

SECTION IV.

Analysis of MBE/WBE/DBE Availability

BBC analyzed the relative availability of minority- and women-owned firms that are ready, willing and able to perform ODOT prime contracts and subcontracts. Section IV contains eight parts:

- A. Purpose of the availability analysis;
- B. Collecting information on firms potentially available for ODOT work;
- C. Number of minority-, women- and majority-owned firms included in the availability database;
- D. Definitions of MBE/WBEs, DBEs and Potential DBEs;
- E. Calculation of MBE/WBE availability as inputs to the disparity analysis;
- F. Base figure for overall goal for DBE participation in FHWA-funded contracts;
- G. Implications for any DBE contract goals; and
- H. Further discussion of issues in an availability analysis.

Appendix C provides supporting information.

A. Purpose of the Availability Analysis

BBC developed information on the relative availability of minority- and women-owned firms for ODOT work as an input for the disparity analysis and for developing a base figure for ODOT's overall annual DBE goal.

Input for the disparity analysis. BBC's analysis of relative availability of minority- and women-owned firms for ODOT work provides an independent benchmark for use in the disparity analysis. In the disparity analysis, the percentage of ODOT contract dollars going to MBEs and WBEs (for each racial/ethnic/gender group) is compared to the percentage of dollars that would be expected to go to MBE/WBEs given their relative availability for specific types, sizes and locations of ODOT prime contracts and subcontracts.

Because BBC examined all firms owned by minorities and women as MBEs and WBEs in both utilization and availability inputs to the disparity analysis, all available firms that are minority- and women-owned firms were counted as such when determining MBE/WBE availability. The availability benchmarks for the disparity analysis examine all minority- and women-owned firms regardless of whether they are or could be certified as DBEs.

Inputs for the base figure analysis related to the overall DBE goal. When establishing its overall annual goal for DBE participation in its FHWA-funded contracts, ODOT must begin by calculating a “base figure” for the relative availability of DBEs.¹ BBC’s analysis of the base figure follows the same steps as determining MBE/WBE availability benchmarks for the disparity analysis, except minority- and women-owned firms that appear too large to be certified as DBEs are not counted as potential DBEs.

B. Collecting Information about Firms Potentially Available for ODOT Work

BBC’s availability analysis focused on specific transportation construction and engineering subindustries in Oklahoma. Section II of the report discusses BBC’s identification of specific subindustries for inclusion in the availability analysis, and selection of Oklahoma as the relevant market area for ODOT contracting.

Once the subindustries and relevant geographic market area were determined, BBC developed a database of available firms by attempting to interview each business establishment within the relevant Oklahoma construction and engineering subindustries. This method of examining availability is sometimes referred to as a “custom census.”

Overview of the availability interviews. BBC collected information from firm owners and managers to identify firms potentially available for ODOT work.

BBC first obtained all business establishment listings under the eight-digit industry codes maintained by Dun & Bradstreet (D&B) that were most pertinent to the subindustries involved in ODOT transportation contracts. D&B provided 4,056 business listings related to these subindustries.

BBC then worked with the telephone survey research firm Customer Research International (CRI), which performs business and consumer interviews throughout the country,² to conduct telephone interviews with the owners or managers of identified business establishments. About 2,900 D&B listings had accurate working phone numbers. CRI was able to successfully contact 2,145 (74%) of these business establishments.³ About 1,000 establishments that were successfully contacted indicated they were not interested in participating in a discussion about their availability for ODOT work.⁴ More than 1,000 firms completed interviews about firm characteristics, their interest and qualifications for ODOT work and other topics. Interview topics included:

- Whether the organization was a subsidiary or branch of another company;
- Whether the organization was a private business or tribally-owned organization (and not a public agency or not-for-profit organization);

¹ 49 CFR Section 26.45 (c).

² CRI’s work includes many tens of thousands of business interviews as part of BBC disparity studies for other state and local agencies.

³ Other establishments could not be reached after multiple attempts (see Appendix C) or could not make a responsible staff member available to complete the interview.

⁴ BBC’s analysis of these firms indicates that very few had performed work for ODOT.

