress Report											
Project Goals: 9% Women & 12% People of Color											
Contractor	Total Hours	Total Committed Hours	Women Hours	Committed Women Hours	Women %	Committed Women %	People of Color Hours	Committed People of Color Hours	People of Color %	Committed People of Color %	Last Payroll Submission
Prime contractor	11,622.15	13,250.00	1,565.90	1,000.00	13.5%	7.5%	858.00	1,250.00	7.4%	9.4%	5/25/2019
Subcontractor 1	90.50	260.00	0.00	0.00	0.0%	0.0%	17.75	30.00	19.6%	11.5%	11/4/2018
Subcontractor 2	172.00	231.00	0.00	24.00	0.0%	10.4%	0.00	0.00	0.0%	0.0%	8/8/2018
Subcontractor 3	279.75		0.00		0.0%		0.00		0.0%		11/3/2018
Subcontractor 4	64.25		0.00		0.0%		0.00		0.0%		10/27/2018
Subcontractor 5	426.00	432.00	0.00	39.00	0.0%	9.0%	100.00	52.00	23.5%	12.0%	10/27/2018
Subcontractor 6	71.75	292.00	0.00	0.00	0.0%	0.0%	0.00	0.00	0.0%	0.0%	8/19/2018
Subcontractor 7	465.00	710.00	0.00	0.00	0.0%	0.0%	0.00	85.30	0.0%	12.0%	11/3/2018
Subcontractor 8	138.25		0.00		0.0%		0.00		0.0%		11/3/2018
Subcontractor 9	391.00	200.00	0.00	0.00	0.0%	0.0%	0.00	40.00	0.0%	20.0%	12/22/2018
Subcontractor 10	105.75		0.00		0.0%		15.50		14.7%		11/3/2018
Subcontractor 11	77.00		0.00		0.0%		0.00		0.0%		6/10/2018
Subcontractor 12	280.75	80.00	0.00	0.00	0.0%	0.0%	0.00	0.00	0.0%	0.0%	11/4/2018
Subcontractor 13	48.50		0.00		0.0%		0.00		0.0%		8/11/2018
Subcontractor 14	1,249.25		21.75		1.7%		0.00		0.0%		11/4/2018
Subcontractor 15	188.25		0.00		0.0%		0.00		0.0%		11/3/2018
Subcontractor 16	243.00		0.00		0.0%		45.50		18.7%		11/3/2018
Subcontractor 17	358.00		0.00		0.0%		0.00		0.0%		11/3/2018
Subcontractor 18	5,979.50	4,450.00	0.00	150.00	0.0%	3.4%	77.00	534.00	1.3%	12.0%	12/22/2018
Subcontractor 19	177.25		0.00		0.0%		0.00		0.0%		11/3/2018
Subcontractor 20	167.00	64.00	0.00	0.00	0.0%	0.0%	35.00	32.00	21.0%	50.0%	10/20/2018
Subcontractor 21	387.50		0.00		0.0%		0.00		0.0%		10/20/2018
Subcontractor 22	19.50		0.00		0.0%		0.00		0.0%		10/27/2018
Subcontractor 23	676.50		0.00		0.0%		208.50		30.8%		9/15/2018
Subcontractor 24	32.25		0.00		0.0%		0.00		0.0%		9/29/2018
Totals	23,710.65	19,969.00	1,587.65	1,213.00	6.7%	6.1%	1,357.25	2,023.30	5.7%	10.1%	
The data in the table above represents all payrolls submitted by contractors as of 6/21/2019 including unapproved payrolls.											

NOTES: This exhibit shows a workforce plan progress report for a state-funded construction contract beginning in 2018. The workforce goals for this contract for women and people of color (listed at the top of the report) were 9 percent and 12 percent, respectively. At the time of this report, the contract was not meeting the workforce goals for women or for people of color. As seen at the bottom of the report, women had worked 6.7 percent of total work hours on this contract, and people of color had worked 5.7 percent of total work hours on this contract.

SOURCE: MnDOT Office of Civil Rights contract files.

that MnDOT sent at least one progress report to the prime contractor for 4 of the 13 contracts in our file review. Without MnDOT's progress reports, MnDOT staff said prime contractors are unable to track in real time the extent to which the contract is meeting workforce goals.

Finally, we found that the timing of MnDOT progress reports did not always provide contractors with sufficient time to improve their workforce goal performance. While

the timing of reports varied, on average, MnDOT provided the progress reports after 66 percent of the scheduled work hours on the project were complete.³³ This late in the project, it could be difficult for a contractor to make meaningful changes toward meeting the workforce goals.

Recommendations

MnDOT staff explained that their less-engaged approach to implementing workforce goals on contracts costing less than \$5 million was largely due to limited agency resources. They told us they have focused their efforts on the more expensive contracts because of their cost, and because they may present greater employment opportunities. However, the result of that decision is that MnDOT takes a very limited approach to implementing state workforce goals for the vast majority of its state-funded construction contracts. Further, while MnDOT has taken a more engaged approach to implementing state workforce goals for contracts costing \$5 million or more, some of its activities—particularly those related to evaluating contractor good faith efforts—warrant further attention. To address the issues we identified above, we provide several recommendations.

RECOMMENDATION

MnDOT should collect workforce plans for all contracts subject to state workforce goals.

Workforce plans contain key information for monitoring and evaluating contractors' progress towards meeting state workforce goals. Without collecting workforce plans, MnDOT has no documentation from contractors as to whether they plan to meet the state's workforce goals. In addition, the workforce plan is MnDOT's primary tool for systematically collecting information about contractors' efforts to meet the workforce goals before work on the contract begins. Without a workforce plan, MnDOT has little information with which to evaluate contractors' good faith efforts to meet the goals. Currently, however, MnDOT does not require workforce plans for the vast majority of state-funded contracts. One MnDOT staff person told us that collecting workforce plans for all projects would provide MnDOT with a more complete picture of workforce participation.

Further, OCR leadership told us that the exercise of completing the workforce plan is often a more effective approach to improving contractor workforce goal performance than asking contractors to pledge to meet the workforce goals alone. Leadership explained that workforce plans provide contractors with an opportunity to see the degree to which they plan to meet state workforce goals and where they may be falling short. They also provide an opportunity for OCR staff to use the information in the plan to work with contractors on their efforts to meet the workforce goals.

³³ To calculate the extent to which a project was complete, we determined the number of hours contractors worked on the project—as reported by OCR—as of the date OCR ran the progress report. We then calculated those hours as a share of the total hours contractors committed to working for the project, as reported by OCR. For one contract, we determined the extent to which the project was complete based on OCR e-mails in the contract file.

While we understand MnDOT's approach to target oversight resources at only the largest contracts, the agency's current practice means that MnDOT does not know whether contractors plan to meet workforce goals for the vast majority of its state-funded construction contracts. In addition, the agency is missing out on a key opportunity to require contractors to reflect upon their current workforce and the extent to which they meet state workforce goals before they begin work on the contract. As such, we recommend that MnDOT require workforce plans for all contracts subject to state workforce goals.

RECOMMENDATIONS

MnDOT should:

- **In consultation with the Minnesota Department of Human Rights, clarify the criteria by which contractors can demonstrate good faith efforts to meet workforce goals specifically.**
- **Require contractors to submit sufficient information—before starting work on the project—to assess their ongoing good faith efforts to meet state workforce goals.**
- **Clarify for which contracts and contractors agency staff will evaluate good faith efforts to meet the workforce goals.**
- **Consider increasing the share of state-funded contracts for which the agency reviews good faith efforts.**

While MnDOT is not explicitly required by law to evaluate contractor good faith efforts to meet the state workforce goals, we think good faith efforts evaluations are an important tool to hold contractors accountable. Further, the process of undergoing a good faith efforts review could provide contractors with additional information about how to improve their workforce goal performance.

We think it is important to evaluate contractors' efforts on an individual contract basis, and over the life of a contract. For example, if a contractor says in its workforce plan that it is not going to meet the goals for a contract, but it commits to taking certain actions to improve its performance, MnDOT should systematically review whether the contractor took the actions it committed to. To conduct more thorough and meaningful evaluations of contractors' good faith efforts, we make several recommendations, as outlined below. These recommendations may require MnDOT to reconsider how and when it collects information from contractors about their good faith efforts to meet the goals.

As we discussed above, it is not clear in law how contractors should demonstrate their good faith efforts to meet workforce goals specifically. Some MnDOT staff indicated it would be helpful to have greater clarity regarding how contractors can demonstrate good faith efforts towards meeting the workforce goals. We agree.

We recommend that MnDOT staff work with MDHR to establish good faith efforts criteria specific to meeting the workforce goals. MDHR is currently the agency responsible for establishing workforce goals. MDHR is also the agency with authority

to sanction contractors that do not meet the various equal employment opportunity and workforce contracting requirements. It follows naturally that MnDOT should consult with MDHR when defining what contractors should do to demonstrate good faith efforts to meet state workforce goals.

We also recommend that MnDOT require contractors to submit sufficient information for MnDOT staff to conduct a more thorough good faith efforts review. For the construction contracts it oversees, MDHR collects a “pre-construction packet” that includes good faith efforts information for all prime contractors and subcontractors working on a given project. In the packet, contractors must describe how they will meet the workforce goals by addressing various criteria and providing supporting documents. For example, contractors must submit (1) documentation indicating that contractors contacted relevant unions to request workers for the project, (2) documentation of any partnerships with construction training programs or educational institutions that target people of color or women, and (3) documentation of any recruitment initiatives that target people of color or women. MnDOT could choose to use this document as a guide for its own efforts to clarify good faith efforts criteria and request relevant information from its contractors.

MnDOT should use the information it gathers regarding contractors’ initial good faith efforts to inform its later review of contractors’ efforts to meet the goals once the project has started. We recommend that MnDOT consult with MDHR and the DBE and Workforce Collaborative to determine what information contractors should submit to demonstrate their good faith efforts.

Finally, we recommend that MnDOT clarify for which contractors and contracts the agency will review good faith efforts. MnDOT staff did not evaluate contractor good faith efforts to meet workforce goals before work on the project began for 93 percent of state-funded construction contracts starting in fiscal years 2018 through 2020. Further, MnDOT does not include state-funded contracts in annual compliance reviews that consider factors related to good faith efforts to meet the goals after the project has begun. Given MnDOT’s finite resources, it may not make sense for the agency to evaluate the good faith efforts of every contractor on every project. However, we recommend that MnDOT consider increasing the share of state-funded contracts subject to good faith efforts reviews. Again, we suggest that MnDOT work with the DBE and Workforce Collaborative to determine the circumstances under which MnDOT staff should evaluate contractor good faith efforts to meet workforce goals on state-funded contracts.

RECOMMENDATION

MnDOT should improve its ongoing tracking of the extent to which contractors are meeting workforce goals for state-funded construction contracts.

We commend MnDOT for increasing its overall oversight of the extent to which contractors are meeting state workforce goals. However, given MnDOT’s current monitoring practices, the agency has an incomplete view of contractor performance.

MnDOT should revise its current monitoring practices to include a greater share of state-funded contracts. We also suggest that MnDOT send workforce progress reports

to contractors early enough in the project lifecycle for contractors to address instances in which the project is underperforming. Finally, we recommend that MnDOT develop a way for contractors to monitor the extent to which the project as a whole is meeting workforce goals in real time. By providing contractors with a better way to monitor their own performance, MnDOT will ease some of the burden on OCR staff of sending periodic performance reports to contractors.

MnDOT Communication with Contractors

A key aspect of working with contractors to achieve the state's workforce goals is communication. We looked at two aspects of MnDOT's communication with contractors about state workforce goals: (1) the extent to which workforce goals are clear in MnDOT contracts, and (2) the extent to which MnDOT notifies contractors about their workforce goal performance at the conclusion of a project. We discuss both below.

Workforce Goal Clarity

As part of our review, we looked at contract files to determine whether MnDOT consistently included the workforce goals in all of its construction contracts.

While MnDOT included the state's workforce goals in each of the contracts we reviewed, the contracts did not always clearly indicate which workforce goals applied to a given project.

MnDOT included a table of workforce goals in each of the construction contracts we reviewed. While the table listed each workforce goal for each county in the state, there was no other indication as to which workforce goals applied to the contract. For the two contracts in our review that took place in multiple counties that were subject to different workforce goals, it was not clear in the contract which workforce goals applied. MnDOT did not otherwise specify which goals the contractors should adhere to, nor did it provide guidance to contractors so that they could determine which workforce goals applied. Overall, at least 69 of the 197 contracts (35 percent) in our review period that were subject to workforce goals took place in multiple counties, several of which had different workforce goals.

MnDOT clearly identifies the workforce goals for contracts on the workforce plan templates provided to contractors. However, as we discussed previously, 93 percent of state-funded contracts in our review period did not require workforce plans.

Both MnDOT and MDHR told us that, for contracts in which there are conflicting workforce goals, the highest workforce goals prevail. However, we found that MnDOT contracts taking place in multiple counties were not always subject to the highest workforce goals. For example, we reviewed one contract for a project in Anoka and Chisago counties. The workforce goals for Anoka County are 22 percent for people of color and 15 percent for women. The workforce goals for Chisago County are 15 percent for people of color and 12 percent for women. Yet, instead of applying the higher goals from Anoka County, MnDOT staff told us the lower Chisago County goals applied. MnDOT staff said the lower goals applied because of how the contract was coded in the agency's contract management system.

RECOMMENDATION

MnDOT should clearly identify the relevant workforce goals in its contracts for state-funded projects.

In order to meet the workforce goals, contractors must first know what the goals are. MnDOT should explicitly list the workforce goals in the contract for each project, rather than (or in addition to) listing the goals for all counties in the state. MnDOT has already implemented this practice for contracting goals; we recommend that the agency also do this for the workforce goals. Doing so will eliminate any confusion or interpretation required on the part of contractors to determine which workforce goals apply to a specific project.

Communication about Final Goal Performance

As we discussed above, for some projects, MnDOT staff monitor progress towards meeting workforce goals over the course of the project. Below, we discuss the extent to which MnDOT evaluates and notifies contractors about their performance after the project is over.

MnDOT neither consistently tracks whether state-funded contracts met workforce goals nor notifies contractors about their workforce goal performance at the end of a contract.

MnDOT does not consistently verify the extent to which state-funded contracts of any dollar amount met workforce goals at the conclusion of a contract. For contracts over \$5 million, MnDOT staff said they review workforce performance with a committee of the DBE and Workforce Collaborative when projects are 90 to 100 percent complete.³⁴ However, MnDOT staff said that final payroll data may yet change after that review. MnDOT does not include contracts that are \$5 million or less in those reviews, despite workforce goals applying to all state-funded construction contracts greater than \$100,000.³⁵

Further, the agency does not consistently notify either prime contractors or subcontractors whether they met state workforce goals at the end of a project. A MnDOT supervisor said that because so few contracts meet the goals, MnDOT does not evaluate whether contractors met the goals at the end of the project.

³⁴ As we discussed above, contracts that were subject to state workforce goals and for which bids were over \$5 million comprised only 7 percent of state-funded contracts in our review period.

³⁵ Staff said they also include contracts taking place on tribal lands in their reviews of workforce performance.

RECOMMENDATION

MnDOT should track the extent to which each state-funded contract met workforce goals and notify contractors as to whether or not they met the goals at the conclusion of each contract.

Regularly tracking whether contracts met the workforce goals provides an important metric to understand how the number of contracts meeting the goals is changing over time, the extent to which MnDOT's efforts are proving successful, and whether the goals are attainable. It is also important for prime contractors to know whether the project met the workforce goals—and perhaps more importantly—to know that MnDOT is monitoring whether the project met the workforce goals.

At a minimum, MnDOT should notify prime contractors at the conclusion of each contract whether they met the workforce goals. MnDOT should tell prime contractors both the extent to which the prime contractor's workforce met the goals, as well as the extent to which the contract's overall workforce met the goals. MnDOT should also track and notify prime contractors about whether they met their workforce goal *commitments*.

MnDOT should also consider whether to notify subcontractors about whether they met the workforce goals at the conclusion of a contract. Some MnDOT staff told us that some subcontractors work few hours on a contract. While this may be true for some subcontractors, other subcontractors contribute a significant number of work hours on a given project. We recommend that MnDOT consult with the DBE and Workforce Collaborative to determine the extent to which MnDOT should communicate with subcontractors about their workforce goal performance.

Workforce Goal Performance

In the previous sections, we discussed what responsibilities MnDOT has with regard to workforce goals, and the agency's approach to meeting those responsibilities. In this section, we describe the extent to which recent MnDOT contracts met state workforce goals.

MnDOT determines whether a project met the workforce goals based on the sum of total hours worked by women and people of color on the project as a share of total hours worked on the contract. As we discussed in Chapter 1, MnDOT construction contracts often have a prime contractor and several subcontractors participating on a project. While one subcontractor may not meet the workforce goals on a project, another subcontractor may exceed them. The project will meet workforce goals so long as the sum of total hours worked by women and people of color across *all* contractors on the project meet the number of hours stipulated by the goal.

State-funded MnDOT construction contracts that started during fiscal years 2018 through 2020 rarely met the state's workforce goals.

We examined all complete MnDOT state-funded construction contracts over \$100,000 that began in fiscal years 2018 through 2020. Of those 82 contracts, only 6 percent of contracts met the goals for *both* women and people of color. A greater share (33 percent) of contracts met the workforce goal for *either* women or for people of color. Sixteen percent of contracts met the workforce goals for women, while 23 percent of contracts met the workforce goals for people of color.

In recent years, only

6%

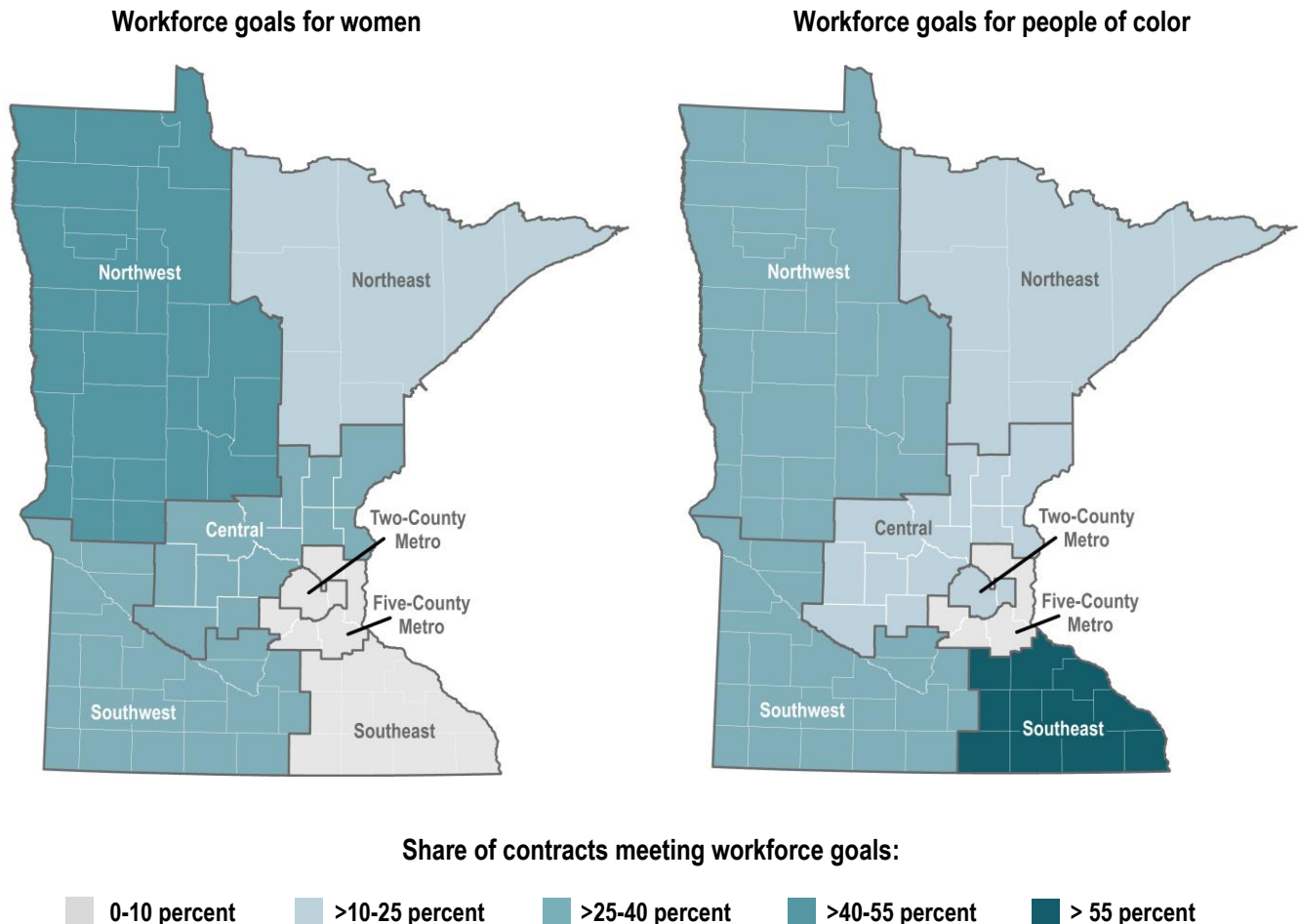
of MnDOT contracts met state workforce goals for both women and people of color.

We also looked at the extent to which project geography affected whether contracts achieved state workforce goals. One MnDOT staff person, for example, told us that contractors were more likely to meet workforce goals for projects taking place in the metropolitan region. Forty-six percent of construction projects in our review period took place in the seven-county metropolitan region. However, none of those projects met the workforce goals for both women and people of color. For MnDOT construction contracts in the seven-county metropolitan region that started in fiscal years 2018 through 2020, 3 percent of contracts met the workforce goal for the employment of women, and 11 percent met the goal for the employment of people of color. Exhibit 2.6 shows the extent to which contracts in recent years met the workforce goals for women and the goals for people of color by region.

In addition to not meeting current workforce goals, we found that most MnDOT construction contracts did not meet the previous state workforce goals (before MDHR increased the goals in 2017). We reviewed data on state-funded MnDOT construction projects that closed during the 18 months prior to MDHR's 2017 workforce goal increase. Nearly 80 percent of contracts we reviewed did not meet the workforce goals for women, and 64 percent of contracts did not meet the goals for people of color.³⁶

³⁶ Whereas MDHR had not increased workforce goals for people of color in other regions of the state since 2006, MDHR increased workforce goals for people of color in the seven-county metropolitan area in 2012. After excluding contracts in the seven-county metropolitan region for which MDHR had more recently increased the goals, 45 percent of contracts we reviewed did not meet the workforce goals for people of color.

Exhibit 2.6: The extent to which MnDOT construction contracts met state workforce goals in recent years varied by region.



NOTES: The data above reflect the percentage of complete, state-funded MnDOT construction contracts beginning in fiscal years 2018 through 2020 that met state workforce goals, by workforce goal region. Workforce goals vary by region and are listed in Exhibit 1.2. For projects that took place in multiple regions with different goals, we first determined the workforce goals MnDOT would assign to the project in accordance with their goal-assignment process. We then assigned the project to the region with the corresponding state workforce goals.

SOURCE: Office of the Legislative Auditor, analysis of MnDOT contract data (Central $N = 10$, Five-County Metro $N = 13$, Northeast $N = 14$, Northwest $N = 13$, Southeast $N = 4$, Southwest $N = 3$, Two-County Metro $N = 25$).

MnDOT neither penalizes contractors that do not meet the state's workforce goals nor rewards contractors that do; the agency does not have clear authority to do either.

There are no penalties for contractors at the end of the project if they do not meet the state's workforce goals. For example, MnDOT does not reduce contractor payments if the contractor does not meet the workforce goals. Also, whether or not a contractor meets the workforce goals, or how close the contractor comes to meeting the goals, does not play a role in how the contractor is assessed for future contract awards. MnDOT also

does not incentivize contractor performance on workforce goals, for example, by giving contractors that met workforce goals on past contracts a preference for future contracts.

If a contractor does not meet the state workforce goals at the end of a project, a MnDOT supervisor told us that MnDOT staff look to see if the contractor is working on any other MnDOT projects. If it is, MnDOT staff try to help the contractor improve its workforce performance on those other projects. If the contractor's performance did not improve, a supervisor explained that MnDOT staff would continue meeting with the contractor about the workforce goals.

