GEORGIA DOT RESEARCH PROJECT 13-29

FINAL REPORT

TASK A: EVALUATION OF GDOT'S SMALL BUSINESS PROGRAM

Georgia Department of Transportation

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16. Abstract:

Federal Regulation 49 CFR Part 26 requires the Georgia Department of Transportation (GDOT) to implement a Small Business Program. The Program must be available to all firms that meet the U.S. Small Business Administration's (SBA) size standard, which generally defines a small business as a firm with 500 or fewer workers. In 2012, the GDOT established a Small Business Program and the State Transportation Board concluded that the most effective way to implement the Program would be to set-aside certain small contracts for bid competition exclusively among small businesses. However, Georgia State law appears to prohibit set-asides because they restrict competition. This report was commissioned to examine GDOT's utilization of small businesses and determine whether or not a set-aside is needed to create greater opportunities for them on highway contracts. The report outlines the legal requirement that must be met to establish a small business set-aside provision and it documents the contribution of small businesses to the State's economy. The findings of this report were based on examining GDOT's highway contracts awarded between January 2009 and May 2014. Overall, the study found that small businesses played a vital role in Georgia's economy. They employ 1.5 million workers or 47.3% of the State's workforce. Furthermore, the highway contracts awarded to small businesses by GDOT (between 2009 and 2014) were estimated to have created about 24,000 new State jobs and contributed $2.7 billion in new economic output. It was also found that during the "Great Recession", when major corporations in Georgia cut jobs significantly, job cuts in small businesses were much smaller. In fact, Georgia's economy would have been hurt much more severely by the recession, and its recovery would have taken much longer, had it not been for small businesses.

Despite the substantial contribution of small businesses to Georgia, one segment of small businesses encountered considerable difficulties in competing for contracts at GDOT. For example, the study looked at the segment of GDOT's small businesses that had $4 million or less in annual revenue; they were labeled Emerging Small Businesses. That segment made up 66.4% of all GDOT's prequalified and registered contractors. Emerging Small Businesses were unable to compete successfully for small projects, e.g., those $500,000 and smaller. Specifically, they received only 7.0% of the total value of awards $500,000 and smaller and only 16.0% of the total number of such projects - even though one-half of Emerging Small Businesses had annual revenues between $1.0 and $4.0 million. Although Emerging Small Businesses had the capacity to perform small projects, they could not compete against large businesses, which comprised 12.8% of all GDOT contractors but received 42.0% of the total value of awards $500,000 and smaller. Nor could Emerging Small Businesses compete successfully against other small businesses, i.e. those with annual revenues greater than $4.0 million. They made up 20.8% of GDOT's registered contractors and received 51% of the value of awards $500,000 and smaller. The research concluded that Emerging Small Business were unsuccessful not because they lacked capacity, but because large businesses and other small businesses competed against them on small projects, those for which they had the capacity to perform. Given the contributions of small businesses to Georgia's economy, **the research concluded that GDOT and the Georgia General Assembly have a rational basis and legitimate government need for a set-aside program at GDOT.** A two-tiered Small Business Program is recommended: Tier 1 should be reserved exclusively for Emerging Small Businesses (i.e. those with $4 million or less in annual revenue and 100 or fewer employees). Certain contracts should be set-aside for competition exclusively among firms in this tier; Tier 2 should include other small businesses, i.e. those larger than Emerging Small Businesses but still small enough to meet the

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Contract with

Georgia Department of Transportation

In cooperation with

U.S. Department of Transportation
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Contents

LIST OF FIGURES ……………………………………………………………………………..7

EXECUTIVE SUMMARY 8

ACKNOWLEDGEMENTS 16

INTRODUCTION 17

REVIEW OF LITERATURE AND PROGRAM REQUIREMENTS 24

Summary of GDOT’s Small Business Program 33

How GDOT’s Program Aligns with Federal Regulations 35

National Review of State DOT Small Business Programs 37

LEGAL ANALYSIS OF GDOT’S SMALL BUSINESS PROGRAM 42

FINDINGS REGARDING GDOT’S SMALL BUSINESS PROGRAM 61

The Rational Basis for a Set-Aside Program 61

The Economic Impact of GDOT’s Small Businesses 68

Disparity in Awards to GDOT Small Businesses 72

Narrowly Tailoring Set-asides to Minimize Adverse Impacts 75

Increasing Opportunities for Disadvantage Business Enterprises (DBEs) 77

RECOMMENDATIONS 79

The Emerging Small Business Program 79

The Regular Small Business Program 89

CONCLUSIONS 94

LIST OF FIGURES

FIGURE 1 COMPARISON OF GDOT'S PROGRAM WITH THE FEDERAL REGULATION........... 35

FIGURE 2 SMALL BUSINESS SIZE CRITERIA OF NINE (9) STATE DOT PROGRAMS 40

FIGURE 3 SUMMARY OF SMALL BUSINESS PROGRAMS FOR 9 STATE DOTS.......................... 41

FIGURE 4 RATE OF UNEMPLOYMENT IN GEORGIA AND NATION, 2005-2014......................... 62

FIGURE 5 JOBS CREATED BY SMALL AND LARGE BUSINESSES IN GA., 2007 - 2012.............. 64

FIGURE 6 GDOT SPENDING ON HIGHWAY PROJECTS, JAN 2009 - MAY 2014 66

FIGURE 7 PERCENT OF GDOT CONTRACTORS THAT COULD QUALIFY AS SMALL USING CURRENT SIZE STANDARD.. 67

FIGURE 8 GDOT AWARDS TO LARGE AND SMALL BUSINESSES, JAN 2009 – MAY 2014..... 67

FIGURE 9. THE ECONOMIC IMPACT OF GDOT'S EXPENDITURES WITH SMALL BUSINESSES, 2009 - 2014 69

FIGURE 10 PERCENT OF FIRMS BY DIFFERENT SIZE STANDARDS 71

FIGURE 11 PERCENT OF AWARD VALUE AND NUMBER OF CONTRACTS BY SIZE OF FIRM 73

FIGURE 12 SHARE OF PRIME CONTRACTS TO LARGEST FIRMS, 2009 - 2014.......................... 75

FIGURE 13 DBE STATUS OF SMALL BUSINESSES BY DIFFERENT SIZE STANDARDS............ 78

FIGURE 14 SIZE STANDARD BY INDUSTRY RECOMMENDED FOR GDOT'S PROGRAM....... 82

FIGURE 15 ESTIMATE OF SET-ASIDE ELIGIBLE WORK CODES.. 88

EXECUTIVE SUMMARY

On February 28, 2012, recipients of Federal-aid highway funds and federal transit funds were required to submit to the Federal Highway Administration (FHWA) their plans for fostering participation and competition among small business concerns. This obligation is a part of the Disadvantaged Business Enterprise (DBE) program regulations that are implemented by FHWA. While the DBE program may have a race- and gender-conscious component, Federal Regulation 49 CFR 26.39 requires the Small Business Program to be race- and gender-neutral.

Georgia Department of Transportation (GDOT) implemented a Small Business Program in July of 2012. In establishing guidelines for the new program, the State Transportation Board concluded that the most operative way to increase opportunities for small businesses is through a race- and gender-neutral set-aside provision. Small business set-asides are policies that reserve designated projects for competitive bid exclusively among “certified” small firms.

In 1980, the Georgia Attorney General rendered a formal opinion that set-asides by GDOT would restrict competition and thereby violate the State’s Constitution. As such, Georgia State law appears to prohibit small business set-asides, even though the Attorney General’s opinion is persuasive, but not necessarily the ultimate authority.

In 2012, the Georgia General Assembly reaffirmed its commitment to small business opportunity. It cited the critical role small businesses play in creating jobs and maintaining the State's economic vitality. The General Assembly modified the section of the Georgia Code that defines the revenue and employment size standards for small businesses. The revenue size standard decreased from $30 million to $1 million. At the same time, the employment size standard was reduced from 399 to 100 workers. The General Assembly approved the modification in 2012 and it took effect on July 1, 2015.

This research concludes that the best way for GDOT to increase opportunities for small businesses significantly is by establishing a set-aside provision. It also recommends that the eligibility to compete for contract set-asides be restricted to businesses with 100 or fewer employees and $4 million or less in annual revenues. The report defines these as Emerging Small Businesses.

Summary of Specific Findings and Recommendations

1. The GDOT and the Georgia General Assembly have a rational basis and legitimate government need for a small business set-aside program at GDOT. Eligibility to compete for small business set-aside contracts should be restricted to Emerging Small Businesses (as defined in item 9 below).
2. One reason for establishing a contract set-aside for small businesses is because they play a critically important role in Georgia's economy. Small businesses employ 1.5 million workers or 47.3% of the State's workforce. Based on an examination of GDOT's highway contracts, awarded to small businesses between January 2009 and

May 2014, the study estimated that about 24,000 new jobs were created and $2.7 billion in new economic output was added to Georgia's economy.

3. During the last recession, major corporations in Georgia cut jobs significantly, but job cuts in small businesses were much less significant. In fact, Georgia's economy would have been hurt more severely, and its recovery would have taken much longer had it not been for small businesses.
4. A second reason for implementing a small business set-aside is this. Despite the substantial contribution of small businesses to Georgia's economy, they encountered considerable difficulties competing for small contracts at GDOT. This conclusion is based on an examination of GDOT's contracting activity between January 2009 and May 2014. The analysis focused mainly on firms with $4 million or less in annual revenue. Such firms comprised 66.4% of all GDOT's prequalified and registered vendors. However, they received only 7.0% of the total value of highway contracts valued at $500,000 and smaller.
5. When the State Board of Transportation implemented GDOT's Small Business Program in July 2012, it concluded that the most effective way to increase opportunities for small businesses would be through implementing a set-aside provision. At the same time, the Board identified 121 contract solicitations (each valued under $500,000) that could be targeted to small business recipients.
6. The findings of this report support the Board's conclusion that a small business set-aside provision is needed. For example, the data analysis found that GDOT significantly underutilized Emerging Small Businesses in relationship to their

capacity. Furthermore, the underutilization occurred even on smaller contracts, i.e. those valued at less than $500,000. Fifty-three and five-tenths percent (53.5%) of GDOT's prime contracts were less than $500,000 in value. Firms with $4.0 million or less in revenue made up 66.4% of all GDOT's prequalified and registered contractors. Emerging Small Businesses were unable to compete successfully for small projects, e.g., those $500,000 and smaller. Specifically, they received only 7.0% of the total value of awards $500,000 and smaller and only 16.0% of the total number of such projects - even though one-half of Emerging Small Businesses had annual revenues between $1.0 and $4.0 million. Although Emerging Small Businesses had the capacity to perform small projects, they could not compete against large businesses, which comprised 12.8% of all GDOT contractors but received 42.0% of the total value of awards $500,000 and smaller. Nor could Emerging Small Businesses compete successfully against other small businesses, i.e. those with annual revenues greater than $4.0 million. They made up 20.8% of GDOT's registered contractors and received 51% of the value of awards $500,000 and smaller.

7. The study concluded that the significant underutilization of small businesses at GDOT was not because those businesses lacked sufficient capacity. Instead, it was because larger businesses successfully competed for small scale projects that could have been performed by small businesses.

8. For GDOT to establish a small business set-aside, the Georgia General Assembly must amend the State's Constitution. Given the large contracting disparity this

study identified for small businesses at GDOT, and the importance of small businesses to the State's economy, this study strongly recommends that the General Assembly amend the State's Constitution accordingly.

9. GDOT should create two tiers within its current Small Business Program: Tier 1 - Emerging Small Businesses; Tier 2 - Regular Small Businesses. Currently, GDOT uses one small business criterion, which is the U.S. Small Business Administration's (SBA's) revenue and industry size standard. However, that standard is too high to benefit emerging small businesses that are registered with GDOT. As a result, this study recommends setting a different eligibility criterion for Emerging Small Businesses - $4 million or less in revenue and 100 or fewer workers.

10. The Georgia General Assembly revised the revenue and employment size standard it uses to define a small business (effective July 1, 2015). The revised standard is $1.0 million in revenue and 100 or fewer employees. This study found the revised criteria are contradictory. For example, if the General Assembly's employment standard of 100 workers were applied to GDOT's prequalified and registered vendors, 78.5% could conceivably qualify as small businesses. However, if the General Assembly's revenue standard of $1 million were applied to GDOT's prequalified and registered vendors, only 39.0% could conceivably qualify as small businesses. Therefore, the General Assembly's revised small business definition is inconsistent.

11. To eliminate the inconsistency within the General Assembly's small business definition, the study identified the average revenue of GDOT's contractors who

have 100 or fewer employees. It is $4.018 million. Therefore, the study also recommends that the General Assembly modify the State of Georgia Small Business Code O.C.G.A. § 50-5-121 (1975, 1982, 2012) increasing the small business revenue size standard from $1 million to $4.0 million. The modification would make General Assembly's small business size standard identical to the size standard that is recommended for GDOT's Emerging Small Business Program.

12. GDOT should take steps to minimize the impact of the set-aside program on larger businesses by restricting competition for small business set-asides exclusively to firms that qualify as Emerging Small Businesses.
13. The study recommends the following criteria be adopted by GDOT to determine which contract solicitations should have set-aside provisions applied to them. First, the solicitation must be in an industry (or GDOT work code) that has at least five (5) companies certified as Emerging Small Businesses. Second, the median revenue of the five or more Emerging Small Businesses in the industry must be greater than the "median value" of GDOT contracts that have been awarded in the industry over the last three fiscal years. Third, at least three competitive bids must be received for the solicitation.
14. GDOT should review and update Set-aside eligible solicitations and work codes each fiscal year. It should do this by taking into consideration the following factors: the number and value of contracts awarded within each work code over the last three fiscal years, the number and value of contracts that GDOT plans to award over the coming fiscal year, the number of GDOT Emerging Small Businesses available within

each work code, and the revenue and employment level of Emerging Small Businesses in each work code.

15. The study estimated that 2,171 GDOT vendors could potentially qualify for the Tier 1 Emerging Small Business Program. GDOT should take aggressive steps to register those firms. It should also take steps to register small businesses that are eligible to participate in the Tier 2 Small Business Program.

