

SECTION ES.

Executive Summary

The Oklahoma Department of Transportation (ODOT) encourages utilization of minority- and women-owned firms in its contracts when implementing the Federal Disadvantaged Business Enterprise (DBE) Program. Although agencies such as ODOT are required by the U.S. Department of Transportation (USDOT) to implement the Program in order to receive USDOT funds, state DOTs must tailor implementation of the Program to their unique markets.

ODOT engaged a team led by BBC Research & Consulting (BBC) to prepare a disparity study focusing on ODOT's transportation construction and engineering contracts. The disparity study will assist ODOT in making decisions concerning future implementation of the Federal DBE Program.

Groups throughout the country have made legal challenges to how state DOTs and other agencies have implemented the Federal DBE Program. The disparity study provides ODOT with additional information to ensure that it is meeting legal standards for Program implementation. It is an independent, objective assessment of ODOT's past utilization of minority- and women-owned firms.

There are steps ODOT could take to open more contracting opportunities to small businesses and minority- and women-owned firms (MBE/WBEs). The disparity study examines these topics in considerable detail. This Executive Summary briefly answers the following questions:

1. Who performed the disparity study?
2. What is the Federal DBE Program?
3. Why did ODOT undertake the disparity study?
4. What does a disparity study include?
5. What proportion of firms available for ODOT contracts are MBEs and WBEs?
6. What share of ODOT contract dollars might be expected to go to MBEs and WBEs?
7. What share of ODOT contract dollars did go to MBEs and WBEs?
8. Was there a disparity between the utilization and availability of MBEs and WBEs on ODOT contracts?
9. What are conditions for minorities and women within the Oklahoma marketplace?
10. How can ODOT use study results when setting an annual goal for DBE participation?
11. How can ODOT use study results to project the portion of its annual DBE goal to be met through neutral means?
12. Can ODOT continue to use race- and gender-conscious measures such as DBE contract goals?
13. Which racial/ethnic/gender groups of DBEs might be considered eligible for any future race- and gender-conscious program elements?
14. What are ODOT's next steps?

1. Who performed the disparity study?

BBC is a Denver-based economic research firm that is one of the leading disparity study consultants in the United States, having conducted disparity studies for more than 70 government agencies since 1989. The disparity study team included:

- **BBC Research & Consulting (BBC) — prime consultant**, a Denver-based research firm. BBC had overall responsibility for the study and performed most of the quantitative analyses.
- **Holland + Knight LLP (H+K)**, a national law firm. H+K conducted the legal analysis that provided the basis for the study and also performed in-depth personal interviews of business owners and trade associations.
- **Technology and Management Solutions (TMS)**, an Oklahoma-based minority woman-owned firm specializing in operations and information technology. TMS assisted in contract data collection and analysis. TMS also conducted in-depth interviews with local businesses.
- **M&M Business Consultants (M&M)**, a minority woman-owned firm in Oklahoma that provides training and other services for MBE/WBEs. M&M staff conducted in-depth interviews with Oklahoma business owners and trade associations.
- **Customer Research International (CRI)**, a minority-owned telephone survey firm in San Marcos, Texas. Under BBC's direction, CRI conducted telephone interviews with construction and engineering companies across Oklahoma.

Section I of the report provides more information about the study team.

2. What is the Federal DBE Program?

The federal government requires state and local governments to implement the Federal DBE Program if they receive U.S. Department of Transportation (USDOT) funds for transportation projects.¹

- ODOT has been implementing some version of a Federal DBE Program since the 1980s.
- The Federal DBE Program is intended to ensure nondiscrimination in the award and administration of USDOT-assisted contracts, including contracts funded in part through the Federal Highway Administration (FHWA). The Program is intended to remedy past and current discrimination against disadvantaged business enterprises, and ensure a “level playing field” in which those firms can compete fairly for USDOT-funded contracts.²

¹ 49 CFR Section 26.21.

² <http://www.dotcr.ost.dot.gov/asp/dbe.asp>.

