



State of Ohio
Office of the Inspector General

THOMAS P. CHARLES, Inspector General

REPORT OF INVESTIGATION

FILE ID NUMBER: 2008239

AGENCY: Ohio Department of Transportation

BASIS FOR INVESTIGATION: Agency Referral

ALLEGATIONS: Mismanagement, Contract Fraud

INITIATED: August 14, 2008

DATE OF REPORT: February 25, 2009

Executive Summary
File Number 2008239

On June 19, 2008, the Office of Contracts at the Ohio Department of Transportation (ODOT) reported that two ODOT construction vendors had potentially committed fraud by submitting false and misleading information to conceal noncompliance with Ohio's EDGE (**E**ncouraging **D**iversity **G**rowth & **E**quity) requirements. On August 14, the Ohio Inspector General initiated an investigation into the allegation reported by ODOT.

In the course of investigating the allegations, we confirmed that the construction firms did, in fact, submit false and misleading documents and information to ODOT. Ironically, though, we also learned that it was ODOT's misunderstanding and misapplication of EDGE requirements which provided the framework for this breach of contract.

The two companies named in this complaint are the prime contractor, TAB Construction ("TAB"), and subcontractor, Andrell Inc. ("Andrell"). Both are EDGE-certified. TAB is owned by William E. Richardson; Andrell is owned by his sister, Andrea Richardson-Sutherland. Both TAB and Andrell operate out of the same building in Canton. Also, at the time of the project in question, Andrea Richardson-Sutherland's husband (Kevin Sutherland) was an employee of TAB. The scope of this construction project was the replacement of a drainage pipe, known as a culvert, on State Route 18 in Medina County.

It is clear from the records we reviewed that TAB did not meet the EDGE subcontractor utilization goal, as specified by ODOT. [See Exhibit A.]¹ Our investigation established that project records submitted by TAB and Andrell incorrectly reflected compliance with ODOT's subcontractor EDGE requirement. TAB failed to avail itself of a waiver,² which provides recourse when an EDGE subcontractor has not been fully utilized on the project as originally intended. [See Exhibit C.]

¹ In an effort to meet the EDGE goal, ODOT offers construction work through a public bid process which contractually binds winning bidders to use EDGE subcontractors. Through written acknowledgement, winning bidders agree to utilize EDGE subcontractors in accordance with a predetermined goal set forth in ODOT's bid specifications.

² A waiver allows contractors to seek an exemption from EDGE requirements for good cause. [See Exhibit B, Section 7.4.] The waiver provision is also contained in the proposal itself. [See Exhibit A, page 6.]

However, it is equally clear from ODOT records and interviews that ODOT's EDGE administrators misconstrued the EDGE requirements vis-à-vis *subcontractors*, in the first instance. Interviews with ODOT administrators establish that they incorrectly believed that EDGE compliance is solely hinged to EDGE *subcontractor* utilization. According to DAS officials, as well as the State Procurement Handbook, this belief is in error. EDGE goals are satisfied where procurement is made from *either* an EDGE-certified *contractor* or *subcontractor*. In other words, ODOT's bid specifications erroneously required TAB to utilize an EDGE-certified subcontractor, despite the fact that, as an EDGE-certified contractor, TAB would have satisfied the EDGE goal for the project on its own.

The fact that EDGE goals were ultimately met certainly has mitigating impact in this case. TAB and Andrell, however, are not excused from submitting false and misleading documents relative to this public contract.

Accordingly, we find that wrongful acts or omissions occurred on the part of TAB and Andrell, as well as ODOT in this case.

We make three recommendations addressing the issues identified in this report, and ask ODOT to respond within 60 days.

A copy of this report is being forwarded to the Franklin County Prosecutor's Office.

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EXHIBITS

- A. ODOT Project 060500 Proposal and bid specifications
- B. DAS State Procurement Handbook, Chapter 7: MBE & EDGE
- C. Request to Sublet for Andrell, Inc.*
- D. Executive Order 2002-17T
- E. Ohio Revised Code §123.152
- F. ODOT analysis of project records vs. Andrell, Inc., payroll records
- G. Sutherland email from November 8, 2007
- H. First Affidavit of Subcontractor Payment, dated December 18, 2007
- I. Revised Affidavit of Subcontractor Payment, dated June 9, 2008
- J. Andrell, Inc. Certified Payroll records
- K. Tonia Davis email from June 10, 2008

*The handwritten notes appearing on this exhibit were made by ODOT Contract Coordinator Merka Flynn, as provided to the OIG.