16. The study recommends the following measures to increase the effectiveness of the Tier 1 and Tier 2 Small Business Programs. The recommendations were derived from a national review of best small business practices are as follows: continue to implement the race-neutral activities of the current Small Business Program; annually document the impact of the Small Business Program on new job creation, economic output, household income and tax collections in the State; document the growth in capacity and competitiveness of small businesses; identify and eliminate barriers to small business success (in the form of reducing any unnecessary paperwork burden, restricting contract bundling, identifying unnecessary bonding requirements and excessive contract specifications); document the impact of the Emerging Small Business Program on DBE opportunity; establish a Small Business Advisory Committee; conduct internal matchmaking sessions to marry small businesses with proposed solicitations; develop an inventory of local organizations and resources that provide assistance to small businesses; create a small business "ecosystem" at GDOT that supports the growth and development of those firms; continue and expand the current small business outreach efforts; create an

electronic small business directory which includes information on the contracting capacity of small businesses; and celebrate and publicize the successes of small program participants and those that have graduated from Emerging Small Business status.

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INTRODUCTION

Background on Small Business Research

On or before February 28, 2012, recipients of Federal-aid highway funds[1] and federal transit funds[2] were required to submit their plans for fostering participation and competition among small business concerns. The submittal is a part of their existing Disadvantaged Business Enterprise (DBE) program obligation. The Small Business Program must be implemented in a race- and gender-neutral manner and comply with Federal Regulation 49 CFR 26.39. Although the Federal Regulation permits DBE programs to have race conscious and race- and gender-neutral provisions (if the evidence establishes that such policies are warranted), the Small Business Program must be race- and gender-neutral.

A *Race-gender neutral* small business program is designed to remedy market imbalances as well as race and gender inequities in the award of contracts. It does this by assisting businesses without consideration to the owner's race, ethnicity or gender. In contrast, *Race- or gender-conscious* policies or programs seek to remedy market inequities by using policies that give preferences to individuals belonging to qualifying race, ethnic or gender designations.

The Federal Regulation uses the U.S. Small Business Administration's (SBA's) revenue and employment size standard to define a small business. A "size standard" is the maximum

[1]Federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, 105 Stat. 1914, or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, 112 Stat. 107

[2] Federal transit funds authorized by Titles I, III, V and VI of ISTEA, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA-21, Pub. L. 105-178.

revenue or employment a firm can have and still qualify as a small business. Standards are set and modified periodically by the U.S. Office of Management and Budget. The most recent modification occurred on January 1, 2012. The SBA size standard table is provided in Small Business Size Regulation, 13 CFR § 121.201.[3]

The race-gender neutral requirement of the federal regulation prompted some State Departments of Transportation to express a concern that the small business element might draw attention away from efforts to assist DBEs. However, U.S. Department of Transportation (U.S. DOT) maintains that DBEs are small business concerns also. As such, the additional program should "foster the objectives of the DBE program" by increasing the ways in which a state DOT could engage DBEs.[4]

U.S. DOT further asserted that race-neutral programs are not meant to be passive. Instead, state DOTs are "responsible for taking active, effective steps to increase race-neutral DBE participation."[5]

State DOTs were required to submit DBE Program Plans that included the Small Business element, or an addendum to the Plan that addresses Small Business Program. They were also encouraged to submit their implementation schedule for the program to guarantee that the program would be fully operational within nine months of approval.

The federal regulation requires Small Business Programs to comply with certain legal guidelines and provide assurances that certain programmatic criteria do not restrict small business activity

[3] It is available electronically at: https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf Accessed August 28, 2015, 7:55 AM.
[4] Federal Register 76, 5085.
[5] Ibid.

or exceed certain limits. At the same time, the programs are expected to have assertive steps that not only increase opportunities for small businesses, but also for DBEs, minority businesses and women-owned businesses.

To comply with the Federal Regulation, the Georgia Department of Transportation implemented a Small Business Program in July 2012. In establishing guidelines for the new Small Business Program, the State Board of Transportation identified 121 projects that were valued under $500,000 as targets for small business awards. The Transportation Board also concluded that the most operative way to increase opportunities for small businesses is through implementing a set-aside provision.

Small business set-aside policies reserve designated projects for competitive bid exclusively among firms that are certified as “small businesses”. The certification criteria are defined by revenue and/or employment size standards and businesses must meet the standard to be included in the competitive pool.

It is important to note that set-asides may limit competition within defined markets. As such, they may be subject to a legal review. In that regard, the Georgia Attorney General rendered a formal opinion in 1980 which concluded that set-asides implemented by GDOT would restrict competition and thereby violate the State’s Constitution.

While the Federal Regulation “requires” state and local recipients of federal highway and transit funds to establish a Small Business Program, it does not “require” them to implement a ‘set-aside’. Instead, it “permits” them to do so, assuming that the set-aside would comply with state regulations.

The difference in language between “requiring” and “permitting” is very significant. Because set-asides are permitted and not required, an agency would not be precluded from receiving federal assistance if it does not implement one.

In 2012, the Georgia General Assembly reaffirmed its commitment to small businesses, citing the critical role they play in creating jobs and maintaining the economic vitality of the State. The General Assembly passed the first Small Business Assistance Act in 1975. The ACT was subsequently modified in 1982 and 2012. The 2012 modification took effect on July 1, 2015. It reduced the revenue and employment size standard for defining small businesses. The previous employment standard was 399 employees and the new standard is 100 employees. The previous revenue standard was $30.0 million annual receipts. The new standard is $1.0 million in annual revenue.[6] The 2012 modification states,

> “Only through the existence of free and vigorous competition can free entry into business and opportunities for personal initiative and individual achievement be assured. The preservation and expansion of such competition is essential for our economic well-being. In order to encourage such competition it is the declared policy of the state to ensure that a fair proportion of the total purchases and contracts or subcontracts for property, commodities, and services for the state be placed with small businesses so long as the commodities and services of small businesses are competitive as to price and quality."

[6] The "size standard" refers to the maximum revenue or employment level a firm may have and still qualify as a small business concern.

The Georgia General Assembly and Georgia Department of Transportation are both committed to creating opportunities for small businesses. This study examines whether a small business set-aside is the most effective means of achieving this objective.

RESEARCH METHOD

Small Business Research Method

The research considered several important factors related to the implementation of GDOT's Small Business Program. Most importantly, it was commissioned to evaluate whether or not GDOT has a rational basis and legitimate need for a small business set-aside. It also identified the most effective policies for implementing such a program at GDOT and for improving the operations of the current Small Business Program.

The research seeks to accomplish the following:

1. Document the contributions of small businesses to the creation of jobs and economic activity in the State of Georgia.

2. Determine whether qualified, willing and able small vendors can compete successfully with large contractors for small GDOT contracts, in the absence of a set-aside provision.

3. Examine the Federal Regulations and requirements governing small business programs.

4. Review the Official Code of Georgia to identify laws and regulations regarding the implementation of small business programs within the State.

5. Determine whether the Official Code expressly prohibits or permits a small business set-aside program on federally funded transportation projects.

6. Determine whether or not there is a rational basis or legitimate government need or purpose for a small business set-aside program.

7. Determine how best to narrowly tailor the Small Business Program.

8. Determine the most effective revenue and employment size standard for eligibility into the Small Business Program.

9. Develop a protocol for determining the work codes in which projects should be set-aside for competition among small businesses; assuming a set-aside policy is implemented by GDOT.

10. Determine whether the small business program should be reserved exclusively for businesses located in the State of Georgia.

DATA

This research used administrative data covering all GDOT prime contract awards between January 2009 and May 2014. Along with contract award data, the study also used data on prequalified contractors, registered subcontractors, prequalified professional consultants, certified small businesses and Disadvantaged Business Enterprises (DBEs).

REVIEW OF LITERATURE AND PROGRAM REQUIREMENTS

Federal Regulation 49 CFR 26.39(a) requires directors of state highway department DBE Programs to take all reasonable steps to facilitate competition and eliminate obstacles to small business participation. The mandate indicates that two types of measures should be taken: First, actions that remove unwarranted or unjustified barriers to small business opportunity such as bundling contracts unnecessarily; and second, proactive measures to promote small business participation. Some suggested measures include the following:

a) Establishing a race-neutral small business set-aside program for prime contracts under a stated amount (*e.g.,* $1 million).

b) Requiring prime contractors on multi-year design-build contracts or other large contracts to specify elements of the contract or specific subcontracts that small businesses, including DBEs, can reasonably perform.

c) Establishing DBE contract goals that require prime contractors to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all work.

d) Identifying alternative acquisition and procurement strategies to facilitate the competitiveness of small business consortia or joint ventures.

e) Identifying in advance contracts or portions thereof that can be performed by small businesses and DBEs.

Finally, state DOTs are required to track DBE race-neutral attainment and document small business participation separately.

Important Assurances, Requirements, and Restrictions

State DOTs were required to submit the Small Business Program (SBP) Plan as a component of their DBE Program Plan or as an addendum to that Plan. The submittal deadline was February 28, 2012. States were also encouraged to include an implementation schedule along with the proposed program, to guarantee that it would be fully operational within nine months of approval.

Small Business Programs must comply with the federal guidelines that outline certain assurances, requirements and restrictions. These include the following issues:

a) *Program Description.* Provide a detailed description of the Small Business Program, which includes its objectives and operational procedures.

b) *Program Authorization.* Include assurances that state law authorizes the policies of the Program.

c) *DBE Eligibility.* Include assurances that certified DBEs who meet the size criteria established under the program are presumptively eligible to participate in the program.

d) *No Geographic Preferences*. Provide assurances that the Program has no geographic preferences or limitations regarding federally assisted procurement.

e) *Restrictions on participation.* Provide assurances that the Program does not limit the number of contracts that can be awarded to firms participating in the program.[7]

f) *Newly Emerging Businesses.* Provide assurances that every effort will be made to avoid creating barriers to the utilization of new, emerging, or untried businesses.

g) *Minority and Women Business Participation.* Provide assurances that aggressive steps will be taken to encourage minority and women owned DBEs to become certified.

h) *Size Standard Compliance.* Assure that the Small Business Program uses the size standard defined for each industry by the U.S. SBA that is linked to the North American Industry Classification System (NAICS) code. This is outlined in 49 CFR 26.5.

i) *Micro-Business Programs.* U.S. DOT allows the development of a separate program for very small businesses whose annual gross receipts are significantly lower than the SBA size criteria. These programs may have a lower personal net worth limit. If a micro business program is implemented, the SBP must also "provide opportunities to facilitate competition among small businesses that are larger than those eligible to participate in the micro-business program." [8]

j) *Personal Net Worth (PNW) Thresholds.* If an SBP has a PNW threshold for the Small Business element of its DBE program, that threshold must be consistent with the

[7] For details regarding DBE Business Development Program stages, time limits, and graduation from the program, see 49 CFR Part 26 Appendix C.

[8] U.S.DOT Official FAQ site last accessed 4/29/14, http://www.dot.gov/osdbu/disadvantaged-business-enterprise/official-questions-and-answers-26

one used for the DBE program as a whole. However, the inclusion of a PNW threshold is optional for the Small Business Program element.

k) *Small Business Participation and DBE Goals.* If recipients wish to use the SBP as a race-neutral means of achieving DBE goals, only certified program participants that are also DBEs will count towards DBE goals.

l) *Unbundling of Contracts.* The small business mandate does not require state DOTs to unbundle contracts as an SBP strategy. However, unbundling must at least be discussed in the SBP Plan that is submitted.

m) *The use of an Existing Small Business Programs Established for State Funded Contracts must be approved.* If a recipient already has an SBP for state-funded contracts, that recipient is permitted but not obligated to extend the program to federally-assisted contracts. However, this extension must be approved by the Federal Highway Administration (FHWA).

n) *DBE Supportive Service cannot be used.* FHWA-funds for DBE supportive services must be restricted in use for the DBE program exclusively. DBE supportive services funds cannot be used to support the SBP.

o) *Outreach activities alone are considered insufficient.* Outreach activities cannot be used as the exclusive method to increase small business participation.

GDOT’s Race-Neutral Policies prior to the Small Business Program

Prior to submitting an amendment to include the Small Business Program element, GDOT utilized several race-neutral means to increase DBE participation, by guidance from 49 CFR 26.51(b). According to GDOT’s DBE Program Plan revised in 2009, pre-existing race-neutral measures focused on broader advertisement circulation and outreach. These measures included the following activities:

- Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBEs and other small businesses;
- Providing assistance in overcoming limitations. This includes simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs and other small businesses obtain bonding and financing;
- Providing technical assistance and other services;
- Carrying out information and communications programs on contracting procedures and specific contract opportunities;
- Ensuring that DBEs and other small businesses are included on mailing lists received by bidders, prime contractors and subcomtractors and disseminating lists in languages other than English, where appropriate; and

- Ensuring that DBE and small business directories are distributed in print and electronic format and are circulated to the widest feasible universe of potential prime contractors.

According to GDOT's 2012 Disparity Study Final Report, additional race-neutral measures implemented by GDOT included the following:

- GDOT awarded a supportive services contract, which provided training and other assistance regarding bonding, financing, business management, technology, business growth and development, and information on conducting business with GDOT.

- GDOT facilitated knowledge of prime contractors and subcontractors to DBEs by placing the directory on the GDOT website. GDOT also created a searchable DBE database on its website that allows prime contractors to identify DBEs based on name, sub-industry, or location.

- GDOT currently posts on its website lists of potential bidders for its construction contracts. That list is available to DBEs and other small businesses seeking subcontracting opportunities. The website allows firms interested in subcontracting opportunities to identify themselves to potential bidders on the GDOT website.

- GDOT has a prompt-pay policy that requires prime contractors to pay subcontractors for satisfactory performance no later than ten days from receipt of each payment from GDOT.

- Prime contractors are not allowed to withhold retainage from subcontractors (GDOT no longer withholds retainage on payments for contracts).

Requirements Regarding a GDOT Small Business Set-aside

GDOT's Small Business Program was enacted in July of 2012. The Program complies with Title 49, Code of the Federal Regulation, Part 26, (49 CFR Part 26).

Currently, GDOT uses U.S. SBA criteria to define small businesses. In common practice, a small business is defined as having 500 or fewer employees. However, the definition is more complex and varies by the industry in which the business operates.[9] The North American Industry Classification System (NAICS) is used to classify industries in the table of size standards.[10]

In some NAICS designaed industries, the U.S. SBA defines small businesses by using a revenue size standard (for example, $7 million for retail trades, professional and business services; $33.5 million for general and heavy construction; $14 million for specialty trades construction; and $25 million for information and computer processing services). In other NAICS designations, SBA uses an employment size standard (e.g. 500 employees – manufacturing; and 100 employees - wholesale trades).