Federal regulations (49 CFR Part 26) guide how state and local governments implement the Federal DBE Program.³

- In Oklahoma, ODOT is responsible for certifying firms as DBEs according to the regulations in the Federal DBE Program. Firms can only be certified as DBEs if they meet criteria for social and economic disadvantage. In the Federal DBE Program, minority- and women-owned firms are presumed to be socially disadvantaged. Certification criteria for economic disadvantage include business revenue and personal net worth of the business owner.
- State and local agencies, including ODOT, develop overall annual goals for utilization of DBEs in their USDOT-funded contracts. An agency expresses its annual DBE goal as a percentage of its contract dollars that might be expected to go to DBEs absent any effects of discrimination.
- If necessary, the Federal DBE Program allows state and local agencies to apply DBE goals to specific contracts, which ODOT has done for certain of its FHWA-funded contracts. ODOT does not set DBE contract goals on contracts that do not include FHWA funds (the study refers to these non-federally-funded contracts as “state-funded contracts”).
- When awarding FHWA-funded contracts, ODOT considers whether or not a bidder meets the DBE contract goal (by including DBEs as subcontractors in the project) or shows good faith efforts to do so.
- The Federal DBE Program lists minority groups (as well as women) presumed to be socially disadvantaged and eligible to participate in measures such as DBE contract goals. However, some state and local agencies limit participation in race- and gender-conscious elements of the Program to certain racial, ethnic or gender groups. For example, some state departments of transportation have received a waiver from USDOT that allows them to set contract goals for “Underutilized DBEs” (UDBEs), rather than all DBE groups.

3. Why did ODOT undertake the disparity study?

Study results will help ODOT make decisions concerning its implementation of the Federal DBE Program. Future ODOT decisions include:

- Its overall annual goal for DBE participation in FHWA-funded contracts;
- Specific program elements, including measures to increase the participation of all small businesses; and
- Whether all DBE groups would be eligible to participate in any race- and gender-conscious measures such as DBE contract goals, or whether eligibility would be limited to UDBEs.

³ <http://www.fhwa.dot.gov/HEP/49cfr26.htm>.

Throughout the country, a number of non-minority contractors and other groups have filed lawsuits challenging the constitutionality of the Federal DBE Program, or the constitutionality of state and local governments' implementation of the Program. Information provided in the disparity study will help ODOT ensure that its implementation of the Federal DBE Program is in compliance with guidance from USDOT and the courts, including U.S. Supreme Court decisions.⁴ Legal issues are explained in Section I and Appendix A of this report.

4. What does a disparity study include?

Disparity studies typically include analyses of whether there is a *disparity* between the utilization and availability of minority-owned firms (MBEs) and white women-owned firms (WBEs).

- “Utilization” refers to the percentage of an agency’s contract dollars that went to MBEs and WBEs over a number of years.
- “Availability” refers to the percentage of contract dollars that one might expect to go to MBEs and WBEs given the number of MBEs and WBEs (relative to all firms) available for specific types and sizes of agency prime contracts and subcontracts.

BBC included both certified and non-certified MBEs and WBEs in the utilization and availability results so that the disparity analysis would identify any potential barriers related to race, ethnicity or gender of the business owner (rather than size of business).⁵ For purposes of this study, “minority” follows the definitions from the Federal DBE Program: African Americans, Asian-Pacific Americans, Subcontinent Asian Americans, Hispanic Americans and Native Americans. To further isolate the possible effects of gender, “WBEs” refers to white women-owned firms in this disparity study. Firms owned by minority women are included in the utilization and availability results for minority-owned firms (see Section IV of this report for more detail about why BBC classifies WBEs in this way).