While MnDOT can encourage contractors to meet the workforce goals, the agency does not have clear authority in law to penalize those who do not do so. State law requires MnDOT to provide MDHR “with any information or assistance [MDHR] deems necessary to seek compliance” with MDHR’s various contracting requirements in law, but the law does not grant MnDOT any enforcement authority directly.³⁷ MDHR and MnDOT’s joint powers agreement also does not indicate that MnDOT has a role in penalizing contractors that do not meet workforce goals. It states that MnDOT will “recommend [contractors] for corrective action and refer to MDHR for sanctions” and “collaborate with MDHR to ensure consistent enforcement of workforce goals.”³⁸ Neither of these responsibilities indicate that MnDOT has authority to enforce the goals. We provide a recommendation regarding the role of contracting state agencies in enforcing state workforce goals at the end of this chapter.

Workforce Goal Challenges

As we have discussed, the majority of state-funded contracts that closed during our review period did not meet state workforce goals. MnDOT staff, contractor representatives, and members of MnDOT’s DBE and Workforce Collaborative described many reasons why contractors struggle to meet these goals. We discuss some of these challenges below.

Several stakeholders and agency staff told us that current workforce goals are not consistently achievable for MnDOT contracts.

MnDOT staff told us that there are various factors that affect whether the state workforce goals are achievable on a given contract; the current goals may be attainable for one contract, but not for another. For example, one staff person told us that some trades have a more diverse workforce than others, so the type of work required on the project can affect whether the workforce goals are attainable. Some MnDOT staff told us that the goals for women are more difficult to achieve than the goals for people of color. On the other hand, one MnDOT staff person commented that the fact that some contractors are able to meet the workforce goals is evidence that the goals are reasonable.

³⁷ *Minnesota Rules*, 5000.3600, subp. 7, <https://www.revisor.mn.gov/rules/5000/>, accessed July 8, 2020.

³⁸ State of Minnesota Joint Powers Agreement for Contract Compliance Activities, effective April 17, 2020, <http://www.mndot.org/civilrights/pdf/joint-powers-agreement.pdf>, accessed June 9, 2020.

Several representatives of organizations in the construction industry told us that the state workforce goals are unattainable given the current composition of Minnesota's construction industry workforce.³⁹ Several MnDOT staff told us that the goals MDHR set were forward looking and were not meant to be achieved until years after the goals were set. One MnDOT staff person told us that the 2017 workforce goals were not set to reflect the workforce demographics of the construction industry in 2017, but rather to move the industry to those goals by 2027.⁴⁰

MnDOT staff and industry stakeholders described several additional barriers to increasing the number of workers in the transportation construction industry who are people of color or women. For example, some MnDOT staff and members of the construction industry commented that workforce goals are sometimes in tension with union requirements.⁴¹ Given union seniority rules at many unions, an agency staff member indicated it can be difficult to place women or people of color who are new to the construction industry on projects because they are more junior than other union members. The more senior union members may not be reflective of recent industry efforts to diversify the workforce.

Below, we discuss some additional challenges to meeting state workforce goals—including challenges specific to the transportation construction industry, as opposed to the building construction industry. Currently, state workforce goals are the same across all construction trades and industries. However, some industry stakeholders questioned whether there should be separate workforce goals for building construction projects and transportation or highway construction projects, given the differences between the two industries.

While some of the challenges we discuss below reflect obstacles facing the transportation construction industry as a whole, some of these challenges may disproportionately affect women and people of color.⁴²

Lack of adequate transportation. An agency staff member and contractor representatives said that transportation construction workers need to be highly mobile, because road construction projects occur across the state. Unlike

³⁹ One publication by the Minnesota Department of Employment and Economic Development reported that in 2015, women comprised 13.6 percent of the construction workforce in Minnesota and people of color comprised 4.8 percent of the state's construction workforce. The article did not provide workforce statistics specific to transportation construction. Oriane Casale, *The Case for Diversifying Construction*, (Minnesota Economic Trends, December 2016), 3-4.

⁴⁰ A current MDHR leader did not agree with this interpretation of the current workforce goals and said that the goals were not meant to be met by a specific future date.

⁴¹ By law, "Neither the provisions of any collective bargaining agreement, nor the failure by a union with whom the contractor has a collective bargaining agreement, to refer either minorities or women shall excuse the contractor's obligations" to meet the goals. *Minnesota Rules*, 5000.3535, <https://www.revisor.mn.gov/rules/5000/>, accessed July 8, 2020.

⁴² For example, as we discuss below, stakeholders described how workers in highway construction need access to reliable transportation. Some studies have suggested that the driver's license suspension rate as a result of unpaid fines or fees is disproportionately higher in communities of color. See for example, *Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California* (East Bay Community Law Center et al., April 2016), https://lccsf.org/wp-content/uploads/Stopped_Fined_Arrested_BOTRCA.pdf, accessed April 20, 2021; and *Driving while Black and Latinx: Stops, Fines, Fees, and Unjust Debts* (New York Law School, February 2020), https://digitalcommons.nyls.edu/racial_justice_project/8, accessed January 14, 2021.

building construction, where a worker might report to the same site for an extended period of time, highway workers might work in Cloquet one day and Willmar the next. This requires workers to have reliable access to transportation—including a vehicle and a driver’s license—which can be a significant barrier, several stakeholders said.

Seasonality. A MnDOT staff member, contractor representatives, and members of groups advocating for increased workforce diversity commented on challenges related to the seasonality of MnDOT construction work. A MnDOT staff member explained that highway construction businesses often lay off most of their workforce during the off-season. Individuals explained that this can pose financial challenges for workers, with one contractor representative explaining that the seasonality of transportation construction requires workers to either find another job or go without a paycheck for several months of the year. Individuals told us that building construction is not as seasonal.

Unpredictable hours. Members of MnDOT’s DBE and Workforce Collaborative as well as contractor representatives described how long or unpredictable hours on road construction projects can pose obstacles for increasing the share of women and people of color working on MnDOT projects. For example, due to weather delays or to accommodate traffic patterns, workers might be required to work long or overnight shifts, which can pose challenges for finding childcare.

Industry culture. Finally, some individuals said the culture of the construction industry is a barrier to increasing the number of workers who are women or people of color. For example, two contractor representatives described the construction industry as an “old boys club.” A representative from a workforce advocacy group and business owners responding to MnDOT’s disparity study described discriminatory or harassing behaviors faced by workers of color and female workers in the construction industry.

Discussion

Overall, women and people of color continue to complete a relatively small share of the work on MnDOT construction contracts. While MnDOT could do more to improve outcomes pertaining to workforce goals on its contracts, by law, MnDOT does not clearly have either the responsibility or the authority to address several obstacles affecting the efficacy of the workforce goals. For example, as we discussed, there are currently no consequences for contractors if they do not meet workforce goals at the end of a project. State law does not grant MnDOT the authority to sanction contractors that did not make adequate efforts to meet the goals.

We also discussed that MnDOT’s current evaluations of contractors’ good faith efforts towards meeting the workforce goals are limited. However, if MnDOT was to conduct a more thorough review of contractors’ efforts, the agency has no clear authority to directly address any deficiencies it finds through those reviews. For example, MnDOT does not have clear authority to deny a contract award because a bidder did not make good faith efforts to meet the workforce goals at the time of bid. While a thorough evaluation of a contractor’s efforts to meet workforce goals could be a learning opportunity for a

contractor, MnDOT must also weigh the resources necessary to conduct those good faith efforts reviews if it has limited ability to make use of its findings.

RECOMMENDATION

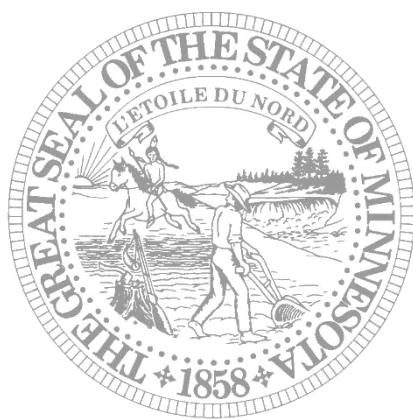
The Legislature should consider the extent to which it wants to prioritize the state's workforce goals and clarify the role of contracting state agencies accordingly.

We suggest that the Legislature review the responsibilities and authority in law given to contracting state agencies to ensure they align with the Legislature's goals and policy priorities for the state with regard to workforce goals. If contractors' performance on state workforce goals for MnDOT construction contracts does not meet the Legislature's expectations, the Legislature may want to consider directing MnDOT to play a greater role in implementing state workforce goals. However, this would require the Legislature to provide more explicit guidance about how contracting state agencies should implement and enforce the state's workforce goals, and more clearly give agencies the authority to do it.

On the other hand, if the Legislature does not want to strengthen contracting agencies' authority with respect to workforce goals, it should, at a minimum, clarify contracting agencies' responsibilities and authority to implement the goals. Without additional clarification of agencies' responsibilities and authority, the state risks investing resources in efforts that may have minimal effects.

Even if the Legislature was to expand in law the roles of contracting state agencies regarding workforce goals, challenges to meeting the workforce goals will remain. As we discussed at the beginning of this chapter, workforce goals are not quotas. If agencies are to enforce the workforce goals, agencies must be careful they do not institute de facto quotas, or they could risk facing challenges in court.

Further, if the Legislature was to give contracting state agencies the authority to enforce state workforce goals, contracting state agencies must consider whether the goals are attainable for construction work in their respective industries before enforcing them. As we discussed earlier in this chapter, some individuals we spoke with told us that the current workforce goals are unattainable for the transportation construction industry. MnDOT should consult with industry stakeholders and interest groups to determine an effective and fair approach to enforcing the existing goals if it is given the authority to do so.



Chapter 3: Contractor Certification and Contract Preferences

In addition to its efforts to diversify the *workforce* of its contracts, MnDOT also has programs intended to increase the diversity of the *business owners* with which the agency contracts. As we discussed in Chapter 1, these programs—referred to as the Targeted Group Business (TGB) and Veteran-Owned Small Business (VET) programs—seek to increase the extent to which MnDOT contracts with businesses owned by people of color, women, people with a substantial physical disability, and veterans on state-funded projects.¹

In the first half of this chapter, we describe which agency is responsible for certifying targeted group and veteran-owned businesses, and what qualifications businesses must meet to be certified. In the second half of this chapter, we discuss how MnDOT uses contract preferences to increase the extent to which the agency contracts with targeted group and veteran-owned businesses. We describe how often MnDOT has applied contract preferences and how often the preferences have changed the outcome of contract awards. Finally, we discuss how the preference programs have affected estimated contract costs in recent years.

Key Findings in This Chapter

- MnDOT limits the maximum dollar value of contract preferences for construction contracts beyond what is required by law.
- For state-funded MnDOT construction and professional/technical contracts starting in fiscal years 2018 through 2020, contract preferences rarely changed which business won the contract.
- MnDOT's preference programs had a very small effect on the total estimated costs of contracts beginning in fiscal years 2018 through 2020.

Contractor Certification

Businesses eligible to participate in MnDOT's TGB or VET programs are not automatically enrolled in the programs. They must first complete a certification process that verifies that the business and business owner(s) meet specific criteria. In this section, we explain which agency is responsible for certifying businesses, and we describe the certification requirements for businesses that wish to participate in the TGB or VET programs.

¹ As we discussed in Chapter 1, "targeted group" businesses include those owned and operated by women, people of color, and people with a substantial physical disability. For the purposes of this report, "people with a physical disability" refers to individuals with a substantial physical disability, and "state-funded" refers to contracts funded solely by state dollars.

Certification Authority

Although contractors must be certified to participate in MnDOT's preference and contracting goal programs, MnDOT is not responsible for certifying targeted group or veteran-owned businesses.

The Minnesota Department of Administration, with assistance from the Minnesota Department of Veterans Affairs, is responsible for certifying targeted group and veteran-owned businesses.

State law requires the commissioner of Administration to “periodically designate businesses that are majority owned and operated by women, persons with a substantial physical disability, or specific minorities as targeted group businesses....”² To designate a business as a targeted group business, the Department of Administration ensures that the business and its owner(s) meet a list of specific criteria. We describe some of those criteria below.

While the Department of Administration is solely responsible for certifying targeted group businesses, the Minnesota Department of Veterans Affairs assists with the certification of veteran-owned businesses. The Department of Veterans Affairs first verifies that the business owner is a veteran and that the veteran's military discharge status does not disqualify them from the program. Once the Department of Veterans Affairs verifies a business owner as an eligible veteran, the Department of Administration ensures the business owner meets the remaining state certification requirements.³

Throughout the remainder of this report, a “certified business” includes a targeted group or veteran-owned business that has been certified as such by the Minnesota Department of Administration or the U.S. Department of Veterans Affairs.

Certified Business Qualifications

Not all businesses owned by women, people of color, people with a physical disability, or veterans are eligible to participate in the TGB and VET programs. Eligible businesses must be based in Minnesota, and the programs are only open to small businesses.

In order to participate in the Targeted Group or Veteran-Owned Small Business programs, businesses and business owners must meet several certification requirements.

By law, the Commissioner of Administration is responsible for adopting specific certification requirements.⁴ State law outlines many requirements businesses and business owners must meet in order for a business to be certified as a targeted

² *Minnesota Statutes* 2020, 16C.16, subd. 5(a).

³ Veteran-owned businesses are also eligible for MnDOT's VET program if they obtain certification through a federal certification program administered by the U.S. Department of Veterans Affairs.

⁴ *Minnesota Statutes* 2020, 16C.19 (a).

group and/or veteran-owned business.⁵ For example, a business must be at least 51 percent owned by one or more veterans to qualify for the VET program, while businesses must be at least 51 percent owned by women, people of color, or individuals with “substantial physical disabilities” to qualify for the TGB program.⁶ A more detailed—though not exhaustive—list of certification requirements is included in Exhibit 3.1.

Exhibit 3.1: Targeted group and veteran-owned businesses must meet several certification requirements.

Businesses and business owners must meet the following criteria to be eligible targeted group or veteran-owned small businesses.

- Businesses must be at least 51 percent owned by women, people of color, individuals with “substantial physical disabilities,” or veterans (referred to as “qualifying individuals”).
- The qualifying individuals must submit a signed and notarized statement that they are qualifying individuals.^a
- Businesses’ ownership by qualifying individuals must be “real, substantial, and continuing.” The qualifying individuals must:
 - Share in the risks and be entitled to the profits and loss “commensurate with their ownership interests.”
 - Make “real and substantial” contributions to the business with regard to capital or expertise.
 - “Possess the power to direct” and make the day-to-day and long-term business decisions on “matters of management, policy, and operations.”
 - Devote “sufficient time and attention” to the management and control of the business.
 - Have “managerial and technical competence” directly related to the company’s line of business.
 - Possess any particular license or credential required by Minnesota or local law for that type of business.
- Qualifying individuals must meet several requirements regarding financial status. For example:
 - Each individual owner whose “ownership and control are relied upon for certification must certify that the individual has a personal net worth that does not exceed the limit” in federal law.^b
 - The annual gross sales revenue for the business must not exceed the thresholds outlined in federal law.^c
 - Qualifying individuals must meet requirements regarding gifts, financial transfers, and marital assets.
- The businesses must be based in Minnesota, for-profit, and independent; they cannot depend on a relationship with another business(es) for viability.
- Those seeking certification must cooperate fully with requests for information relevant to the certification process.

NOTE: The requirements listed above do not encompass all certification requirements for targeted group and veteran-owned businesses.

^a This requirement does not apply to veteran-owned businesses.

^b An individual’s personal net worth must not exceed \$1.32 million. *Minnesota Rules*, 1230.1603, subp. 1B, <https://www.revisor.mn.gov/rules/1230/>, accessed July 8, 2020; and 49 *CFR*, sec. 26.67 (2019).

^c Thresholds in law vary by industry. 49 *CFR*, sec. 26.65 (2019); and 13 *CFR*, sec. 121.201 (2020).

SOURCE: *Minnesota Rules*, 1230.0100-0150; 1230.1600-1608; and 1230.1700, <https://www.revisor.mn.gov/rules/1230/>, accessed July 8, 2020; 49 *CFR*, secs. 26.5 and 26.65-67 (2019); 13 *CFR*, sec. 121.201 (2020); and *Minnesota Statutes* 2020, 16C.16, 16C.19, and 197.447.

⁵ *Minnesota Rules*, 1230.1600-1608, <https://www.revisor.mn.gov/rules/1230/>, accessed April 27, 2020. A business can be both TGB-certified and VET-certified. For example, a business owner who is both a veteran and an individual of Asian descent would qualify for both the TGB and VET programs.

⁶ *Minnesota Rules*, 1230.0150, subps. 23 and 28, <https://www.revisor.mn.gov/rules/1230/>, accessed April 27, 2020.

Certification Challenges

Because MnDOT is not responsible for TGB or VET certifications, we did not evaluate the quality or rigor of the Department of Administration's TGB and VET certification process. However, some industry representatives and an academic expert we spoke with raised concerns pertaining to TGB and VET certification. Because these concerns may affect the outcome of MnDOT's contract preference and goal programs, we discuss some of them below.

Several contractor certification programs operate in Minnesota, each with its own certification authority and program structure.

In addition to the targeted group and veteran-owned business programs we discuss throughout this report, there are other certification programs in Minnesota that aim to increase the diversity of contractors working on public contracts throughout the state. While the Minnesota Department of Administration certifies targeted group and veteran-owned businesses for state-funded contracts, the Minnesota Unified Certification Program certifies businesses owned by women and people of color as "disadvantaged business enterprises" for federally funded projects. Representatives of MnDOT, the Metropolitan Council, the Metropolitan Airports Commission, and the City of Minneapolis jointly administer the Minnesota Unified Certification Program. While the Disadvantaged Business Enterprise Program shares many similarities with MnDOT's Targeted Group Business and Veteran-Owned Small Business programs, there are also differences. For example, unlike MnDOT's programs for state-funded contracts, the Disadvantaged Business Enterprise Program does not include a contract preferences component.

In addition to other small businesses, small businesses at least 51 percent owned by people of color or women that are based in the greater Twin Cities metropolitan area may also seek certification through the Central Certification Program (CERT).⁷ The City of Saint Paul administers the CERT program, which is recognized by other local authorities. Again, this certification program differs from the Department of Administration's certification program for targeted group and veteran-owned businesses. For instance, the CERT program does not include a specific certification for veteran-owned small businesses. Further, businesses owned by people with a substantial physical disability are eligible for certification as a targeted group business, but are not eligible for certification as a minority business enterprise in the CERT program.

Certified businesses, public agency staff, and industry group representatives described how the existence of multiple certifying authorities and multiple certifications causes confusion or creates more work for the business community. They explained that there are different standards and requirements between the programs, and that businesses need additional guidance and education to understand the various program requirements. During an interview, one certified business owner described the TGB program as "confusing as heck," and asserted that it was too difficult for smaller

⁷ To participate in the Central Certification Program, a business's principal place of business must be in Anoka, Benton, Carver, Chisago, Dakota, Hennepin, Isanti, Ramsey, Scott, Sherburne, Stearns, Washington, or Wright counties in Minnesota, or Pierce or St. Croix counties in Wisconsin.

businesses without large numbers of administrative staff to keep track of detailed program requirements.

In addition, some stakeholders found the certification process onerous. In MnDOT's most recent disparity study, one respondent said that the TGB certification process is difficult, invasive, and time-consuming to navigate. One industry representative told us that the TGB certification process could be more user-friendly and described it as cumbersome and a lot of work. A staff person at the Minnesota Department of Veterans Affairs said they hear similar complaints about VET certification; they described how some veterans begin the certification process only to quit due to the level of documentation required.⁸

TGB/VET Directory

After the Department of Administration certifies a business, it adds the business to the Directory of Certified Targeted Group, Economically Disadvantaged and Veteran Owned Vendors—henceforth referred to as the TGB/VET directory. The directory includes a description of the business, the business's contact information, and an indication of whether the business owner is a veteran or a member of a targeted group.

The Department of Administration's Directory of Certified Targeted Group, Economically Disadvantaged and Veteran-Owned Vendors is an important tool for the staff and businesses involved in MnDOT's contract preference and goal programs.

MnDOT staff told us they rely on the TGB/VET directory for multiple aspects of their work regarding the contract preference and goal programs. For example, one MnDOT staff person said they use the directory to confirm a bidder's certification status to determine whether the business is eligible for contract preferences. MnDOT staff also stated that staff use the directory when setting the TGB and VET contracting goals, which we discuss in chapters 4 and 5 of this report. A former staff person in MnDOT's Office of Civil Rights (OCR) emphasized that the directory is an especially important tool for new staff members who are less familiar with the certified businesses and the types of work they perform.

The directory also includes important information for contractors. Prime contractors often hire certified subcontractors to help them meet the TGB and VET contracting goals on MnDOT projects.⁹ Prime contractors can use the directory to identify those certified subcontractors. Likewise, the directory can increase the visibility of certified subcontractors.

Despite its importance to MnDOT's contract preference and goal programs, some MnDOT staff and a member of the contracting community commented that the

⁸ Staff from the Minnesota Department of Administration told us the agency has taken steps to simplify the certification process, but that the agency must also ensure that the certification process is sufficiently rigorous.

⁹ Prime contractors are businesses that sign a contract directly with MnDOT. In contrast, subcontractors are businesses that sign a contract with the prime contractor or another subcontractor on a MnDOT project, as opposed to signing a contract directly with MnDOT.

TGB/VET directory can be difficult to use. MnDOT staff explained that the directory's data and data configuration make it challenging for both MnDOT staff and contractors to identify the specific types of work certified businesses perform. A member of the contracting community likewise said the directory would be more useful if it was better designed to search for certified businesses that provide specific types of work. In addition, based on our review of the directory, it was not clear the extent to which the directory was up-to-date.¹⁰

Contract Preferences

As we discussed in Chapter 1, in order to increase the participation of businesses owned by veterans, women, people of color, and people with a “substantial” physical disability on state-funded contracts, MnDOT implements contract preference programs for targeted group and veteran-owned businesses. Contract preferences may be exercised only by certified businesses bidding as the prime contractor. These preferences make the recipients of the preference more cost-competitive relative to bidders who are not eligible for the preference.

When MnDOT applies a contract preference to a certified business's bid, the agency effectively treats the certified business's bid as if it costs less than it actually does. As we discuss in greater detail below, statutes state that certified businesses are eligible for

up to a 6 percent preference on certain MnDOT contracts.¹¹ In practice, this means that when MnDOT applies a preference to a certified business's bid, MnDOT staff treat the total amount of the certified business's bid as if it is up to 6 percent less than the actual bid amount. Because MnDOT typically considers contract cost when it makes contract award decisions, the preference serves to make the certified business's bid more competitive. The box to the left provides an example of how MnDOT would apply a 6 percent preference on one of its contracts.

MnDOT applies contract preferences only for the purpose of evaluating bid proposals to determine the apparent low (or best) bidder to which the agency would award the contract. Preferences do not affect actual bid amounts or what MnDOT ultimately pays the winning bidder.

Construction Contract Preference Scenario

Highway Masters, Inc. was a certified targeted group business bidding as a prime contractor on a state-funded construction project on Trunk Highway 38. Roads R Us, LLC was a non-certified business bidding as a prime contractor on the same project. Highway Masters' bid for the project was \$750,000, while Roads R Us bid \$710,000.

If neither business was certified, MnDOT would award the contract to Roads R Us, because it had the lowest bid. However, because Highway Masters was a certified business, MnDOT applied a 6 percent preference to its bid ($\$750,000 \times 6 \text{ percent} = \$45,000$). MnDOT subtracted the preference (\$45,000) from the business's original \$750,000 bid. This made Highway Masters' effective bid price \$705,000.

After MnDOT applied the preference, Highway Masters became the low bidder and was awarded the contract. Since preferences apply only to bid prices rather than contract award amounts, Highway Masters' awarded contract amount remained \$750,000, even though its final bid price was \$705,000, as a result of the preference.