[9] The US Small Business Administration produces periodically a table that lists small business size standards matched to industries described in the North American Industry Classification System (NAICS), as modified by the Office of Management and Budget effective January 1, 2012. The latest NAICS codes are referred to as NAICS 2012. The size standards are for the most part expressed in either millions of dollars or number of employees. A size standard is the largest that a concern can be and still qualify as a small business for Federal Government programs. For the most part, size standards are the average annual receipts or the average employment of a firm. For the most recent table of size standards by industry see: https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf

[10] For more information on the NAICS, see: http://www.census.gov/eos/www/naics/

The GDOT Transportation Board is interested in implementing a set-aside provision as part of its Small Business Program. The Federal Regulation permits GDOT to consider a small business set-aside for federally funded projects if this action does not conflict with state laws and regulations. This raises three legal issues:

- Do Georgia laws or regulations expressly prohibit or permit a small business set-aside program?
- If State laws or regulations do not permit it, is there a rational basis or legitimate government need or purpose for GDOT to implement a small business set-aside?
- If a provision is established, what are the issues that could arise and potential legal challenges that should be considered in establishing a small business set-aside program?

To answer those questions, the research team sought the advice of one of the country's most knowledgeable attorneys in the area, Attorney Keith M. Wiener of Holland & Knight, LLP. Attorney Weiner is intimately familiar with government regulations regarding all aspects of DBEs and DBE programs. He is a senior partner and lead government representation attorney for the company. Attorney Weiner drafted a "Memorandum" which is summarized in the sections that follow. The main conclusion of the memorandum is as follows.

> "Although it appears there is no specific Georgia Department of Transportation (GDOT) rule or regulation for non-federal funded programs or contracts (state funded) that expressly prohibits or authorizes implementation of a small business set-aside program, there is a 1980 Georgia Attorney General opinion stating that the Department of

Transportation may not establish a set-aside program whereby certain jobs or parts of jobs are reserved to be bid upon exclusively by a designated class of contractors. See, Ga. Att'y Gen Op. No. 80-2, 1980 WL 26286 (Jan. 4, 1980)."

Implications for Research

The summary provided an essential roadmap for the research methodology of this report. It suggests that the research must achieve the following outcomes:

- Determine whether there is a legitimate government purpose and rational basis for GDOT and the State of Georgia to implement a small business set-aside program.
- Provide evidence that the Georgia General Assembly might consider in adapting a Constitutional Amendment (if necessary) and legislation to expressly provide for a small business set-aside program for certain federally funded highway contracts.
- Provide a framework that will allow GDOT to narrowly tailor the small business set-aside program.
- Define small business size standards for implementing the set-aside program. The set-aside should have a rational basis that is related to a legitimate government need and the standards should minimize the program's impact on other businesses.

While an original objective was to determine whether the SBP should be restricted to businesses located in Georgia, the Federal Regulation expressly forbids such geographic restrictions on the program.

Summary of GDOT's Small Business Program

According to the U.S. Small Business Administration (SBA), a small business is a concern whose revenue or employment meets the U.S. Small Business Administration *Small Business Size Standard.* The size standard varies by industry of operation. GDOT defines a small business enterprise by the U.S. SBA size standards for each NAICS code and 13 CFR 121.

SBA uses two principles in its methodology. First, the size standard differs by industry so as to reflect the unique requirements of industries. Second, the size standard is designed to strengthen the competitiveness of small businesses in the economy. GDOT's small business size standards are identical to those set by the SBA.

By the mandate outlined in 49 CFR 26.39, GDOT utilizes the following measures to ensure maximum practicable opportunities for small businesses on GDOT contracts:

- Encourage and promote prime contractors to waive bonding or assist small business subcontractors in obtaining bonding;
- Encourage and promote staged bonding where feasible; that is where bonding is carried over from one project stage to the next;
- Identify projects through its Transportation Enhancement (TE) Program that are valued at under $500,000. These projects vary in size, scope, location, and specialty, and are small enough to allow for small business contractors to bid as primes. TE Projects are not considered set-asides;

- Provide information on GDOT’s organizational and contractual needs and offer instructions on bid specifications, procurement policy, procedures, and general bidding requirements;

- Provide specifications and requests for proposals to the small business community promptly to allow adequate time to develop responsible and responsive bids. In instances where the cost of obtaining specifications or requests for proposal is prohibitive, copies of the material are made available at no charge to small business development agencies;

- Encourage primes to prorate payment and delivery schedules, where feasible, to minimize cash flow problems faced by small firms.

- Give guidance to small business contractors regarding cash flow management.

- Use debriefing sessions to explain why bids were unsuccessful.

- Document efforts to identify and award contracts to small businesses and establish a monitoring system to ensure that all contractors, subcontractors, consultants, and vendors comply with contract specifications related to small business utilization; and

- Inform small businesses of bid notices and specifications related to their capability by placing bid notices in local newspapers and other periodicals. Send bid notices to local trade associations, technical assistance agencies, economic development groups and small businesses that have capabilities which are relevant to the bid solicitation.

How GDOT’s Program Aligns with Federal Regulations

Figure 1 lists the recommended Small Business Program provisions of the Federal Regulation (column 1 of the figure) and it compares the recommended guidelines with GDOT’s current Small Business Program provisions (column 2) and the recommendations of the GDOT’s 2012 Disparity Study (column 3).

FIGURE 1 COMPARISON OF GDOT’S PROGRAM WITH THE FEDERAL REGULATION

Suggested by CFR 26.39	GDOT’s Current Program	Program provisions recommended by GDOT’s 2012 Disparity Study
If state regulations and laws allow, DOTs may implement a race-neutral small business set-aside for prime contracts under a stated amount (*e.g.,* $1 million).	Program does not include a set-aside provision	GDOT might consider employing a small business set-aside program for small construction and engineering-related contracts that are not legally required to be publicly bid. GDOT would establish a dollar limit for these contracts, and then consider application of the program for contracts under that ceiling on a case-by-case basis.
In multi-year design-build contracts or other large contracts, requiring bidders on the prime contract to specify elements of the contract or specific subcontracts that are of a size that small businesses, including DBEs, can reasonably perform.	No requirement for prime contractors to use small businesses on subcontracting elements; however, a bidder/proposer shall document the steps that it has taken to obtain Small Business participation.	On any large construction project, GDOT might require bidders to document that they have broken out subcontract opportunities of sizes suitable for small subcontractors, including DBEs.

Suggested by CFR 26.39	GDOT's Current Program	Program provisions recommended by GDOT's 2012 Disparity Study
On prime contracts not having DBE contract goals, requiring the prime contractor to provide subcontracting opportunities of a size that small businesses, including DBEs, can reasonably perform, rather than self-performing all the work.	No requirement as such; however, as a part of Good Faith Efforts, any federal contractor receiving a contract with GDOT shall agree in the contract that small businesses will have the maximum practical opportunity to participate in the contract consistent with its efficient performance.	GDOT might consider a mandatory subcontracting minimum, such that for each contract above a certain dollar amount, GDOT would set a percentage to be subcontracted based on an analysis of the work to be performed and past experience with similar contracts.
Identifying alternative acquisition strategies and structuring procurements to facilitate the creation of consortia or joint ventures with small businesses, including DBEs, that allow them to compete for and perform prime contracts.	Based on the project and scope of work, GDOT will consider a joint venture of large and small business collaborations; joint ventures must be approved in advance by GDOT to ensure small businesses perform a commercially useful function and add value to the project.	GDOT could explore a pilot program that would encourage large prime contractors to joint venture with smaller contractors including DBEs, or for small contractors to join in a joint venture.
Ensuring that a reasonable number of prime contracts are of a size that small businesses, including DBEs, can reasonably perform.	GDOT identifies projects each fiscal year under $500,000 (through its Transportation Enhancement Program) that small businesses can perform as primes.	No recommendation in this category.
Structuring contracting requirements to facilitate competition by small business concerns.	Encourage and promote prime contractors to waive bonding or assist small business subcontractors in obtaining bonding; encourage and promote staged bonding where feasible, wherein bonding is carried over from one project stage to subsequent stages.	Review GDOT's prequalification procedures to determine whether they create a barrier to small business participation; consider whether changes should be made in the contract threshold at which firms must become prequalified to bid on contracts, or whether the prequalification scoring system should be modified.
Unbundling contract by size and requirements to facilitate small business participation as prime contractors or subcontractors.	Not addressed.	No recommendation in this category.

National Review of State DOT Small Business Programs

The report investigated nine (9) state Departments of Transportation to evaluate the characteristics of their small business programs. The results draw heavily from the results of a recently published report, see National Cooperative Highway Research Program (NCHRP) Synthesis 448: *State Department of Transportation Small Business Programs* (2013). The states examined included the following: Alaska, California, Colorado, Florida, Illinois, Iowa, New Mexico, North Carolina and Oregon. Small business programs were identified at seven of the nine state agencies, the exceptions were Illinois and New Mexico. Most of the small business programs were implemented before the new FHWA small business mandate. Some covered federally funded projects, others covered federal and state funded projects, and some pertained to state funded projects exclusively. The assessment was conducted by examining the following source documents and records:

- FHWA-approved DBE and Small Business program documents
- Disparity studies
- FHWA DBE goal attainment records
- State DOT program websites and manuals
- Additional press releases or FHWA communications available on State DOT web sites
- Responses to Transportation Research Board surveys

Figure 2 describes the details of programs in various states. The description includes the size standard used to determine program eligibility (column 2 of the figure), an indication of whether the standard is applied uniformly across all industries or varies by industry (column 3), an indication of whether there is a time limit for participating in the program (column 4), and an indication of whether DBE certification automatically makes a firm eligible to participate in the small business program (column 5). This information was taken from the state DOT websites and from reports those agencies submitted to FHWA. Figure 3 indicates whether the states have a single small business program or multi-tiered program for small businesses of different sizes (see column 2 of the figure), whether the states have a set-aside program for small businesses (column 3), whether the small business program applies to both state and federally funded contracting (column 4), and the maximum size construction solicitation that can be set-aside for small business competition (column 5), and finally the maximum size non-construction solicitation that can be set-aside for small business competition (column 6).

Size standards:

The findings show that Small Business Program participation size standards vary by state. Only one of the 9 states examined (Alaska) used SBA size standards as criteria for participation in its small business program. Colorado's size standard is one-half the SBA standard for each NAICS code, which also meant that it differed by industry. In contrast, California, Iowa and North Carolina used the same size standard for all industries. Florida's size standard differed by industry, but the State used only two revenue thresholds. Oregon varied its size standard across only two broad industry categories – construction and non-construction. Finally, it was not possible to determine the standards for Illinois and New Mexico.

Program Participation Time Limits:

Of the nine states examined, five did not have a program participation time limit, two states did and the remaining two (Illinois and New Mexico) did not provide sufficient information. Oregon limits participation to 12 years and Iowa limits participation to 5 years.

Set-asides:

Two-thirds of the States used set-aside contracts on which only Small Business Program participants could bid. The maximum size of set-aside contracts for Small Businesses varied by state. For construction contracts, three states set the limit at $1,000,000; two states set the limit at $100,000; and one state set the limit at $500,000. The amount of services contract set-asides also varied. Of the three states that implemented set-asides in services, one state set the limit at $100,000, one state set it at $150,000 and one at $1,000,000. The maximum contract size set-aside value did not appear to be strongly related to the size standard because the size standards varied a great deal more than did the maximum set-aside.

Emerging Small Business Program and Federal, State Applicability

Each state for which information was available (i.e. seven of the nine) implemented an Emerging Small Business Program along with its regular Small Business Program. One state agency applied the program to federally funded contracts only, two agencies applied the program to state and federal contracts, two agencies applied the program to state contracts only and it was unclear how the remaining two agencies applied their program.

FIGURE 2 SMALL BUSINESS SIZE CRITERIA OF NINE (9) STATE DOT PROGRAMS

NAME OF STATE	SIZE STANDARD CRITERIA	IS THE SAME SIZE STANDARD APPLIED TO ALL INDUSTRIES? (NAICS)*	PROGRAM PARTICIPATION TIME LIMIT	DOES DBE CERTIFICATION AUTOMATICALLY QUALIFY FIRM AS A THE SMALL BUSINESS?
Alaska	US SBA standard	No	None	Yes
California	<100 employees, or <$14 million gross receipts	Yes	None	No
Colorado	One half of SBA size standard for each NAICS* with an overall cap at $11.205 million	No	None	No
Florida	$22.31 million or $13.1 million by industry	No	None	No
Illinois	No Program identified	No Program identified	No Program identified	No Program identified
Iowa	<20 employees or <$3 million annual gross receipts (averaged over 3 years)	Yes	5 years	No
New Mexico	No Program identified	No Program identified	No Program identified	No Program identified
North Carolina	Gross income after COGS** <$1.5 million	Yes	None	No
Oregon	Tier 1: $1,699,953 for construction; $679,981 for non-construction firms, and <20 employees Tier 2: Not exceeding $3,399,907 for construction firms and $1,133,302 for non-construction, and <30 employees	No	12 years	No

- **NAICS is the North American Industry Classification System. It is the coding system used for all US firms into respective industries. **COGS is cost of goods sold.**

FIGURE 3 SUMMARY OF SMALL BUSINESS PROGRAMS FOR 9 STATE DOTS

STATE	DOES STATE HAVE SEPARATE SB/ESB* PROGRAM?	DOES THE SB/ESB PROGRAM USE SET-ASIDE PROVISIONS?	IS THE PROGRAM APPLICABLE TO STATE AND FEDERAL CONTRACTS?	MAXIMUM CONSTRUCTION CONTRACT SIZE THAT CAN BE SET-ASIDE FOR SBES	MAXIMUM SERVICE CONTRACT SIZE THAT CAN BE SET-ASIDE FOR SBES
Alaska	Yes	Yes	Federal	$1,000,000	$100,000
California	Yes	No	State only	-	-
Colorado	Yes	Yes	Both	$1,000,000	$150,000
Florida	Yes	Yes	Both	$1,000,000	$1,000,000
Illinois	No Program identified	No Program identified	No Program identified	No Program identified	No Program identified
Iowa	Yes	Yes	Unclear	$100,000	-
New Mexico	No Program identified	No Program identified	No Program identified	No Program identified	No Program identified
North Carolina	Yes	Yes	State	$500,000	Not specified
Oregon	Yes	Yes	Unclear	$100,000	Not specified

*SB stands for a regular Small Business Program, while ESB stands for an Emerging Small Business Program

LEGAL ANALYSIS OF GDOT'S SMALL BUSINESS PROGRAM

This section provides a legal opinion regarding a small business set-aside program. This outline includes five primary areas applicable to a small business set-aside program:

(1) Identification of Georgia State laws or regulations that expressly prohibit or permit a small business set-aside program;

(2) Identification of the issues that arise and potential challenges to consider in establishing a small business set-aside program;

(3) Determination of a rational basis or legitimate government need or purpose for a small business set-aside program;

(4) Discussion of other state laws that provide for a small business set-aside program; and

(5) A discussion of specific legislation that is narrowly tailored to achieve a legitimate government purpose.