- To perform the utilization analysis, the BBC study team examined about 8,000 ODOT prime contracts and subcontracts related to FHWA- and state-funded transportation contracts from July 2004 through June 2009, totaling \$3.3 billion. The study team examined location, types of work involved, size of the contract or subcontract, year of the contract and whether DBE contract goals applied.
- In the availability analysis, the study team successfully contacted more than 2,100 Oklahoma firms doing business in relevant subindustries to discuss whether they were qualified and interested in ODOT work, the types of work they conduct, sizes of contracts they perform and other firm characteristics.
 - Not all firms reported qualifications and interest in ODOT work.
 - A business that did express qualifications and interest in ODOT work was typically only available for certain types, sizes and locations of ODOT prime contracts and subcontracts.

⁴ *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989) and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

⁵ If the disparity analysis were conducted based only on certified DBEs, it would exclude the most successful MBEs and WBEs from analysis, which could skew results.

- BBC determined overall availability by examining the number of MBEs and WBEs available for each prime contract and subcontract in proportion to the total number of firms available for that prime contract or subcontract.⁶

Contract-by-contract availability results were then aggregated on a dollar-weighted basis to determine the overall percentage of ODOT contract dollars that might be expected to go to MBEs and WBEs.

- BBC compared actual utilization of MBEs and WBEs on ODOT contracts with the utilization that might be expected based on their availability for those types, sizes and locations of prime contracts and subcontracts.

The BBC study team also analyzed ODOT contracting processes, local marketplace conditions and business assistance programs. As part of those analyses, the study team developed statistical models using U.S. Census data and other information on the local marketplace; compiled and analyzed many hundreds of bids and proposals on ODOT contracts; completed telephone interviews with more than 1,000 local businesses; and conducted in-depth personal interviews with 59 business owners, trade associations and other individuals knowledgeable about local marketplace conditions.

5. What proportion of firms available for ODOT contracts are MBEs and WBEs?

Of the firms successfully interviewed in the availability analysis that reported qualifications, interest and other characteristics indicating that they were available for certain ODOT construction and engineering contracts:

- 16.6 percent were MBEs; and
- 11.6 percent were WBEs.
- In total, more than one in four firms available for ODOT construction and engineering prime contracts or subcontracts were an MBE or WBE.

These results are based on research with firms in the Oklahoma marketplace available for ODOT construction and engineering contracts. BBC primarily determined race/ethnicity/gender ownership of firms through telephone interviews with business owners and managers and other sources.

The availability interviews with local firms focused on Oklahoma businesses performing the types of work most pertinent to prime contracts and subcontracts involved in ODOT construction and engineering contracts. More than 2,100 firms were successfully contacted in the availability analysis.

Section IV and Appendix C of this report discuss the availability analysis in detail.

⁶ For example, if BBC examined a \$50,000 fencing subcontract in 2009, only firms indicating that they were qualified and interested in ODOT work as a subcontractor, had performed or bid on similar work in the past in Oklahoma, had bid on or performed work of that size, and were in business in 2009 were counted as available for that work. (All of this information was collected from each firm by telephone in the availability interviews.) If 50 firms in the BBC availability database met those criteria, and 5 were minority-owned, MBE availability for that subcontract would be 10 percent. These results were weighted by the size of subcontract and combined with all of the other results for each ODOT prime contract and subcontract to determine overall availability.

6. What share of ODOT contract dollars might be expected to go to MBEs and WBEs?

Based on the information collected in availability interviews with local firms, and a review of about 8,000 construction prime contracts and subcontracts, the percentage of ODOT construction and engineering contract dollars expected to go to MBEs and WBEs is:

- 6.0 percent for MBEs; and
- 7.1 percent for WBEs.

These dollar-weighted availability figures are lower than what is indicated from a simple “headcount” of minority-, women- and majority-owned firms because relatively few of the firms available for ODOT’s largest construction prime contracts are MBEs or WBEs.

BBC developed availability estimates for specific groups of MBEs, and for specific subsets of FHWA- and state-funded prime contracts and subcontracts. These values serve as benchmarks to evaluate the actual percentage of ODOT contract dollars going to MBEs and WBEs.

Section IV provides more information about the availability analysis. Appendix B discusses study team collection of ODOT contract data.