- Qualifications and interest in transportation contracting work for state and local agencies;
- Qualifications and interest in work as a prime, a subcontractor or a supplier/trucker;
- Firm specialization;
- The largest contract or subcontract bid on or performed in the past five years;
- Ability to work in specific geographic regions of Oklahoma;
- How long the firm has been in business; and
- Race/ethnicity/gender of firm ownership.

Firm representatives were offered the option of answering questions that were e-mailed or faxed if they preferred not to complete an interview over the phone. (About 2 percent of interviews were completed through e-mail or fax.)

Consolidating responses from multi-location firms. In total, 1,084 individual organizations were successfully contacted and answered availability interview questions. Before analyzing responses, BBC identified 18 instances in which multiple local offices of the same firm completed interviews. Responses were combined for these nine multi-location firms.⁵ This step reduced the number of interviews completed with unique firms by nine, as shown in Figure IV-1.

Figure IV-1.
Screening of completed business telephone interviews for possible inclusion in the availability analysis

Source:
 BBC Research & Consulting from
 2008/2009 Availability Survey.

	Number
Establishments successfully contacted	2,145
Less establishments not interested in discussing availability for ODOT work	<u>1,061</u>
Establishments that completed interviews about firm characteristics	1,084
Less:	
Multiple establishments	9
No road or highway-related work or not interested in work	335
Work outside of industry scope	11
Not a business	16
No past bid/award for state or local government work	154
No interest/qualifications in ODOT/local government work	<u>17</u>
Firms possibly available for ODOT work included in BBC analysis	542

Qualifications and interest, and firm specialization. Firms successfully contacted were asked a number of questions concerning types of work performed, past bidding and qualifications for and interest in ODOT and local government work. Appendix C includes one of the telephone interview instruments used in collecting these data.

⁵ BBC's methodology for combining responses, and following up with respondents when necessary, is described in Appendix C.

As described below, firms BBC included as potentially available for ODOT prime contracts or subcontracts were those reporting that they:

- a. Perform types of work relevant to ODOT contracts;
- b. Are a private sector or tribally-owned business;
- c. Have performed or bid on state or local government or private sector highway- or road-related contracts or subcontracts in the past five years; and
- d. Are qualified for and interested in work as a prime contractor or subcontractor for ODOT or local governments.

In addition, firms were asked about (e) their ability to work in specific regions of Oklahoma, (f) the largest contract they had bid on, and (g) the year the firm was established (so that BBC could avoid counting firms as available for contracts that predated a firm's establishment date).

a. Perform types of work relevant to ODOT contracts. The study team telephone interviewer initially confirmed with the business owner or manager that the firm does work or provides materials related to construction, maintenance or design of roads and highways. If the business owner or manager had any questions as to whether his or her firm fit this definition, the interviewer explained that the interviews were for firms performing any work related to “construction, maintenance or design, such as building and parking facilities, paving and concrete, tunnels, bridges and roads, [also including] design, engineering, planning, environmental assessment or related professional services.”⁶ As shown in Figure IV-1, 335 interviews were discontinued because the firm owner or manager indicated that the firm was not involved in that type work or was uninterested in it.

Firms were also asked if they perform the following specific types of transportation-related work:

- Grading (including excavation, erosion control, right of way clearance and demolition);
- Drainage structures (including trenching and bedding of pipes, sanitary sewer construction, water lines and underground utility relocations);
- Paving and coldmilling (including asphalt, concrete pavement, pavement and bridge deck repair or surface removal);
- Bridge construction and repair (including bridge waterproofing and sealing, joints and redecking of bridge structures);
- Fencing, guardrail and barriers (including concrete barrier, bridge rail, standard highway fencing and noise barrier fences);
- Painting and striping (including permanent traffic control markings and painting services);
- Traffic control (including flagging, traffic control supervision and traffic control devices);
- Electrical, lighting and signals (including highway lighting and traffic signals); and
- Other types.

⁶ In response to questions from the firm manager or owner, the interviewer also offered that doing work includes having done work, trying to sell this work, or providing related materials.

BBC coded the specific answers that provided information on “other types” of work into corresponding subindustries. These firms were then deemed available for the types of transportation related contracting that corresponded to the coded answers.