Although it appears that there is no specific Georgia Department of Transportation (GDOT) rule or regulation for non-federal funded programs or state funded contracts that expressly prohibits or authorizes the implementation of a small business set-aside program, there is a 1980 Georgia Attorney General opinion that the Department of Transportation may not establish a set-aside program whereby certain jobs or parts of jobs are reserved to be bid upon exclusively by a designated class of contractors.[11]

Georgia Attorney General Opinion Regarding GDOT Set-Aside Programs

A January 4, 1980 Opinion of the Georgia Attorney General provides that GDOT "may not establish a 'set-aside program' whereby certain jobs are reserved to be bid upon exclusively by a designated class of contractors."[12] On December 3, 1979, GDOT requested advice from the Office of the Attorney General regarding the establishment of a "set-aside program." GDOT desired to establish a program whereby certain jobs or parts of jobs would be reserved to be bid upon exclusively by a "designated class of contractors." As used in the opinion, the term "designated class of contractors" means a category of contractors established by criteria that were not job related.[13]

The Office of the Attorney General ("AG") responded that Article III, Section VIII, Paragraph VIII of the Georgia Constitution declares illegal and void all contracts and agreements which may have the effect, or be intended to have the effect, of defeating or lessening competition or encouraging monopoly.[14] Thus, the AG found that GDOT's proposed set-aside program would

[11] Ga. Att'y Gen Op. No. 80-2, 1980 WL 26286 (Jan. 4, 1980) *(See* Exhibit A attached).

[12] ibid

[13] GDOT has implemented a Small Business Enterprise (SBE) Program, which was revised in July 2012 and appears to be related to its implementation of the Federal DBE program. According to the policy, "[t]he GDOT Small Business Enterprise Program is not considered or implemented as [an] annual goal, project specific goals, quotas or set aside." GDOT identified 121 projects in FY 2013 through its state-funded Transportation Enhancement (TE) Program that are valued at under $500,000. GDOT states that the TE Program projects vary in size, scope, location and specialty. The TE projects, GDOT indicates, are small enough to allow for the small business contractors to bid as a prime. However, the GDOT SBE Program provides that TE projects are not to be considered as a set aside.

[14] This provision is now found at art. III, § 6, ¶ V of the Georgia Constitution. **In** addition to the limitations on the General Assembly, this provision provides that the General Assembly shall have the power to authorize and provide by general law for judicial enforcement of contracts or agreements restricting or regulating competitive

likewise tend to defeat or lessen competition and any contract entered into pursuant to such a program would be null and void.

The Attorney General's opinion also stated that because the General Assembly could not bestow upon GDOT powers, which are withheld from it by the Constitution, the General Assembly would have no power to authorize any such contract or agreement. The Attorney General said that GDOT was created by the General Assembly and received its powers from the body. One of the powers provided was the power to contract for the construction of public roads in such manner as provided by law. Under the law, the contract must be awarded to the lowest reliable bidder. The Attorney General noted that where the government offers contracts for public works to the lowest bidder, the public is deeply interested in free competition in the bidding.

The Attorney General opinion also relied upon *City of Atlanta v. Stein,* I 1 1 Ga. 789, 793 (1900), in which the Court invalidated a city ordinance prescribing that all printing work done for or by the city would be given exclusively to printers who belonged to a particular union. The court found that the ordinance was illegal because it tended to encourage monopoly and defeat competition. The AG concluded that the same reasoning would apply to GDOT's proposed "set-aside program" in which certain jobs would be reserved to be bid upon exclusively by a designated class of contractors.

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activities between or among: (a) employers and employees; (b) distributors and manufacturers; (c) lessors and lessees; (d) partnerships and partners; (e) franchisors and franchisees; (f) sellers and purchasers of a business or commercial enterprise; or (g) two or more employers. *(See* Ex. B attached.)

It is important to note that while opinions of the Attorney General are persuasive authority, they do not constitute "controlling authority," on the appellate courts. *Synovus Bank v. Griner,* 321 Ga. App. 359, 369-70, 739 S.E.2d 504, 513 (2013). Nonetheless, according to this 1980 Attorney General opinion, the implementation of a small business set-aside program by GDOT arguably may require an amendment to the Georgia Constitution so that it permits a set-aside program - to the extent that absent such an amendment, a set-aside program is construed to violate art. III, § 6, ¶ V of the Georgia Constitution.

GDOT Statutory Rules and Regulations

In implementing the Federal DBE program as required by the U.S. Department of Transportation (49 C.F.R. Part 26), GDOT is permitted to establish a race-neutral small business program for prime contracts under a stated amount, which includes the use of a small business set-aside. See 49 C.F.R. § 26.39. 49 C.F.R. § 26.39 provides as follows:

> "(a) Your DBE program must include an element to structure contracting requirements to facilitate competition by small business concerns, taking all reasonable steps to eliminate obstacles to their participation, including unnecessary and unjustified bundling of contract requirements that may preclude small business participation in procurements as prime contractors or subcontractors. (b) As part of this program element you may include, but are not limited to the following strategies: (1) establishing a race-neutral small business set-aside program for prime contracts under a stated amount (e.g. $1 million)..."

It appears that there is no specific GDOT statutory procurement law or contract which expressly prohibits or authorizes implementation of the small business set-aside program. However, GDOT does have specific rules about procurement contracts:

> O.C.G.A. § 32-2-60(a)- "The department shall have the authority to contract as set forth in this article and in Code Section 32-2-3. All department construction contracts shall be in writing."
>
> O.C.G.A. § 32-2-64- "Except as authorized by subsection (d) of Code Section 32-2-61[15], all department construction and maintenance contracts shall be let by public bid. For purposes of this Code Section, posting a bid on the department's website shall satisfy the public bid requirement."
>
> O.C.G.A. § 32-2-69(a)- "Except as authorized by Code Sections 32-2-79 and 32-2-80,[16] the department shall award the contract to the lowest reliable bidder, provided that the department shall have the right to reject any and all such bids whether such right is reserved in the public notice or not and, in such case, the department may re-advertise, perform the work itself, or abandon the project."

[15] O.C.G.A. § 32-2-61(d) provides that GDOT is prohibited from "negotiating any contract" for the construction or maintenance of a public road involving the expenditure of $200,000.00 or more except in any contract (a) with counties, municipalities, and state agencies; (b) with a railroad company or utility; (c) for emergency construction or maintenance involving the expenditure of $200,000.00 or more when the public interest requires that the work be done without the delay of advertising for public bids; (d) for the procurement of business, professional, or other services from any person, firm or corporation as an independent contractor; (e) with the State Road and Tollway Authority; or through the provisions of a design-build contract. "Negotiated contract" means a contract made without formal advertising for competitive bids. O.C.G.A.. § 32-1-3.

[16] O.C.G.A. § 32-2-79 provides that projects related to congestion mitigation may be let and constructed using procedures of O.C.G.A. § 32-2-80. O.C.G.A. § 32-2-80 outlines circumstances under which projects, financed in part or in whole by private sources, may be let by request for proposal. These very specific exceptions to competitive bidding do not include authorization for projects to be set aside for small businesses.

Although GDOT's statutory law and implementing regulations do not expressly define "lowest reliable bidder”, Georgia courts have interpreted similar legislation requiring that contracts be awarded to the "lowest and/or best bidder" to have the purpose of ensuring that public contracts are awarded without favoritism. Furthermore, they should be awarded at the lowest price consistent with the reasonable quality and expectation of completion. *Ga. Branch Associated Gen. Contractors of Am., Inc. v. City of Atlanta,* 253 Ga. 397, 399, 321 S.E.2d 325, 327 (1984).

Additionally, Georgia courts have held that state statutes requiring contracts be awarded to the lowest responsible bidder do not permit consideration of any other factors in the award of such contracts. *See Hilton Constr. Co. v. Rockdale Cnty. Bd. of Educ.,* 245 Ga. 533, 266 S.E.2d 157 (1980) (under state school board regulations providing that projects using state funds will be awarded to responsible bidder submitting lowest acceptable bid, county board of education was not authorized to reject construction contractor's bid on the basis that contract was unknown).

Ga. Comp. R. & Regs. 672-5-.04(1)- "All persons proposing to bid on Department work, except as otherwise provided in Rule 672-5-.05, for the performance of any contract in excess of $2,000,000 must submit an application under oath on forms to be furnished by the office of the Prequalification Committee."

Rule 672-5-.05 provides that the Engineer may designate certain specialty items of work and exempt contractors bidding to perform such work from the requirements of Chapter 672-5 of the Rules (i.e. not required to prequalify).

Consideration of criteria based on other factors

Restricting competition to small businesses would result in the application of factors such as the size of a business in determining an award of contracts. The following Georgia cases are instructive in addressing analogous issues in connection with legislation that does not provide for the consideration of factors in awarding contracts outside of those expressly prescribed in the legislation:

- *See Ga. Branch Associated Gen. Contractors of Am., Inc. v. City of Atlanta,* 253 Ga. 397, 321 S.E.2d 325 (1984) (City Minority and Female Business Enterprise (MBFE) ordinance was void since its implementation would directly conflict with Atlanta City Charter requirement that contracts go to "lowest and/or best bidder" because charter did not expressly permit consideration of MBFEs in award of contracts).

- *See also Si Groves & Sons Co. v. Fulton Cnty.,* 920 F.2d 752 (11th Cir. 1991) (County's Minority Business Enterprise {MBE} program violated Georgia low-bid statute because the statute did not expressly provide for consideration of MBE status in award of county contracts to "lowest bidder").

- *See also Morton v. Bell,* 264 Ga. 832, 452 S.E.2d 103 (1995) (Principle of statutory construction *expressio unius es exclusio alterius:* the express mention of one thing implies the exclusion of another).

Therefore, it appears that in addition to considering the need to adopt potentially a constitutional amendment permitting GDOT to implement a small business set-aside program, GDOT may also need to obtain statutory legislation expressly providing for a small business set-aside program.

Other states have adopted small business program legislation that specifically provides for agencies to set-aside contracts for small businesses (see section IV below).

IV. Other states have expressly provided for small business set-aside programs by statute.

Some examples of states that have implemented small business set-aside programs include the following:

- Connecticut - CT (C.G.S.A. § 4a-60g)- Set-aside program for small contractors and minority business enterprises- Requires agencies to set-aside contracts for small contractors or minority business enterprises. Value of contracts set-aside should be at least 25% of the total value of all contracts let that year. Small contractor is defined as any contractor, subcontractor, manufacturer, service company or nonprofit that (a) maintains principal place of business in state, (b) has gross revenues not exceeding $15 Million in last fiscal year, and (c) is independent.

- Arizona - AZ (A.R.S. § 41-2535)- Any procurement that does not exceed $100,000 shall be restricted, if practicable, to small businesses.

- New Jersey - NJ (N.J.S.A. § 5232-20)- Set-Aside Act for Small Businesses, Female Businesses, and Minority Businesses- Agencies may designate contracts for small business, female, or minority set-aside pursuant to goals and procedures established in the Set-Aside Act whenever expectation is that bids can be obtained from at least three qualified small business or female or minority businesses. Statutory goal is 15% for small businesses.

At this time, it does not appear that there are any reported cases in which these set-aside programs have been challenged on statutory or constitutional grounds. At this time, it also does not appear that there are reported cases in which any small business set-aside programs in other states have been challenged on statutory or constitutional grounds.

Georgia's Small Business Assistance Acts

Georgia adopted legislation in 1975 and 2012 related to small businesses:

- O.C.G.A. § 50-5-120 (1975 and 2012)- "The Small Business Assistance Act of 1975."

- O.C.G.A. § 50-5-121 (1975, 1982, 2012) (Effective until July 1, 2015)- "Small business" means a Georgia resident business that is independently owned and operated. Also, such business must have either fewer than 399 employees or less than $30Million in gross receipts per year.

- O.C.G.A. § 50-5-121 (1975, 1982, 2012) (Effective on and after July 1, 2015)- "Small business" means a business that is independently owned and operated. Also, such business must have fewer than 100 employees or less than $1Million in gross receipts per year.

It should be noted that the definition of "small business" under the Department of Administrative Services Procurement Code, effective after July 1, 2015, removed the requirement of "Georgia residency" for an entity to be considered a "small business" for purposes of the Small Business Assistance Act.

- O.C.G.A. § 50-5-122 (1975)- The legislative intent of this part is declared to be as follows: "The most important element of the American economic system of private enterprise is free and vigorous competition. Only through the existence of free and vigorous competition can free entry into business and opportunities for personal initiative and individual achievement be assured. The preservation and expansion of such competition is essential for our economic well-being. In order to encourage such competition it is the declared policy of the state to ensure that a fair proportion of the total purchases and contracts or subcontracts for property, commodities, and services for the state be placed with small businesses so long as the commodities and services of small businesses are competitive as to price and quality."

- O.C.G.A. § 50-5-123 (1975, 1982)- "There is created an advisory council to the [Department of Administrative Services] to be composed of representatives of designated small business enterprises to be named as follows: five by the Governor, two each by the President of the Senate and the Speaker of the House of Representatives, and one by the Commissioner Of Administrative Services to serve ex officio as chairman of the council. The members of the council shall serve without compensation. The council shall meet at least once monthly or more often when necessary, at the call of the

Chairman in consultation with the Commissioner Of Administrative Services or his designee who shall also serve without additional compensation as executive director of the council."

- O.C.G.A. § 50-5-124 (1975, 1982, 1986, 1992, 2009)- “The council shall make a written report to the Governor, the President of the Senate, the Speaker of the House of Representatives, and the Chairmen of the Senate Committee on Insurance and Labor and the House Economic Development and Tourism Committee at least once each year, such report to be made no later than December 1. The report shall advise the Governor, the Speaker, the President, and the designated chairmen concerning progress toward achieving the legislative intent as set forth in Code Section 50-5-122 and shall contain such recommendations for legislation as the council herein provided for deems proper.”

The legislative intent stated in O.C.G.A. § 50-5-122, passed in 1975, appears to assist in an analysis of whether there is a rational basis for the utilization of small businesses in state purchasing and contracting.

It may be of interest to review any reports submitted to the Governor, the Senate, and the House as required in O.C.G.A. § 50-5-124.