¹⁰ State law does not specify how frequently the Department of Administration must recertify targeted group and veteran-owned businesses. Department of Administration staff told us the agency tries to recertify businesses every two years; however, we found nearly 400 businesses in the directory that the department had not recertified for at least two years. As of June 30, 2020, there were roughly 1,400 certified businesses in the TGB/VET directory.

¹¹ *Minnesota Statutes* 2020, 161.321, subds. 2(a) and 2b(a).

By law, MnDOT may award a contract preference to certified targeted group or veteran-owned businesses.

Statutes state that MnDOT “may award” a preference to targeted group and veteran-owned businesses for “specified construction work.”¹² These preferences apply only when certified businesses bid as the prime contractor, and only on contracts that do not receive federal funding. MnDOT may award preferences on contracts of any size, and MnDOT may also award preferences for professional/technical contracts.¹³

As indicated by law, MnDOT *may* award a preference on a given contract, but the agency is not required to do so.¹⁴ Despite the permissive language in law, a representative of MnDOT’s Office of Chief Counsel said that the agency believes it is required by law to administer the TGB and VET preference programs, but that MnDOT has the flexibility to decide on a contract-by-contract basis whether to award a preference. In other words, MnDOT believes that the TGB and VET preference programs overall are required, but the agency may choose the contracts to which it applies a preference.¹⁵

Preference Caps

State law limits the preference amount that MnDOT can provide to certified businesses. Statutes state that MnDOT “may award up to a 6 percent preference in the amount bid.”¹⁶ In other words, MnDOT cannot provide a contract preference that is greater than 6 percent of the certified business’s bid amount. For example, if a certified business submitted a bid for \$100,000, MnDOT could not award a preference greater than \$6,000 (\$100,000 x 6 percent = \$6,000).

Statutes also limit the preference size by explicitly stating that preferences “are not cumulative.”¹⁷ In practice, this means that if a business was certified as both a targeted group and veteran-owned business, MnDOT would apply up to a 6 percent TGB preference *or* up to a 6 percent VET preference; it would not apply both preferences for the same contract.

¹² *Minnesota Statutes* 2020, 161.321, subds. 2(a) and 2b(a).

¹³ *Minnesota Statutes* 2020, 161.321, subd. 2b(b), states that MnDOT “must be as inclusive as possible in specifying contracts for construction work, as well as for construction-related professional and technical services, available under this bid preference program for veteran-owned small businesses.” MnDOT can award TGB preferences on professional/technical contracts under *Minnesota Statutes* 2020, 16C.16, subd. 6(a).

¹⁴ Specifically, statutes state, for example, “The commissioner may award up to a six percent preference in the amount bid for specified construction work to small targeted group businesses.” *Minnesota Statutes* 2020, 161.321, subds. 2(a) and 2b(a).

¹⁵ Minnesota Department of Administration staff did not agree with MnDOT’s interpretation of law, stating that they would expect that MnDOT always apply a preference unless MnDOT has requested an exception from the Department of Administration.

¹⁶ *Minnesota Statutes* 2020, 161.321, subds. 2(a) and 2b(a).

¹⁷ *Minnesota Statutes* 2020, 16C.06, subd. 10.

MnDOT limits the maximum dollar value of contract preferences for construction contracts beyond what is required by law.

While statutes do not permit MnDOT to award a preference that is greater than 6 percent of the bid amount, statutes do allow MnDOT to award a preference for less than 6 percent. MnDOT staff told us they always award a 6 percent preference for bids costing \$1 million or less. However, for bids on construction contracts that are over \$1 million, MnDOT applies the 6 percent preference to only the first \$1 million of the bid amount, effectively capping any preference at \$60,000.¹⁸

For construction contract bids that are greater than \$1 million, the \$60,000 preference limit has the effect of lowering the preference to less than the 6 percent allowed by law. For example, a maximum \$60,000 preference on a \$1.4 million dollar bid is equivalent to a 4 percent preference. As a result of MnDOT's preference cap, for construction contract bids that exceed \$1 million, the effect of MnDOT's preference programs for certified businesses decreases as the bid cost increases. This is particularly noteworthy for MnDOT's construction contracts, for which bids were often greater than \$1 million.¹⁹

**MnDOT limits the
maximum dollar value
of the TGB and VET
contract preferences to
\$60,000
for construction
contracts.**

MnDOT staff thought the agency originally implemented the preference cap in order to limit the total costs of the preference programs and to comply with the Department Administration's preference policy.²⁰ However, Department of Administration staff told us they raised their preference cap to \$120,000 in 2018 to help certified businesses better compete for state contracts. MnDOT has not followed suit. We provide a recommendation regarding MnDOT's preference cap at the end of this chapter.

Preference Implementation

In this section, we discuss how the implementation of TGB and VET preferences affected contract award outcomes for MnDOT construction and professional/technical contracts that started in fiscal years 2018 through 2020. We also review the process by which certified bidders requested preferences, and the frequency with which eligible certified bidders took advantage of the preference programs.

Preference Effects on Contract Awards

MnDOT awards contracts for construction and professional/technical contracts in different ways. For many of its construction contracts, MnDOT awards contracts based

¹⁸ MnDOT does not cap preferences for professional/technical contracts due to the process by which the agency awards those contracts. We discuss these differences in the next section.

¹⁹ We found that 40 percent of bids on MnDOT's state-funded construction contracts that started in fiscal years 2018 through 2020 were more than \$1 million.

²⁰ One MnDOT staff person said he thought the cap has been in place for at least 20 years, without adjustment.

on the price of the bid. For these contracts, MnDOT awards the contract to whichever bidder submits the lowest-cost bid, a method referred to as “low-bid contracting.”

For professional/technical contracts, the agency awards contracts using several methods that can take into account bid price, as well as other technical criteria, such as the business’s plans to ensure quality, and the experience and qualifications of the employees who will work on the project. For these contracts, the agency rates each bidder on various criteria, and awards the contract to the bidder with the highest rating.

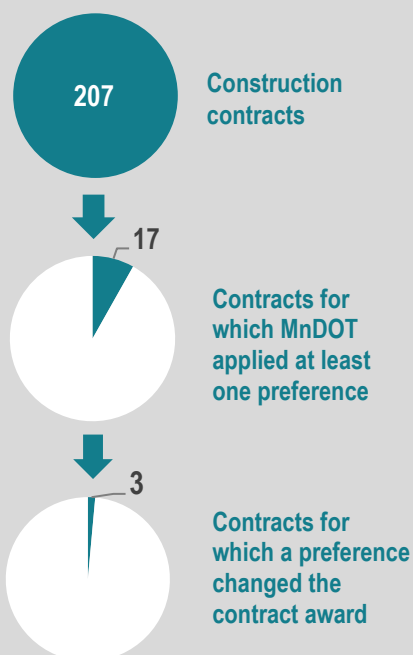
For most state-funded construction and professional/technical contracts, MnDOT awards contracts using one of two different selection approaches.

Low-bid: MnDOT awards the contract to whichever business submitted the lowest-cost bid. In recent years, low-bid contracting was MnDOT’s primary method for awarding construction contracts.

Technical assessment: MnDOT evaluates businesses according to technical criteria and sometimes bid cost. MnDOT awards the contract to the highest-rated business, which may or may not be the business with the lowest-cost contract proposal. MnDOT generally uses this approach for awarding professional/technical contracts. This approach encompasses several different contract award methods, including best value.

As we discuss throughout the rest of this chapter, these different contracting approaches affect MnDOT’s contract preference programs in different ways.

Contracting preferences changed the award outcome for only three construction contracts in recent years.



* Data reflect state-funded contracts starting in fiscal years 2018 through 2020.

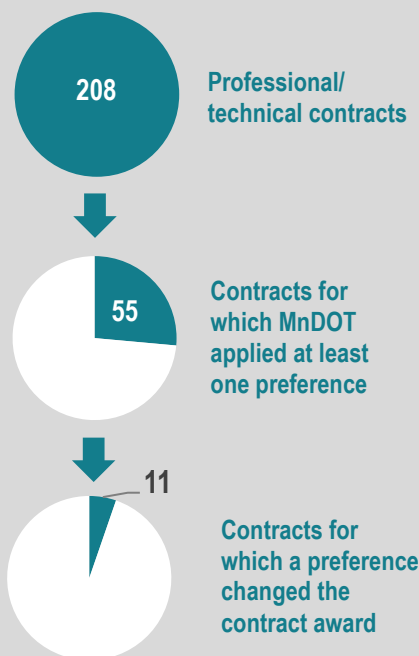
For state-funded MnDOT construction and professional/technical contracts starting in fiscal years 2018 through 2020, contract preferences rarely changed which business won the contract.

MnDOT’s preference programs did not affect the vast majority of MnDOT construction contracts in recent years. Of the 207 construction contracts that started in fiscal years 2018 through 2020, MnDOT applied preferences for only 17 different contracts (8 percent).²¹ Of those 17 construction contracts, the lowest bidder switched from a non-certified business to a certified business as a result of a preference for only 3 contracts.²² In other words, MnDOT’s preference programs affected only 1 percent of the 207 construction contracts that started in fiscal years 2018 through 2020.

²¹ On three contracts, MnDOT applied a TGB or VET preference to more than one certified business.

²² For 8 of these 17 contracts, the certified business that exercised the preference was already the lowest bidder.

Contracting preferences changed the award outcome for 11 professional/technical contracts in recent years.



* Data reflect state-funded contracts starting in fiscal years 2018 through 2020.

MnDOT's preference programs had a slightly greater effect on MnDOT's professional/technical contracts in recent years. Of the 208 professional/technical contracts starting in fiscal years 2018 through 2020 that had multiple bidders and complete bid data, MnDOT applied preferences for 55 contracts (26 percent).²³ The highest-rated bidder switched from a non-certified business to a certified business as a result of a preference for 11 contracts (5 percent).²⁴

Use of Allowable Preferences

MnDOT does not automatically apply preferences on behalf of certified targeted group or veteran-owned businesses. If a certified business would like MnDOT to apply a preference to their bid, MnDOT requires the business to submit a form indicating that they are an eligible certified business. After MnDOT receives the preference application, staff verify that the business is certified and apply the preference to the business's bid.

Targeted group and veteran-owned businesses did not always claim preferences for which they were eligible.

At least one certified business did not claim a preference for which it was eligible for 11 percent of construction contracts starting in fiscal years 2018 through 2020. Of the 207 construction contracts starting during that period, certified businesses did not claim a preference for which they were eligible on 23 contracts.²⁵ Further, some certified businesses did not claim a preference for multiple contracts during our review period. In total, nine certified businesses could have claimed preferences for contracts in our review period but did not do so.

Certified contractors did not always claim preferences for which they were eligible.

Number of contracts with unclaimed preferences	23
Number of different contractors that did not claim a preference	9
Number of contracts that would have been awarded to a certified business had the business claimed its preference	2

* Data reflect state-funded MnDOT construction contracts beginning in fiscal years 2018 through 2020.

²³ There were an additional 69 professional/technical contracts authorized to begin in fiscal years 2018 through 2020 for which MnDOT did not have complete bid data or for which there was only one bidder. On 18 professional/technical contracts, MnDOT applied a TGB or VET preference to more than one certified business.

²⁴ A certified business was already the highest-rated bidder for 12 of the 55 professional/technical contracts that had a preference applied and that started in fiscal years 2018 through 2020.

²⁵ We did not conduct a similar analysis for professional/technical contracts due to the nature with which MnDOT collects data on these contracts.

Had MnDOT applied all of the unclaimed preferences for contracts in our review period, more contract awards would have been affected by the TGB or VET preferences. As we described above, contract preferences caused MnDOT to switch its contract award from a non-certified business to a certified business for only three construction contracts during our review period. Had MnDOT applied all of the unclaimed preferences, the agency would have awarded two additional construction contracts to certified businesses.

A MnDOT staff person and stakeholders could only speculate why a certified small business would not claim a preference. One stakeholder suggested that it was not always clear from contract to contract whether a certified business could claim a contract preference. Another blamed confusion surrounding the TGB program and suggested that unclaimed preferences may occur because it is too difficult for smaller businesses with fewer administrative staff to keep track of program details.

RECOMMENDATION

MnDOT should increase outreach to certified businesses to ensure they are aware of the opportunity to claim contract preferences.

Currently, in the event a certified bidder does not claim a preference on a construction contract, MnDOT does not remind the bidder of its ability to do so. Given the nature of MnDOT contracting—in which the identity of bidders on a contract is unknown until MnDOT closes the letting period—it is not possible for MnDOT to remind certified contractors to claim a preference before opening the bids.

However, MnDOT could—and should—reach out to certified contractors that did not claim preferences to remind them of the opportunity to do so after the letting period ends, should the business bid on a MnDOT contract again in the future. Given that MnDOT did not have a clear explanation for why certified contractors did not claim preferences for which they were eligible, we also recommend that MnDOT collect information to understand why a business did not claim a preference for which it was eligible and determine if further program improvements are necessary.

Alternatively, MnDOT could consider applying contract preferences to certified bidders automatically, without requiring them to submit additional paperwork. The Department of Administration, for example, automatically applies contract preferences to certified businesses.

Costs of MnDOT Contract Preferences

Because contract preferences have the potential to change which contractor MnDOT selects for a project, there is a potential for MnDOT to pay more—or less—for a contract than it would have in the absence of a preference.²⁶ We discuss below how preferences have affected the estimated costs of MnDOT contracts.

²⁶ As previously described, a contract preference does not change the true cost of a contract. The final contract award amount and payments ultimately due to the prime contractor reflect the winning contractor's bid total prior to any preference.

It is important to note that because the following analysis reflects total bid amounts at the time of contract award, the analysis only reflects what bidders *estimated* a contract would cost. There is no way to know how contract preferences affected the *actual* project costs at the end of a contract. Given potential cost overruns or savings on any project, we could not determine whether actual contract costs for a non-certified contractor would have been greater, less than, or similar to a certified contractor that won a contract as a result of MnDOT's preference programs.

MnDOT's preference programs had a very small effect on the total estimated costs of contracts beginning in fiscal years 2018 through 2020.

As previously discussed, TGB and VET preferences did not frequently change which business was awarded a MnDOT contract in recent years. As a result, the effects on MnDOT's total budget were unlikely to be substantial. In addition, MnDOT caps preferences for construction contracts at \$60,000, meaning that for any given construction contract, any extra estimated costs to MnDOT resulting from contract preferences could not exceed \$60,000 per contract.

We found that the total estimated costs for MnDOT construction contracts in recent years were slightly higher as a result of MnDOT's preference programs. For contracts starting in fiscal years 2018 through 2020, MnDOT's estimated construction contract costs were about \$60,000 more in total due to TGB and VET preferences. When viewed as a share of total contract costs, these added (estimated) expenses represented 0.01 percent of the \$596 million total estimated costs for state-funded construction projects that started during our review period. The box below provides an example of how a contract preference could increase total estimated contract costs.

In some cases, contract preferences can increase the total estimated cost of a MnDOT construction contract.

Bidder	Bid amount before preference	Bid amount after preference	Rank before preference	Rank after preference
Bidder A (TGB)	\$656,000	\$616,640	2	1
Bidder B	618,000	618,000	1	2
Bidder C	698,000	698,000	3	3
Bidder D	712,000	712,000	4	4

A 6 percent TGB preference on Bidder A's bid amount is worth \$39,360 ($\$656,000 \times 6 \text{ percent} = \$39,360$). For the purpose of evaluating bids, Bidder A's bid becomes \$616,640 after MnDOT applies the TGB preference ($\$656,000 - \$39,360 = \$616,640$).

Since \$616,640 is less than \$618,000, the bid ranking changes and Bidder A wins the contract. This occurs even though Bidder A's bid amount before the preference is more than Bidder B's bid amount. The estimated cost of the project is still equal to Bidder A's original bid of \$656,000.

On the other hand, estimated costs for MnDOT professional/technical contracts were *lower* as a result of the preference programs. As we discussed above, in contrast to most construction contracts, MnDOT generally awards professional/technical contracts based on a technical assessment of contract proposals. After evaluating businesses according to a variety of technical criteria—and sometimes contract cost—MnDOT awards the professional/technical contract to the bidder with the highest score on a 100-point scale.

With regard to contract preferences, rather than treating certified businesses' bids as if they cost 6 percent less—as MnDOT does with most construction contracts—TGB and VET preferences on professional/technical contracts are worth 6 additional points on the 100-point scale. As we explain in the box below, higher scores indicate a “better” proposal, but not necessarily a lower-cost proposal. As a result, a contract preference could result in MnDOT selecting a lower-cost, certified business over a higher-cost, non-certified business that had a higher technical score.

In some cases, contract preferences could lower the total estimated cost of a MnDOT professional/technical contract.

Bidder	Bid amount	Total score before preference	Total score after preference	Rank before preference	Rank after preference
Bidder A (TGB)	\$174,000	80	80 + 6 = 86	2	1
Bidder B	180,000	83	83	1	2
Bidder C	178,000	79	79	3	3
Bidder D	182,000	67	67	4	4

MnDOT evaluates proposals on a 100-point scale according to technical criteria (such as, project experience and staff expertise) or a combination of technical criteria and cost. Better proposals receive higher total scores.

TGB and VET preferences add 6 additional points to the certified business's final score. Despite having a higher cost proposal, Bidder B had a better rank before preferences due to its performance on the project's technical criteria. However, the TGB preference increased Bidder A's final score from 80 to 86, making it the highest-ranked bidder.

As a result of the preference, the lower cost Bidder A wins the contract award over the higher cost Bidder B.

For contracts starting in fiscal years 2018 through 2020, MnDOT's estimated professional/technical contract costs were about \$416,900 *less* in total due to the preference programs.²⁷ Again, the difference in cost represents a very small share of total contract costs. These possible savings represented 0.2 percent of the \$181 million total estimated costs for professional/technical contracts starting in fiscal years 2018 through 2020.

²⁷ Estimated contract costs above are based on project proposals that included cost information. MnDOT did not require businesses to include cost information in their project proposals for 4 of the 11 professional/technical contracts we reviewed for which a TGB or VET preference changed the outcome of the contract award.

Discussion

In this chapter, we discussed the effects of MnDOT's contract preference programs on contract award outcomes and estimated project costs for recent MnDOT contracts. Overall, the effects were minimal.

First, we found that contract preferences affected which bidder won a contract for few contracts in recent years. Among MnDOT's 415 construction and professional/technical contracts beginning in fiscal years 2018 through 2020, contract preferences affected the outcomes of only 14 contract awards. In addition, we found that contract preferences had negligible effects on the estimated cost of construction contracts in our review period, and in the case of professional/technical contracts, preferences actually reduced the total estimated contract cost.

We also discussed how MnDOT caps the dollar value of construction contract preferences beyond what is required by law. While statutes limit contract preferences to 6 percent of the total bid amount, MnDOT caps the dollar value of construction contract preferences at \$60,000. This means that for bids greater than \$1 million, the effective size of MnDOT's preference is less than the 6 percent allowed in law. Forty percent of bids on MnDOT state-funded construction contracts starting in fiscal years 2018 through 2020 were more than \$1 million; the average construction bid amount was over \$3.2 million.

RECOMMENDATION

MnDOT should reconsider its \$60,000 cap on construction contract preferences.

We appreciate that MnDOT has tried to be sensitive to program costs by limiting the maximum value of contract preferences. However, if the goal of the programs is to increase the number of certified contractors working on state-funded MnDOT contracts, MnDOT should reconsider its current preference cap. Raising its preference cap could also bring MnDOT into alignment with the Department of Administration, which raised its preference cap to \$120,000 in 2018. If MnDOT has concerns about how revising or eliminating the preference cap would affect overall contract costs, it should consult with the Legislature for further guidance.

Even after increasing or eliminating the preference cap, a 6 percent preference may continue to have only limited effects on the extent to which certified contractors participate on MnDOT contracts as prime contractors. Our analysis of construction bid data showed that maintaining a 6 percent preference, but eliminating the \$60,000 cap on the total dollar value of the preference, would not have changed MnDOT's contract award decision for any construction contracts in our review period. If MnDOT would like contract preferences to have a greater effect on the extent to which the agency contracts with certified businesses, it should approach the Legislature about increasing the 6 percent preference limit in law.

Chapter 4: Implementing Construction Contracting Goals

As we discussed in Chapter 3, MnDOT has established programs designed to increase the share of certified businesses that participate on MnDOT contracts as *prime* contractors.¹ MnDOT has also established programs with the goal of increasing the participation of certified businesses on MnDOT contracts as *subcontractors*.² These programs involve MnDOT setting and implementing “contracting goals.”

In this chapter, we describe the legal requirements for MnDOT’s targeted group business (TGB) and veteran-owned business (VET) contracting goals. We then discuss how and how often MnDOT has set TGB and VET goals for state-funded construction contracts in recent years.³ Next, we describe how MnDOT evaluates whether a contractor made adequate efforts to meet TGB and VET contracting goals before awarding a contract.

Finally, we discuss MnDOT’s monitoring of contractors’ ongoing progress towards meeting the goals.

Key Findings in This Chapter

- For the contracts we reviewed, it was somewhat unclear how MnDOT staff determined the contracting goals and whether staff made goal-setting decisions consistently.
- For state-funded construction contracts beginning in fiscal years 2018 through 2020, MnDOT rarely rejected a bidder because it failed to demonstrate good faith efforts to meet the contracting goals.
- For the contracts we reviewed, MnDOT staff did not consistently document their good faith efforts decisions or review all good faith efforts criteria outlined in contract provisions.
- Although MnDOT made improvements in 2020, its monitoring of contractors’ progress towards meeting contracting goals for the Targeted Group Business and Veteran-Owned Small Business programs remains limited.

¹ Throughout this chapter, a “certified business” includes a targeted group or veteran-owned small business certified as such by the Minnesota Department of Administration or the U.S. Department of Veterans Affairs. As we discussed in Chapter 1, “targeted group” businesses include those owned and operated by women, people of color, and people with a substantial physical disability. For the purposes of this report, “people with a physical disability” refers to individuals with a substantial physical disability. Prime contractors are businesses that sign a contract directly with MnDOT.

² Subcontractors are businesses that sign a contract with the prime contractor or another subcontractor on a MnDOT project, as opposed to signing a contract directly with MnDOT.

³ For the purposes of this report, “state-funded” refers to contracts funded solely by state dollars.

Requirements in Law

MnDOT’s contracting goals indicate the target share of contract expenditures that are meant for certified targeted group or veteran-owned businesses working on a project. For example, a contract with a 5 percent TGB goal indicates that at least 5 percent of total contract expenses are meant to go to certified targeted group businesses for their services on the contract.

Contracting goals apply only to prime contractors. Prime contractors often meet contracting goals by subcontracting with certified businesses to perform various responsibilities on a project.⁴ For example, a prime contractor may hire a certified subcontractor to provide traffic or erosion control on a MnDOT project. The prime contractor meets the contracting goal if the sum of the prime contractor’s payments to certified businesses, as a share of the total cost of the project, is equal to or greater than the goal.



Contracting Goals

MnDOT’s contracting goals indicate the target share of contract expenditures that go to certified targeted group or veteran-owned businesses for their services on a contract. Contracting goals are meant to encourage prime contractors to hire businesses owned by people of color, women, veterans, and people with a substantial physical disability as *subcontractors*.

By law, MnDOT may—but is not required to—set goals for the use of targeted group and veteran-owned businesses on state-funded MnDOT contracts.

State law does not require MnDOT to set contracting goals on all state-funded MnDOT contracts. According to state statutes, the Commissioner of Transportation “*may* set goals for targeted group business participation in contracts” [emphasis added].⁵ The commissioner may do the same for veteran-owned businesses.⁶ MnDOT also may set contracting goals for professional/technical contracts.⁷ MnDOT has interpreted these statutes to mean that the agency may set goals on a contract-by-contract basis, but that the agency must implement the TGB and VET goal programs overall.

⁴ Prime contractors can meet contracting goals in various ways. For example, joint ventures and equipment lease agreements can also count towards TGB or VET goals.

⁵ *Minnesota Statutes* 2020, 161.321, subd. 2a(a).

⁶ *Minnesota Statutes* 2020, 161.321, subd. 2c(a).