I. BASIS FOR INVESTIGATION

On June 19, 2008, staff from the Office of Contracts at the Ohio Department of Transportation (ODOT) reported to the Office of the Inspector General (OIG) a case of potential fraud concerning the EDGE (Encouraging Diversity Growth & Equity) requirements by two construction companies on an ODOT construction project. In their review of project records, the ODOT personnel identified several irregularities which gave rise to the concern of possible fraud. These concerns fell into two general categories: failure to comply with the EDGE subcontracting requirements, which would constitute a breach of contract by the prime contractor; and the submission of false or fraudulent records by the prime and subcontracting firms in an attempt to conceal the noncompliance.

II. ACTIONS TAKEN IN FURTHERANCE OF INVESTIGATION

In the course of the investigation, we reviewed contract documents, project records, and email correspondence between and among ODOT Central Office and District 3 (Ashland) personnel and representatives of the prime and subcontractor. We also conducted interviews with the Central Office staff involved in project review, as well as with the District 3 staff involved in the administration and oversight of the construction project. The Ohio Revised Code (ORC), Ohio Administrative Code, and the Department of Administrative Services (DAS) State Procurement Handbook sections pertaining to the EDGE program were reviewed. Additionally, the DAS program manager for the administration of the EDGE program for the State of Ohio was interviewed. Finally, we interviewed the business owners, William Richardson of TAB Construction and his sister, Andrea Sutherland, owner of Andrell, Inc.

III. DISCUSSION

The EDGE program is designed to help socially and economically disadvantaged companies develop into successful businesses by requiring state agencies to procure a certain percentage of goods and services from EDGE-certified vendors. The EDGE program was originally

established by Executive Order 2002-17T. [See Exhibit E.] EDGE was given statutory force through ORC Section 123.152. [See Exhibit F.]

To qualify as an EDGE vendor, a firm must be a small, socially and economically disadvantaged business enterprise owned and controlled by a United States citizen who is also an Ohio resident. Factors considered to qualify for social disadvantage include race, ethnic origin, gender, physical or mental disability, and location in an economically depressed area, among others.

Overall administration of the EDGE program is the responsibility of DAS, which is required to set EDGE procurement goals, as well as monitor and report state agency compliance. Primary responsibility for monitoring EDGE compliance rests with the respective state agencies' equal opportunity officers. [See ORC 123.152(B)(13)]. EDGE policies and procedures are set forth in the DAS procurement handbook, Chapter 7. [See Exhibit B.] The state EDGE goal for state agencies to meet is currently set at least 5% of awarded contracts. For the project reviewed in this investigation, ODOT established a 10% goal.

The EDGE program operates on a basis of establishing goals for each state agency to utilize EDGE-certified businesses for the purchases of goods and services, including construction. Participation in the EDGE program by a business is the basis to determine whether work performed by that business accrues towards a state agency's goal for EDGE utilization. Where a prime contractor is an EDGE-certified business, 100 % of the project work applies towards an agency's EDGE goal. EDGE subcontracting requirements are only needed for situations in which the prime contractor is a non-EDGE-certified firm.

Prime contractors are required to submit a "Request to Sublet" form to ODOT for approval. Among other things, this form identifies specific tasks in the project plan to be performed by an EDGE-certified subcontractor. This is an important part of ODOT's process for tracking EDGE participation and compliance where a non-EDGE prime contractor is proposing to meet EDGE goals through an EDGE-certified subcontractor.

Where ODOT eliminates or otherwise reduces project requirements, thereby impacting the prime contractor's intended utilization of an EDGE-certified subcontractor, the prime contractor may

request from ODOT a waiver of the EDGE goal equal to the value of the cancelled or reduced tasks.³

Additionally, prime contractors are supposed to follow a project schedule, which includes identifying when subcontractors will be on the project site. This is to ensure that ODOT is able to have appropriate personnel on the job site to perform inspections and provide appropriate oversight of the project work. Upon completion of a project, the prime contractor is required to submit an “Affidavit of Subcontractor Payment” within 15 days in order for ODOT to verify whether the EDGE subcontractor was utilized in accordance with contract specifications relative to EDGE requirements.

Allegation 1: TAB Construction failed to comply with ODOT’s EDGE subcontracting requirements.

The two companies named in this complaint are the prime contractor, TAB Construction (“TAB”), and subcontractor, Andrell Inc. (“Andrell”). Both are EDGE-certified. TAB is owned by William E. Richardson; Andrell is owned by his sister, Andrea Richardson-Sutherland. Both TAB and Andrell operate out of the same building in Canton. Also, at the time of the project in question, Andrea Richardson-Sutherland’s husband (Kevin Sutherland) was an employee of TAB.