7. What share of ODOT contract dollars did go to MBEs and WBEs?

Of the \$3.3 billion in ODOT construction and engineering contract dollars from July 2004 through June 2009 study period, \$217 million (6.6%) went to MBEs and \$401 million (12.1%) went to WBEs. ODOT’s overall utilization of MBE/WBEs was 18.7 percent.

Native American-owned firms comprised most of the participation of MBEs in ODOT contracts. MBEs other than Native American-owned firms received about 1 percent of ODOT contract dollars during the study period (see Section V for detailed results by group).

MBE/WBE participation differed considerably between ODOT construction and ODOT engineering contracts:

- MBE/WBEs received 19.5 percent of ODOT construction contract dollars (see Figure ES-1).
- MBE/WBE participation in ODOT engineering contracts was much lower — 4.2 percent (see Figure ES-2).

ODOT applied DBE contract goals to many of its FHWA-funded construction contracts, but not to its FHWA-funded engineering contracts during the study period. ODOT did not apply DBE contract goals to its state-funded contracts during the study period. There was little difference in MBE/WBE participation between ODOT’s FHWA-funded and state-funded contracts, as shown in Figures ES-1 and ES-2.

Figure ES-1 also indicates that firms certified as DBEs represented 8.3 percentage points of the overall MBE/WBE participation on FHWA-funded construction contracts and 3.7 percentage points of overall MBE/WBE utilization on state-funded construction contracts. The balance went to firms owned by minorities and women that were not DBE certified. Even with the DBE contract goals program, more of the overall utilization of MBE/WBEs was non-DBE-certified firms than businesses certified as DBEs.

Figure ES-1.
MBE/WBE and DBE share of prime contract/subcontract dollars for ODOT construction contracts
July 2004–June 2009, FHWA vs. state funding

Note:

Certified DBE utilization.

Number of contracts/subcontracts analyzed is 5,741 for FHWA-funded contracts, 1,552 for state-funded contracts and 7,293 for all contracts.

For more detail and results by group, see Figures K-6, K-7 and K-5 in Appendix K.

Source:

BBC Research & Consulting from data on ODOT contracts.

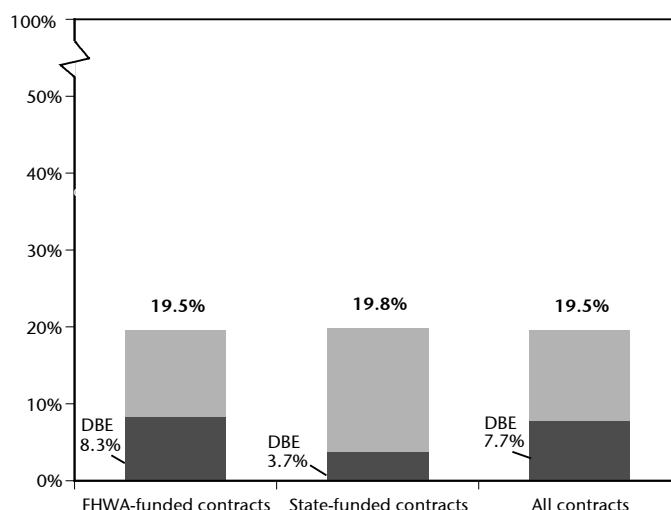


Figure ES-2 shows that firms certified as DBEs accounted for 1.7 percentage points of the 4.2 percent overall utilization of minority- and women-owned firms on engineering contracts; MBE/WBEs not certified as DBEs received the balance.