Firms could respond that they perform only one type of work or multiple types of work. The interview also identified the firm’s main line of business. For 11 firms, the primary line of business was outside the scope of the disparity study for 11 firms even though the firm indicated that they did perform work related to highway contracting. These firms were still included in the availability analysis for the types of work they perform related to highway contracting.

b. Private or tribally-owned business. Most of the organizations contacted confirmed that they were a business (including one tribally-owned business). Sixteen establishments indicated that they were a public sector or not-for-profit organization and were therefore excluded from the availability analysis.

c. Performed or bid highway- or road-related contracts or subcontracts in the past. The interviewer asked each firm owner or manager if the firm had bid on or submitted a price quote for any part of a state or local government project in the past five years (concerning construction, maintenance or design work related to roads and highways), or had been awarded any part of such a contract. The interview asked similar questions related to private sector work. In the interviews, 154 firms indicated that they had not bid on or been awarded a part of a contract related to roads and highways in the past five years.

d. Qualified for and interested in work as a prime contractor or subcontractor for ODOT or local governments. In addition, firms were asked if they “were qualified and interested in working with the Oklahoma Department of Transportation or local governments.”⁷ Separate questions probed qualifications and interest in working as a prime contractor (or prime consultant) and as a subcontractor/supplier (or subconsultant). Of the firms asked this pair of questions, 17 indicated that they were not qualified and interested in working with ODOT or local governments as a prime or a subcontractor/supplier.⁸ BBC included responses from these firms when analyzing marketplace conditions but not when calculating availability for ODOT contracts.

After screening for qualifications and interest, there were 542 firms remaining for analysis of availability out of the interviews completed with 1,084 business establishments (see Figure IV-1).

e. Ability to work in specific regions of Oklahoma. For each of the five regions of the state identified in Figure II-2, firm owners and managers were asked questions similar to the following:

“Could your company do work or serve customers in the Tulsa area and other parts of Northeast Oklahoma?”

⁷ BBC included local government projects in this question as some ODOT projects also include local governments.

⁸ Included in the database of available firms were 26 companies that expressed qualifications and interest in working as a prime contractor and not as a subcontractor and 104 firms that expressed qualifications and interest in working as a subcontractor/supplier and not as a prime contractor.

No firms were excluded from the availability analysis based on lack of an answer to these questions. Firms giving no response were only counted as able to work on projects in the region in which they were physically located.

f. Largest contract on which they had bid or performed. Firms were counted as available for ODOT work up to the maximum size of contracts and subcontracts on which they had bid or performed in Oklahoma within the prior five years (regardless of private or public sector). If no response to this question was received, the firm was counted as available for just the smallest contract elements (those up to \$100,000). One-hundred and eight firms did not answer at least one of these questions.

g. Year the firm was established. Interviewers also confirmed when the firm was established. Firms were only counted as available for ODOT contracts that were awarded after they were in business. Ninety firms were operating for only a portion of the July 2004 through June 2009 utilization study period.⁹

C. Number of Minority-, Women- and Majority-owned Firms Included in the Availability Database

Of the 542 companies counted as possibly available for specific types of ODOT contracts, 153 (28%) were minority- or women-owned. Figure IV-2 provides race/ethnicity/gender information for these 542 companies.

Figure IV-2.
MBE/WBEs as a percentage of firms available for ODOT transportation contracts, by race, ethnicity and gender

Source:
BBC Research & Consulting from
2008/2009 Availability Survey.

Race, ethnicity and gender	Number of firms	Percent of total
African American-owned	9	1.7 %
Asian-Pacific American-owned	2	0.4
Subcontinent Asian American-owned	1	0.2
Hispanic American-owned	12	2.2
Native American-owned	66	12.2
Total MBE	90	16.6 %
WBE (white women-owned)	63	11.6
Total MBE/WBE	153	28.2 %
Total majority-owned firms	389	71.8
Total firms	542	100.0 %

The data in Figure IV-2 solely reflect a simple count of firms, with no analysis of availability for specific contract types. As such, it does not indicate relative availability of minority- and women-owned firms to perform ODOT work. To develop the measures of availability for the disparity analysis and base figure analysis, BBC conducted a sophisticated analysis of the relative number of MBEs and WBEs available for each ODOT prime contract and subcontract. Parts E and F of Section IV provide those results.