⁷ MnDOT establishes contracting goals for professional/technical contracts under its delegated contracting authority from the Department of Administration based on *Minnesota Statutes* 2020, 16C.16, subds. 6(d) and 6a(d). MnDOT’s processes related to contracting goals for professional/technical contracts vary from its processes for construction contracts in some key ways. Due to these differences, we focus on contracting goals for MnDOT construction contracts for the remainder of this chapter.

MnDOT sets separate goals for the use of targeted group and veteran-owned businesses. Some contracts may have a TGB goal and not a VET goal (or vice versa).⁸ Other contracts may have both a TGB and VET goal, while other contracts may have neither. Further, a contract may have TGB and/or VET contracting goals in addition to workforce goals.

Contractors must meet contracting goals—or demonstrate adequate efforts to do so—as a condition of contract award for state-funded projects.

State statutes stipulate that contractors must meet TGB and VET contracting goals, or demonstrate adequate efforts to do so, “as a condition of award.”⁹ In practice, this means that when bidders submit their bids, MnDOT requires each bidder to explicitly indicate whether they commit to meeting the contracting goals. The apparent low bidder must further identify the certified businesses they plan to hire as subcontractors.

If the apparent low bidder does not plan to contract with certified businesses at a level sufficient to meet the contracting goal(s), the bidder must demonstrate that it made adequate efforts to meet the goal(s). If a bidder cannot meet the contracting goals, and does not demonstrate adequate efforts to do so, MnDOT may reject their bid.

The requirement that contractors meet—or demonstrate adequate efforts to meet—contracting goals prior to award is in contrast to workforce goals, in which contractors do not have to meet workforce goals as a condition of contract award. MnDOT’s ability to reject bidders based on their lack of effort to meet contracting goals has been affirmed in court.¹⁰

Goal Setting

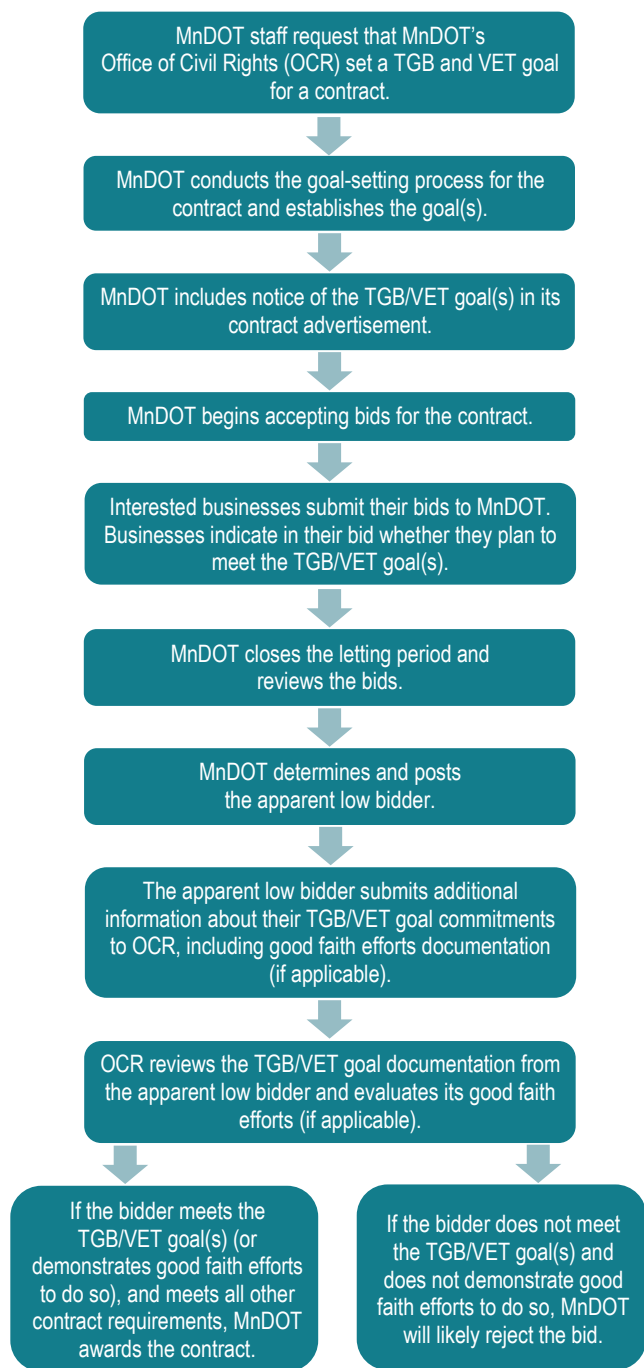
As we discussed above, MnDOT’s contracting goals indicate the share of contract expenditures that are meant to go to certified targeted group or veteran-owned businesses working on a project. MnDOT establishes these contracting goals on a contract-by-contract basis before the agency solicits bids on a given contract. An overview of MnDOT’s contract award process as it relates to TGB and VET contracting goals is in the box on the following page.

⁸ We discuss how MnDOT staff determine which goals to set later in this chapter.

⁹ *Minnesota Statutes* 2020, 161.321, subds. 2a(a) and 2c(a). Federal law also requires that MnDOT award contracts only to contractors who met—or made a good faith effort to meet—the federal Disadvantaged Business Enterprise (DBE) goal. Federal requirements pertain only to contracts that receive federal funding.

¹⁰ For example, in *C.S. McCrossan Construction, Inc. v. Minnesota Department of Transportation*, the U.S. District Court upheld MnDOT’s decision to reject C.S. McCrossan’s bid for a partially federally funded bridge construction project because the agency determined McCrossan did not make adequate good faith efforts to meet DBE goals. *C.S. McCrossan Construction, Inc. v. Minnesota Department of Transportation*, 946 F. Supp. 2d 851 (U.S. Dist. Ct. 2013). We describe the process by which bidders demonstrate adequate efforts to meet contracting goals later in this chapter.

MnDOT establishes TGB and VET contracting goals before awarding a contract.



* This does not reflect all steps taken for all types of contracts.

In this section, we describe the TGB and VET goals for state-funded construction contracts that started in recent years. We then discuss how frequently MnDOT has set TGB and VET goals for state-funded construction contracts, as well as MnDOT's process for determining TGB and VET goals on a contract-by-contract basis.

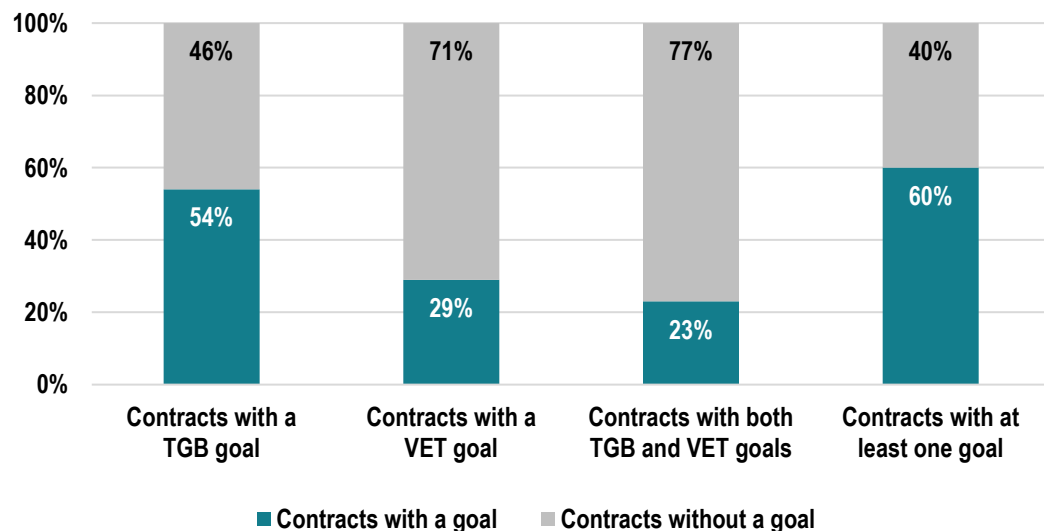
For recent state-funded construction contracts, MnDOT set relatively low contracting goals for certified businesses, and the agency did not set any contracting goals for a substantial share of contracts.

We analyzed contract data for all state-funded MnDOT construction contracts that began in fiscal years 2018 through 2020. For contracts with a TGB goal, the median TGB goal was 4.2 percent. In other words, for the median construction contract with a TGB goal during that time period, MnDOT asked prime contractors to direct at least 4.2 percent of their contract expenditures to certified targeted group businesses. The median VET goal for contracts that had a VET goal and started in the same period was 1.8 percent.¹¹

As we discussed above, MnDOT is not required to set a TGB and/or VET goal for each state-funded contract. Nonetheless, 124 of the 207 construction contracts beginning in fiscal years 2018 through 2020 (60 percent) had at least one contracting goal. As shown in Exhibit 4.1, MnDOT did not set a TGB goal for 95 of the 207 construction contracts starting during this period (46 percent), or a VET goal for 148 of the 207 contracts (71 percent). Only 47 of the 207 contracts (23 percent) had both a TGB and a VET goal.

¹¹ In comparison to construction contracts, MnDOT set higher TGB and VET goals on professional/technical contracts. For contracts beginning in fiscal years 2018 through 2020, the median TGB goal on professional/technical contracts with a TGB goal was 14 percent. The median VET goal for contracts with a VET goal was 5 percent.

Exhibit 4.1: MnDOT did not set contracting goals for a substantial share of state-funded construction contracts that began in fiscal years 2018 through 2020.



NOTES: We reviewed 207 state-funded MnDOT construction projects that started in fiscal years 2018 through 2020. For the purposes of this report, “state-funded” refers to contracts funded solely by state dollars. “Contracts with a TGB goal” includes contracts that had only a targeted group business (TGB) goal as well as contracts that had both a TGB and a veteran-owned business (VET) goal. We calculated “Contracts with a VET goal” in the same manner. “Contracts with at least one goal” includes contracts with only a TGB goal, only a VET goal, or both a TGB and VET goal.

SOURCE: Office of the Legislative Auditor, analysis of MnDOT contract data.

There are several reasons why MnDOT may not set TGB or VET goals for a given contract. For example, as we discuss in greater detail below, MnDOT takes into account whether certified businesses are interested in participating on a given contract. If there is not a sufficient number of certified businesses interested in or capable of performing the types of work needed for a project, MnDOT may not set a goal.

MnDOT also does not generally set TGB or VET goals for contracts valued at less than \$250,000 because, according to a recent MnDOT report, they “are not expected to present significant subcontracting opportunities.”¹² Contracts estimated to cost less than \$250,000 comprised 22 percent of MnDOT’s state-funded construction contracts that started in fiscal years 2018 through 2020, meaning that MnDOT typically did not set goals for nearly one-quarter of contracts because of their cost. Even after excluding contracts estimated to cost less than \$250,000 from our analysis, we still found that MnDOT did not set contracting goals for a substantial share of construction projects. Among contracts valued at \$250,000 or more, MnDOT did not set a TGB goal for one-third of contracts or a VET goal for 64 percent of contracts. Twenty-five percent of contracts valued at \$250,000 or more had neither a TGB nor a VET goal.

¹² MnDOT, *Targeted Group Business and Veteran-Owned Small Business Programs, Fiscal Year 2018-19 Report* (St. Paul, February 1, 2020), 9.

RECOMMENDATION

MnDOT should evaluate all state-funded construction contracts for contracting goals.

MnDOT may not be able to set contracting goals for each state-funded construction contract—for example, because certified contractors do not perform the types of work needed on a project, or because they do not work in the counties in which the project is taking place. However, we think it is important that MnDOT assess whether a goal is appropriate for each contract, rather than limit goal-setting to contracts over \$250,000.

As we discuss in the next chapter, one of the barriers stakeholders identified to increasing the participation of certified businesses on MnDOT contracts is the large size of MnDOT projects and the relatively small capacity of many certified businesses. Both a former staff person in MnDOT's Office of Civil Rights (OCR) and a certified business owner told us that by eliminating smaller contracts from goal-setting, MnDOT is eliminating the contracts that may be best suited for small businesses.

Goal-Setting Process

As we noted in Exhibit 1.1, when MnDOT sets TGB and VET contracting goals, it does so on a contract-by-contract basis. MnDOT staff evaluate the contract to determine whether to set a TGB and/or a VET goal, and to determine what the goal should be. In contrast to the federal Disadvantaged Business Enterprise (DBE) Program, there are no statewide contracting goals for either of MnDOT's TGB or VET programs.¹³

MnDOT's goal-setting process for state-funded construction projects is complicated. Goal-setting decisions vary based on the specifics of each contract. For example, MnDOT staff consider what types of work are required for the project, and whether and how many certified businesses indicated interest in participating on the contract. We provide an example of a hypothetical goal-setting process for a MnDOT construction contract in Exhibit 4.2.

¹³ For contracts funded by the Federal Highway Administration, MnDOT's statewide DBE contracting goal is 12.23 percent; for contracts funded by the Federal Transit Administration, MnDOT's statewide DBE contracting goal is 9.12 percent.

Exhibit 4.2: MnDOT's contracting goal-setting process is complicated.

The following describes MnDOT's targeted group business (TGB) and veteran-owned business (VET) goal-setting process for a hypothetical construction contract. The contract entails building shoulders on a highway in the metro area.

Before starting the goal-setting process, MnDOT's Office of Civil Rights (OCR) received a design estimate for the project. The estimate identified many different types of work (also referred to as "scopes") that were needed for the project. Some of the scopes of work included multiple tasks; for example, storm water management included storm drain inlet protection and sediment control. Estimated costs of each scope are listed below.

- Construction surveying: \$50,000
- As Built: \$10,000
- Mobilization: \$50,000
- Field office and laboratory: \$15,000
- Maintenance and restoration of haul roads: \$1,000
- Remove shoulder pavement and curb: \$20,000
- Other pavement and miscellaneous structure removal: \$10,000
- Sawing: \$5,000
- Excavation and embankment: \$15,000
- Aggregate surfacing: \$45,000
- Aggregate base: \$45,000
- Rumble strips: \$10,000
- Plant mixed asphalt pavement: \$250,000
- Manholes and catch basins: \$25,000
- Concrete curbing: \$40,000
- Other concrete curbing: \$5,000
- Traffic management system: \$30,000
- Traffic barriers: \$30,000
- Traffic control: \$40,000
- Traffic signs and devices: \$5,000
- Storm water management: \$20,000
- Turf establishment: \$500
- Pavement markings: \$5,000
- Trucking: \$30,000

Total estimated project cost: \$756,500

Steps 1-2: Identify work that small businesses could possibly complete

After receiving the design estimate, OCR identified potential scopes of work that certified businesses could perform. OCR staff may refer to the Department of Administration's TGB/VET directory to see which certified businesses perform these types of work. After OCR conducted its initial review of the design estimate, OCR identified targeted group or veteran-owned businesses that could potentially perform the following seven scopes of work:

- Construction surveying: \$50,000
- Field office and laboratory: \$15,000
- Remove shoulder pavement and curb: \$20,000
- Sawing: \$5,000
- Concrete curbing: \$40,000
- Storm water management: \$20,000
- Trucking: \$30,000

Step 3: Determine the interest of certified businesses in the project

Next, OCR staff contacted the certified businesses that could potentially perform these scopes of work to ask if those businesses were interested in participating on this construction project. Certified businesses indicated interest in participating on this contract for the following scopes of work:

Scope	Number of Interested Veteran-Owned Businesses	Number of Interested Targeted Group Businesses
Construction surveying	1	2
Field office and laboratory	0	1
Remove shoulder pavement and curb	1	2
Sawing	0	3
Concrete curbing	1	2
Storm water management	0	2
Trucking	0	3

Steps 4-6: Determine which scopes of work to include in the VET goal and in the TGB goal

After receiving information from targeted group and veteran-owned businesses regarding their interest in the project, OCR made a final determination of which scopes to include in the goal. If an insufficient number of certified businesses respond, or if an insufficient number of businesses indicate they are interested in performing a specific scope of work, OCR may omit that scope from the final goal.

(Continued on next page.)

Exhibit 4.2: MnDOT's contracting goal-setting process is complicated (continued).

For the VET goal for this contract:

Three veteran-owned businesses indicated interest in participating on this project. However, while three businesses indicated interest, they indicated interest in working on three different scopes:

Scope	Estimated Cost	Number of Businesses that Indicated Interest
Construction surveying	\$50,000	1
Remove shoulder pavement and curb	20,000	1
Concrete curbing	40,000	1

OCR generally does not include a scope in the goal if only one certified business indicated interest. However, in instances such as this where there were three or more scopes with only one business expressing interest, per OCR's goal-setting guide, OCR included the lowest cost scope in the goal.

Final Scopes Included in the Goal	Estimated Cost	Number of Businesses that Indicated Interest
Remove shoulder pavement and curb	\$20,000	1

For the TGB goal for this contract:

OCR excluded the field office scope because only one targeted group business indicated interest. OCR also excluded the shoulder pavement removal scope from the TGB goal because OCR included that scope in the VET goal.

Final Scopes Included in the Goal	Estimated Cost	Number of Businesses that Indicated Interest
Construction surveying	\$50,000	2
Sawing	5,000	3
Concrete curbing	40,000	2
Storm water management	20,000	2
Trucking	30,000	3

When calculating the TGB or VET goal, OCR treats certain types of activities—such as installation, material provision, and trucking—differently. For example, if the scope involves installation of a product, OCR includes 100 percent of the estimated cost of that scope in the goal. On the other hand, if the scope only pertains to providing materials for a project, OCR includes 60 percent of the estimated cost of that scope in the goal.

After determining which scopes to include in the final TGB goal, OCR next determined the final dollar amount per scope to include in the goal:^a

Final Scopes Included in the Goal	Estimated Cost	Percentage of Estimated Cost Included in the Goal	Amount Included in the Goal
Construction surveying	\$50,000	100%	\$ 50,000
Sawing	5,000	100	5,000
Concrete curbing	40,000	100	40,000
Storm water management	20,000	60	12,000
Trucking	30,000	5	1,500
Total			\$108,500

Step 7: Calculate the final contracting goals

Finally, OCR calculated the goals by summing the total calculated amount of all included scopes and dividing that by the total estimated cost of the project.

Total estimated cost of the project = \$756,500

For the VET goal:

\$20,000/\$756,500 = 2.6% goal

For the TGB goal:

\$108,500/\$756,500 = 14.3% goal

NOTE: Contractors may meet the contracting goals by hiring certified businesses to perform any of the scopes of work required for the project, regardless of whether MnDOT included those scopes in its goal calculation.

^a For simplicity, we omitted this calculation from the VET goal example.

SOURCE: Office of the Legislative Auditor, review of MnDOT contracting goal-setting documents.

MnDOT has developed a goal-setting guide, but MnDOT staff have significant discretion to determine how to adhere to the guidelines.

MnDOT developed a goal-setting guide that describes the agency's process for setting contracting goals. The guide outlines eight major steps staff should take to set a goal. For example, the guide instructs staff to determine the types of work (referred to as "scopes") that small businesses could potentially perform on the project. Then the guide instructs staff to search for certified businesses that perform those scopes of work, and then "survey" those businesses about whether they are interested in participating on the project.



MnDOT's TGB and VET goal-setting process involves eight primary steps:

1. Determine the scopes of work small businesses could potentially perform on the project.
2. Identify certified businesses that perform the scopes of work identified in step 1.
3. Survey certified businesses identified in step 2 to determine whether they are interested in participating on the project.
4. Determine whether to set a TGB goal, VET goal, both, or neither.
5. Determine a "baseline" goal based on the information collected in steps 1-4.
6. Evaluate the baseline goal "for reasonableness."
7. Establish a final project goal after accounting for step 6 and making adjustments based on the type of services provided by certified businesses (for example, whether they will provide materials versus install materials).
8. Obtain goal approval from office management.

— MnDOT, Office of Civil Rights, *Small Business Contracting Goal Setting*, (2020).

In our discussions with MnDOT staff, however, they told us of several circumstances in which staff may choose not to follow the process outlined in the goal-setting guide. For example, the guide says MnDOT staff must survey certified businesses to determine how many are interested in working on the contract. One MnDOT staff person told us that sometimes certified businesses do not respond to MnDOT e-mails intended to gauge their interest in a contract. In those cases, a supervisor said MnDOT staff may use other "modes and means" to establish the goal(s), rather than relying solely on responses from certified contractors.¹⁴ As another example, the guide states that in cases where there are "three or more scopes with only one small business expressing interest" in each scope, MnDOT staff should include in the goal the one scope estimated to cost the least.¹⁵ However, a MnDOT staff person told us there may be times when staff include a scope in the goal that is not estimated to cost the least. Finally, we learned that the staff person responsible for setting TGB and VET goals during the latter half of our review period was unaware of MnDOT's goal-setting guide.

MnDOT staff further described other instances in which staff have goal-setting discretion. For example, as we discussed above, MnDOT usually does not set TGB or VET goals for contracts valued at less than \$250,000.

However, MnDOT staff told us that this is not a policy, and there may be times when the agency does set TGB or VET goals on projects below the \$250,000 threshold.¹⁶

¹⁴ For example, the supervisor said staff may set goals based on their knowledge of which certified businesses *usually* bid on MnDOT contracts, rather than basing it on which businesses responded to MnDOT's solicitation for the specific contract. MnDOT indicated that a supervisor would review these other "modes and means" when the supervisor assesses a goal for "reasonableness."

¹⁵ MnDOT, Office of Civil Rights, *Small Business Contracting Goal Setting*, revised 2020, 3.

¹⁶ MnDOT set contracting goals for 3 of the 45 state-funded construction contracts under \$250,000 that began during fiscal years 2018 through 2020.

The goal-setting guide does not describe the circumstances under which a project costing less than \$250,000 should be considered for a goal.

In addition, MnDOT staff have discretion to determine whether to set a TGB goal, VET goal, neither, or both for a specific contract. As described in Exhibit 4.2, sometimes both targeted group and veteran-owned businesses express interest in performing the same scope of work on a contract. For goal-setting purposes, MnDOT includes a given scope in *either* the TGB *or* the VET goal, meaning that MnDOT staff must decide in which goal to include that scope. The goal-setting guide states that MnDOT staff “have discretion” to decide whether to include the scope in the TGB goal or in the VET goal.¹⁷ A former OCR staff person told us there is “no clear formula” dictating how MnDOT staff should make this decision.

MnDOT staff regularly had to decide which scopes to include in a TGB goal versus a VET goal. To more deeply understand MnDOT’s TGB and VET goal-setting process, we reviewed OCR files for a sample of state-funded construction contracts.¹⁸ MnDOT staff excluded at least one scope from either the TGB or VET goal in order to include it in the goal for the other program for 7 of the 21 contracts in our file review. Excluding a scope of work from the goal for one program ultimately decreases the contracting goal for that program, while including the scope in the goal for the other program ultimately increases the contracting goal for the other program.

Goal-Setting Transparency

As we discussed above, MnDOT’s TGB and VET goal-setting process is complex. Because of this complexity, transparency and communication are especially important. Below, we discuss the extent to which it was clear how MnDOT set TGB and VET goals for the contracts we reviewed, and the extent to which the agency clearly communicates with certified businesses during the goal-setting process.

Determining Contracting Goals

Given the level of discretion MnDOT staff have when setting TGB and VET goals, we sought to assess the extent to which MnDOT staff adhered to MnDOT’s goal-setting guide and made goal-setting decisions consistently across contracts.

For the contracts we reviewed, it was somewhat unclear how MnDOT staff determined the contracting goals and whether staff made goal-setting decisions consistently.

We attempted to follow decisions made by MnDOT staff when setting TGB and VET goals for each contract in our file review. While most contract files included a

¹⁷ The goal-setting guide says that while staff have discretion, staff should consider the number of certified businesses that are interested in a scope and the ability of the businesses to perform the scope. The guide also says that staff should set goals for both the TGB and VET programs if there are multiple businesses expressing interest in multiple scopes.

¹⁸ For our review of contracting goals, we examined contract files for 21 state-funded MnDOT construction contracts over \$250,000 that began in fiscal years 2018 through 2020. OCR set TGB and/or VET contracting goals for 16 of the contracts in our review.

“goal-setting worksheet” that provided some information about how staff determined TGB and VET goals, there were some steps in the goal-setting process that were not sufficiently documented for us to determine how staff arrived at a specific goal and whether they did so consistently across contracts. We provide two examples below.