Issues and Constitutional Challenges

It is instructive to review and analyze issues that have arisen and constitutional challenges to analogous legislation, which have been ruled upon by the courts. Below are examples of these cases that may demonstrate potential issues and challenges regarding a small business set-aside program:

Equal Protection

- A suspect class (e.g. race, gender, and ethnicity) or fundamental right (e.g. freedom of speech, religion, right to privacy) is not involved, so courts apply a rational basis test.

- "Under the rational basis test, a court will uphold the statute if, under any conceivable set of facts, the classifications drawn in the statute bear a rational relationship to a legitimate end of government not prohibited by the Constitution." *Ga. Dep't of Human Resources v. Sweat,* 276 Ga. 627, 580 S.E.2d 206 (2003).

    - Rational Basis is applied to economic regulations when no fundamental right and no suspect class is involved.

    - "Because rate making is a legislative act, our test under an equal protection analysis of this economic regulation matter is whether there was a rational basis for the differing rate treatment..." *Allied Chemical Corp. v. Ga. Power Co.,* 246 Ga. 548, 224 S.E.2d 396 (1976) (restructuring of electrical rates to charge industrial consumers at a higher rate than residential consumers rested upon a rational basis that was reasonably related to legitimate ends of utility rate making).

    - *Ga. Dep't of Human Resources v. Sweat,* 276 Ga. 627, 580 S.E.2d 206 (2003) (child support guidelines evaluated under rational basis test).

- The Court in *Firstline Transp. Security, Inc. v. U.S.,* 107 Fed. Cl. 189, 202 (Fed. Cl. 2012) illustrates the relevance of gathering evidence to ensure that any small business set-aside program is rationally related to a legitimate government interest. Although the court could not determine that the Transportation Security Administration's (TSA) 40 percent goal for small business participation based on its "experience with small businesses who have successfully performed security screening services" lacked a rational basis, the court noted: "If the Court were issuing this solicitation instead of this agency, it may well have based the rather aggressive small business goals on more robust market research, and it likely would have stated the goals as a percentage of subcontracting dollars, as FAR Part 19 authorizes." *Id.*

Commerce Clause

- Commerce Clause grants Congress authority to regulate commerce among the States but limits the power of the States to discriminate against interstate commerce. Limitation on state power is called "Dormant Commerce Clause," which prohibits economic protectionism—regulatory measures designed to benefit in-state economic interest by burdening out-of-state competitors.

- Market participant exception- If a state is acting as a market participant, rather than as a market regulator, the Dormant Commerce Clause places no limitation on its activities. The Court examines whether the state or local government has imposed restrictions that reach beyond the immediate parties with which the government transacts business. *See Big*

Country Foods, Inc. v. Bd. of Ed. of Anchorage School Dist., 952 F.2d 1173 (9th Cir. 1992) (The market participant exception to Dormant Commerce Clause's limitation on state power was applied to permit Alaska statutory preference requiring schools receiving state funds to buy dairy products harvested in state if prices were no more than seven percent higher than products of like quality harvested outside state notwithstanding Alaska's use of school districts to implement the milk purchase program).

It appears that the market participant exception applies here because GDOT would be a party to a contract with the small business.

- Examples of legislation triggering such challenges:
    - *Big Country Foods, Inc. v. Bd. of Ed. Of Anchorage School Dist.,* 952 F.2d 1173 (9th Cir. 1992) (The Court upheld Alaska's statute that gave 7% bidding preference to Alaska milk harvesters in contracting to supply milk to school districts in Alaska because of market participant exception).
    - *J.F. Shea Co., Inc. v. City of Chicago,* 992 F.2d 745 (7th Cir. 1993) (City of Chicago's local business preference rule for award of City's construction contracts did not violate commerce clause; "market participant exception" applied since city was using its own funds to hire contractors).
    - *Metro. Washington Chapter, Assoc. Builders and Contractors, Inc. v. District of Columbia,* No. 12-853 (EGS), 2014 WL 3558698, at *16 (D.D.C, July 14, 2014) (Residential preference statute mandating that certain percentages of

construction jobs on projects funded in whole or in part, or administered by the city, be filled by District residents did not violate the Commerce Clause because market participant exception applied with respect to city-funded construction projects).

Privileges and Immunities Clause

- Privileges and Immunities Clause of the United States Constitution (art. IV, §11, cl. I) gives constitutional assurance to citizens of each state that they are entitled to all privileges and immunities of citizens in several states. To the extent policies disadvantage out-of-state residents as a class, certain policies can violate Privileges and Immunities Clause.

- Two step test to determine whether there is a violation under the Privileges and Immunities Clause of United States' Constitution is as follows: (1) Does ordinance burden one of those privileges and immunities protected by the clause? (2) Is there a substantial reason for treating classes of citizens differently? (Nonresidents must somehow be shown to "constitute a peculiar source of the evil at which the statute is aimed.") *United Bldg, and Constr. Trades Council of Camden Cnty. and Vicinity v. Mayor and Council of the City of Camden,* 465 U.S. 208, 104 S.Ct. 1020 (1984); *Metro. Washington Chapter, Assoc. Builders and Contractors, Inc. v. District of Columbia,* No. 12-853 (EGS), 2014 WL 3558698, at *16 (D.D.C. July 14, 2014) (Stating court must consider (1) whether the activity purportedly threatened by classification is a fundamental right protected by the Privileges and Immunities Clause, and (2) if the challenged restriction deprives nonresidents of a protected privilege, whether the restriction is "closely related to the advancement of a substantial state interest”).

- Right to pursue common calling or compete for contracts has been recognized by courts as a right protected by the Privileges and Immunities Clause. Thus, potential issue arises as to whether a set-aside program for small businesses that is limited to Georgia resident businesses can withstand legal challenges based on the Privileges and Immunities Clause.
    - Generally, corporations have been held not to have standing under Privileges and Immunities Clause. *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel,* 20 F.3d 1311 (4th Cir. 1994) (citing *Western & Southern Life Ins. Co. v. State Bd. of Equalization,* 451 U.S. 648 (1981)). However, for an exception s*ee Metro. Washington Chapter, Assoc. Builders and Contractors, Inc. v. District of Columbia,* No. 12-853 (EGS), 2014 WL 3558698, at *16 (D.D.C. July 14, 2014).
    - In-state residents have been held not to have standing to challenge legislation under United States Privileges and Immunities Clause. *J.F. Shea Co., Inc. v. City of Chicago,* 992 F.2d 745 (7th Cir, 1993).
- Georgia Constitution has Privileges and Immunities Clause, but Georgia courts apply an equal protection standard to challenges under the state Privileges and Immunities Clause (so standard is rational basis). *See Ambles v. State,* 259 Ga. 406, 383 S.E.2d 555 (1989).

Examples of legislation triggering such challenges:

- *Utility Contractors Ass 'n of New England, Inc.,* 236 F. Supp. 2d 113 (D. Mass2002) (City of Worcester's Residency Requirement Ordinance which required that all private contractors or subcontractors on city public works projects allocate 50% of their total employee work hours to Worcester residents violated Privileges and Immunities Clause because it discriminated against out-of-state residents, and City's reason of high unemployment did not demonstrate substantial reason for discrimination).
- *Smith Setzers & Sons, Inc. v. South Carolina Procurement Review,* 20 F.3d 1311 (4th Cir. 1994) (South Carolina local product and vendor preference scheme for procurement bidding process was challenged by shareholder of corporation; court held that because shareholder had no individual injury and corporation had no standing to bring suit under Privileges and Immunities Clause, shareholder also lacked standing).
- *Big D. Constr. Corp. v. Court of Appeals,* 789 P.2d 1061 (Ariz. 1990) (Bid preference statute that granted preference to resident businesses for public works projects violated Privileges and Immunities Clause when privileges it conferred were no longer rationally related to any legitimate state purpose).
- *Metro. Washington Chapter, Assoc. Builders and Contractors, Inc. v. District of Columbia,* No. 12-853 (EGS), 2014 WL 3558698, at *16 (D.D.C. July 14, 2014) (The Court denied in part D.C. government's motion to dismiss claim that residential preference statute for the construction industry mandating that certain percentages of construction jobs on projects funded in whole or in part, or administered by the city, be filled by District residents violated Privileges and Immunities Clause; court held that because there were

no findings of fact (i.e. sufficient evidence) to demonstrate the District's program was narrowly tailored to address the unique evil of the District's inability to levy a commuter tax on non-residents, government's motion was dismissed without prejudice, potentially meaning that it could re-assert motion if it had sufficient evidence to show program was narrowly tailored).

Legislation for small business set-aside program must do the following:

- Establish whether there is a legitimate government purpose and rational basis for small business set-aside program.
- Conduct economic study or analysis that considers whether there is a legitimate government need and purpose.
- Consider and adopt constitutional amendment (if necessary) and legislation to expressly provide for small business set-aside program for certain state contracts.
- Narrowly tailor any legislation or program to remedy identified legitimate government need and purpose.
- Define small businesses using economic criteria that have a rational basis reasonably related to a legitimate government purpose (i.e. size, revenue, personal net worth of owner, etc.)
- Consider permitting small businesses from any state (i.e. not limited to Georgia residents) to avoid or assist in withstanding potential challenges under Privileges and Immunities

Clause. (Note that the court in *Metro. Washington Chapter, Assoc. Builders and Contractors, Inc. v. District of Columbia* said that similar state resident preference laws that have been challenged on Privileges and Immunities grounds have been found to be unconstitutional.)

FINDINGS REGARDING GDOT'S SMALL BUSINESS PROGRAM

The Rational Basis for a Set-Aside Program

Small businesses provide 50% of all jobs in the State:

The U.S. Small Business Administration found that small businesses "significantly impact Georgia's economy" and are "critical to the physical condition of the state".[17] Furthermore, 166,400 of Georgia's 170,200 employee-based firms were small businesses, i.e. 97.8%.

All firms located in Georgia employed 3.135 million workers in 2010. Of that number, small businesses employed 1.484 million (47.3%). This means that about one in every two jobs in the State is in small businesses. Additionally, the small business segment employing 19 or fewer workers created over one-half million jobs (.568 million or 18.1%). Clearly, small businesses are vital to job creation and economic development in the state.

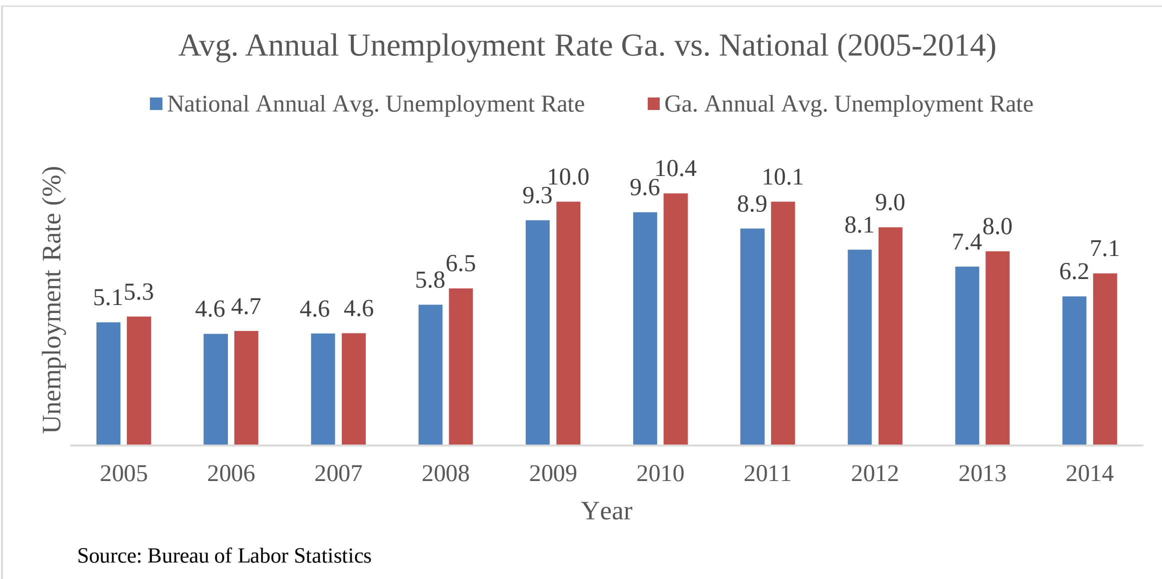
Small businesses cushioned the effects of the recession on Georgia's economy:

Small businesses helped offset the impact of the last recession on Georgia's economy. The Georgia Budget & Policy Institute (a nonpartisan organization) estimated the State loss of 340,000 jobs between the start of the recession in 2007 and 2011. Georgia was one of the hardest hit states during the recession and it was among the slowest to recover. However, had it not been for small businesses, the effect would have been even more dire.

[17] Office of Advocacy, Small Business Administration (2013) Small Business Profile: Georgia https://www.sba.gov/sites/default/files/advocacy/ga12.pdf

In August of 2013, the state unemployment rate was 8.7%, while the national average was 7.3%. Not until 2014 did Georgia turn the corner on the slower than average job growth. Figure 4 provides information on the annual rate of unemployment, between 2005 and 2014, in Georgia and the rest of the nation. In 2007, when the recession began, there was no significant difference in the State and national rates of unemployment. By 2008, the difference was significant and it widened even more significantly in 2011 and 2012.