⁹ Companies for which no establishment date was identified were counted as available for the full study period.

D. Definitions of MBE/WBEs, DBEs and Potential DBEs

BBC's discussion of terms and definitions used in the availability analysis pertains to the difference between minority- and women-owned firms and certified DBEs and how BBC coded firms owned by minority women.

Definitions. BBC's availability analysis uses the following definitions:

- **“Minority- and women-owned firms”** (MBE/WBEs) are firms that are owned and controlled by minorities or women, regardless of whether they are certified as DBEs or as MBE/WBEs. BBC follows the definitions of specific minority groups contained in 49 CFR Part 26. Most minority- and women-owned firms doing business in Oklahoma are not currently certified.¹⁰ The disparity analysis examines MBEs (by race/ethnicity) and WBEs as explained in further detail below.
- **Disadvantaged business enterprises** (“DBEs”) are businesses that are certified as such (which means that they are certified as being below revenue and personal net worth limits included in 49 CFR Part 26). Because implementation of the Federal DBE Program requires ODOT to track DBE utilization, BBC reports certain utilization data for DBE-certified firms.
- **Potential DBEs** are minority- and women-owned firms that are certified or appear that they potentially could be certified as DBEs (regardless of actual DBE certification). These firms are considered for purposes of establishing a base figure for the overall annual aspirational DBE goal. Figure IV-3 provides additional information on the firms included as potential DBEs.

Analysis of potential DBEs when examining the base figure for the overall annual aspirational DBE goal. ODOT must set an overall annual aspirational goal for DBE utilization, but many firms that could be certified as DBEs are not currently certified. Consistent with court-reviewed availability analyses in states such as Illinois and Minnesota, BBC analyzed the base figure for the overall DBE goal based primarily on relative availability of minority- and women-owned firms that are potential DBEs, not just those that are currently certified.

Figure IV-3. Definitions of potential DBEs

To formulate the overall annual DBE goal, BBC excluded firms that recently graduated from the DBE Program as well as high-revenue minority- and women-owned firms that are not currently DBE-certified. Firms that appeared that they could be potentially certified as DBEs based on ownership and revenue were counted in the overall goal. Construction-related firms with annual revenue of less than \$25 million and engineering-related firms with annual revenue of less than \$5 million were counted as potential DBEs. These sizes correspond to the categories Dun & Bradstreet uses to report revenue (which BBC used to develop revenue size ranges in the availability interviews).

The \$5 million revenue limit for engineering-related firms closely matches the SBA small business size standard for these firms (\$4.5 million). The \$25 million revenue limit is below the SBA size standard for what constitutes a small business that performs highway, street and bridge construction (\$33.5 million) because of the overall revenue limit established in USDOT guidelines (\$22,410,000 average over three years).

Firm owners must also meet USDOT personal net worth limits. Personal net worth of the owners of available firms was not available as part of this study and thus was not considered when determining potential DBE status.

¹⁰ Of the 542 MBE/WBE firms included in the availability database, 32, or about 6 percent, had DBE certification.

Although USDOT allows state and local agencies to develop overall annual aspirational goals for DBE participation by counting the number of available firms in DBE directories and dividing by total firms available in the local marketplace, its “Tips for Goal-Setting in the Disadvantaged Business Enterprise Program” identifies the concern that a DBE directory may undercount potential DBEs in a local market area.¹¹ USDOT recommends that agencies consider going beyond the directory of certified DBEs to include minority- and women-owned firms that may be available for agency contracting. “Tips for Goal-Setting” states that firms potentially certified as DBEs be included in the base figure analysis (see Section II of “Tips for Goal-Setting”). BBC’s approach to setting the base figure is also consistent with methods approved in *Sherbrooke Turf*¹² and in *Northern Contracting*, which favorably refers to and cites “Tips for Goal-Setting.”¹³ (See Appendix A of this report for a discussion of these and other legal cases.)