**Goal-Setting Step 1:
Determine the types of work small businesses
could perform on the project.**

“The specialist identifies potential scopes of work for small businesses to perform on the project. The following are examples of areas that the specialist should look at for these firms. This list is not all-inclusive nor is it exclusive:”

Bituminous, concrete, electrical, excavation, landscaping, erosion control, fencing, pavement, materials, planning, sewer, rebar/steel, trucking, walls, miscellaneous, other

— MnDOT, Office of Civil Rights,
Small Business Contracting Goal Setting, (2020), 1.

In the first step of MnDOT’s TGB and VET goal-setting process, MnDOT staff determine the types of work that small businesses could potentially perform on the contract. As seen in the box to the left, MnDOT’s goal-setting guide provides some guidance to staff, listing various types of work MnDOT staff should consider including in the goal. In step 2, the guide goes on to explain that staff should search the TGB/VET directory to “identify firms that could participate on, and work towards meeting the project goal.”¹⁹

We were rarely able to find records or documentation about how MnDOT staff decided which types of work certified

businesses could potentially perform for the contracts in our file review. While MnDOT staff sometimes indicated in their goal-setting analysis that they consulted the TGB/VET directory, staff largely did not document which scopes of work they searched for in the directory, and they rarely explained why they chose to exclude various scopes from the goal during this stage of the goal-setting process.

Determining which scopes of work certified businesses could potentially perform is an important step that affects the remainder of the goal-setting process and the final goal. For example, MnDOT estimated one contract in our review would cost about \$1.1 million in total. OCR staff determined that targeted group businesses could potentially perform only about \$72,000 worth of work on that contract. However, there was no indication in the file regarding how OCR staff determined that the other 93 percent of the work on the contract could not be performed by targeted group businesses.²⁰ Among the contracts we reviewed, on average, OCR staff determined that targeted group businesses could potentially perform nearly 40 percent of the project work and veteran-owned businesses could potentially perform about 30 percent of the project work.

After determining which scopes of work certified businesses could possibly perform, per the goal-setting guide, MnDOT staff may “survey” certified businesses to determine their interest in working on the different scopes of the contract.²¹ For contracts in our file review, MnDOT’s survey was an e-mail sent to a group of certified contractors. In the e-mail, OCR staff generally notified contractors that the agency was setting

¹⁹ We discussed the Department of Administration’s TGB/VET directory in Chapter 3. *Small Business Contracting Goal Setting*, 2.

²⁰ Ultimately, MnDOT set a TGB goal of 1 percent for this contract.

²¹ A MnDOT supervisor stated that, while included in the goal-setting guide, the survey step of the goal-setting process is not required.



contracting goals for a new contract, provided them a small amount of information about the project, and then asked the businesses to respond with whether they were interested in participating on the project and for what scopes of work. MnDOT staff did not document which or how many certified businesses they contacted for 19 of the 21 contracts in our file review. In addition, certified businesses sometimes did not specify what scopes they would like to perform when responding to MnDOT's solicitation, and it was not clear how MnDOT took these responses into account when setting TGB and VET goals.

Goal-Setting Step 3:

Survey certified businesses regarding their interest in participating on the project.

"Small businesses are surveyed regarding interest, availability, and scopes to assess the reasonableness of the ready, willing, and able certified firms.

1. Survey certified firms identified in the previous step, regarding interest, availability, and scope.
2. Document the responses of small businesses in the project file.
3. Identify interest only by scope, not by name on the goal-setting worksheet.
4. Associate the scope with the type of work being performed for counting purposes (trucking, supply, installation).
5. Tally the number of firms in each scope on...the goal-setting worksheet."

— MnDOT, Office of Civil Rights, *Small Business Contracting Goal Setting*, (2020), 2.

Like the steps described above, this third step affects the remainder of the goal-setting process and the final goal. Typically, MnDOT only includes scopes in the final goal if a sufficient number of certified businesses tell MnDOT that they are interested in bidding on the project for that scope of work. If MnDOT does not include all possible certified businesses in its survey, it may end up establishing lower goals because fewer businesses had the opportunity to indicate interest. In our file review, we found that MnDOT excluded at least one scope of work from

a goal due to a lack of response from certified businesses for 10 of the 21 contracts we reviewed (48 percent).

Several individuals who either work in or study the construction industry told us that MnDOT's goal-setting process for TGB and VET goals is unclear overall. For example, one individual speaking on behalf of contractors described goal-setting as a "black box." An academic expert we interviewed commented that it is "hard to figure out where the [TGB and VET goal] numbers come from." A certified business owner said MnDOT's goal-setting process is "not at all" clear. Given the degree of documentation we found in our file review, and the discretionary nature of MnDOT's goal-setting process, we agree that MnDOT's goal-setting decisions could be clearer.

RECOMMENDATION

MnDOT should further clarify its goal-setting process and better document goal-setting decisions left to staff discretion.

We appreciate that MnDOT has created a goal-setting guide to put parameters around the TGB and VET goal-setting process. However, members of the contracting community—including both those subject to and benefiting from contracting goals—expressed confusion about the agency's goal-setting processes. We likewise struggled

to follow staff goal-setting decisions for certain steps of the goal-setting process for the contracts we reviewed. While the goal-setting guide outlines how MnDOT staff *should* set TGB and VET goals, it was not clear in our review the extent to which staff followed the goal-setting guide consistently.

Due to the unique nature of each contract, MnDOT staff may need to exercise some discretion with regard to establishing goals. However, in instances in which staff must exercise discretion, it is important that staff clearly document how and why they arrived at their decisions. This will help MnDOT to ensure goal-setting decisions are being made consistently across staff and contracts and in adherence with its goal-setting guide.

Further, a lack of documentation may make it more difficult for MnDOT to justify its decisions in the event a contractor challenges them. As we discuss in the next chapter, while permitted by law, MnDOT does not currently penalize contractors that do not meet contracting goals. If MnDOT was to establish penalties for contractors that do not meet contracting goals, the agency would have to clearly document all decisions regarding the contracting goals. Without clearer documentation, we are concerned that MnDOT would not be able to stand up to legal challenges to its programs, should they occur.

Communication with Certified Businesses

As we discussed above, a key step in setting contracting goals is determining how many certified businesses are interested in participating on a contract, and in what capacity. In order for certified businesses to accurately indicate to MnDOT whether they are interested in potentially working on a contract, they must know what the project involves. For example, businesses need to know when and where the project is going to take place, how long the project will last, and what types of work the project entails. Without this information, it is difficult for businesses to accurately determine whether they have the expertise, capacity, or availability to bid on the contract as a subcontractor.

For the contracts we reviewed, MnDOT's Office of Civil Rights staff provided certified businesses with limited information to determine whether they are interested in participating on a contract.

For contracts for which MnDOT documented its solicitation of certified businesses, MnDOT always or almost always provided information about the project location, the project start date, and a brief project description.²² However, other key information was lacking. For example, MnDOT indicated how long the project would last for only 6 of the 17 contracts for which MnDOT documented its solicitation. Additionally, while MnDOT regularly provided a description of the project, those descriptions were often quite limited, such as "TH 40 Br. Rehab."

²² MnDOT did not document its survey of certified businesses for four contracts in our review.

For the contracts we reviewed, OCR staff never indicated what types of work were needed on the project.²³ In our file review, a few businesses indicated confusion about—or a lack of knowledge of—the types of work needed for the project. One bidder asked for additional information, while several bidders provided MnDOT with a list of scopes they could perform if those scopes were part of the project. One targeted group business owner we spoke with said OCR often does not provide sufficient information about the project when it asks certified businesses if they are interested in bidding.

Stakeholders expressed other concerns about how MnDOT determines whether certified businesses are interested in participating on a contract. For example, one certified business owner said MnDOT gives certified businesses very little time to respond to the agency's solicitation about whether the business is interested in participating on a contract. In our file review, we looked at how long MnDOT gave certified businesses to respond and notify MnDOT that they were interested in working on a contract. MnDOT gave certified businesses a deadline to respond to its solicitation for only 7 of the 21 contracts we reviewed. When MnDOT did give businesses a deadline, on average, MnDOT gave certified businesses four calendar days to indicate their interest.

RECOMMENDATION

MnDOT should ensure certified businesses have sufficient information to accurately respond to MnDOT solicitations.

To help ensure the quality of the goals MnDOT establishes, we recommend that MnDOT provide additional information to certified businesses when it solicits their interest on MnDOT construction projects. OCR should consistently provide businesses with information about the contract, including how long the project is likely to last and the scopes of work needed on the project. We also suggest that MnDOT consult with members of its DBE and Workforce Collaborative about how it can more effectively solicit interest from certified businesses for goal setting.

Evaluating Contractor Good Faith Efforts

As shown in the box describing the contract-award process at the beginning of this chapter, after MnDOT determines the apparent low bidder for a contract with a TGB and/or VET contracting goal, the agency collects additional information from the apparent low bidder about the extent to which, and how, the bidder plans to meet the TGB and VET goals. For example, the bidder must submit a form for each certified business that it plans to have work as a subcontractor on the project. The form describes the type of work that each certified subcontractor will complete as well as how much the work is expected to cost. MnDOT staff review the information the bidder provides to determine if the amount the bidder has committed to pay certified businesses for their work on the contract is sufficient to meet the contracting goals.

²³ Because MnDOT solicits contractor interest before the letting period opens, businesses cannot access project specifications through other means, such as via MnDOT's website.

If the apparent low bidder does not plan to contract with certified businesses at a level that will meet the goals, by law, the bidder must demonstrate its “good faith efforts” to meet the TGB and VET goals.²⁴ Statutes do not define what it means to make good faith efforts to meet contracting goals. With regard to good faith efforts, MnDOT explains in its contracting provisions:

The [bidder] must demonstrate that it took all necessary and reasonable steps to achieve the TGB and VET goals. Necessary and reasonable steps are those efforts that, by their scope, intensity, and appropriateness, could reasonably be expected to obtain sufficient participation, even if the efforts were not fully successful.²⁵

We discuss the frequency with which MnDOT has awarded contracts based on contractor good faith efforts and MnDOT’s approach to evaluating contractor good faith efforts below.

Contract Award Based on Good Faith Efforts

To determine whether a bidder made good faith efforts, MnDOT staff conduct a good faith efforts evaluation before awarding the contract. If MnDOT finds through its evaluation that the apparent low bidder did not demonstrate that it made adequate good faith efforts to meet the goal(s), MnDOT’s contract provisions indicate the agency will deem the bidder “non-responsible,” meaning MnDOT will no longer consider the bidder for the contract.²⁶

For state-funded construction contracts beginning in fiscal years 2018 through 2020, MnDOT rarely rejected a bidder because it failed to demonstrate good faith efforts to meet the contracting goals.

As shown in the box on the following page, the majority of bidders committed to meeting TGB and VET contracting goals on state-funded MnDOT construction contracts starting in fiscal years 2018 through 2020. Bidders committed to meeting the TGB goal for 105 of the 112 contracts with a TGB goal in our review period, while bidders committed to meeting the VET goal for 52 of the 59 contracts in our review period with a VET goal.

²⁴ *Minnesota Statutes* 2020, 161.321, subds. 2a(a) and 2c(a).

²⁵ MnDOT, Office of Civil Rights, *Targeted Group Business (TGB) and Veteran-owned Small Business (VET) Special Provisions*, revised March 27, 2017, <https://www.dot.state.mn.us/civilrights/pdf/tgb/tgbvets-special-provision.pdf>, accessed April 27, 2020, 13.

²⁶ Bidders may appeal MnDOT’s decision to reject their bid because the bidder did not meet the contracting goals and MnDOT determined the bidder did not make good faith efforts to do so. According to MnDOT, there was one reconsideration hearing regarding good faith efforts for state-funded contracts during our evaluation period (fiscal years 2018 through 2020). Because so few businesses appealed the agency’s decisions in recent years, we did not include the appeals process in our evaluation.

Bidders committed to meeting TGB and VET contracting goals for the majority of state-funded MnDOT construction contracts starting in fiscal years 2018 through 2020.

Number of contracts without a TGB or VET contracting goals	83
Number of contracts with a TGB and/or VET contracting goal(s)	124
Bidder committed to meeting the goals	113
Bidder did not commit to meeting the goals and MnDOT reported that it conducted (or should have conducted) a good faith efforts evaluation	9
Bidder did not commit to meeting the goals, and MnDOT reported that it did not conduct a good faith efforts evaluation	2
TOTAL	207

MnDOT reported that prime contractors did not commit to meeting the TGB and/or VET goal for 11 of the 124 state-funded construction contracts that had a TGB and/or VET goal and began in fiscal years 2018 through 2020. Of those 11 contracts, the agency reported that it conducted (or should have conducted) a good faith efforts evaluation for 9 contracts, or 7 percent of all state-funded construction contracts with a TGB and/or VET goal that began in fiscal years 2018 through 2020.²⁷

Of the nine contracts for which MnDOT said it conducted (or should have conducted) a good faith efforts evaluation, MnDOT found that only one of the nine bidders did not demonstrate adequate good faith efforts to meet the contracting goals. In that case, MnDOT rejected

the bidder and selected a different company for the contract. For the remaining eight contracts, MnDOT determined that the bidders demonstrated adequate good faith efforts, meaning the agency could move forward with awarding the contracts to those bidders.

Evaluation Criteria

Below, we discuss how MnDOT conducts its good faith efforts evaluations for state-funded construction projects.

MnDOT has established criteria for evaluating contractors' good faith efforts to meet contracting goals for state-funded construction projects.

Statutes require MnDOT to “establish a procedure for evaluating the good faith efforts of contractors that do not meet the [TGB or VET] goal.”²⁸ Statutes do not provide further guidance about what criteria MnDOT should include in its procedure.

MnDOT has developed several factors to consider when determining whether a contractor made good faith efforts to meet the contracting goals. The agency outlines these criteria in its contracting provisions. For example, the provisions state that MnDOT will consider how prime contractors solicited bids from targeted group and veteran-owned businesses, and whether prime contractors made efforts to provide interested certified contractors with financial assistance. Exhibit 4.3 lists the eight good faith efforts criteria MnDOT includes in its contracts.

²⁷ As we discuss below, MnDOT determined that two contracts did not warrant a good faith efforts evaluation even though the bidder did not commit to meeting the contracting goals.

²⁸ *Minnesota Statutes* 2020, 161.321, subs. 2a(a) and 2c(a).

Exhibit 4.3: MnDOT lists eight criteria in its contract provisions to assess contractors' good faith efforts to meet contracting goals for state-funded contracts.

Criterion	Description
Solicitation	Did the prime contractor solicit in a timely manner the interest of certified businesses that have the capability to perform the contract work? Did the contractor follow up with interested certified businesses as necessary?
Selection of work	Did the prime contractor select portions of work to be performed by certified businesses that would increase the likelihood that the contract would meet contracting goals? Did the prime contractor break out work items into "economically feasible units" for small contractors, even if the prime contractor would have otherwise performed those items?
Providing information and assistance	Did the prime contractor provide certified businesses with sufficient and timely information about project plans, specifications, and requirements to assist them in responding to the solicitation?
Negotiation	Did the prime contractor negotiate in good faith with certified businesses? For example, did it consider the business's price and capabilities as well as the contracting goals? ^a
Rejection of certified businesses	Did the prime contractor reject—or choose not to solicit—quotes from certified businesses it determined were unqualified? If yes, did the prime contractor provide sound reasons for rejecting the certified businesses that it based on a "thorough investigation of [the businesses'] capabilities?"
Financial assistance	Did the prime contractor make any efforts to assist certified subcontractors in obtaining required lines of credit or insurance?
Equipment assistance	Did the prime contractor make any efforts to assist certified subcontractors in obtaining needed equipment, supplies, or materials?
Recruitment	Did the prime contractor effectively use services such as community organizations, contractor groups, and government business assistance offices for assistance with recruiting certified businesses?

NOTE: In addition to the criteria above, MnDOT says it may consider other relevant factors or evidence in its review of good faith efforts.

^a MnDOT states "the fact that there may be some additional costs involved in finding and using [certified] businesses is not in itself sufficient reason for the [bidder's] failure to meet" the contracting goals. However, MnDOT also states that contractors are not required to accept higher quotes if the price difference between a certified business and a non-certified business is "excessive and unreasonable."

SOURCE: MnDOT, Office of Civil Rights, *Targeted Group Business (TGB) and Veteran-owned Small Business (VET) Special Provisions*, revised March 27, 2017, <http://www.dot.state.mn.us/civilrights/pdf/tgb/tgb-vet-special-provisions.pdf>, accessed April 27, 2020, 13-14.

In addition to including criteria in its contract provisions, MnDOT has developed a good faith efforts memorandum template to guide staff's good faith efforts analyses. The template outlines and explains the criteria listed in the contract provisions to guide staff decisions about whether a contractor made good faith efforts to meet the contracting goals.

For the contracts we reviewed, MnDOT staff did not consistently document their good faith efforts decisions or review all good faith efforts criteria outlined in contract provisions.

As we noted above, MnDOT reported that there were nine state-funded construction contracts that started in fiscal years 2018 through 2020 for which MnDOT conducted (or should have conducted) a good faith efforts evaluation. Agency staff did not include any rationale for its good faith efforts determination in the contract files for at least two of the nine contracts.²⁹ For two additional contracts, MnDOT determined that the bidder did not commit to meeting the VET contracting goal, but MnDOT staff reported the agency decided not to conduct a good faith efforts review.³⁰ MnDOT staff likewise did not document this decision for at least one of the two contracts.³¹

Contract provisions state that, “In evaluating the responder’s adequate good faith efforts, MnDOT *will* consider the following list of actions” [emphasis added], and then it proceeds to list the eight criteria outlined in Exhibit 4.3.³² An OCR supervisor and a staff member from MnDOT’s Office of Chief Counsel told us that staff should consider all criteria in the contracting provisions when determining whether contractors made adequate good faith efforts, although staff may weigh some criteria more heavily than others.³³

However, in our file review, we found that MnDOT staff did not always consider—or did not indicate that they considered—all of the good faith efforts criteria. For example, MnDOT staff indicated they considered whether the bidder offered certified businesses assistance with finances or equipment for only three of the eight contracts in our review. For three contracts, MnDOT staff indicated that the bidders did not provide information that would allow the agency to fully evaluate each criterion according to the good faith efforts memorandum, but MnDOT staff still determined the bidders demonstrated good faith efforts to meet the goals.

²⁹ We did not review one contract for which MnDOT conducted (or should have conducted) a good faith efforts evaluation because MnDOT failed to provide a complete list of contracts subject to good faith efforts reviews until after we had concluded our research.

³⁰ For one contract, MnDOT determined the bidder came close enough to meeting the goal. For this contract, in order for the bidder to meet the VET goal, certified veteran-owned businesses needed to account for 1 percent of total contract expenditures (just over \$14,000). The bidder said veteran-owned businesses would account for \$11,550 of the project costs; the bidder committed to meeting 82 percent of the goal. MnDOT decided to use the second contract for a pilot project.

³¹ We did not review one of the two contracts for which MnDOT decided not to conduct a good faith efforts evaluation because MnDOT failed to provide a complete list of contracts subject to good faith efforts reviews until after we had concluded our research.

³² *Targeted Group Business (TGB) and Veteran-owned Small Business (VET) Special Provisions*, <https://www.dot.state.mn.us/civilrights/pdf/tgb/tgbvets-special-provision.pdf>, accessed April 27, 2020, 13.

³³ MnDOT staff emphasized that the good faith efforts criteria should not be a checklist for contractors. For example, staff said contractors could be weaker with regard to one criterion but stronger in others and still demonstrate adequate good faith efforts. They said that contractors could also demonstrate they made good faith efforts by providing information not explicitly described by the criteria. A MnDOT staff person also said that there may be instances in which certain good faith efforts criteria are not applicable to a specific contract, such as if a prime contractor did not reject bids from any certified businesses in favor of bids from non-certified businesses.

Some contractor representatives commented that the criteria MnDOT uses to make its good faith efforts determinations are unclear. For example, one contractor representative said that MnDOT's good faith efforts determinations vary from one year to the next, and what constitutes good faith efforts in one year may not be sufficient the next. A certified business owner said that it is "100% unclear" what contractors must do to demonstrate good faith efforts.

RECOMMENDATION

MnDOT should consider all good faith efforts criteria outlined in its contract provisions and consistently document its decisions regarding contractors' good faith efforts.

Analyzing the adequacy of contractors' good faith efforts is an important part of MnDOT's work related to contracting goals. If MnDOT's analysis is insufficient, the agency runs the risk of either unfairly denying contracts to businesses, or awarding contracts to businesses that did not make a reasonable attempt to meet the contracting goals. In the case of the latter, MnDOT also risks unfairly disadvantaging other bidders that may have been more successful at meeting the goals, but perhaps at a greater cost.

We recommend that MnDOT staff evaluate all of the criteria listed in the contract provisions to determine whether a contractor made adequate good faith efforts to meet TGB and VET goals. In addition, MnDOT should clearly document the criteria it considered for each contract and how it arrived at its final decision. If MnDOT staff determine that a particular criterion is not relevant to demonstrating good faith efforts to meet contracting goals for a particular contract, staff should explain this decision in their good faith efforts analysis.

In order to ensure MnDOT staff can analyze each criterion, MnDOT must ensure that contractors provide the agency with sufficient information. We suggest that MnDOT further clarify what contractors must submit in order to demonstrate adequate good faith efforts for TGB and VET goals. MnDOT includes more detailed good faith efforts guidance to contractors bidding on federally funded contracts, and we suggest MnDOT refer to that guidance to inform its efforts to clarify good faith efforts requirements for state-funded contracts.³⁴

³⁴ For example, in MnDOT's guidance for federally funded contracts, MnDOT indicates that the bidder's good faith efforts submission "should include evidence of the solicitation effort such as; [sic] copies of request for bids sent to DBE firms with the name of the DBE firms clearly identified; fax confirmation sheets showing the date, fax number, name of DBE firm, confirmation the fax was sent; list of all DBE firms called time of call, person contacted and response; or email lists with time/day sent clearly indicated etc." In contrast, MnDOT's guidance for state-funded contracts indicates that the bidder "can include, but is not limited to, copies of solicitation letters, faxes, and emails to TGB and VET firms."

Good Faith Efforts Reporting

Statutes require MnDOT to provide biennial reports to the Legislature on the TGB and VET programs. By law, MnDOT must include in its report “a review of goals and good faith efforts to use small targeted group businesses and veteran-owned small businesses in subcontracts, including analysis of methods used for, and effectiveness of, good faith efforts.”³⁵

In recent years, MnDOT did not consistently track or accurately report on the share of contracts approved as a result of good faith efforts.

In its 2018-2019 biennial report, MnDOT reported to the Legislature that it approved two contracts based on good faith efforts after not meeting the VET goal and one contract after not meeting the TGB goal.³⁶ However, in response to OLA inquiries, OCR staff found that they approved five contracts during the 2018-2019 biennium based on a bidder’s good faith efforts after not meeting the TGB goal.³⁷ During the same time period, MnDOT also reported to the Legislature that the agency did not deny any bidders a contract for failing to make good faith efforts to meet a contracting goal, when in fact, the agency did reject one bidder on the basis of a lack of good faith efforts.

Further, while MnDOT has provided information on some of the items it is required to report on by law, the reports are incomplete. For example, MnDOT provided a review of the purpose of good faith efforts in its recent biennial reports, but it did not describe the methods used to demonstrate good faith efforts.

An OCR staff person told us that they are unable to query the number of contracts they reviewed for good faith efforts in the agency’s contract management system. One staff person explained that OCR used to manually track the number of contracts that required good faith efforts reviews, but that they do not do so currently.

RECOMMENDATION

MnDOT should regularly track and accurately report on its good faith efforts reviews, as well as the methods used by contractors to demonstrate good faith efforts.

In order to meet reporting requirements in law—and as a matter of good practice—MnDOT should consistently and accurately track the number of contracts for which it

³⁵ *Minnesota Statutes* 2020, 161.321, subd. 8(b).

³⁶ Because MnDOT reported separately the number of contracts that did not meet TGB and VET goals, it is not clear in the biennial report whether MnDOT conducted a good faith efforts review for two or three contracts in total. *Targeted Group Business and Veteran-Owned Small Business Programs, Fiscal Year 2018-19 Report*, 10.