The scope of this construction project was the replacement of a drainage pipe on State Route 18 in Medina County. TAB Construction (“TAB”) was the lowest bidder among twelve construction companies that submitted competitive bids for the project, and was awarded the contract for \$218,297.96. Work on the project began on April 6, 2007, and was completed on July 18, 2007, earlier than the target completion date of July 31, 2007.

In accordance with ODOT’s specific contract terms requiring EDGE subcontractor use, as well as in accord with ODOT’s policy relative to subcontracting in general, TAB submitted a “Request to Sublet” form identifying Andrell as the intended EDGE subcontractor on the project.

³ See Exhibit C, Section 7.4. The waiver provision is also contained in the proposal itself. [See Exhibit D, page 6.]

TAB's Request to Sublet identified fifteen specific tasks that Andrell was to perform. [See Exhibit C.] Andrell was to be paid \$22,333.80 for this work, thereby satisfying the EDGE subcontracting goal established by ODOT for this project.

During the course of the project, ODOT altered the scope of work from the original plans,⁴ eliminating seven project assignments from among the fifteen tasks TAB had intended for Andrell to complete. The elimination of seven of Andrell's work tasks resulted in reducing Andrell's overall utilization well below the established EDGE subcontracting requirement set by ODOT for this project. Project records reveal that TAB did not avail itself of a waiver of the EDGE subcontracting requirement permitted by both statute and ODOT procurement policies which contemplate a reduction in work initiated by the state agency.

Project records also reveal that several of the tasks documented by TAB, as performed by Andrell, were completed in April, May and early June. However, a review of Andrell's payroll records shows that Andrell employees were only on the project site from late June 27, 2007 to July 4, 2007. And, these records further reveal that Andrell only performed one task from TAB's proposed subcontractor work plan. [See Exhibit G.]

TAB did not properly notify ODOT of Andrell's project site schedule. According to ODOT site manager, Charles Laughrey, he was not notified by TAB when Andrell would be working at the project site. Laughrey said that prime contractors are required to identify when subcontractors will be on the project site to ensure that ODOT can perform inspections and provide appropriate oversight. Laughrey reported that he observed skilled workers from Andrell performing non-skilled, basic laborer, tasks not included on TAB's proposed subcontractor work plan.

The evidence documents that TAB did not comply with ODOT's specified EDGE subcontractor requirements set forth in the contract.

Accordingly, we find reasonable cause to believe that a wrongful act or omission occurred in this instance.

⁴ Per ORC 5525.14, ODOT may add, alter or eliminate project plans.

Allegation 2: TAB Construction and subcontractor Andrell, Inc., submitted false and misleading records to ODOT relative to their performance in a public contract .

As previously noted, TAB completed the project on July 18, 2007. ODOT policy and contract terms require prime contractors to submit an “Affidavit of Subcontractor Payment” within 15 days of project completion. This allows ODOT to verify whether EDGE subcontracting requirements were met for a given project. TAB did not meet this requirement.

The records reflect an email sent to ODOT Contract Administration Coordinator Jeff Peyton on November 8, 2007, from Kevin Sutherland, husband of Andrell owner Andrea Richardson-Sutherland (TAB employee at that time). In this email, Sutherland reports that Andrell had performed two of the tasks originally proposed by TAB, for which Andrell was paid \$5,831. [See Exhibit H.] Sutherland’s email evidences TAB’s deficient EDGE subcontractor utilization. According to the original Request to Sublet for Andrell, submitted by TAB to ODOT January 4, 2007, TAB’s EDGE subcontractor utilization was to be \$22,333.80.

According to ODOT program administrators, an attempt to obtain verification of EDGE subcontractor utilization from TAB occurred in August 2007. TAB submitted an Affidavit of Subcontractor Payment on December 18, 2007, stating that payment to Andrell totaled \$22,451.78. [See Exhibit I.]

In February 2008, ODOT attempted to reconcile the discrepancy between Sutherland’s November 8, 2007 email and TAB’s December 18, 2007 affidavit. As a result of numerous inquiries by ODOT contract staff, TAB submitted another affidavit reflecting \$22,333.80 payment to Andrell [See Exhibit J.], with certified payroll records for Andrell employees who worked on the project. [See Exhibit K.]

On June 10, 2008, Tonia Davis, Quality Control Assistant for TAB, sent ODOT a fax transmission reflecting TAB’s original proposal for Andrell to perform fifteen tasks. The fax also includes a statement by Davis incorrectly representing that Andrell completed all fifteen. [See Exhibit L.] However, project records clearly reveal that ODOT eliminated seven of the fifteen tasks prior to project completion, and that these seven items were, in fact, not performed on this project.