When considering minority- and women-owned firms that are not currently DBE certified in the base figure for the overall annual aspirational goal, BBC excludes firms that have grown too large for the DBE Program or otherwise been denied DBE certification. BBC also excludes MBEs and WBEs with revenue that would place them near the revenue ceiling for DBE certification. These steps are consistent with USDOT’s instructions in Part G of “Tips for Goals Setting.”

Summary. Figure IV-4 summarizes how different types of minority- and women-owned firms are counted when (a) determining MBE/WBE availability for purposes of disparity analyses and (b) calculating the base figure for the overall annual DBE goal.

Figure IV-4.
Summary of how firms are counted in different availability analyses

Type of firm	a. MBE/WBEs for disparity analysis	b. Potential DBEs for base figure analysis
Firms currently DBE-certified	Counted as MBE/WBE if minority- or women-owned	Counted as potential DBE
MBE/WBEs that are below revenue ceiling for DBS certification	Counted as MBE/WBE	Counted as potential DBE
MBE/WBEs that have graduated from DBE program	Counted as MBE/WBE	Not counted as potential DBE
MBE/WBEs that appear to have revenue too large to be DBE-certified	Counted as MBE/WBE	Not counted as potential DBE

¹¹ USDOT Tips for Goals Setting in the Disadvantaged Business Enterprise Program. <http://www.osdbu.dot.gov/DBEProgram/tips.cfm>.

¹² *Sherbrooke Turf, Inc. v. Minnesota DOT, and Gross Seed Company v. Nebraska Department of Road*, 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004)

¹³ *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 at 723 (7th Cir. 2007).

E. Calculation of MBE/WBE Availability as Inputs to the Disparity Analysis

One of the uses of availability information for minority- and women-owned firms is as an input to the disparity analysis in this study.

Purpose. Availability of MBEs and WBEs is expressed in terms of the percentage of contract dollars that might be expected to go to MBE/WBEs given the relative availability of minority- and women-owned firms for the specific types, sizes and locations of a particular set of contracts and subcontracts. Availability establishes a “benchmark” for comparing the actual share of contract and subcontract dollars going to minority- and women-owned firms. (The availability analysis counts firms as MBEs — by race/ethnicity — and WBEs regardless of whether they are or could be certified as DBEs.)

The availability database for the ODOT disparity study included 542 businesses, but only a subset of those firms were included as potentially available for a particular ODOT prime contract or subcontract. BBC examined the characteristics of the specific prime contract or subcontract, including type of work involved, contract size and date, and then identified firms in the availability database that performed that type of work, role and size of contract — a “bottom-up” approach to determining availability that is explained in detail on the following page.

Steps to calculating availability. When calculating relative MBE/WBE availability, BBC examined more than 7,900 ODOT contract elements and the availability of minority- and women-owned firms associated with each element. To be counted as available for an individual ODOT contract or subcontract, firms must have reported that they perform the type, size and contract role related to the work on that contract element:

1. For each ODOT contract element (prime contract, subcontract, etc.), BBC determined the type of work, contract role and size of the work.
2. BBC then identified firms in the availability database that reported they:
 - ▶ Are qualified and interested in performing that role (prime or subcontractor) for the specific type of work for public agencies;
 - ▶ Have bid on or performed work of that size;
 - ▶ Are available to work in the region in which the project was located; and
 - ▶ Were in business in the year the contract was awarded.
3. BBC counted the relative number of minority- and women-owned firms among all firms available for that specific type of work (e.g., three white woman-owned firms and one African American-owned firm, and 16 majority-owned firms out of 20 firms available to perform that contract element).
4. The study team then translated the numeric availability of firms for a contract element into percentage availability for the contract element (For example, if WBEs were 3/20ths of available firms, availability of WBEs for this work would be 15 percent.).

5. BBC weighted the relative availability for each prime contract and subcontract by the dollars of work corresponding to each contract element.
 - ▶ BBC multiplied percentage availability for each group by the dollars associated with each ODOT contract element;
 - ▶ Added the results across contract elements; and
 - ▶ Divided by total dollars for all ODOT contract elements to produce a dollar-weighted estimate of overall availability for MBE/WBEs and for each MBE/WBE group.