Figure ES-2.
MBE/WBE and DBE share of prime contract/subcontract dollars for ODOT engineering and related professional services contracts
July 2004–June 2009, FHWA vs. state funding

Note:

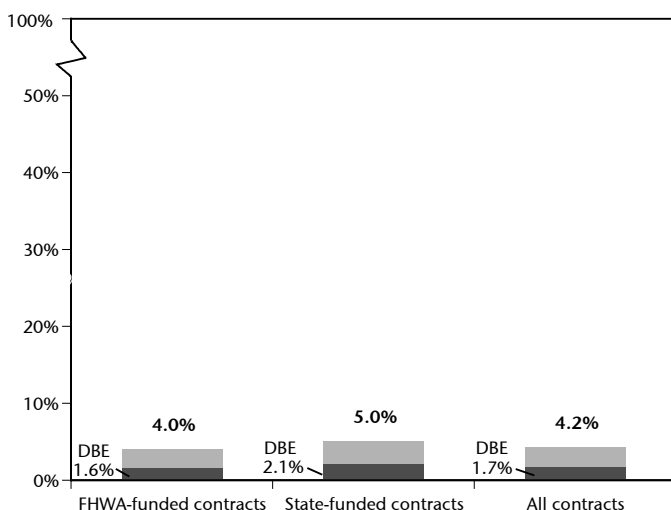
Certified DBE utilization.

Number of contracts/subcontracts analyzed is 565 for FHWA-funded contracts, 133 for state-funded contracts and 698 for all contracts.

For more detail and results by group, see Figures K-9, K-10 and K-8 in Appendix K.

Source:

BBC Research & Consulting from data on ODOT contracts.



8. Was there a disparity between utilization and availability of MBEs and WBEs on ODOT contracts?

BBC compared ODOT's actual utilization of minority- and women-owned firms with the share of contract dollars that those firms might be expected to receive based on their availability for specific ODOT prime contracts and subcontracts.

Overall, ODOT's utilization of minority- and women-owned firms exceeded what would be expected based on the availability of MBE/WBEs for that work. Results differ, however, between ODOT construction and engineering contracts. For construction contracts, disparity results differ by MBE/WBE group.

Disparity results for construction contracts. Utilization of Native American- and white women-owned firms on ODOT construction contracts exceeded what those firms would be expected to receive based on availability, even without DBE contract goals. However, there were substantial disparities in the utilization of certain other MBE groups.⁷

- There were substantial disparities for African American-, Asian Pacific American- and Hispanic American-owned firms on state-funded ODOT construction contracts.
- For FHWA-funded contracts, to which DBE contract goals applied, there were substantial disparities for African American- and Asian-Pacific American-owned firms.
- Because availability of Subcontinent Asian American-owned firms for construction contracts is small, it was difficult to assess the low utilization observed for that group.

Disparity results for engineering contracts. The 4.2 percent utilization of MBE/WBEs on ODOT engineering contracts was substantially less than what those firms would be expected to receive based on availability (19.2%).

- The observed disparity was statistically significant.
- MBE/WBE utilization was substantially below availability for FHWA-funded, state-funded and combined engineering contracts.
- BBC observed substantial disparities for all DBE groups — African American-, Asian-Pacific American-, Subcontinent Asian American-, Hispanic American-, Native American- and white women-owned firms.
- BBC identified disparities for prime consultants and subconsultants.
- There is quantitative and qualitative evidence that MBE/WBE consultants pursuing ODOT prime contracts do not have the same success as majority-owned firms.

Until recently, ODOT did not implement any race-conscious measures such as DBE contract goals for FHWA-funded engineering-related contracts. Although not part of the study period, BBC analyzed engineering-related contracts that ODOT awarded in late 2009 and 2010, many of which did include DBE contract goals. Data from those contracts indicated that the use of DBE goals has led to greater MBE/WBE utilization.

Report sections V, VI and VII as well as Appendix K provide detailed results of the utilization and disparity analyses for different sets of ODOT contracts.

⁷ A number of courts have ruled that a “substantial” disparity is one where utilization is less than 80 percent of what might be expected based on the availability analysis.

9. What are conditions for minorities and women within the Oklahoma marketplace?

BBC analyzed information collected through telephone interviews with Oklahoma businesses, in-depth interviews with local businesses and other data concerning marketplace conditions in Oklahoma. (Most of ODOT's contract dollars go to firms within Oklahoma.) The study identified:

- Within the local engineering industry, disparities related to opportunities for entry and advancement, business ownership and business success for minorities and women.
- For the local construction industry, disparities related to employment and business opportunities for African Americans, Hispanic Americans and Asian Americans.