³⁷ One of the five contracts for which MnDOT conducted a good faith efforts review for the TGB goal also failed to meet the VET goal.

reviews contractor good faith efforts. Further, as required by law, MnDOT should include in its biennial reports an analysis of the methods used by contractors to demonstrate good faith efforts.

Contractor Performance Monitoring

Currently, at the end of a contract, MnDOT staff review prime contractors' payments to certified subcontractors. Staff then calculate whether the prime contractor met the contracting goal(s) based on the project's total cost and the total amount paid to certified businesses.³⁸

In addition to determining whether contractors met contracting goals at the *end* of a project, MnDOT could monitor various aspects of contractor performance throughout the course of the project. For example, MnDOT could monitor whether the prime contractor paid certified subcontractors for their work in a timely manner.

According to MnDOT staff, prior to 2020, ongoing monitoring of contractor performance on TGB and VET goals took place on an ad hoc basis. Historically, staff said monitoring often took place as a result of someone notifying OCR staff that a project was not meeting contracting goals; for example, other MnDOT staff or certified subcontractors might alert OCR to issues on a project. One OCR supervisor told us that staffing limitations hindered the agency's ability to monitor contracting goals, and that if something was not explicitly required in law, OCR staff generally did not do it.³⁹

State law does not explicitly require MnDOT to monitor the extent to which contractors meet contracting goals.

Statutes require contracting state agencies—such as MnDOT—to “diligently administer and monitor any contract it has entered into.”⁴⁰ However, state law does not explicitly indicate that this responsibility extends to monitoring TGB and VET contracting goals. MnDOT staff had different interpretations of whether or not MnDOT is required by law to monitor contractor progress towards meeting TGB and VET goals; some staff indicated that MnDOT was required to do so, while other staff indicated it was not.

Unlike federal law, state statutes do not describe *how* MnDOT should monitor contractors' progress towards meeting contracting goals. Federal law explicitly requires contracting agencies—such as MnDOT—to monitor aspects of contracting goals for federally funded projects. For example, the federal government requires MnDOT to ensure that DBEs actually perform the work awarded to them and that their

³⁸ We discuss how many contractors met contracting goals in Chapter 5.

³⁹ OCR staff told us that prime contractors are obligated to notify MnDOT if they are not going to meet the TGB and/or VET contracting commitments they made prior to contract award.

⁴⁰ *Minnesota Statutes* 2020, 16C.05, subd. 4.

contributions to the project are substantive.⁴¹ There are no comparably explicit requirements in state law.

Although MnDOT made improvements in 2020, its monitoring of contractors' progress towards meeting contracting goals for the Targeted Group Business and Veteran-Owned Small Business programs remains limited.

While MnDOT is not explicitly required by law to monitor contracting goals for state-funded projects, the agency has recently increased the extent to which it does so. Specifically, in 2020, OCR staff reviewed 46 state-funded contracts to ensure payments to certified subcontractors were made in a timely manner and recorded in MnDOT's contract management system.⁴²

Despite this improvement, MnDOT's monitoring of TGB and VET goals remains limited. For example, MnDOT does not regularly review or report on the share of contracts that met TGB and VET goals at the conclusion of the contract. MnDOT also does not regularly monitor the extent to which contractors are meeting TGB and VET contracting goals throughout the course of a contract. Further, MnDOT does not have any automatic reporting on contracting goals for state-funded projects; a former OCR staff person told us that MnDOT staff can only monitor contractor performance manually, on a contract-by-contract basis.

In addition to monitoring the extent to which contractors are meeting TGB and VET contracting goals on an ongoing basis, MnDOT could monitor other aspects of contractor performance throughout the course of the project. For example, contract provisions indicate that MnDOT project engineers are supposed to evaluate certified businesses during the first half of the project work to determine whether each certified business on the project is meeting industry standards and performing the work the business said it would perform. However, for 7 of the 11 contracts we reviewed that had at least one contracting goal and for which work on the project was complete, engineers submitted the evaluation of at least one certified business after the project was complete. When engineers submit evaluations after the project is complete, OCR staff do not have a chance during the course of the contract to address any of the issues identified by the engineer.

Further, until recently, there was not a DBE and Workforce Collaborative committee to monitor *contracting* goals.⁴³ In contrast, as we discussed in Chapter 2, a collaborative committee meets regularly to review the extent to which contractors are meeting *workforce* goals. In 2020, collaborative members began expressing an interest in

⁴¹ The federal government refers to this as evaluating whether a certified business is providing a “commercially useful function” on the contract. A business provides a commercially useful function “when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved.” 49 *CFR*, secs. 26.37(b) and 26.55(c)(1) (2019).

⁴² As we discuss at the end of Chapter 5, several respondents to the most recent disparity study and some individuals we interviewed indicated that a lack of prompt payments to certified subcontractors was a significant barrier to working on MnDOT contracts.

⁴³ The last committee responsible for monitoring contracting goals dissolved in 2017.

reestablishing a committee to monitor contracting goals. This committee met for the first time in late 2020.

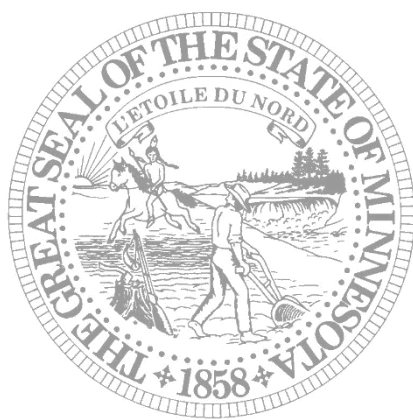
RECOMMENDATION

MnDOT should more thoroughly monitor contractor progress towards meeting the contracting goals for targeted group and veteran-owned businesses.

We commend MnDOT for beginning to review the timeliness of contractor payments to certified businesses, and we encourage the agency to continue this practice. An OCR supervisor told us that ensuring that contractors pay certified subcontractors in a timely manner “goes hand in hand” with ensuring contractors meet TGB and VET contracting goals. While we agree that ensuring timely payments of certified subcontractors is an important component of overseeing contractor progress towards meeting TGB and VET contracting goals, we believe OCR needs to further develop its monitoring of contracting goals.

We recommend that OCR adopt and document a strategy for regularly monitoring contractor performance on TGB and VET contracting goals. For example, OCR should formalize and document its new process for monitoring whether certified subcontractors are paid in a timely manner. OCR’s monitoring strategy should also include a timely review of the certified subcontractor evaluations prepared by project engineers. OCR should establish a process for regularly tracking the extent to which contractors are meeting TGB and VET goals at the end and over the course of the contract. We recommend that OCR also consistently track the extent to which contractors rely on good faith efforts to meet goal obligations, both at the time of contract award and at the end of the contract. Further, OCR should automate its reporting processes for state-funded projects.

Finally, MnDOT should continue to support the reestablishment of the collaborative committee that is dedicated to overseeing and providing guidance on contracting goals. In March 2021, MnDOT stated that the agency had assigned several OCR staff members to support this committee. MnDOT should ensure this committee includes TGB and VET goals in its oversight activities, and MnDOT should consult with members of this committee to determine what other aspects of contracting goals—if any—MnDOT should monitor.



Chapter 5: Contracting Goal Performance and Outcomes

In the previous chapter, we discussed MnDOT’s contract goal-setting process for targeted group and veteran-owned businesses, and how the agency evaluates the adequacy of prime contractors’ efforts to meet targeted group business (TGB) and veteran-owned business (VET) goals.¹ In this chapter, we discuss the outcomes of those contracting goals.

We first describe the extent to which contractors met TGB and VET goals. We then discuss the share of MnDOT contract payments that went to certified businesses in recent years, how many certified businesses participated on state-funded MnDOT contracts, and the extent to which contracting goals affected total MnDOT contracting costs.² Finally, we discuss challenges to increasing certified business participation on MnDOT contracts and describe various policy options that could enable MnDOT to more effectively fulfill the purpose of its contracting goal programs.

Key Findings in This Chapter

- Despite statutory authority to do so, MnDOT neither sanctions nor rewards prime contractors based on their efforts to meet contracting goals for state-funded MnDOT contracts.
- In recent years, payments to certified businesses working on state-funded MnDOT contracts were not evenly distributed across the demographic groups eligible for MnDOT’s Targeted Group Business Program.
- Relatively few certified businesses participated as prime contractors on state-funded MnDOT contracts that began in fiscal years 2018 through 2020.

Contracting Goal Performance

We had hoped to independently verify how often contractors met contracting goals for all contracts in our review period. However, because MnDOT determines whether contractors meet contracting goals manually, on a contract-by-contract basis, we were unable to systematically assess the extent to which contractors met TGB and VET contracting goals for all contracts.

¹ As we discussed in Chapter 1, “targeted group” businesses include those owned and operated by women, people of color, and people with a substantial physical disability. For the purposes of this report, “people with a physical disability” refers to individuals with a substantial physical disability. Prime contractors are businesses that sign a contract directly with MnDOT. In contrast, subcontractors are businesses that sign a contract with the prime contractor or another subcontractor on a MnDOT project, as opposed to signing a contract directly with MnDOT.

² Throughout this chapter, a “certified business” includes a targeted group or veteran-owned small business certified as such by the Minnesota Department of Administration or the U.S. Department of Veterans Affairs. “State-funded” refers to contracts funded solely by state dollars.

We confirmed that half of the small number of state-funded contracts we reviewed met MnDOT contracting goals; however, MnDOT often did not clearly document how it determined whether contractors met the goals.

Given the challenges with calculating contractors' goal performance for all contracts, we instead reviewed a sample of contracts eligible for TGB and VET goals in an attempt to manually verify whether contractors met contracting goals.³ Of the eight contracts we reviewed, we determined that four contracts met the TGB and VET contracting goals, while one did not.⁴ We were unable to verify whether contractors met the goals for the remaining two contracts.

Missing documentation posed a significant obstacle to our review. For example, for all of the contracts we reviewed, MnDOT's Office of Civil Rights (OCR) did not provide documentation indicating either the total payments to certified businesses or the total contract cost that the agency used to calculate whether contractors met the goal(s).⁵ When we calculated the percentage of contract expenditures that went to certified businesses, our calculations were often substantially different from OCR's calculations relative to the overall size of the TGB and VET goals. In the case of one of the two contracts for which we could not verify whether the contractor met the contracting goals, OCR calculated that the contractor met the TGB goal, while we calculated that the contractor did not. Given MnDOT's lack of documentation, it was not possible to determine why our calculations differed from MnDOT's.

In the case of the second contract for which we could not confirm whether the contractor met the goal, contract files did not include documents that indicated OCR's determination of whether or not the contractor met the contracting goal. Without knowing what MnDOT calculated as the final percentage of payments that went to certified businesses—or even whether or not the contractor met the goal—we had no way to verify whether our calculations were in agreement with MnDOT's.

Documentation issues posed further challenges to our efforts to calculate whether contractors met the TGB and VET goals. Depending on the services a certified business provides, MnDOT may not count payments to a certified business at 100 percent of their total dollar value. For example, if a certified business supplies materials but does not install or manufacture them, MnDOT counts payments to that certified business at 60 percent of its value. One of the eight contracts we reviewed

³ For our review of contracting goals, we examined contract files for 21 state-funded MnDOT construction contracts that began in fiscal years 2018 through 2020 (10 percent). Only 8 of the 21 contracts we reviewed had at least one contracting goal and were sufficiently complete to determine whether the contractor had reached the goal(s).

⁴ For a sixth contract, the prime contractor indicated that they did not plan to contract with any certified targeted group businesses, despite the contract's TGB goal of 3.5 percent. MnDOT's Office of Civil Rights (OCR) conducted a good faith efforts evaluation and determined that the contractor demonstrated good faith efforts to meet the goal. While the contractor did not meet the goal at the conclusion of the contract, the contractor performed in accordance with its commitment that OCR approved.

⁵ OCR requires contractors to submit a "Total Payment Affidavit" indicating their total payments to certified businesses. An OCR supervisor said that they refer to both the total payments listed on the affidavit as well as payments recorded in MnDOT's contract management system to determine how much certified businesses were paid on a given contract. While the supervisor told us that the payments listed on the affidavit should match those in the contract management system, payments did not match for two of the eight contracts we reviewed.

lacked the documentation needed for us to determine whether to calculate contractor payments at 100 percent of their value or less.

As we explained in Chapter 4, we recommend that MnDOT better document its contracting goal decisions for each state-funded contract. That includes documenting its calculations for determining whether contractors met contracting goals.

Performance Sanctions and Incentives

As we discussed in Chapter 4, businesses bidding on MnDOT construction contracts with a TGB or VET contracting goal are required by law to “either meet the [contracting] goal or demonstrate good faith efforts” to meet the goal as a condition of contract award.⁶ If a bidder does not commit to meeting the contracting goals at the time of contract award, and it does not demonstrate good faith efforts to do so, MnDOT can refuse to award the contract to that bidder.

However, just because a contractor commits to meeting the contracting goals at the beginning of the contract does not guarantee that a contractor will ultimately meet the contracting goals at the end of the contract. For example, after being awarded a contract, a prime contractor could cancel its contract with a certified subcontractor or reduce the amount of work on a project for certified businesses. MnDOT can—and does—penalize bidders that do not commit to meeting contracting goals (and do not demonstrate good faith efforts to do so) by not awarding those bidders the contract. MnDOT could also penalize contractors that do not make adequate efforts to meet contracting goals (and do not provide sufficient justification for failing to meet goals) *after* contract award.

Despite statutory authority to do so, MnDOT neither sanctions nor rewards prime contractors based on their efforts to meet contracting goals for state-funded MnDOT contracts.

By law, MnDOT may establish “sanctions for prime contractors who fail to make good faith efforts to meet [TGB or VET] goals.”⁷ In its contract provisions, MnDOT outlines possible sanctions for contractors that fail to meet their contracting goal commitments. For example, MnDOT says it may take deductions from contract payments or withhold payments altogether for work already completed. By law, MnDOT may also establish “financial incentives for prime contractors who exceed the goals set for the use of [certified targeted group or veteran-owned] subcontractors.”⁸

While law permits MnDOT to sanction or incentivize contractor performance regarding TGB and VET contracting goals, the agency does not currently do so. For example, MnDOT does not reduce contractor pay if the contractor does not meet the contracting goals to which it had committed. Further, whether or not a contractor meets the goals at

⁶ *Minnesota Statutes* 2020, 161.321, subds. 2a(a) and 2c(a).

⁷ *Ibid.*

⁸ *Ibid.*

the end of the contract, or how close they come to meeting the goals, does not play a role in how MnDOT assesses the contractor for future contract awards.

Some MnDOT staff we spoke with said there should be consequences for contractors who do not meet contracting goals. One MnDOT staff person said there especially should be consequences for contractors that fail to meet contracting goals across multiple contracts. A former staff person said there should be sanctions for contractors that fail to meet goals by large margins. A contractor representative also expressed support for formal sanctions and argued that without sanctions, contracting goals are not meaningful.

However, some of the individuals we spoke with suggested that sanctions and incentives are not necessarily the best way to encourage prime contractors to meet their contracting goal requirements. One academic expert argued that incentives and sanctions are ineffective if contractors lack an understanding of the purpose of the contracting goals. The expert commented that MnDOT needs to better explain why the contracting goal programs exist; otherwise, implementing sanctions or incentives could generate hostility towards these programs. A MnDOT supervisor commented that educating and building relationships with contractors is the most effective way for MnDOT to encourage contractor compliance with goal requirements. We further discuss the advantages and drawbacks of MnDOT implementing sanctions and incentives at the end of this chapter.

Contracting Goal Outcomes

As we described in Chapter 1, the purpose of MnDOT contracting goals is to increase certified businesses' participation on MnDOT contracts. In the following sections, we use two metrics to look at program outcomes. First, we describe the share of contract payments that went to certified businesses working on MnDOT contracts in recent years, and how those payments compared across the various groups the programs seek to serve. Then we discuss how many certified businesses participated on MnDOT contracts in recent years.

Payments to Certified Businesses

In this section, we describe how much money MnDOT paid to certified businesses that worked on state-funded contracts in recent years. This includes payments MnDOT made directly to TGB- and VET-certified prime contractors on construction and professional/technical contracts that started in fiscal years 2018 through 2020. We also include the payments prime contractors made to TGB- and VET-certified subcontractors for those same contracts.

The totals below do not necessarily represent payments to all businesses owned by women, people of color, individuals with a physical disability, or veterans on MnDOT contracts. For example, there may be businesses owned by women, people of color, individuals with a physical disability, or veterans that were never—or are no longer—certified. MnDOT does not systematically collect data on payments to non-certified business owners belonging to these groups for state-funded contracts. As a result, the total value of MnDOT payments to businesses owned by veterans, women, people of color, and individuals with a physical disability may be larger than the totals presented in this section.

For state-funded construction and professional/technical contracts beginning in fiscal years 2018 through 2020, payments to certified businesses comprised 11 percent of total contract payments.

Overall, payments to certified contractors made up a relatively small portion of total contract payments during our review period. For state-funded construction and professional/technical contracts starting in fiscal years 2018 through 2020, MnDOT's total contract expenditures were slightly more than \$473 million. Approximately \$52 million, or 11 percent, of those contract expenditures went to certified businesses.⁹

In addition to analyzing total payments to certified businesses, we examined payments to certified businesses based on whether they were payments to prime contractors, or payments to subcontractors. As seen in Exhibit 5.1, for state-funded MnDOT construction projects beginning in fiscal years 2018 through 2020, only 3 percent of total MnDOT payments to prime contractors went to certified prime contractors.¹⁰ In contrast, certified subcontractors on MnDOT construction projects received 24 percent of total payments to construction subcontractors for contracts starting in fiscal years 2018 through 2020. We found the same pattern with payments to certified businesses on professional/technical contracts.

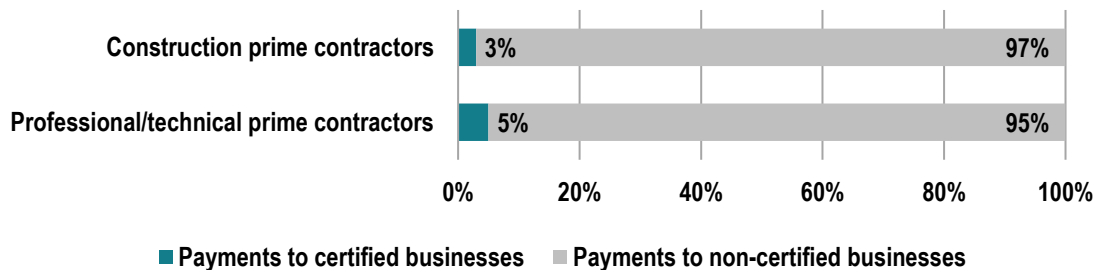
Payments to certified businesses accounted for a slightly greater share of total contract payments on professional/technical contracts than on construction projects. For example, for MnDOT contracts beginning in fiscal years 2018 through 2020, 5 percent of total payments to prime contractors on professional/technical contracts went to certified businesses, while only 3 percent of payments to prime contractors on construction contracts went to certified businesses. For subcontractors, the share of total contract payments to certified businesses were 24 and 29 percent for construction and professional/technical contracts, respectively.

⁹ To calculate total MnDOT contract expenditures, we summed all payments to prime contractors on construction and professional/technical contracts during our review period. To calculate total spending on certified businesses, we summed MnDOT's payments to certified prime contractors and prime contractors' payments to certified subcontractors. For some contracts, certified subcontractors operated under a certified prime contractor. In these cases, to avoid double counting payments to certified contractors, we counted MnDOT's payments to certified prime contractors but did not count certified prime contractors' payments to their certified subcontractors.

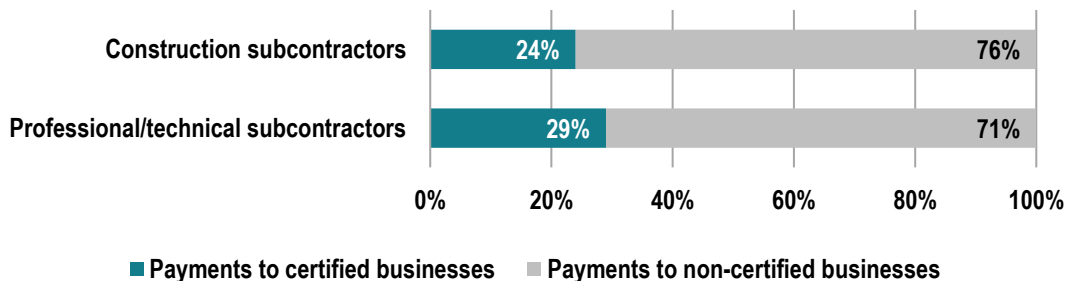
¹⁰ In contrast, the Department of Administration set an enterprise-wide goal in 2018 that 10 percent of payments to prime contractors go to certified targeted group, economically disadvantaged, or veteran-owned businesses.

Exhibit 5.1: **Certified businesses** received a larger share of payments to subcontractors than payments to prime contractors.

Payments to Prime Contractors



Payments to Subcontractors^a

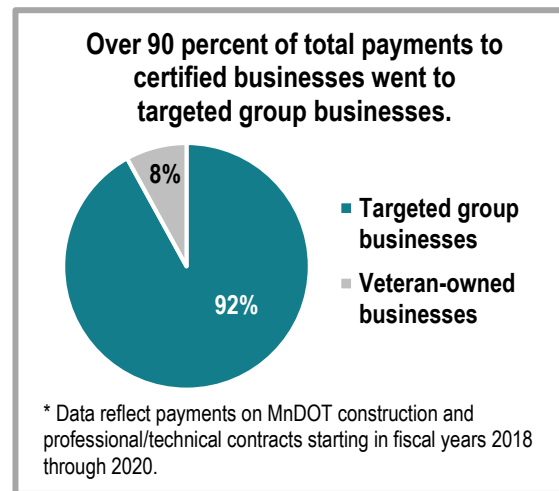


NOTES: Figures above reflect state-funded MnDOT contracts that started in fiscal years 2018 through 2020. Payments to prime contractors on construction and professional/technical contracts totaled \$377,066,755 and \$96,183,113, respectively. Payments to subcontractors on construction and professional/technical contracts totaled \$109,028,849 and \$28,560,206, respectively.

^a According to a former Office of Civil Rights (OCR) staff member, contractors on MnDOT construction projects may not have submitted to the agency all payments to all subcontractors as required by MnDOT contract provisions; the percentages above reflect the data that contractors provided to MnDOT.

SOURCE: Office of the Legislative Auditor, analysis of MnDOT contract data.

Payments to certified businesses went overwhelmingly to targeted group businesses rather than veteran-owned businesses for construction and professional/technical contracts beginning in fiscal years 2018 through 2020. As seen in the box at the right, payments to targeted group contractors accounted for 92 percent of payments to certified businesses, while payments to veteran-owned contractors accounted for 8 percent of these payments.



In recent years, payments to certified businesses working on state-funded MnDOT contracts were not evenly distributed across the demographic groups eligible for MnDOT's Targeted Group Business Program.

As shown in Exhibit 5.2, contract data suggest businesses owned by White women were the primary recipients of payments to certified targeted group businesses for both construction and professional/technical contracts at both the prime contractor and subcontractor levels.¹¹ Businesses owned by White women received 82 percent of MnDOT payments to certified targeted group prime contractors on state-funded professional/technical contracts starting in fiscal years 2018 through 2020. Payments to businesses owned by White women comprised a somewhat smaller share of payments to certified subcontractors on state-funded professional/technical contracts, but still totaled 66 percent of payments to certified targeted group subcontractors for contracts beginning in fiscal years 2018 through 2020.

Contract data suggest that certified targeted group businesses owned by individuals who were not White women earned far fewer contract dollars on MnDOT's construction and professional/technical projects. For example, for state-funded MnDOT construction contracts that started in fiscal years 2018 through 2020, MnDOT did not make any payments to certified prime contractors identifying as Black/African American, Asian, or Hispanic/Latino.