The process summarized above was used for both the base figure analysis and to determine relative MBE/WBE availability for a particular set of contracts or subcontracts examined in the disparity analysis.

Figure IV-5 reports dollar-weighted availability by MBE/WBE group for ODOT FHWA-funded contracts for July 2004–June 2009 (including related subcontracts). About 12.7 percent of combined prime and subcontract dollars on these contracts would be expected to go to MBE/WBEs. White women-owned firms (availability of 7%) and Native American-owned firms (availability of 4%) account for much of this availability.

Figure IV-5.
Availability of firms for
ODOT FHWA-funded
transportation contracts,
July 2004–June 2009, by
race, ethnicity and
gender

Note: See Figures K-6, K-9 and K-3.
 BBC Research & Consulting from
 2008/2009 Availability Survey.

Race, ethnicity and gender	Utilization benchmark (availability %)		
	Construction	Engineering	Total
African American-owned	0.3 %	0.9 %	0.4 %
Asian-Pacific American-owned	0.0	3.9	0.2
Subcontinent Asian American-owned	0.0	2.5	0.1
Hispanic American-owned	0.9	1.7	0.9
Native American-owned	4.0	7.0	4.1
WBE (white women-owned)	<u>7.2</u>	<u>3.1</u>	<u>7.0</u>
Total MBE/WBE	12.4 %	19.1 %	12.7 %

Unique availability benchmark for each set of contracts. BBC separately determined dollar-weighted availability by racial/ethnic/gender group for each set of ODOT contracts and subcontracts examined in the disparity analysis. A number of tables in Appendix K report MBE/WBE availability and disparity analysis results for subsets of ODOT contracts and subcontracts. Overall MBE/WBE availability varies from 8 percent to about 25 percent depending upon the types and sizes of work examined. In general:

- Dollar-weighted MBE/WBE availability is greater for small ODOT prime contracts and subcontracts compared with large contract elements.
- MBE/WBE availability is greater for subcontracts than for ODOT prime contracts.

The 12.7 percent availability for all MBE/WBEs for FHWA-funded contracts is higher than the level BBC suggests as the base figure for the Authority's overall annual aspirational goal. BBC's calculation of MBE/WBE availability counts as MBE/WBEs two groups of minority- and women-owned firms not counted as potential DBEs in the base figure: (a) businesses that have grown to be too large for the Federal DBE Program, and (b) firms that are currently not DBE-certified and are likely to be too large to meet certification requirements.

Why disparity analysis for MBE/WBEs, not DBEs. Analysis of utilization and availability of minority- and women-owned firms (by race/ethnicity/gender) allows one to analyze whether there are disparities affecting minority- and women-owned firms. In other words, the possibility that race or gender discrimination affects utilization of firms is analyzed by comparing outcomes for firms based on the race/ethnicity/gender of their ownership, not certification status. Firms may be discriminated against because of the race or gender of the business owner regardless of whether that owner has applied for DBE certification.

Furthermore, analysis of whether firms face disadvantages based on the race/ethnicity/gender of the firm owner counts the most successful, highest-revenue minority- and women-owned firms in the statistics for all minority- and women-owned firms. A disparity analysis focusing on DBEs would improperly compare outcomes for certified DBEs (by definition, "economically disadvantaged" minority- and women-owned firms) with all other firms (combining majority-owned firms with very successful firms owned by minorities and women). One might find disparities for any group of firms for which membership is limited to low-revenue firms.¹⁴

Finally, 49 CFR Part 26 allows certification of white male-owned firms as DBEs. Disparity analysis based on DBEs is not purely an analysis of disparities by race/ethnicity and gender.

¹⁴ An analogous situation concerns analysis of possible wage discrimination. A disparity analysis that would compare wages of minority employees to wages of all employees should include both low- and high-wage minorities in the statistics for minority employees. If the analysis removed high-wage minorities from the statistics for minorities, any comparison of wages between minorities and non-minorities would likely show disparities in wage levels.

Coding of minority women-owned firms. In the disparity study, BBC combines firms owned by minority women and firms owned by minority men into “minority-owned firms.” “WBEs” are firms owned by white women. BBC’s rationale is discussed in Figure IV-6.