Section II of the report identifies the relevant geographic market area for the disparity study. Section III summarizes quantitative and qualitative information about the Oklahoma marketplace. Appendices D through I provide detailed analyses.

10. How can ODOT use study results when setting an annual goal for DBE participation?

The Federal DBE Program outlines how agencies are to set overall annual goals for DBE participation in their USDOT-funded contracts (49 CFR Section 26.45). Steps include establishing a "base figure" after considering firms available for an agency's USDOT-funded work, and then considering a "step 2 adjustment." The BBC disparity study considered both the base figure and possible step 2 adjustment for a future ODOT overall annual goal.

Base figure. BBC's availability analysis determined that 12.7 percent of ODOT FHWA-funded contract dollars might be expected to go to minority- and women-owned firms based upon the availability of those firms for ODOT work. However, this figure refers to the availability of all minority- and women-owned firms, not just firms that appear to meet the federal guidelines for DBE certification.

- After accounting for minority- and women-owned firms that might be too large to meet federal DBE certification requirements, the availability analysis indicated a "base figure" of 9.3 percent.
- ODOT should consider 9.3 percent as the base figure for its overall annual DBE goal, but adjust it if the types of work anticipated in the future differ from the study period.
- Since 2005, ODOT's annual DBE goals have been between 8 and 9 percent.

Consideration of a step 2 adjustment. Per federal regulations, ODOT must consider possible adjustments to its overall annual DBE goal through a “step 2” process.⁸ BBC’s analysis suggests that ODOT consider the following options.

- **Option 1 – making an upward adjustment.** There are reasons that ODOT might consider a higher overall annual DBE goal than the 9.3 percent base figure.
 - BBC identified disparities in business ownership rates for certain MBE/WBE groups. If ODOT were to make an upward step 2 adjustment to its annual DBE goal, it might consider a figure of 12.9 percent, which reflects adjustments for disparities in business ownership rates for minorities and women.
 - Analyses of access to capital and other marketplace information also support an upward step 2 adjustment.
- **Option 2 – making no step 2 adjustment.** When evaluating a step 2 adjustment, agencies are required to consider past DBE participation, which may represent a minimum demonstration of “current capacity of DBEs to perform work.”⁹ Overall participation of certified DBEs on ODOT’s FHWA-funded contracts for July 2004 through June 2009 was about 8 percent.¹⁰ That information might lead ODOT to not make an upward step 2 adjustment and instead adopt the 9.3 percent base figure as its overall annual goal for DBE participation.

ODOT is not required to make a step 2 adjustment, but would need to explain to FHWA why no adjustment is warranted if it chooses this option. Section VIII presents these analyses.

11. How can ODOT use study results to project the portion of its annual DBE goal to be met through neutral means?

The Federal DBE Program requires agencies to determine whether the overall annual DBE goal can be met solely through race-neutral measures, or whether race-conscious measures — such as DBE contract goals — are also needed. If any race- and gender-conscious measures are needed, the agency must project the portion of the overall annual DBE goal to be met through neutral and race- and gender-conscious means. Based on 49 CFR Part 26 and related USDOT guidance, transportation agencies should consider factors including:

- Past experience of the agency in meeting its overall annual DBE goal;
- Participation when the agency did not apply DBE contract goals (or other race- and gender-conscious measures); and
- The extent and effectiveness of race- and gender-neutral means that the agency could have in place for the next fiscal year.

⁸ 49 CFR Section 26.45 (d).

⁹ 49 CFR Section 26.45 (d)(1)(i).

¹⁰ ODOT’s assessment of median DBE participation indicated 8.9 percent utilization during a similar time period.