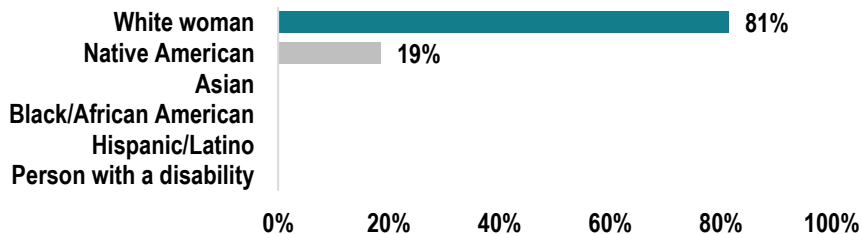
Appendix A provides a more detailed breakdown of payments to certified prime contractors, including payments to veteran-owned businesses by race and gender. Appendix B provides similar information on certified subcontractors.

¹¹ There is no racial category denoting "White" in the Department of Administration's TGB/VET directory. We defined White business owners as any individual who did not identify as a person of color. A staff member at the Department of Administration said that individuals who do not identify as a person of color in the directory are likely White; however, it is possible for a person of color who is a woman or any individual who has a physical disability to obtain certification status without identifying themselves as a person of color.

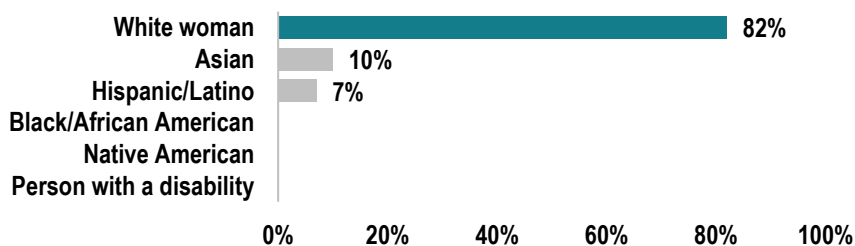
Exhibit 5.2: MnDOT contract data suggest that businesses owned by White women received a large majority of payments to certified targeted group businesses.

Payments to Certified Prime Contractors

Percentage of total payments made to TGB-certified prime contractors on construction contracts

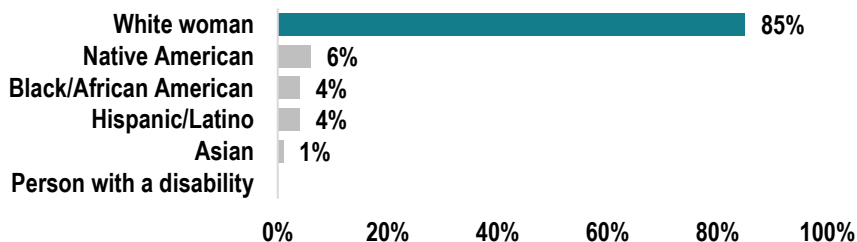


Percentage of total payments made to TGB-certified prime contractors on professional/technical contracts

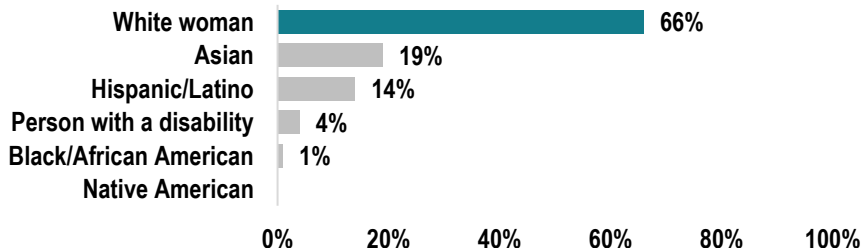


Payments to Certified Subcontractors

Percentage of total payments made to TGB-certified subcontractors on construction contracts



Percentage of total payments made to TGB-certified subcontractors on professional/technical contracts



NOTES: Percentages reflect the share of total payments in each category that went to certified targeted group businesses for MnDOT contracts starting in fiscal years 2018 through 2020. "TGB" refers to targeted group businesses owned by women, people of color, or people with a substantial physical disability. With the exception of "White woman," all other demographic groups include individuals identifying as men or women. There is no racial category denoting "White" in the Department of Administration's TGB/VET directory. We defined White business owners as any individual who did not identify as a person of color. A staff member at the Department of Administration said that individuals who do not identify as a person of color in the directory are likely White; however, it is possible for a person of color who is a woman or any individual who has a physical disability to obtain certification status without identifying themselves as a person of color.

SOURCE: Office of the Legislative Auditor, analysis of MnDOT contract data.

Certified Business Participation on MnDOT Contracts

In addition to evaluating *payments* to certified businesses, we also reviewed the *number* of certified businesses that worked on MnDOT projects in recent years.

Relatively few certified businesses participated as prime contractors on state-funded MnDOT contracts that began in fiscal years 2018 through 2020.

The majority of prime contractors participating on MnDOT construction and professional/technical projects in recent years were not certified businesses. As shown in Exhibit 5.3, only seven certified targeted group businesses and one certified veteran-owned business served as a prime contractor on any of MnDOT's 207 construction contracts that began in fiscal years 2018 through 2020.¹² These eight certified businesses represented only 9 percent of the 89 different prime contractors that worked on MnDOT construction contracts during that period.

Certified businesses represented a somewhat larger share of prime contractors on professional/technical contracts. Among the 277 professional/technical contracts that began in fiscal years 2018 through 2020, 14 certified targeted group businesses and 1 certified veteran-owned business worked as prime contractors. These certified businesses represented 16 percent of the 85 different businesses that worked as prime contractors on professional/technical contracts during that time period.

The share of certified businesses working as subcontractors on MnDOT construction and professional/technical projects in recent years was larger than the share participating as prime contractors. As shown in Exhibit 5.3, 67 different certified targeted group businesses and 8 different certified veteran-owned businesses worked as subcontractors on state-funded construction contracts that began in fiscal years 2018 through 2020. Combined, certified subcontractors comprised 23 percent of subcontractors working on MnDOT construction projects. In comparison, certified businesses represented only 9 percent of prime contractors working on MnDOT construction contracts during that period.

¹² Some certified businesses participated on more than one contract.

Exhibit 5.3: The majority of contractors participating on MnDOT contracts that began in fiscal years 2018 through 2020 were **not certified businesses**.

Prime contractors:

	Number of Contractors on Construction Contracts	Number of Contractors on Professional/Technical Contracts
Non-certified businesses	81	71
Targeted group businesses	7	14
Veteran-owned businesses	<u>1</u>	<u>1</u>
Total	89	85

Subcontractors:

	Number of Contractors on Construction Contracts ^a	Number of Contractors on Professional/Technical Contracts ^a
Non-certified businesses	248	79
Targeted group businesses	67	21
Veteran-owned businesses	<u>8</u>	<u>4</u>
Total	322	102

NOTES: The number of targeted group businesses (TGBs) and veteran-owned businesses (VETs) include certified businesses that performed as a prime contractor or subcontractor on at least one MnDOT contract that began during fiscal years 2018 through 2020. Totals include contractors that were not certified when MnDOT opened contract bids, but became certified and received payment as a certified business before the contract was complete. Some prime contractors and subcontractors worked on more than one contract during our evaluation period. When this occurred, we counted the contractor once. If a contractor was both TGB- and VET-certified, we included it in both of the TGB and VET totals; as a result, some categories do not sum to the total number of contractors indicated. If a business worked as both a prime contractor and a subcontractor or on both a construction and a professional/technical contract, we counted the business toward all relevant totals.

^a Totals do not include subcontractors that were scheduled to participate on MnDOT contracts starting in fiscal years 2018 through 2020 that had not yet received payment for their work as of August 2020. According to a former Office of Civil Rights (OCR) staff member, contractors on MnDOT construction projects may not have submitted to the agency all payments to all subcontractors as required by MnDOT contract provisions; the totals above reflect the payment data that prime contractors provided to MnDOT.

SOURCE: Office of the Legislative Auditor, analysis of MnDOT contract data.

In addition to analyzing the share of certified contractors working on MnDOT projects, we sought to determine how many certified contractors worked on MnDOT projects relative to the total number of certified businesses in the Department of Administration's TGB/VET directory. To do so, we determined the specific types of work recent MnDOT contractors were most commonly certified to perform and evaluated the extent to which MnDOT used all contractors certified in the directory to perform those types of work.¹³ For each type of work we examined, data suggest that MnDOT may not be

¹³ The Department of Administration certifies targeted group and veteran-owned businesses to perform specific types of work indicated by the six-digit North American Industry Classification System (NAICS) codes. We selected the four most common NAICS codes for certified prime contractors and subcontractors that participated on MnDOT construction projects starting in fiscal years 2018 through 2020: highway, street, and bridge construction; specialized freight trucking (local); water and sewer line and related structures construction; and site preparation. We also examined the most common NAICS code for contractors working on MnDOT's professional/technical contracts starting during the same time period: engineering services.

using all of the businesses certified in the TGB/VET directory to provide those services. For example, of MnDOT's 484 construction and professional/technical contracts beginning in fiscal years 2018 through 2020, we found that MnDOT used 26 different businesses that were certified to provide specialized freight trucking services. As of April 2021, there were 81 businesses in the TGB/VET directory certified to provide specialized freight trucking services. For those same contracts, MnDOT used 16 different businesses that were certified to provide engineering services. In contrast, there were 62 businesses certified to provide engineering services in the TGB/VET directory as of April 2021.¹⁴

Given the numerous factors that could shape whether a particular certified business is interested in working on a particular project, it is difficult to assess the extent to which MnDOT and prime contractors are fully using all available certified businesses on MnDOT contracts. Overall, of the approximately 490 prime contractors and subcontractors who worked on MnDOT construction or professional/technical projects starting in fiscal years 2018 through 2020, 104 (21 percent) were certified businesses.¹⁵ At the end of this chapter, we discuss various options MnDOT and the Legislature may want to consider to affect the number of certified businesses that work on MnDOT contracts.

Costs of MnDOT Contracting Goals

MnDOT's contracting goals have the potential to affect which subcontractors prime contractors choose to work with on a given contract. For instance, a prime contractor may choose to subcontract with a certified business over a non-certified business in order to meet the contracting goals. Since the prime contractor's total bid amount may take into account the cost of the subcontractors working on the project, picking one subcontractor to work on a contract over another could potentially affect the total cost of a bid.¹⁶

Determining how TGB and VET goals affect the total estimated cost of MnDOT contracts requires knowing what MnDOT prime contractors would have agreed to pay subcontractors had prime contractors not had to meet (or make efforts to meet) TGB and/or VET goals. However, MnDOT is not present when prime contractors search for and/or negotiate with potential subcontractors. As a result, for most state-funded contracts, it is difficult for MnDOT to know if a prime contractor decided to hire a certified business over a non-certified business (or vice versa), and the effect this decision may have had on the total cost of the bid.

¹⁴ We asked MnDOT for a list of certified businesses that it considered to be potential candidates for MnDOT work. The number of total potential contractors on MnDOT's list was typically smaller than the number of potential contractors we identified in the Department of Administration's directory for the types of work we examined.

¹⁵ These figures differ from the totals in Exhibit 5.3. Unlike Exhibit 5.3, we counted each participating business only once, even if the business served as both a prime contractor and subcontractor, or participated on both construction and professional/technical contracts.

¹⁶ Contracting *goals* affect the total bid cost separately from contract *preferences*. If contracting goals were to affect bid costs, they would do so at the subcontractor and supplier level. In contrast, contract preferences are applied to the total cost of the bid.

Given limitations to MnDOT's data, we were unable to determine how contracting goals affected bid prices on state-funded contracts.

MnDOT does not systematically collect data from prime contractors bidding on state-funded projects about the cost of bids they received from potential subcontractors. Without this information, MnDOT cannot know how quotes from certified subcontractors differed from those provided by non-certified subcontractors. As a result, we were unable to determine whether the TGB or VET contracting goals increased, decreased, or had no effect on bid costs.

Even if we had complete information on bid costs, our ability to calculate how contracting goals affect *final* contract costs would be limited. As we discussed in Chapter 3, bid prices reflect cost estimates that may be greater or less than actual project costs at the end of the contract. Subcontractor bid amounts are estimates and may not reflect the final amounts paid to that subcontractor. Further, there is no way to determine how final payments to a certified subcontractor selected for the project in order to meet contracting goals would have compared to a non-certified subcontractor.

Our review of contract files and discussions with stakeholders did not clearly suggest that contracting goals consistently increased or decreased bid costs. On the one hand, in our review of contract files, we found one instance in which a prime contractor indicated it used a certified subcontractor that was not the lowest bidder in order to get closer to meeting the contracting goal.¹⁷ On the other hand, our review of TGB and VET contract preferences in Chapter 3 revealed numerous instances in which certified contractors had the lowest bid, indicating instances in which certified businesses were just as cost-competitive as non-certified businesses. Without additional data on subcontractor bids, we cannot draw any firm conclusions regarding the effects of contracting goals on bid costs, let alone final project costs.

While MnDOT does not collect data about subcontractor bid costs for state-funded contracts, a MnDOT staff person told us MnDOT does collect subcontractor bid data for federally funded contracts with a Disadvantaged Business Enterprise (DBE) Program contract goal.¹⁸ If the Legislature would like more information on the effects of TGB and VET contracting goals on contract costs, it should consult with MnDOT about the agency's data collection practices and the feasibility of collecting bid price information for subcontracts on state-funded projects.

¹⁷ Per MnDOT's contracting provisions, rejecting a certified subcontractor because they cost more than a non-certified subcontractor does not, in and of itself, excuse a prime contractor's failure to meet a contracting goal.

¹⁸ For contracts with a DBE goal, federal regulations require prime contractors to submit bid price information to the agency receiving U.S. Department of Transportation funds if the prime contractor does not meet the DBE contracting goal and selects a non-DBE subcontractor over a DBE subcontractor. 49 *CFR*, sec. 26.53(b)(2)(vi) (2019).

Challenges to Increasing Certified Business Participation

According to MnDOT's contract provisions, the purpose of MnDOT's Targeted Group Business and Veteran-Owned Small Business programs is to "provide eligible businesses with increased access to state contracting opportunities." However, as we discussed above, certified contractors received a relatively small share of total contract spending for MnDOT contracts starting in fiscal years 2018 through 2020.

MnDOT staff and stakeholders described many barriers to increasing the participation of certified businesses on state-funded projects.

Some of these challenges may not be the result of the business owner being a woman, person of color, person with a physical disability, or a veteran. Some of the barriers to increasing certified contractor participation on MnDOT contracts are likely faced by many small businesses regardless of certification. For example:

Large project sizes. MnDOT staff and industry stakeholders indicated that many MnDOT projects are too large for smaller businesses to bid on as prime contractors due to limitations in staffing, equipment, or overall business capacity. For example, one certified business owner stated that many targeted group businesses would likely be unable to work on MnDOT projects worth more than \$250,000. In contrast, the average bid amount was over \$3.2 million for MnDOT construction contracts starting in fiscal years 2018 through 2020.

Financial obstacles. Some industry stakeholders told us that subcontractors often struggle to get paid in a timely manner on MnDOT projects. One contractor representative told us they spoke with several business owners who had concerns about prompt payment on MnDOT contracts; the representative explained that the TGB and VET programs are not helpful when a small business has to take out a loan in order to cover expenses due to delayed payments. In MnDOT's most recent disparity study, several industry stakeholders described how limited cash resources make businesses vulnerable to failure when contract payments are delayed. Others reported that bonding and insurance requirements for projects can be prohibitively expensive for some small businesses.

Cost competition. Some stakeholders said that—despite MnDOT contract preferences—the agency's low-bid contracting process for construction contracts puts small businesses at a disadvantage because they are unable to be as cost-competitive as larger businesses. In MnDOT's most recent disparity study, a targeted group business owner commented that competition from "national players" with "deeper pockets" is growing. Another disparity study participant described how it is easier for larger businesses to absorb the added costs of certain state contracting requirements.

Complex bidding process. Several industry stakeholders and small business owners described how MnDOT's bidding process is difficult to navigate. They reported having inadequate time to indicate their intent to bid, that bid due dates were unclear, or that it was challenging and time-consuming to complete bid-related documentation. Additionally, some stakeholders commented on the additional paperwork and the time-consuming nature of government procurement as barriers to participation.

In addition to challenges resulting from their small size, certified businesses sometimes confront challenges specific to the gender, race, ethnicity, and/or differing abilities of their owners. MnDOT's most recent disparity study and our interviews with the contracting community revealed challenges to certified businesses that are distinct from the challenges that may be faced by other small businesses.

Access to capital. While accessing start-up loans and capital investment can be difficult for any small business, these may be particularly difficult to obtain for targeted group businesses. Some studies have shown that women and people of color can face additional barriers and/or discrimination when trying to obtain access to capital.¹⁹ One stakeholder indicated that this challenge is particularly acute in highway construction, which is generally capital-intensive. In MnDOT's most recent disparity study, several business owners from targeted groups described having difficulty securing financing for equipment.

Closed contracting networks. Some representatives of businesses owned by women or people of color described how they sometimes struggle to get a foot in the door and build necessary connections in Minnesota's marketplace. Some disparity study respondents and an interviewee described "closed" or "good old-boy" networks of contractors that can exclude businesses owned by women or people of color from business opportunities.

Discrimination and bias. Some business owners who participated in MnDOT's disparity study told stories of discrimination or bias on the basis of their gender, race, ethnicity, or disability. For example, women business owners described how other business owners or staff would treat female business owners less seriously, question their knowledge or ability, or exclude them from professional events. Disparity study participants of color reported facing harassment, pay discrimination, unfair treatment on the job, or presumptions that they were "less capable."²⁰

¹⁹ See for example: Alicia Robb, "Access to Capital among Young Firms, Minority-owned Firms, Women-owned Firms, and High-tech Firms" (United States Small Business Administration, Office of Advocacy, April 2013); Elizabeth Asiedu, James A. Freeman, and Akwasi Nti-Addae, "Access to Credit by Small Businesses: How Relevant Are Race, Ethnicity, and Gender?" *American Economic Review* 102, no. 3 (May 2012): 532-537; Patricia G. Greene, et al, "Women Entrepreneurs: Moving Front and Center: An Overview of Research and Theory," *Coleman White Paper Series* 3, no. 1 (2003); and Robert W. Fairlie and Alicia M. Robb, "Disparities in Capital Access Between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs" (United States Department of Commerce, Minority Business Development Agency, January 2010).

²⁰ 2017 Minnesota Joint Disparity Study, Minnesota Department of Transportation, Final Report (Keen Independent Research LLC, March 2018), Appendix J.

Discussion

In this chapter, we described how relatively few certified businesses participated as prime contractors on MnDOT contracts, and that payments to certified businesses comprised just over 10 percent of total contract payments in recent years. We also explained that those payments were not distributed equally across the various groups of individuals the programs are designed to benefit. Finally, we discussed various challenges to increasing the participation of certified businesses on MnDOT contracts.

Our recommendations in earlier chapters are based on MnDOT's existing practices and approach to delivering its contracting goal programs. However, through conversations with MnDOT staff and stakeholders, and in reviewing academic literature, we identified other activities or practices that could lead to an increase in MnDOT's use of certified contractors.

RECOMMENDATION

MnDOT and the Legislature should jointly consider additional strategies that could enable MnDOT to more effectively fulfill the purpose of its contracting goal programs, taking into account the state's broader policy priorities.

We provide several policy options below for MnDOT and/or the Legislature to consider as a way to potentially increase certified contractor participation on MnDOT contracts. These options have advantages and drawbacks, which we discuss below. We do not mean for this list to be exhaustive, and we do not make specific recommendations as to which options to pursue. Instead, we suggest MnDOT and the Legislature work together to determine policy priorities, considering the pros and cons of the various approaches.

Sanctions or Incentives

As we discussed earlier in this chapter, MnDOT is permitted by law to sanction prime contractors that do not make good faith efforts to meet TGB and VET goals.²¹ Statutes also permit MnDOT to provide financial incentives for prime contractors that exceed the contracting goals.²² MnDOT does not currently do either.

As we described in greater detail above, some MnDOT staff and a representative of targeted group contractors expressed support for the increased use of sanctions, while others expressed reservations. Academic literature has suggested sanctions and incentives can be used to increase contractor achievement of contracting goals, but it also suggests potential challenges regarding their implementation.²³ In addition to the

²¹ *Minnesota Statutes* 2020, 161.321, subds. 2a(a) and 2c(a).

²² *Ibid.*

²³ For instance, for examples of how sanctions and incentives are open to "gaming" by both those who set the goals and those subject to them, see Gwyn Bevan and Christopher Hood, "What's Measured Is What Matters: Targets and Gaming in the English Public Health Care System," *Public Administration* 84, no. 3 (August 2006).

monetary sanctions we discussed above, sanctions could be nonmonetary, such as publicly reprimanding contractors for poor performance.²⁴

If MnDOT is to establish sanctions or incentives, it is imperative that the agency better document its decision-making and ensure its consistent application of policies and procedures for contracting goals. Further, it is important that the agency does not inadvertently establish contract quotas, which could be subject to legal challenges. Like the workforce goals, contracting goals are targets that contractors should *strive* to meet; they are not quotas that contractors *must* meet.²⁵ If, in implementing a sanction process MnDOT institutes a de facto quota system, the agency risks facing challenges in court.

Alternative Contracting Approaches

As we discussed in Chapter 3, in recent years, MnDOT primarily used a low-bid contracting approach for its state-funded construction contracts. With the low-bid approach, MnDOT awards the contract to whichever bidder meets contract requirements and submits the lowest-cost bid. While the TGB and VET contract preferences are designed to help certified businesses be more cost-competitive, some stakeholders described how small businesses still struggle to compete from a cost perspective against larger businesses. Low-bid contracting also does not take into account a bidder's past performance on workforce or contracting goals, or the extent to which the bidder plans to exceed workforce or contracting goals on the contract on which it is actively bidding.

As an alternative to low-bid contracting, MnDOT could increase its use of direct contracting with certified businesses, as permitted by law. Statutes permit MnDOT to “designate a contract for construction work for award only to small targeted group businesses if the commissioner determines that at least three small targeted group businesses are likely to bid.”²⁶ Statutes permit the same for veteran-owned small businesses.²⁷

MnDOT has made limited use of its ability to directly contract with certified businesses. A MnDOT staff person told us the agency piloted this approach in 2017, and that it was met with some pushback from non-certified contractors that wanted the opportunity to bid on the contracts.²⁸ On the other hand, two stakeholders representing certified businesses expressed an interest in MnDOT reserving more contracts for targeted group businesses.

²⁴ For example, a 2007 survey of local government managers in Ohio found that though public reprimand was infrequently used, 100 percent of respondents who did use it perceived it to be an effective method to improve the performance of for-profit businesses. Mary K. Marvel and Howard P. Marvel, “Shaping the Provision of Outsourced Public Services: Incentive Efficacy and Service Delivery,” *Public Performance and Management Review* 33, no. 2 (December 2009): 197.

²⁵ For example, a contractor must strive to meet TGB and VET goals on a project, but if it cannot do so, it can instead demonstrate it made adequate good faith efforts to meet the goals and still win the contract award (despite not committing to meet the goals).

²⁶ *Minnesota Statutes* 2020, 161.321, subd. 2(b).

²⁷ *Minnesota Statutes* 2020, 161.321, subd. 2b(d).

²⁸ In developing the pilot, a MnDOT staff person said the agency consulted with the Department of Administration, which had already been using this contracting approach for a couple of years.

As another contracting strategy, MnDOT could consider making greater use of “direct negotiation” contracting. By law, for projects estimated to cost \$250,000 or less, the agency “may enter into a contract for the work by direct negotiation, by obtaining two or more quotations for the work, and without advertising for bids or otherwise complying with the requirements of competitive bidding.”²⁹

MnDOT has already implemented this approach for select road maintenance contracts. For example, in recent years, MnDOT identified several opportunities for contractors to work on accessibility-related refurbishment contracts. MnDOT has generally not expanded the program to include road construction contracts. Given that 22 percent of MnDOT’s state-funded construction contracts starting in fiscal years 2018 through 2020 were estimated to cost \$250,000 or less, direct negotiation contracting could present a significant opportunity to increase the participation of certified businesses on MnDOT construction contracts.