FIGURE 4 RATE OF UNEMPLOYMENT IN GEORGIA AND NATION, 2005-2014



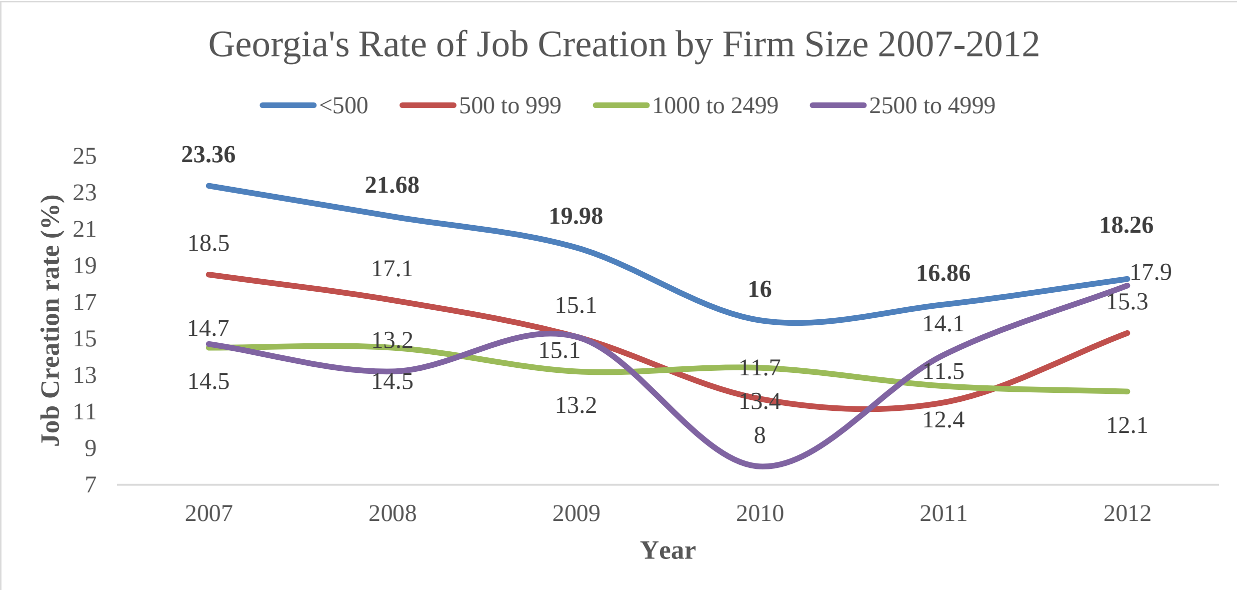
The recession hit Georgia's economy hard because of the State's heavy dependence on the construction and financial sectors. Fortunately, job creation in small businesses mitigated some of the adverse effects. Figure 5 shows the percent of total jobs created in the State by businesses of various sizes: 499 or fewer employees, which is represented by the light blue line; 500 to 999 employees represented by the red line; 1000 to 2499 employees represented by the green line; and 2500 to 4999 employees represented by the purple line.

The purple line traces the percent of new jobs created in the largest category of firms. The figure shows the drastic decrease in job creation. Between 2007 and 2010, new job creation within large corporations decreased by 46%, from 14.7% in 2007 to 8.0% in 2010. In contrast, jobs in small businesses declined by a smaller amount, 31.6% (from 23.4% in 2007 to a low point of 16.0% in 2010 or by 31.6%).

Nationally, more than 50% of jobs and Gross Domestic Product are created by small businesses. More importantly, small businesses account for the largest share of net new jobs. For example, between 1992 and the first quarter of 2010, firms with 500 or fewer workers accounted for 74% of the gross increase in jobs and 62% of the net increase.[18] A recent study by the Kauffman Foundation revealed that the net increase in jobs is concentrated primarily among start-ups, i.e. firms that are less than one years old. In contrast, older firms were found to be net destroyers of jobs.

[18] Kevin Kliesen and J. Maues (2010) op. cit also available on the World Wide Web at: http://research.stlouisfed.org/publications/regional/11/04/small_business.pdf accessed, October 16, 2011 9:38 PM.

FIGURE 5 JOBS CREATED BY SMALL AND LARGE BUSINESSES IN GA., 2007 - 2012



(Source: Bureau of Labor Statistics, Www.census.gov/ces/dataproducts/bds/methodology. Note that the avg. annual rate of job creation for small businesses was created by averaging the annual job creation rate of businesses with 1 to 4, 5 to 9, 10 to 19, 20 to 49, and 250 to 499 employees.

GDOT's Small Businesses Impact

The research measured the economic impact on Georgia's economy of GDOT's contracting with small businesses. The findings indicated that GDOT's highway expenditures with small businesses between January 2009 and May 2014 created 23,691 new jobs and $2.697 billion in total economic output. The methodology for measuring economic output was based on the results of a previous study conducted by the author, which examined the impact of all GDOT highway expenditures on Georgia's economy. The study's findings revealed that each dollar spent on highway construction created $1.89 of total economic output. In addition, for every million dollars spent on highways created 16.6 new jobs In the State. [19] The results were derived by using the IMPLAN model, which is one of the most frequently used software applications by government agencies and organizations to estimate local and regional impacts.

The IMPLAN model generated employment and output multipliers. This was accomplished by assessing the cumulative effects of numerous rounds of spending that were set in motion by the initial expenditures on highways and roadways. Each highway investment created secondary expenditures when prime contractors bought goods and services from suppliers, hired subcontractors and made payments to workers and suppliers. In turn, suppliers, subcontractors and workers spent portions of their income on other goods and services, which set in motion additional rounds of spending. The total economic impact is the cumulative result of the successive rounds of spending. The IMPLAN model was developed by the federal government and it is widely used by public and private organizations to assess economic impacts.

GDOT's spending on all highway projects between January 2009 and May 2014 totaled $3.431 billion. Figure 6 records the percent distribution of prime contracting awards between expenditures on construction ($3.280 billion or 95.6% of the total) and expenditures on professional consulting ($.151 billion or 4.4% of the total).

[19] Thomas Boston and R. Oyelere (2014) Economic Development and Workforce Impacts of State DOT Highway Expenditures. GDOT Research Project 12 – 19.

FIGURE 6 GDOT SPENDING ON HIGHWAY PROJECTS, JAN 2009 - MAY 2014

PRIME CONTRACT STATUS		AWARD VALUE	
		TOTAL	% OF TOTAL
	PRIME CONTRACTOR	$3,280,092,503	95.6%
	PRIME CONSULTANT	$150,611,072	4.4%
	Total	$3,430,703,575	100.0%

Source: GDOT contracting data

In 2014, there were 2,365 firms registered with GDOT. Those firms were distributed as follows: 17.8% (421) were prequalified prime contractors; 24.1% (570) were registered subcontractors; 56.6% (1339) were prequalified consultants; and 1.5% (35) were certified in the Small Business Program. In 2014, there were no DBEs certified in the Small Business Program.

To determine the economic impact of small businesses, we first had to calculate how much GDOT spent with those businesses. To do this, we created a representative sample of 664 firms which was drawn from the 2365 GDOT registered firms. The representative sample consisted of prequalified prime contractors, registered subcontractors and prequalified professional consultants. There was sufficient information on the revenue and employment of each business in the sample and that information allowed us to determine whether the firm met the US SBA's small business size standard.

An examination of the sample indicated that it was statistically representative of all 2365 firms. When the size distribution of firms in the sample was observed, the results indicated that 12.8% could be classified as large businesses and 87.2% could be classified as small businesses, see Figure 7.

FIGURE 7 PERCENT OF GDOT CONTRACTORS THAT COULD QUALIFY AS SMALL USING CURRENT SIZE STANDARD

		TOTAL	% OF TOTAL
	LARGE BUSINESS	85	12.8%
	SMALL BUSINESS	579	87.2%
	Total	664	100.0%

Source: Representative sample of 664 GDOT prequalified firms

Firms in the sample received $1.987 billion in highway contracts (which represented 1001 projects). The projects were let by GDOT between January 2009 and May 2014 (see Figure 8). While large businesses made up 12.8% of all registered firms, they received 58.4% of the total value of awards and 51.3% of the total number of project awards. In contrast, small businesses made up 87.2% of all GDOT registered businesses but received 41.6% of the total value of awards and 48.7% of the total number of project awards. The results showed a disparity in awards to small businesses.

FIGURE 8 GDOT AWARDS TO LARGE AND SMALL BUSINESSES, JAN 2009 – MAY 2014

CATEGORY	TOTAL CONTRACT VALUE	% OF TOTAL VALUE	NUMBER OF AWARDS	% OF TOTAL AWARDS
LARGE BUSINESS	**$1,160,054,145**	**58.4%**	**514**	**51.3%**
SMALL BUSINESS	**$826,918,436**	**41.6%**	**487**	**48.7%**
Total	**$1,986,972,581**	**100.0%**	**1001**	**100.0%**

Source: Representative sample of 664 GDOT prequalified firms

The Economic Impact of GDOT's Small Businesses

After creating the representative sample of large and small businesses and measuring the number of contracts they received, the research team estimated the economic impact of GDOT's highway expenditures with small businesses. To do this we used the modeling results of the 2014 GDOT economic impact study[20], which indicated that every $1.00 of GDOT highway expenditures created $1.89 of total economic output and each million dollars of highway expenditures added 16.6 new jobs.

Those results help the research team to determine the economic impact of GDOT's highway expenditures with small businesses that were awarded between 2009 and 2014. Total expenditures were $3.431 billion. Based on the results of the sample, researchers were able to determine that 41.6% of the $3.431 billion was spent with small businesses (i.e. $1.427 billion). Then the IMPLAN multipliers were applied, which were derived in the economic impact study.[21] As a result, it was determined that small businesses created a combined economic impact of $2.697 billion and generated 23,691 jobs in Georgia, See Figure 9.

[20] T. Boston and R. Oyelere 2014. Economic Development and Workforce Impacts of State DOT Highway Expenditures, GDOT Research Project No. 12-19.
[21] Op. cit

FIGURE 9. THE ECONOMIC IMPACT OF GDOT'S EXPENDITURES WITH SMALL BUSINESSES, 2009 - 2014

EXPLANATION	AMOUNT
Total GDOT Highway Expenditures with Small Businesses	$1.427 billion
Statewide Economic Impact per Dollar Spent (economic impact multiplier derived from IMPLAN model)	$1.89
Statewide Jobs Created per $1.0 million Spent (jobs impact multiplier derived from IMPLAN model)	16.6 new jobs
Total Economic Impact of GDOT's Small Business Expenditures	$2.697 billion
Total New Jobs Created Statewide from GDOT's Small Business Expenditures	23,691

The Georgia General Assembly Recognized the Vital Contribution of Small Businesses to the State:

In recognition of the importance of small businesses to the state, the Georgia General Assembly adopted Georgia's Small Business Assistance Act, in 1975, and modified it in 1982 and 2012. The 2012 modification took effect July 1, 2015. The Act reads in part as follows:

> The legislative intent of this part is declared to be as follows: "The most important element of the American economic system of private enterprise is free and vigorous competition. Only through the existence of free and vigorous competition can free entry into business and opportunities for personal initiative and individual achievement be assured. The preservation and expansion of such competition is essential for our

> economic well-being. In order to encourage such competition it is the declared policy of the state to ensure that a fair proportion of the total purchases and contracts or subcontracts for property, commodities, and services for the state be placed with small businesses so long as the commodities and services of small businesses are competitive as to price and quality."[22]

Effective July 1, 2015, the General Assembly's size standard for defining a small business is less than 100 employees and/or revenue of less than $1.0 million.[23]

The General Assembly's Small Business Employment Size Standard is not Consistent with its Revenue Size Standard

The General Assembly's employment size standard defines small businesses as firms with fewer than 100 employees. At the same time, it sets the revenue size standard at less than $1 million. However, the employment standard and the revenue standard yield results that are contradictory. For example, Figure 10 measures the percent of GDOT's registered and prequalified firms that would qualify as small businesses if one uses the General Assembly's revenue standard (see column 2) and employment standard (see column three). It indicates that if the General Assembly's employment standard (100 or fewer employees) were applied to GDOT available firms, 78.5% could qualify as small businesses. In contrast, if the General Assembly's revenue size standard ($1,000,000 or less) were applied to GDOT's available firms, only 39.0% could qualify as small businesses. Hence, the two standards are not consistent.

[22] O.C.G.A. § 50-5-122 (1975)
[23] O.C.G.A. § 50-5-121 (1975, 1982, 2012)

The research found that the average revenue of GDOT's contractors who employ 100 or fewer workers is $4.018 million (see Figure 10). This means that if the General Assembly used $4.0 million as the revenue size standard, the two definitions would be more consistent. Therefore, Figure 10 indicates that 68.8% of GDOT's small businesses would qualify by that standard, which is not too dissimilar to the 78.5% that would qualify if 100 or fewer employees were used as the standard. As a result, the study recommends setting the revenue size standard at $4 million and employment standard at 100 workers.

FIGURE 10 PERCENT OF FIRMS BY DIFFERENT SIZE STANDARDS

		REVENUE SIZE STANDARD: $1.0 MILLION OR LESS	EMPLOYMENT SIZE STANDARD: 100 WORKERS OR FEWER	RECOMMENDED: $4.0 MILLION OR LESS REVENUE OR 100 OR FEWER EMPLOYEES
	LARGE BUSINESS	**61.0%**	**21.5%**	**31.2%**
	SMALL BUSINESS	**39.0%**	**78.5%**	**68.8%**
	Total	**100.0%**	**100.0%**	**100.0%**

Source: Representative sample of 664 GDOT prequalified firms.

Additionally, the revenue and employment size standards should not be applied as "either/or" criteria. Instead, they should be applied respectively to the same industries to which they are applied by the US SBA. That agency generally applies the revenue standard to nonmanufacturing industries and the employment standard to manufacturing industries. As will be discussed below, the study also recommends using this standard as eligibility criteria for the proposed Emerging Small Business Program.

Disparity in Awards to GDOT Small Businesses

Small businesses with $4 million or less in annual revenue were significantly underutilized by GDOT. An important factor contributing to this disparity was large firms competing successfully for very small contracts. We have seen above that small businesses in Georgia play a vital role in creating jobs and economic activity in the State. Despite this contribution, they are significantly underutilized by GDOT.

The study looked at GDOT's small businesses with $4 million or less in annual revenue; they were labeled Emerging Small Businesses. That segment made up 66.4% of all GDOT's prequalified and registered contractors. Emerging Small Businesses were unable to compete successfully for small projects, e.g., those $500,000 and smaller. Specifically, Figure 11 indicates they received only 7.0% of the total value of awards $500,000 and smaller and only 16.0% of the total number of such projects - even though one-half of Emerging Small Businesses had annual revenues between $1.0 and $4.0 million. Although Emerging Small Businesses had the capacity to perform small projects, they could not compete against large businesses, which comprised 12.8% of all GDOT contractors but received 42.0% of the total value of awards $500,000 and smaller. Nor could Emerging Small Businesses compete successfully against other small businesses, i.e. those with annual revenues greater than $4.0 million. They made up 20.8% of GDOT's registered contractors and received 51% of the value of awards $500,000 and smaller. The research concluded that Emerging Small Business were unsuccessful not because they lacked capacity, but because large businesses and other small businesses competed against them on small projects, those for which they had the capacity to perform. It is very difficult for Emerging Small Businesses to compete successfully with large firms and other small firms.