Past experience in meeting overall DBE goal. ODOT's annual DBE goals for federal fiscal years 2005 through 2009 ranged from 8.1 to 8.8 percent. Only firms certified as DBEs at the time of the contract can be counted toward meeting the annual DBE goal. Based on ODOT's reports and BBC's independent measurement of DBE utilization, it does not appear that ODOT fell substantially short of its past overall annual DBE goals, nor does it appear that it exceeded them.

Participation when no DBE contract goals applied. The disparity results described previously in this Executive Summary are pertinent when examining participation when no DBE contract goals are applied.

- Participation of MBE/WBEs on ODOT engineering contracts was about one-quarter of what would be expected based on the availability of MBE/WBEs for those contracts.
- Utilization of African American-, Asian-Pacific American- and Hispanic American-owned firms on state-funded construction contracts was very low compared with availability. In a race-neutral environment, there was close to 0 percent participation of firms owned by those groups, well below what would be expected base on availability.

Section IX of the disparity study report presents a framework that ODOT might use when projecting the portion of the annual DBE goal that can be achieved through neutral means.

Race-neutral means that ODOT could have in place. Race- and gender-neutral measures are initiatives that open opportunities, remove barriers and otherwise assist businesses regardless of the race/ethnicity/gender of their ownership. ODOT currently implements a broad range of neutral measures. Many other organizations also implement small business development programs in Oklahoma.

BBC reviewed additional neutral measures that ODOT might consider for future implementation, including:

- Small business goals, consultant evaluation points and other programs to encourage utilization of certified small businesses on ODOT contracts;
- Changes to contracting policies and practices that would assist small businesses; and
- Business assistance programs.

Some neutral measures might be implemented quickly with minimal resources. However, other measures may require considerable time for review and development as well as additional resources for their administration. ODOT should consider these factors when projecting the portion of its overall DBE goal that could be achieved through neutral means (see Section IX of the report).

12. Can ODOT continue to use race- and gender-conscious measures such as DBE contract goals?

If ODOT projects that a certain portion of its overall annual DBE goal is to be met through race- and gender-conscious measures, one of the appropriate measures under the Federal DBE Program is contract goals for its FHWA-funded contracts.

Certain stronger race-conscious measures identified in the Federal DBE Program are permissible under extreme circumstances, but they might not be appropriate for ODOT implementation at this time.

13. Which racial/ethnic/gender groups of DBEs might be considered eligible for any future race- and gender-conscious program elements?

If ODOT determines that it will continue DBE contract goals, it must decide whether all DBE groups or only certain DBE groups would be included in meeting any contract goals. The following information may be useful in making such a determination:

- All DBE groups were underutilized in ODOT's engineering contracts.
- Certain DBE groups were underutilized in construction contracts when no DBE contract goals applied — African American-, Asian-Pacific American- and Hispanic American-owned firms.

ODOT would need to request a waiver from USDOT if it were to implement a program where all DBEs were eligible to meet DBE contract goals for engineering contracts but only underutilized DBEs (UDBEs) were eligible to meet DBE contract goals for construction contracts.

Several departments of transportation for other states have obtained waivers from USDOT that allow them to implement DBE contract goals for which only UDBEs are eligible.

14. What are ODOT's next steps?

The disparity study is an independent analysis of information related to ODOT's implementation of the Federal DBE Program. ODOT should review report results and other relevant information when making decisions concerning its implementation of the Federal DBE Program. Section X of the report provides additional guidance concerning Program components.

One of ODOT's past challenges has been collecting comprehensive data regarding DBE/MBE/WBE utilization in its contracts. Going forward, ODOT will need to closely monitor whether it is successful in removing barriers to MBE/WBE participation in its contracts, especially for groups showing substantial underutilization from July 2004 through June 2009. Ongoing data collection and analysis should include MBE/WBE and DBE utilization for both FHWA- and state-funded contracts.

USDOT periodically revises components of the Federal DBE Program and issues guidance concerning implementation of the Program. In addition, new court decisions provide insights as to proper implementation of the Federal DBE Program. ODOT should closely follow such developments.