If MnDOT were to increase its use of alternative contracting approaches, the agency should consider the ways in which it affects competitive bidding. Contracting directly with certified businesses, for example, excludes non-certified businesses from bidding on a contract. In addition, the agency would need to be careful not to implement a set-aside program that could be susceptible to legal challenges.³⁰

Smaller Scopes of Work

As we discussed above, some MnDOT staff and stakeholders described how the large size of MnDOT projects can be a challenge to increasing certified business participation on MnDOT contracts. To address this issue, MnDOT could more frequently carve out project scopes of work into smaller pieces that are more feasible for small businesses. State statutes already identify this as an approach to facilitate small business participation on state contracts. For example, statutes require the Department of Administration to “divide the procurements...into contract award units of economically feasible production runs in order to facilitate offers or bids from small businesses.”³¹

This approach could provide certified businesses with opportunities to participate on MnDOT contracts that are achievable given their small business capacity. Additionally, if MnDOT chose to directly contract for these services, it could give certified businesses more of a chance to participate on MnDOT contracts as prime contractors. As we discussed above, prime contractors working on MnDOT construction and professional/technical contracts starting in recent years often were not certified businesses. On the other hand, breaking out work into smaller scopes and contracts would likely result in increased administrative costs and work for the agency. Further, depending on the project and the scopes of work involved, it may make it more difficult to coordinate the timing of the larger project overall.

²⁹ *Minnesota Statutes* 2020, 161.32, subd. 2.

³⁰ “Set-asides” are contracts reserved or “set aside” for specific types of businesses. Courts have found some set-aside programs unconstitutional. For example, in *City of Richmond v. J.A. Croson Co.*, the United States Supreme Court ruled that a city set-aside plan requiring prime contractors to subcontract at least 30 percent of their total contract amount to “Minority Business Enterprises” was unconstitutional. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

³¹ *Minnesota Statutes* 2020, 16C.16, subd. 1(a).

Project Design

As another approach to increasing certified business participation on MnDOT contracts, OCR staff could participate in conversations with MnDOT engineers earlier in the project cycle when MnDOT is determining project design and scopes of work. This could facilitate project designs that better take into account the capacity of small businesses. Currently, OCR staff are not typically involved in these early project discussions.

A former OCR staff person and an academic expert told us it is important to consider small business goals when designing construction projects. For example, the academic expert explained that historically, MnDOT engineers have not been included in discussions about contracting goals. The expert explained that there are different techniques and materials that could be used for a highway construction project, and that MnDOT should be considering the contracting goals throughout the entire procurement process. The former OCR staff person told us it is necessary that OCR be involved in these early planning discussions if the agency plans to make changes in the level of certified business participation on MnDOT contracts.

List of Recommendations

- MnDOT should collect workforce plans for all contracts subject to state workforce goals. (p. 34)
- MnDOT should:
 - In consultation with the Minnesota Department of Human Rights, clarify the criteria by which contractors can demonstrate good faith efforts to meet workforce goals specifically.
 - Require contractors to submit sufficient information—before starting work on the project—to assess their ongoing good faith efforts to meet state workforce goals.
 - Clarify for which contracts and contractors agency staff will evaluate good faith efforts to meet the workforce goals.
 - Consider increasing the share of state-funded contracts for which the agency reviews good faith efforts. (p. 35)
- MnDOT should improve its ongoing tracking of the extent to which contractors are meeting workforce goals for state-funded construction contracts. (p. 36)
- MnDOT should clearly identify the relevant workforce goals in its contracts for state-funded projects. (p. 38)
- MnDOT should track the extent to which each state-funded contract met workforce goals and notify contractors as to whether or not they met the goals at the conclusion of each contract. (p. 39)
- The Legislature should consider the extent to which it wants to prioritize the state's workforce goals and clarify the role of contracting state agencies accordingly. (p. 45)
- MnDOT should increase outreach to certified businesses to ensure they are aware of the opportunity to claim contract preferences. (p. 57)
- MnDOT should reconsider its \$60,000 cap on construction contract preferences. (p. 60)
- MnDOT should evaluate all state-funded construction contracts for contracting goals. (p. 66)
- MnDOT should further clarify its goal-setting process and better document goal-setting decisions left to staff discretion. (p. 72)
- MnDOT should ensure certified businesses have sufficient information to accurately respond to MnDOT solicitations. (p. 74)
- MnDOT should consider all good faith efforts criteria outlined in its contract provisions and consistently document its decisions regarding contractors' good faith efforts. (p. 79)

- MnDOT should regularly track and accurately report on its good faith efforts reviews, as well as the methods used by contractors to demonstrate good faith efforts. (p. 80)
- MnDOT should more thoroughly monitor contractor progress towards meeting the contracting goals for targeted group and veteran-owned businesses. (p. 83)
- MnDOT and the Legislature should jointly consider additional strategies that could enable MnDOT to more effectively fulfill the purpose of its contracting goal programs, taking into account the state's broader policy priorities. (p. 99)

Appendix A: Payments to Certified Prime Contractors

The tables below reflect payments to certified prime contractors on state-funded MnDOT construction and professional/technical contracts that began during fiscal years 2018 through 2020. Data reflect payments as a share of total payments to prime contractors for contracts starting during that time period.

Total payments to prime contractors for state-funded MnDOT construction projects beginning in fiscal years 2018 through 2020 were \$377,066,755. Total payments to prime contractors for state-funded MnDOT professional/technical projects beginning in fiscal years 2018 through 2020 were \$96,183,113.

Construction Contracts: (\$377,066,755)

Targeted Group Businesses (TGBs)	Percentage of Total Payments to Prime Contractors	Percentage of Total Payments to TGB Prime Contractors
All TGBs	3%	100%
White	3	81
White Woman	3	81
Native American	1	19
Native American Woman	1	19
Asian	0	0
Asian Woman	0	0
Black/African American	0	0
Black/African American Woman	0	0
Hispanic/Latino	0	0
Hispanic/Latina Woman	0	0
Person with a disability	0	0
Woman with a disability	0	0

Veteran-Owned Businesses (VETs)	Percentage of Total Payments to Prime Contractors	Percentage of Total Payments to VET Prime Contractors
All VETs^a	<1%	100%
White	<1	100
White Woman	0	0
Asian	0	0
Asian Woman	0	0
Black/African American	0	0
Black/African American Woman	0	0
Hispanic/Latino	0	0
Hispanic/Latina Woman	0	0
Native American	0	0
Native American Woman	0	0
Person with a disability	0	0
Woman with a disability	0	0

(Continued on next page.)

**Professional/Technical Contracts:
(\$96,183,113)**

Targeted Group Businesses (TGBs)	Percentage of Total Payments to Prime Contractors	Percentage of Total Payments to TGB Prime Contractors
All TGBs	5%	100%
White	4	82
White Woman	4	82
Asian	<1	10
Asian Woman	<1	5
Hispanic/Latino	<1	7
Hispanic/Latina Woman	0	0
Black/African American	0	0
Black/African American Woman	0	0
Native American	0	0
Native American Woman	0	0
Person with a disability	0	0
Woman with a disability	0	0

Veteran-Owned Businesses (VETs)	Percentage of Total Payments to Prime Contractors	Percentage of Total Payments to VET Prime Contractors
All VETs^a	<1%	100%
Hispanic/Latino	<1	100
Hispanic/Latina Woman	0	0
Asian	0	0
Asian Woman	0	0
Black/African American	0	0
African American Woman	0	0
Native American	0	0
Native American Woman	0	0
Person with a disability	0	0
Woman with a disability	0	0
White	0	0
White Woman	0	0

NOTES: For the purposes of this report, “state-funded” refers to contracts funded solely by state dollars. We counted payments to businesses certified in more than one demographic category towards all relevant categories. Similarly, we counted payments to businesses certified as both targeted group businesses and veteran-owned businesses towards both the TGB and VET categories. We excluded payments made on or after the date a business lost its certification. We also excluded payments made prior to the date a business was initially certified.

^a The Department of Administration certifies businesses owned by veterans as either “veteran-owned” or “service-disabled veteran-owned.” VET includes both veteran certification categories, although only businesses certified as “veteran-owned” served as prime contractors on MnDOT construction contracts beginning in fiscal years 2018 through 2020. We did not classify businesses owned by service-disabled veterans as targeted group businesses. We did not include payments to veteran-owned businesses that were certified by the U.S. Department of Veteran Affairs—but not by the Minnesota Department of Administration—in the VET totals above.

SOURCE: Office of the Legislative Auditor, analysis of MnDOT contract data.

Appendix B: Payments to Certified Subcontractors

The tables below reflect payments to certified subcontractors on state-funded MnDOT construction and professional/technical contracts that began during fiscal years 2018 through 2020. Data reflect payments as a share of total payments to subcontractors for contracts starting during that time period.

Total payments to subcontractors for MnDOT construction projects beginning in fiscal years 2018 through 2020 were \$109,028,849. Total payments to subcontractors for MnDOT professional/technical projects beginning in fiscal years 2018 through 2020 were \$28,560,206.

Construction Contracts: (\$109,028,849)

Targeted Group Businesses (TGBs)	Percentage of Total Payments to Subcontractors	Percentage of Total Payments to TGB Subcontractors
All TGBs	22%	100%
White	19	85
White Woman	19	85
Native American	1	6
Native American Woman	0	0
Black/African American	1	4
Black/African American Woman	<1	<1
Hispanic/Latino	1	4
Hispanic/Latina Woman	<1	<1
Asian	<1	1
Asian Woman	<1	<1
Person with a disability	0	0
Woman with a disability	0	0

Veteran-Owned Businesses (VETs)	Percentage of Total Payments to Subcontractors	Percentage of Total Payments to VET Subcontractors
All VETs^a	2%	100%
White	2	99.9
White Woman	0	0
Person with a disability	1	48
Woman with a disability	0	0
Native American	<1	<1
Native American Woman	0	0
Asian	0	0
Asian Woman	0	0
Black/African American	0	0
Black/African American Woman	0	0
Hispanic/Latino	0	0
Hispanic/Latina Woman	0	0

(Continued on next page.)

**Professional/Technical Contracts:
(\$28,560,206)**

Targeted Group Businesses (TGBs)	Percentage of Total Payments to Subcontractors	Percentage of Total Payments to TGB Subcontractors
All TGBs	28%	100%
White	18	66
White Woman	18	66
Asian	5	19
Asian Woman	<1	<1
Hispanic/Latino	4	14
Hispanic/Latina Woman	1	2
Person with a disability	1	4
Woman with a disability	1	4
Black/African American	<1	1
Black/African American Woman	<1	1
Native American	0	0
Native American Woman	0	0

Veteran-Owned Businesses (VETs)	Percentage of Total Payments to Subcontractors	Percentage of Total Payments to VET Subcontractors
All VETs^a	5%	100%
Hispanic/Latino	3	68
Hispanic/Latina Woman	0	0
Person with a disability	1	30
Woman with a disability	<1	4
White	1	28
White Woman	0	0
Black/African American	<1	4
African American Woman	<1	4
Asian	0	0
Asian Woman	0	0
Native American	0	0
Native American Woman	0	0

NOTES: For the purposes of this report, “state-funded” refers to contracts funded solely by state dollars. We counted payments to businesses certified in more than one demographic category towards all relevant categories. Similarly, we counted payments to businesses certified as both targeted group businesses and veteran-owned businesses towards both the TGB and VET categories. We excluded payments made on or after the date a business lost its certification. We also excluded payments made prior to the date a business was initially certified.

^a The Department of Administration certifies businesses owned by veterans as either “veteran-owned” or “service-disabled veteran-owned.” VET includes both veteran certification categories; we did not classify businesses owned by service-disabled veterans as targeted group businesses. We did not include payments to veteran-owned businesses that were certified by the U.S. Department of Veteran Affairs—but not by the Minnesota Department of Administration—in the VET totals above.

SOURCE: Office of the Legislative Auditor, analysis of MnDOT contract data.



**395 John Ireland Blvd.
Saint Paul, Minnesota 55155**

May 20, 2021

Mr. Jim Nobles, Legislative Auditor
State of Minnesota
Office of the Legislative Auditor
658 Cedar Street, Room 140
Saint Paul, MN 55155

Dear Mr. Nobles:

The Minnesota Department of Transportation (MnDOT) has reviewed the evaluation report entitled “MnDOT Workforce and Contracting Goals.” We would like to acknowledge the diligence of your staff in conducting its audit, as well as the constructive insight it has provided concerning this highly regulated -- and incredibly important -- area of highway heavy construction.

MnDOT’s Office of Civil Rights (OCR) is committed to ensuring equal opportunity for all businesses and personnel on MnDOT projects. Specifically, its objectives include:

- Implementing policies to ensure equal opportunity and prevent exclusion from any MnDOT program or activity based on race, color, national origin, sex, age, disability, or income status.
- Creating and overseeing training opportunities and pipelines of opportunity for women, minorities, and other disadvantaged individuals to gain employment in highway-heavy construction.
- Increasing the opportunities for, and number of businesses owned by, socially and economically disadvantaged individuals in the highway and bridge construction industry.
- Providing quality technical assistance, resources, and business development tools for small businesses seeking to participate in the highway-heavy construction industry.

As stated in the audit report, the workforce and small business programs target minorities, women and disadvantaged persons who are disproportionately underrepresented in state contracting activities. Minnesota has some of the greatest socio-economic disparities in the nation, including in the transportation industry; therefore, these objectives are important to the economic health of our state.

Diversity and inclusion are core values for MnDOT, and the department recognizes the need to continuously review our programs and improve internal systems, processes and procedures. As stated in the report, in 2017 and 2018, MnDOT made substantial investments in technology to automate our recordkeeping of contract workforce data and contractor/subcontractor performance data to improve our overall administration of the programs within the scope of the audit. Some of these enhancements are still in the development and implementation stages.

Likewise, the audit scope did not include MnDOT's supportive services programs which provide outreach and engagement, job training and small business development resources. These are important elements that contribute to the overall success of the programs.

Our commitment to this work is ongoing, and MnDOT has taken recent steps to enhance the program based on discussions with the OLA during the year-long program evaluation. During this process, MnDOT has:

- Revised documentation practices to ensure day-to-day program decisions are adequately documented;
- Taken steps to strengthen contractor accountability to their contractual commitments to make efforts to meet contract goals; and
- Initiated conversations with other state agencies on process improvement measures and enforcement mechanisms, including the Department of Human Rights and Department of Administration.

MnDOT appreciates the opportunity to provide further context and feedback surrounding some of the report's recommendations. MnDOT's response is organized under the headings of workforce and small business contracting, followed by specific responses to each of the key recommendations in the report.

Workforce

Workforce goals are aspirational and must not act as quotas. Goals are intended to provide contractors with targets for the participation of women and minorities on state construction projects. The prime contractor is responsible for monitoring its performance towards achieving the goal on a MnDOT contract, and that information should inform their hiring decisions throughout the life of the contract. While MnDOT is in the process of developing our systems to provide reporting tools that will improve our ability to monitor contracts, it does not relieve contractors of their responsibility under the law.

Monitoring Workforce Goals

The report is critical of MnDOT's practices to determine which contracts the department monitors workforce goals and the level of review. The report notes that MnDOT has a tiered approach in its monitoring of contractors' workforce inclusion efforts.

It is important to note that MnDOT does implement workforce participation goals on all projects over \$100,000 and the goals are included in all applicable contracts, as the state law requires. The report implies that workforce goals only apply to a contract if MnDOT requires the contractor to prepare a workforce plan. However, a workforce plan does not dictate the applicability of workforce goals.

MnDOT does not dispute the report's finding that 31 percent of state funds contracted are not subject to the more critical review of *enhanced* monitoring. MnDOT performs *enhanced* workforce monitoring and requires a workforce plan for contracts with a total estimate of \$5 million or more. MnDOT established this practice to focus our resources on contracts that are more likely to provide opportunities to hire and offer workforce participation, versus contracts that are primarily composed of material, mobilization and other construction costs. This context is important when considering how many of the 197 state-funded construction contracts MnDOT awarded during the reporting period. However, MnDOT is committed to reviewing the delineation and expanding the use of a workforce plan or other enhanced monitoring tool to a larger number of state-funded contracts. In addition, MnDOT will conduct a cost analysis to determine the benefit of requiring a workforce plan for every state-funded construction contract.

The report indicates that annual compliance reviews (ACR) are broad and do not target state-funded contracts. The ACR is a comprehensive in-depth review of a contractor's EEO and employment practices. MnDOT identifies contractors for ACRs based on the number of contracts a contractor has with the department, the number of people the contractor employs, and other factors that are designed to maximize the impact of the review. With

this approach, MnDOT reviews contractors who work on state and federally funded contracts. The numbers tell that story: out of the 64 annual compliance reviews conducted on contractors since 2014, only 4 of the contractors had not worked on a state-funded contract. The remaining 60 contractors worked on 1,278 state funded contracts as either prime or subcontractors.

MnDOT has structured its practices to focus our resources on contracts that present the greatest opportunities for achieving the overall workforce program objectives including meeting workforce goals. These challenges inform our work, and while the report's suggestions about monitoring all contracts is laudable, it is impracticable for MnDOT to review all contracts with the same level of scrutiny for the various reasons identified above. This additional information provides better context about the breadth of our contractor oversight, which extends to both state and federally funded contracts.

Small Business Contracting

The report includes observations and recommendations related to MnDOT's administration of state-funded small business programs, the Targeted Group Business (TGB) and Veterans Preference (Vet) programs. These programs ensure certified small businesses have access to contracting opportunities on MnDOT construction and professional/technical contracts. Based on recommendations from the audit, we have adopted some changes to improve recordkeeping and document retention practices within the small business programs.

As the report notes, MnDOT spends more on our TGB and Vet programs than the annual appropriation received from the Legislature. The administration of the programs includes goal setting and contract monitoring among other functions. For goal setting, MnDOT prioritizes contracts based on the likelihood of opportunity for small business participation.

In setting contract goals, considerations include the contract estimate, types of work, and availability of certified businesses – just to name a few. For these reasons, goals are not assigned to every contract. MnDOT's practice is to evaluate goals on contracts with an estimated value of \$250,000 and greater. This focuses the program's resources on more than 75 percent of the contracts awarded during the review period, as noted in the report.

Outside of these goal-oriented programs, MnDOT's work to advance equity includes strategically breaking out scopes of work into "right-sized" contracts for small businesses to perform. These contracts average less than \$100,000 and provide opportunities for the firms to contract directly with MnDOT. Combined, these efforts create a comprehensive approach to working with small businesses in a meaningful way. In response to the OLA recommendation, MnDOT will conduct a cost analysis to evaluate the benefit of setting contract goals on all state-funded construction contracts.

MnDOT agrees that the contract goal setting process is complex. It is a process informed by case law. We review our process with other government agencies that administer similar programs which consider race and gender preferences. There is some discretion in the goal setting process, therefore, there is a two-step review process to ensure reasonableness. The small business contracting team, which sets all TGB and Vet goals at MnDOT, meets weekly, and provides time at each meeting for questions about goal-setting and other areas related to the administration of the certified small business programs.

Key Recommendations

The following table includes the key recommendations identified in the summary of the report along with MnDOT's possible next steps.

Key Recommendation	Response
The Legislature should consider the extent to which it wants to prioritize the state's workforce goals and clarify the role of contracting state agencies accordingly.	MnDOT welcomes any clarity the Legislature can provide relating to priorities and the role of contracting agencies.
MnDOT should take a more engaged role in overseeing workforce goals for a greater share of its state-funded contracts.	Although workforce goals apply to all contracts over \$100,000, MnDOT will review current practices related to workplans and enhanced workforce monitoring in an attempt to include more contracts.
MnDOT should better monitor the extent to which contractors are meeting both workforce and contracting goals for state-funded contracts.	The implementation of the civil rights module in AASHTOWare, MnDOT's construction contract system, should improve monitoring and administration of workforce and contracting goals. MnDOT will also look for other ways to improve monitoring efforts.
MnDOT should reconsider its current cap on contract preferences.	MnDOT is already reviewing the cap to more closely align with the Department of Administration.
MnDOT and the Legislature should consider additional strategies that could enable MnDOT to fulfill the purpose of its contracting goal programs, taking into account the state's broader policy priorities.	MnDOT is committed to working with the Legislature and the DBE & Workforce Collaborative on strategies to further our mutual objectives.

Please accept MnDOT's gratitude for identifying these opportunities for improvement, as well as our commitment to improving the efficacy of MnDOT programs. MnDOT will continue to review the recommendations of this report and work with our stakeholders in the administration of its equity programs.

Sincerely,



Margaret Anderson Kelliher, Commissioner

Equal Opportunity Employer

Forthcoming OLA Evaluations

Child Protection Removals and Reunifications

Recent OLA Evaluations

Agriculture

Pesticide Regulation, March 2020

Agricultural Utilization Research Institute (AURI),
May 2016

Agricultural Commodity Councils, March 2014

Criminal Justice and Public Safety

Driver Examination Stations, March 2021

Safety in State Correctional Facilities, February 2020

Guardian ad Litem Program, March 2018

Mental Health Services in County Jails, March 2016

Health Services in State Correctional Facilities,
February 2014

Law Enforcement's Use of State Databases,
February 2013

Economic Development

Minnesota Investment Fund, February 2018

Minnesota Research Tax Credit, February 2017

Iron Range Resources and Rehabilitation Board (IRRRB),
March 2016

Education, K-12 and Preschool

*Collaborative Urban and Greater Minnesota Educators
of Color (CUGMEC) Grant Program*, March 2021

Compensatory Education Revenue, March 2020

Debt Service Equalization for School Facilities,
March 2019

Early Childhood Programs, April 2018

Minnesota State High School League, April 2017

Standardized Student Testing, March 2017

Perpich Center for Arts Education, January 2017

Minnesota Teacher Licensure, March 2016

Education, Postsecondary

*Collaborative Urban and Greater Minnesota Educators
of Color (CUGMEC) Grant Program*, March 2021

*Preventive Maintenance for University of Minnesota
Buildings*, June 2012

MnSCU System Office, February 2010

MnSCU Occupational Programs, March 2009

Energy

*Public Utilities Commission's Public Participation
Processes*, July 2020

Renewable Energy Development Fund, October 2010

Biofuel Policies and Programs, April 2009

Environment and Natural Resources

*Public Facilities Authority: Wastewater Infrastructure
Programs*, January 2019

Clean Water Fund Outcomes, March 2017

*Department of Natural Resources: Deer Population
Management*, May 2016

Recycling and Waste Reduction, February 2015

Government Operations

*Office of Minnesota Information Technology Services
(MNIT)*, February 2019

Mineral Taxation, April 2015

*Councils on Asian-Pacific Minnesotans, Black
Minnesotans, Chicano/Latino People, and Indian
Affairs*, March 2014

Helping Communities Recover from Natural Disasters,
March 2012

Health

Office of Health Facility Complaints, March 2018

*Minnesota Department of Health Oversight of HMO
Complaint Resolution*, February 2016

*Minnesota Board of Nursing: Complaint Resolution
Process*, March 2015

Minnesota Health Insurance Exchange (MNsure),
February 2015

Human Services

DHS Oversight of Personal Care Assistance, March 2020

*Home- and Community-Based Services: Financial
Oversight*, February 2017

Managed Care Organizations' Administrative Expenses,
March 2015

Medical Assistance Payment Rates for Dental Services,
March 2013

State-Operated Human Services, February 2013

Child Protection Screening, February 2012

Civil Commitment of Sex Offenders, March 2011

Housing and Local Government

Economic Development and Housing Challenge Program,
February 2019

Consolidation of Local Governments, April 2012

Jobs, Training, and Labor

State Protections for Meatpacking Workers, 2015

State Employee Union Fair Share Fee Calculations,
July 2013

Workforce Programs, February 2010

Miscellaneous

Board of Cosmetology Licensing, May 2021

*Minnesota Department of Human Rights: Complaint
Resolution Process*, February 2020

Minnesota State Arts Board Grant Administration,
February 2019

*Board of Animal Health's Oversight of Deer and
Elk Farms*, April 2018

Voter Registration, March 2018

Minnesota Film and TV Board, April 2015

Transportation

MnDOT Workforce and Contracting Goals, May 2021

MnDOT Measures of Financial Effectiveness,
March 2019

MnDOT Highway Project Selection, March 2016

*MnDOT Selection of Pavement Surface for Road
Preservation*, March 2014

MnDOT Noise Barriers, October 2013



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