FIGURE 11 PERCENT OF AWARD VALUE AND NUMBER OF CONTRACTS BY SIZE OF FIRM

CATEGORY	PERCENT OF TOTAL AWARD VALUE	PERCENT OF THE NUMBER OF CONTRACTS AWARDED	PERCENT DISTRIBUTION OF FIRMS BY SIZE
LARGE BUSINESSES	**42.0%**	**57.2%**	**12.8%**
SMALL BUSINESSES WITH $4.0 MILLION OR LESS IN REVENUE	**7.0%**	**16.0%**	**66.4%**
OTHER SMALL BUSINESSES	**51.0%**	**26.8%**	**20.8%**
Total	**100.0%**	**100.0%**	**100.0%**

GDOT's large businesses (i.e. those with more than 500 employees) and its small businesses with 100 to 500 employees performed many projects that could have been performed by Emerging Small Businesses. Figure 12 records total contracts awarded to firms that received the largest share of GDOT awards between 2009 and 2014. The results show that large firms received the greatest share of contracts. More importantly, it shows that large firms also bid on smaller prime contracts.

- Of the $3.4 billion that were awarded in prime contracts between 2009 and 2014, 47.4% went to the five largest prime contractors and 61.8% went to the 10 largest prime contractors. In terms of the number of project, the five largest award recipients received 36.9% of all projects awarded and the 10 largest received 43.8%, (see Figure 12).

- Using the recommended Emerging Small Business Program size standard, the results showed that such firms received only 7.0% of the total value of prime contracts even though they made up 66.4% of GDOT registered firms (see Figure 11).

This disparity occurred despite the fact that emerging small businesses had significant capacity in certain industries, especially in comparison to the size of contracts that were typically awarded in those industries. This finding is illustrated in Figure 15. The figure shows the relationship between the median size contract awarded by GDOT in specific industries and the median revenue of GDOT firms that can be classified as emerging small businesses. Column six of the figure records a “yes” for industries in which the median revenue of emerging small businesses exceeded the median size contract that was awarded in the industry. The results show that GDOT firms were registered in 34 different industries. Furthermore, GDOT awarded contracts in 23 of the 34 industries. In eight of the 23 industries (i.e. approximately one-third), the median revenue of emerging small businesses exceeded the median value of GDOT contracts awarded in the industry. This suggests that emerging small businesses had sufficient capacity to perform contracts in those industries.

FIGURE 12 SHARE OF PRIME CONTRACTS TO LARGEST FIRMS, 2009 - 2014

# ASSIGNED TO FIRM	Sum	% of Total Value	No. of Contracts	% of Contracts	Smallest Contract	Median Contract	Largest Contract
1	$820,118,909	25.0%	184	16.5%	$169,087	$1,696,423	$42,618,295
2	$208,695,889	6.4%	56	5.0%	$196,900	$1,318,060	$42,995,636
3	$187,402,703	5.7%	73	6.6%	$161,451	$896,524	$34,550,071
4	$181,534,637	5.5%	95	8.5%	$145,336	$1,278,395	$19,657,859
5	$155,592,717	4.7%	3	0.3%	$26,939,701	$61,158,833	$67,494,183
Cumulative %		47.4%		36.9%			
6	$129,502,701	3.9%	9	0.8%	$1,443,800	$13,732,961	$47,164,956
7	$113,924,625	3.5%	38	3.4%	$152,533	$963,235	$29,013,824
8	$96,406,894	2.9%	3	0.3%	$1,417,550	$21,423,500	$73,565,844
9	$77,531,789	2.4%	26	2.3%	$396,799	$1,762,381	$22,299,110
10	$56,372,380	1.7%	1	0.1%	$56,372,380	$56,372,380	$56,372,380
Cumulative %		61.8%		43.8%			

Narrowly Tailoring Set-asides to Minimize Adverse Impacts

The following steps are recommended as a way that GDOT might minimize the impact of the Small Business Set-Aside on other businesses.

a. First and most importantly, only Emerging Small Businesses should be eligible for set-asides. However, to implement set-asides, the Small Business Program must undertake the following steps outlined below.

b. All GDOT prequalified contractors, prequalified consultants, registered subcontractors and certified small business owners must be classified correctly by the North American Industry Classification System (NAICS) or work code designations within which they are qualified to offer goods and services.

c. GDOT work codes must be linked to their corresponding NAICS designations.

d. The Small Business Program must maintain accurate information on the average revenue and current level of employment of businesses certified in the Small Business Program.

e. The Small Business Program must identify “set-aside eligible work codes”. An “eligible work code” is one in which certain solicitations may be set-aside for bid competition exclusively among Emerging Small Businesses.

f. Set-aside eligible work code must have five (5) or more certified Emerging Small Businesses that offer goods and services in the code.

g. In set-aside eligible work codes, the “median revenue” of Emerging Small Businesses is greater than the “median value” of GDOT contracts awarded in the work code (over the last three fiscal years). Median should not be confused with average. Median is the midpoint that separates the largest values from the smallest values. In plain terms, this criterion means that one-half of Emerging Small Businesses in the work code must have revenues that exceed 50% of the contracts awarded in the work code - when those contracts are ranked by their smallest to highest values.

h. Finally, for a solicitation to be awarded as a set-aside, it must receive at least three bids from Emerging Small Businesses. Otherwise, the solicitation may be rebid for competition among all contractors.

i. Figure 15 identifies set-aside eligible work codes as determined by this report.

j. GDOT should review and update Set-aside eligible work codes each fiscal year by taking into consideration the following information.

    1. The number and value of contracts awarded over the last three fiscal years, by work code;
    2. The estimated number and value of contracts to be awarded forecast over the coming fiscal year;
    3. The number of GDOT vendors available for prime contract awards (where an available firm is defined as a prequalified contractor, prequalified consultant or registered subcontractors); and
    4. The average revenue and current employment level of each firm certified in the Emerging Small Business Program.

Increasing Opportunities for Disadvantage Business Enterprises (DBEs)

Currently, 17.4% of all GDOT prequalified firms are DBEs, broken down as 11.1% Minority Business Enterprises (MBEs) and 6.3% Women Business Enterprises WBEs (Figure 13). Using the current GDOT Small Business Program size standards, 56.3% of potentially eligible small business program participants would be DBEs (33.5% MBEs and 22.8% WBEs). If the Emerging Small Business Program size standards were implemented, 62.5% of potentially eligible Program participants would be DBEs (38.6% MBEs and 23.9% WBEs). The Federal Regulation stipulates that the new Small Business Program must assure that opportunities would be made available for DBEs and minority firms. The set-aside provision would facilitate the accomplishment of that goal.

FIGURE 13 DBE STATUS OF SMALL BUSINESSES BY DIFFERENT SIZE STANDARDS

GDOT DBE CERTIFICATION STATUS	WITHOUT GDOT SMALL BUSINESS PROGRAM	SMALL BUSINESS DEFINED BY EXISTING SMALL BUSINESS STANDARD	SMALL BUSINESS DEFINED BY EMERGING SMALL BUSINESS STANDARD
NON-DBE	82.6%	43.7%	37.5%
MBE	11.1%	33.5%	38.6%
WBE	6.3%	22.8%	23.9%

RECOMMENDATIONS

The Emerging Small Business Program

1. **The Georgia General Assembly should amend the State Constitution so as to allow GDOT to set-aside certain small highway contracts for Emerging Small Businesses.**

Small businesses are fundamental to job creation and economic development in Georgia. They employ one-half of the State's workforce and account for the largest percentage of new jobs created. The goal of the Small Business Program is to "increase the number of small companies doing businesses with GDOT on a race and gender neutral basis while promoting equal business opportunities for all." This evaluation determined that GDOT's Emerging Small Businesses are unsuccessful mainly because large contractors and Regular Small Businesses compete down the "food chain" for small contracts that Emerging Small Businesses have the capacity to perform efficiently. Therefore, it is difficult or impossible to achieve more parity in the utilization of Emerging Small Businesses without a set-aside provision. However, Georgia State law appears to prohibit set-asides for any purpose, because they could constrain competition. This report recommends amending the Georgia Constitution so as to allow set-asides for Emerging Small Businesses in GDOT contracting and procurement.

2. **Create two tiers within GDOT's current Small Business Program: Tier 2 - Regular Small Business; Tier 1 - Emerging Small Business. Currently, GDOT uses U.S. SBA criteria to define eligibility for the Small Business Program. We recommend applying the SBA criteria to Regular Small Businesses, i.e. those that are too large to qualify as Emerging Small Businesses.**

GDOT Tier 2 - Regular Small Business: A Regular Small Business is any for-profit firm that is independently owned and operated and is not a subsidiary of another business. The firm must conform to the U.S. Small Business Administration (SBA) "small business eligibility size standard".[24]

Federal Regulation 49 CFR Part 26 requires the small business program be made eligible to all firms meeting the U.S. SBA revenue and employment size standards. However, the regulation also permits recipients of federal funds to establish subcategories for Micro Businesses within their Small Business Programs.

Currently, GDOT uses U.S. SBA criteria to define small businesses. We recommend continuing to apply these criteria, but also creating the subcategory for Emerging Small Businesses. This recommended subcategory is defined below. In common practice, a small business is defined as having 500

[24] The "size standard" is the largest that a firm can be and still qualified as a small business. It is expressed in millions of dollars or number of employees. Standards are set and modified periodically by the U.S. Office of Management and Budget. The most recent modification occurred January 1, 2012. SBA table of size standards can be found in the Small Business Size Regulation, 13 CFR § 121.201. It is available electronically at: https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf Accessed August 28, 2015, 7:55 AM.

or fewer employees. However, technically the definition is more complex and varies by the industry in which the business operates; where industries are classified by the North American Industry Classification System (NAICS). In certain NAICS designations, SBA defines small businesses by using revenue size standards. Examples include $7 million for retail trades, professional and business services; $33.5 million for general and heavy construction; $14 million for specialty trades construction; and $25 million for information and computer processing services. In other NAICS designations, SBA uses employment size standards (e.g. 500 employees – manufacturing; and 100 employees - wholesale trades).

If we were to use GDOT's current Small Business Program size standard (which is identical to that of the U.S. SBA) 87.2% of prequalified contractors, consultants and registered subcontractors could qualify as small businesses. This means that the remaining 12.8% would be large businesses.

3. **Create an "Emerging Small Business Program" within the current Small Business Program.**

GDOT Tier 1 - Emerging Small Business: An emerging small business is any for-profit firm that is independently owned and operated and is not a subsidiary of another business. The firm must conform to U.S. SBA size standards and GDOT Emerging Small Business eligibility standard. The Emerging Small Business revenue standard is recommended to be $4 million. The GDOT Emerging Small

Business employment size standard is recommended to be 100 workers. The revenue and employment size standards should be applied to the same industries in which they are applied by the SBA (see Figure 14).

FIGURE 14 SIZE STANDARD BY INDUSTRY RECOMMENDED FOR GDOT'S PROGRAM

GDOT Emerging Small Business NAICS Industry Description (2 digit Designation)	Revenue Size Standard	Employment Size Standard
Sector 11 – Agriculture, Forestry, Fishing and Hunting	$4,000,000	
Sector 21 – Mining, Oil and Gas Extraction, Utilities		100
Sector 23 – Construction	$4,000,000	
Sector 31 – 33 – Manufacturing		100
Sector 42 – Wholesale Trade		100
Sector 44 - 45 – Retail Trade (except car and fuel dealers)	$4,000,000	
Sector 48 - 49 –Air and Pipeline Transportation and Warehousing		100
Subsector 484 – Truck and Ground Transportation	$4,000,000	
Sector 51 – Information, Publishing, Music (except Software)		100
Subsector 512 – Motion Picture and Sound Recording Industries	$4,000,000	
Subsector 515 – Broadcasting (except Internet)	$4,000,000	
Subsector 517 – Telecommunications except Satelite		100
Subsector 518 –Data Processing, Hosting, and Related Services	$4,000,000	
Subsector 519 – Other Information Services	$4,000,000	
Sector 52 – Finance and Insurance, Leasing	$4,000,000	
Sector 54 – Professional, Scientific and Technical Services	$4,000,000	
Sector 55 – Management of Companies and Enterprises	$4,000,000	
Sector 56 – Administrative and Support, Waste Management	$4,000,000	
Sector 61 – Educational Services	$4,000,000	
Sector 62 – Health Care and Social Assistance	$4,000,000	
Sector 71 – Arts, Entertainment and Recreation	$4,000,000	
Sector 72 – Accommodation and Food Services	$4,000,000	
Sector 81 – Other Services	$4,000,000	
Sector 92 – Public Administration	$4,000,000	

4. **The Georgia General Assembly should modify the small business size standard in State of Georgia Small Business Code O.C.G.A. § 50-5-121 (1975, 1982, 2012). The modification will make it identical to the size standard recommended for the GDOT Emerging Small Business Program.**

On July 1, 2015, the new small business size standard implemented by the General Assembly took effect. The employment standard was changed from 399 employees to not more than 99 employees. The revenue standard was changed from $30 million to less than $1.0 million. This study recommends establishing the revenue standard at $4.0 million annually and employment standard at 100 workers. Furthermore, the standard should not be applied as 100 employees or $4 million in annual revenue. Instead, the revenue and employment size standards should be applied to the same industries in which they are applied by the SBA. (see Figure 14). If this recommendation were implemented, 68.8% of GDOT’s available firms meet these criteria.

The rationale for the recommendation is that the current employment size standard and revenue size standard are inconsistent. Specifically, if the State of Georgia employment size standard (100 employees) were applied to GDOT available firms, 78.5% would qualify as small businesses. In comparison, if the State of Georgia revenue size standard ($1,000,000) were applied to GDOT available firms, only 39.0% would qualify as small businesses. The average revenue of GDOT contractors with 100 or fewer employees is $4.018 million. If the State of Georgia adopted $4.0 million as the revenue threshold, 68.8% of GDOT available firms could qualify as small businesses.

To eliminate the inconsistency in the way small businesses are defined in the State of Georgia Small Business code, we recommend setting the revenue standard at $4 million and employment standard at 100 workers. Additionally, the revenue and employment size standard should be applied to the same industries in which the SBA applies them.

If this recommendation were implemented, 68.8% of GDOT's available firms would be eligible to qualify as small businesses by the State of Georgia code. These are the same size standards that we recommend GDOT to use to certify Emerging Small Businesses.

5. **Implement a set-aside provision for the Emerging Small Business Program. A set-aside is needed because businesses with $4 million or less in annual revenue were significantly underutilized by GDOT. This happened primarily because large firms competed successfully for very small contracts. Therefore, GDOT has a rational basis and legitimate government need for a set-aside provision for Emerging Small Businesses.**

Small businesses in Georgia play a vital role in creating jobs and economic activity in the State. They employ 1.5 million workers, or 47.3% of the State's workforce and GDOT's awards to small businesses created about 24,000 jobs and added $2.7 billion to Georgia's economic output between 2009 and 2014. During the last recession, Georgia's economy would have been hurt more severely and its recovery would have taken much longer had it not been for the continued job creation of small businesses.