**Figure IV-6.
Coding of firms owned by minority women**

Firms owned by minority women present a challenge in coding for purposes of both the availability analysis and the utilization analysis. BBC considered four options for coding and analysis of firms owned by minority women:

- a. Coding these firms as both minority- and women-owned;
- b. Creating a unique group of minority female-owned firms;
- c. Grouping minority female-owned firms with all women-owned firms; and
- d. Grouping minority female-owned firms with the relevant racial/ethnic group.

BBC chose not to code the firms as both women-owned and minority-owned to avoid potential double-counting when reporting total MBE/WBE utilization and availability. Dividing each racial/ethnic group into firms owned by men versus women (e.g., African American male-owned firms, African American female-owned firms, etc.) was also unworkable for purposes of the disparity analysis because some minority groups had utilization and availability so low, even when combining men and women, that further disaggregation made it more difficult to interpret results.

After rejecting the first two options, BBC then considered whether to group minority female-owned firms with the relevant minority group or with all women-owned firms. BBC chose the former – to group African American women-owned firms with all African American-owned firms, etc. “WBE” in this report refers to white women-owned firms. Evidence of discrimination against white women-owned firms should be considered evidence of discrimination against women of any race or gender. This definition of WBEs also gives ODOT information to answer questions that often arise pertaining to utilization of white women-owned firms, such as whether a disproportionate share of work goes to firms owned by white women.

F. Base Figure for Overall Goal for DBE Participation in FHWA-funded Contracts

Establishing the base figure is the first step in calculating an overall annual goal for DBE participation in ODOT FHWA-funded contracts. BBC calculated the base figure using information on currently-certified DBEs and minority- and women-owned firms that potentially could be DBE-certified (see previous explanation in Section IV).

As with the calculation of MBE/WBE availability for purposes of the disparity analysis, BBC did not include in the availability analysis expenditures that went to non-businesses or are otherwise outside the scope of typical ODOT construction, engineering and related professional services. Because government agencies, associations and not-for-profit agencies are neither DBE- nor non-DBE-owned, associated FHWA-funded contracts are not included in the calculations concerning the overall annual aspirational goal. BBC did consider tribally-owned businesses in the availability analysis, however.

Base figure. BBC’s availability analysis indicates that minority- and women-owned firms currently or potentially certified as DBEs would receive 9.3 percent of prime contract and subcontract dollars for ODOT FHWA-funded transportation contracts if they had the same opportunities as similarly situated majority-owned firms.

ODOT should consider 9.3 percent as the base figure for its overall annual aspirational goal for DBE participation if the distribution of FHWA-funded contracts for the time period covered by the goal is expected to be similar to FHWA-funded contracts from July 2004 through June 2009.¹⁵

Figure IV-7 presents the components of the base figure for the overall annual DBE goal by group of potential DBEs. The base figure reflects a weight of 95 percent for construction and 5 percent for engineering.

**Figure IV-7.
Potential DBEs as a percentage of firms available for ODOT FHWA-funded transportation contracts, by race, ethnicity and gender**

Note:

Includes certified DBEs and minority- and women-owned firms potentially certified as DBEs. Total reflects a weight of 95% for construction and 5% for engineering, reflecting FHWA-funded dollars of contracts for July 2004–June 2009.

Source:

BBC Research & Consulting.

Potential DBEs	Utilization benchmark (availability %)		
	Construction	Engineering	Total
African American-owned	0.3 %	0.9 %	0.4 %
Asian-Pacific American-owned	0.0	3.9	0.2
Subcontinent Asian American-owned	0.0	0.0	0.0
Hispanic American-owned	0.7	1.4	0.7
Native American-owned	4.0	7.0	4.1
WBE (white women-owned)	<u>4.0</u>	<u>3.1</u>	<u>3.9</u>
Total potential DBEs	9.0 %	16.2 %	9.3 %
Sector weight	95 %	5 %	

The base figure presented in Figure IV-7 is similar to the 8 to 9 percent range of ODOT goals for DBE participation it has set since 2004.

Additional steps before determining the overall annual DBE goal. ODOT must consider whether to make a “step 2” adjustment to the base figure before determining a final overall annual DBE goal. The step 2 adjustment can be upward or downward. Section VIII of the report presents information ODOT should consider in choosing whether to make such an adjustment.