ODOT project manager Laughrey compared the payroll records provided by Andrell to project records kept by ODOT inspectors and engineers during the project. This analysis shows that most of the remaining tasks assigned to Andrell, not previously eliminated by ODOT, were completed on days that Andrell employees were not on the job site. [See Exhibit G.] Laughrey found that only one Andrell task, waterproofing, was performed during the time Andrell's employees were actually on the job site.

In an interview with Richardson and Sutherland, they acknowledged negligence in failing to keep accurate project records and in the submission of inaccurate project documentation, including the Affidavit of Subcontractor Payment, subsequent to the completion of the project. They pointed to a lack of due diligence on the part of company representatives to verify work performed by Andrell. In their words, their employees relied on the original Request to Sublet that identified tasks to be performed by Andrell and assumed that Andrell had performed all tasks as originally planned. In the interview, Richardson reviewed the Request to Sublet for Andrell and immediately identified the tasks that ODOT removed from the project, at the same time acknowledging that representations about the amount of work performed by Andrell could not have been accurate. Regardless of the contractors' intentions, the result remains that the contractors submitted false and misleading documentation to ODOT relative to this construction contract.

Accordingly, we find reasonable cause to believe that a wrongful act or omission occurred in this instance.

Other issue: ODOT administrators misconstrued and misapplied the state's EDGE program requirements.

In interviews with the ODOT EDGE program manager and administrative staff for the program, they were adamant that EDGE goals for construction projects were *subcontracting* goals, and that *all* prime contractors had to comply with the subcontracting provisions. Even when asked if the subcontracting goals applied where the project had an EDGE-certified prime contractor, their answer remained unchanged.

We interviewed Todd McGonigle, the state EDGE program manager with the DAS Equal Opportunity Division. McGonigle said that, in instances in which a prime contractor is an EDGE-certified business, 100 percent of the project work applies towards an agency's EDGE goal. He also added that ODOT's EDGE subcontractor requirement on a project where the contractor is also EDGE-certified is, in his characterization, "a significant misunderstanding" of the administrative requirements of the EDGE program. Examining the facts concerning this project, McGonigle concluded that ODOT had no reason to require use of EDGE subcontractors for any portion of this project, given TAB's status as an EDGE-certified contractor.

EDGE policies and guidelines are clearly outlined in Chapter Seven of the State of Ohio Procurement Handbook. Nowhere in the Handbook is there a requirement that EDGE goals be met solely via subcontracting. Subcontracting is but one avenue identified as a means for a state agency to reach EDGE objectives.

Accordingly, we find reasonable cause to believe that a wrongful act or omission occurred in this instance.

IV. CONCLUSION

Although not required to do so, ODOT specified an EDGE subcontracting requirement. This stipulation was part of the project requirements by which TAB was to abide, and TAB operated under the premise that the subcontracting requirement had to be met. The records evidence that TAB failed to comply with these terms.

And, it appears that a significant factor in TAB's falling short of this requirement was alterations of the project plans by ODOT. However, TAB had legitimate recourse -- pursue a waiver from ODOT. Rather, TAB opted to submit contradictory and misleading records to ODOT.

On page six of the ODOT proposal packet from which interested contractors prepare their bids, it specifies that the EDGE goal for the project "must be subcontract(ed) to certified EDGE firms." [See Exhibit A.] As explained by the state EDGE program administrator from DAS, EDGE goals are established for *participation* by EDGE-certified firms, which can occur in any fashion,

not necessarily via subcontracting. Since the prime contractor for this project was an EDGE-certified firm, *all* expenditures by ODOT for this project count towards the department's EDGE goal. By focusing only on the EDGE subcontracted amount for this project, as opposed to the total project cost, ODOT underreported expenditures towards its departmental EDGE goal by approximately \$175,000.

This investigation revealed confusion on the part of ODOT's EDGE administrator with respect to EDGE policies and objectives. The DAS Equal Opportunity Division makes training on the administration and goals of the EDGE program available to all state agencies twice per year. DAS also provides any state agency individualized training, as well as technical support and policy interpretation.

In light of the findings of this investigation, a copy of this report is being forwarded to the Franklin County Prosecutor's Office.

V. RECOMMENDATIONS

Based on the results of our investigation, the OIG makes the following recommendations and further requests that ODOT respond to this office within 60 days with a plan as to how the recommendations will be implemented:

1. ODOT should review and evaluate the findings of this report and all departmental records relative to the construction project to determine if administrative action against TAB Construction and/or Andrell is warranted;
2. ODOT should review and revise all proposal, bid guidelines, and contract documents to ensure consistency and compliance with EDGE program guidelines and with the overall program objectives established by the Department of Administrative Service's Equal Opportunity Division; and
3. ODOT should seek additional training concerning the administration of the EDGE program for all program staff and supervisors.