Despite this contribution, they are significantly underutilized by GDOT. For example, businesses with $4 million or less in annual revenue comprised two-thirds of firms available to GDOT. However, they received only 7.0% of the value of GDOT prime contracts awarded between 2009 and 2014. Similarly, they received only 16.0% of the number of contracts valued at less than $.5 million.

More than one-half of Emerging Small Businesses had annual revenues that ranged from $1.0 million to $4.0 million. Presumably, they could have performed many of the $.5 million contracts efficiently. Most were won by large companies or by small businesses that were much larger in size than were Emerging Small Businesses.

As a result, it is very difficult for Emerging Small Businesses to compete successfully for smaller contracts. Therefore, the study recommends a set-aside provision for Emerging Small Businesses.

6. Take steps to minimize the impact of the set-aside program on large businesses and regular small businesses.

The following steps are recommended to minimize the impact of the Small Business Set-Aside.

k. First and most importantly, only Emerging Small Businesses should be eligible for set-asides. However, to implement set-asides, the Small Business Program must undertake the following steps outlined below.

l. All GDOT prequalified contractors, prequalified consultants, registered subcontractors and certified small business owners must be classified correctly by the NAICS or work code designations within which they are qualified to offer goods and services.

m. GDOT work codes must be linked to their corresponding NAICS designations.

n. The Small Business Program must maintain accurate information on the average revenue and current level of employment of businesses certified in the Small Business Program.

o. The Small Business Program must identify “set-aside eligible work codes”. An “eligible work code” is one in which certain solicitations may be set-aside for bid competition exclusively among Emerging Small Businesses.

p. Set-aside eligible work code must have five (5) or more certified Emerging Small Businesses that offer goods and services in the code.

q. In set-aside eligible work codes, the “median revenue” of Emerging Small Businesses is greater than the “median value” of GDOT contracts awarded in the work code (over the last three fiscal years). Median should not be confused with average. Median is the midpoint that separates the largest values from the smallest values. In plain terms, this criterion means that one-half of Emerging Small Businesses in the work code must have revenues that exceed 50% of the contracts awarded in the work code - when those contracts are ranked by their smallest to highest values.

r. For a solicitation to be awarded as a set-aside, we recommend that it must receive at least three bids from Emerging Small Businesses. Otherwise, the solicitation may be rebid for competition among all contractors.

s. Finally, Figure 15 identifies set-aside eligible work codes that are recommended by this report.

7. **Review and update Set-aside eligible work codes each fiscal year by taking into consideration the following information.**

    a. The number and value of contracts awarded over the last three fiscal years, by work code;

    b. The estimated number and value of contracts forecast to be awarded over the coming fiscal year;

    c. The number of GDOT vendors available for prime contract awards (where an available firm is defined as a prequalified contractor, prequalified consultant or registered subcontractor); and

    d. The average revenue and current employment level of each firm certified in the Emerging Small Business Program.

8. **Take aggressive steps to register businesses that are eligible to participate in the Emerging Small Business Program.**

The success of the emerging small business set-asides depends critically upon the ability of GDOT's Small Business Program (SBP) to enroll potentially eligible businesses. The report estimates that there are 2,171 prequalified contractors, prequalified consultants, registered subcontractors and certified small businesses that potentially are eligible for the Emerging Small Business Program. GDOT should attempt to register as many of those businesses as possible in the Tier 1 and Tier 2 SBP.

FIGURE 15 ESTIMATE OF SET-ASIDE ELIGIBLE WORK CODES

GDOT WORK CODE	Number of GDOT Awards in Work Code	Median Valued of GDOT Awards in Work Code	Median Revenue of Emerging Small Businesses in Work Code (weighted estimate)	Number of Emerging Small Businesses in Work Code (weighted estimate)	Set-Aside Eligible Work Code: YES, NO, TBD = to be determined	Cut Value for the Smallest 25% of Awards in Work Code
STATEWIDE SYSTEM PLANNING	379	$60,055	$373,364	7	YES	$22,610
TRAFFIC CONTROL AND SIGNAL INSTALLATIONS	54	$846,122	$1,586,029	54	YES	$496,528
COMPUTER SYSTEMS AND DESIGN			$250,000	4	TBD	
CONSULTING AND ADMINISTRATIVE SERVICES			$205,574	32	TBD	
DRAINAGE STRUCTURES	10	$649,044	$1,028,184	7	YES	$419,365
GENERAL ADMINISTRATIVE SERVICES			$300,000	25	TBD	
JANITORIAL AND SECURITY SERVICES			$1,504	4	TBD	
HAULING AND TRUCKING	18	$847,686	$573,904	284	NO	$441,842
ERECTION OF MAJOR STRUCTURES, BRIDGES, CULVERTS	25	$2,579,110	$301,150	7	NO	$1,154,829
ELECTRICAL AND COMMUNICATIONS SERVICES	3	$1,008,223	$145,417	14	NO	$878,862
GRASSING AND GRADING			$2,000,000	4	TBD	
ASPHALT AND CEMENT PAVING	427	$697,958	$15,000,000	410	YES	$389,985
SUBSURFACE ENGINEERING AND EROSION CONTROL	1	$1,083,991	$520,183	43	NO	$1,083,991
CURBS, GUTTERS AND GUARD RAILS	7	$707,617	$2,036,171	11	NO	$206,898
SPECIALTY ITEM AND EQUIPMENT RENTALS	5	$2,160,350	$622,137	4	NO	$696,450
FIBER OPTICS AND TELECOMMUNICATIONS	1	$436,298	$2,307,542	18	NO	$436,298
CIVIL AND ENVIRONMENTAL ENGINEERING			$703,992	14	TBD	
MIXED MODAL PLANNING	17	$112,631	$778,890	65	YES	$40,149
CLEARING, GRUBBING, EXCAVATION	15	$707,289	$556,444	119	NO	$473,817
CONSTRUCTION: GENERAL CONTRACTING AND BUILDING	1	$1,224,121	$491,740	187	NO	$1,224,121
PAINTING AND STRIPING	4	$953,192	$456,095	36	NO	$365,939
STRUCTURAL STEEL ERECTION	1	$4,712,160	$3,500,138	4	NO	$4,712,160
MASS TRANSIT PLANNING	16	$127,109	52,417,464	29	YES	$567,673
FENCING			$750,480	32	TBD	
HYDRAULIC SYSTEMS INSTALLATION	2	$5,996,422	$1,200,000	40	NO	$757,911
HIGHWAY CONSTRUCTION, STREETS AND BRIDGES	517	$1,510,672	$1,200,000	76	NO	$686,558
SOIL, CEMENT CONSTRUCTION			$2,205,389	7	TBD	
MANUFACTURING, BEARINGS, METALS			$180,172	11	TBD	
ENVIRONMENTAL CONSULTING	161	$30,898	$2,200,000	299	YES	$12,131
ARCHITECTURAL AND CIVIL ENGINEERING	160	$45,286	$673,000	151	YES	$17,095
SIGNAGE			$1,129,644	11	TBD	
SCIENTIFIC SERVICES, SURVEYING, MATERIALS TESTING	2	$587,635	$1,587,048	130	NO	$30,972
CONCRETE RETAINING WALLS AND STRUCTURES	26	$1,694,188	$682,319	25	NO	$1,104,022
FOUNDATION WORK			$1,386417	7	TBD	
OVERALL TOTAL OR VALUE	1852	$469,111	$1,448,185	2171		$81,118

Note: TBD means to be determined at a later date. Currently, there is either not enough information to make a determination or GDOT has not made awards in the industry.

Assumption: The number of Emerging Small Businesses estimated in the figure assumes that all GDOT vendors who meet the revenue and employment size standards are enrolled in the Emerging Small Business Program.

The Regular Small Business Program

The following recommendations are taken from a review of national best practices in implementing small business programs. The review included the following material:

a. Continue to implement the current race-neutral activities of the Small Business Program.

b. Document the economic impact of small businesses that received GDOT contracts. Create a periodic report on the number of jobs created by small businesses as a result of GDOT contracting and the stimulus that contract awards provide to local economies.

c. Document the growth and development in the capacity of firms in the Small Business Program. Track their ability to compete successfully in open competition for larger size contracts.

d. Identify and address any real or potential barriers to small business success (in the form of paperwork burdens, bonding, contract specifications, etc.).

e. Annually evaluate the effectiveness of the Small Business Program. Go beyond the normal metrics that simply focus on utilization, and document the program's impact on small business development and its impact on the creation of new jobs and economic output in Georgia.

f. Document the contribution of a small business program to increase in the DBE opportunity.

g. Establish a Small Business Advisory Committee to provide guidance and assistance on the implementation of Programs. Members should consist of representatives from major trade associations, corporations with successful supplier diversity programs, business owners who successfully transitioned their enterprise from small to large scale, and other business or civic leaders and small business advocates.

h. Engage in internal matchmaking by identifying viable small business contracting opportunities and notifying small business owners of such opportunities promptly.

i. Avoid the tendency to provide “one shoe fits all” type of assistance to small businesses. Take into consideration their respective stage of growth and development. The four stages are as follows: Stage 1: Start-up and proof of concept; Stage 2: Early growth and market penetration; Stage 3: Professionally managed enterprise; and Stage 4: Mature corporation.

j. Make an inventory of local organizations that provide technical assistance and supportive resources to small businesses.

k. Build a GDOT small business “ecosystem” that supports the growth and development of small businesses. The ecosystem should provide technical assistance, streamline regulations, create networking opportunities and identify mentorships and funding opportunities.

l. Continue to conduct regular outreach efforts through print media, electronic media, small business events, forums, workshops, trainings and special events.

m. Collaborate with other local governmental agencies to sponsor small business outreach events.

n. Sponsor matchmaking conferences to connect small businesses with corporate sourcing officers and government procurement officials.

o. When necessary, provide instructions for preparing bid specifications.

p. Sponsor intensive workshops and one-on-one training sessions to identify small business problem areas.

q. Collaborate with construction industry trade association representatives to establish low-cost skill intensive training sessions to improve small business success.

r. Maintain an updated and electronic small business directory.

s. Establish a Small Business Advisory Committee. The committee will assist in the following manner:

    1. Provide advice and guidance on implementing the program.

2. Provide assistance in getting the General Assembly to pass a constitutional amendment for the Emerging Small Business Set-Aside Program.

3. Strengthen the GDOT Board's understanding and support of the program and make it aware of the program's challenges.

4. Annually evaluate the effectiveness of the small business program.

5. Make recommendations for improving the program's effectiveness.

6. Connect small businesses to information and resources.

7. Help streamline services and resources for small business owners.

8. Provide platforms for networking.

t. Celebrate and publicize the successes of small businesses in the program. Recognize the contributions of small businesses to the economic vitality of the State.

u. Small businesses help build the foundation for a resilient local economy by providing jobs to residents, contributing to sales tax revenues, and attracting tourists and other visitors. GDOT should explore ways to formally recognize their contribution to State, periodically.

v. Encourage small businesses to enhance their web presence, because a strong online presence is helpful to establishing a recognizable brand presence.

w. Provide information to small business owners regarding the most efficient techniques for identifying and staying abreast of bid opportunities.

CONCLUSIONS

Federal Regulation 49 CFR Part 26 requires the Georgia Department of Transportation (GDOT) to implement a Small Business Program because the agency receives federal highway funds. The regulation stipulates that the Small Business Program must be available to all businesses that meet the U.S. Small Business Administration (SBA) small business size standard. That standard varies by industry. In 2012, the GDOT established a Small Business Program. At the time, the State Transportation Board concluded that the most effective way to implement the Program would be to set-aside certain small contracts for bid competition among small businesses only. However, Georgia State law appears to prohibit set-asides because they restrict competition. This report examined GDOT's utilization of small businesses on highway projects and evaluated whether a set-aside is needed to increase opportunities for small businesses. It also looked at the impact of small businesses on the State's economy.

The report found that small businesses play a vital role in Georgia's economy. They employ 1.5 million workers or 47.3% of the State's workforce. The highway contracts awarded to small businesses by GDOT between January 2009 and May 2014 were estimated to have created about 24,000 new jobs and $2.7 billion new economic output. During the last recession, major corporations in Georgia cut jobs significantly, but job cuts in small businesses were much smaller. In fact, Georgia's economy would have been hurt more severely, and its recovery would have taken much longer had it not been for small businesses.

Despite the substantial contribution of small businesses to Georgia, one segment of small businesses encountered considerable difficulties in competing for contracts at GDOT. For example, the study looked at the segment of GDOT's small businesses that had $4 million or less in annual revenue; they were labeled Emerging Small Businesses. That segment made up 66.4% of all GDOT's prequalified and registered contractors. Emerging Small Businesses were unable to compete successfully for small projects, e.g., those $500,000 and smaller. Specifically, they received only 7.0% of the total value of awards $500,000 and smaller and only 16.0% of the total number of such projects - even though one-half of Emerging Small Businesses had annual revenues between $1.0 and $4.0 million. Although Emerging Small Businesses had the capacity to perform small projects, they could not compete against large businesses, which comprised 12.8% of all GDOT contractors but received 42.0% of the total value of awards $500,000 and smaller. Nor could Emerging Small Businesses compete successfully against other small businesses, i.e. those with annual revenues greater than $4.0 million. They made up 20.8% of GDOT's registered contractors and received 51% of the value of awards $500,000 and smaller. The research concluded that Emerging Small Business were unsuccessful not because they lacked capacity, but because large businesses and other small businesses competed against them on small projects, those for which they had the capacity to perform.

The study found that the underutilization of Emerging Small Businesses at GDOT was not just because small firms lacked capacity. It was also because large businesses and other small businesses competed down the "food chain" for small projects. Therefore, the research concluded that GDOT and the Georgia General Assembly have a rational basis and legitimate government need for a small business set-aside program at GDOT. To minimize the impact of a set-aside on other firms, the study recommended segmenting the current Small Business Program into two tiers. Tier 1 should include Emerging Small Businesses only (i.e. those with $4 million or less in annual revenue and 100 or fewer employees). Selected contracts should be set-aside for Tier 1 firms only. Small businesses that are not eligible for Tier 1 should be included in Tier 2, as long as their size does not exceed the U.S. Small Business Administration's size standard. Those businesses should be eligible for all of the benefits of GDOT's current Small Business Program.