G. Implications for any DBE Contract Goals

As noted in Section X, if ODOT chooses to utilize DBE contract goals in the future, ODOT should:

- Continue to set goals on a contract-by-contract basis given the unique attributes of a contract.
- Continue to only set DBE contract goals on FHWA-funded contracts that have subcontracting opportunities.
- Use information in the availability database developed through this study as a starting point for establishing contract goals.

¹⁵ Construction contracts constituted 95% of the FHWA-funded contract dollars in the study period and engineering and related professional services contracts represented 5% of FHWA-funded contract dollars.

- For each major subcontracting discipline, examine the sizes and disciplines of expected subcontracts for the project.
- Examine the availability database to determine number of potential and currently-certified DBEs that can perform the work (including factors such as type of work, subcontract size and location).

H. Other Approaches Examined

BBC explored other approaches to developing a database of firms available for ODOT contracts before deciding to use information collected through interviews of local businesses. For example, ODOT prequalifies certain construction prime contractors and collects some information on potential bidders. Both sets of data were considered for use in the availability analysis, as discussed below.

Why not use ODOT’s pre-qualification and bidders lists to determine availability? BBC evaluated use of the ODOT prequalification list for construction prime contracts and the ODOT bidders list for engineering-related contracts in analyzing availability for ODOT work.

Prequalification for construction prime contracts. ODOT requires firms bidding on certain types of construction work as prime contractors to successfully go through its process for pre-qualifying contractors. Contractors must identify types of work for which they are seeking pre-qualification plus supporting information that demonstrates the ability to perform that work (which ODOT reviews). Contractors also submit balance sheet information, which ODOT uses to calculate the maximum size of ODOT contract they are allowed to bid. Contractors that have successfully won and performed a certain amount of ODOT contracts have the bid size restriction removed. ODOT also reports that it is flexible in “qualifying” firms for work categories.

BBC chose not to use the ODOT prequalification list as the list of firms available for ODOT prime contracts:

- The prequalification requirement is an ODOT-created process. Many Oklahoma local governments and many other state DOTs do not have prequalification requirements for the same types of work. Oklahoma firms can and do bid on and perform work for private sector and other public sector organizations without being prequalified.¹⁶
- Certain elements of the prequalification process favor firms that have been successful in winning ODOT work, which raises further questions as to its suitability as an independent benchmark for evaluating MBE/WBE utilization (see Section VII).
- Certain types of ODOT prime contracts do not require prequalification, and firms need no prequalification to work as subcontractors.
- ODOT prequalification is relatively fluid, with firms able to apply for new work categories and update information as conditions change.
- By its nature, the prequalification process is somewhat subjective.

¹⁶ Ninety percent of the firms responding to availability interviews that reported that they have bid on or have been awarded public sector prime contracts were not currently on the ODOT prequalification list.

Because BBC already considers sizes of contracts a firm has bid on as a prime contractor in the availability analysis (as described further in this section), it is not necessary for BBC to utilize ODOT prequalification information to capture the fact that firms bid on different sizes of projects. Further, the specific types of work for which firms prequalify are not especially instructive, as it is relatively easy to become prequalified in a number of different fields.

Based on the above information, BBC determined that ODOT prequalification should be examined as an ODOT-created step in the procurement process rather than as a requirement for the firm to be considered available for ODOT construction prime contracts. Section VII presents BBC's analysis of whether the current ODOT prequalification process is a potential barrier to new firms, small businesses and/or minority- and women-owned firms seeking to obtain ODOT construction work as a prime contractor.

“Bidders’ list” for professional services contracts. ODOT provides a downloadable information form that engineering-related firms can fill out to receive notifications of solicitations. Because solicitation notices are also posted on the website, and private bid listing services can notify firms as well, there are other ways that potential bidders learn of ODOT professional services contracts. Firms do not need to fill out the information form to be eligible to bid. For these reasons, BBC did not determine availability of firms for ODOT engineering-related contracts from the ODOT professional services bidders list.

Strengths of BBC’s enhanced “custom census” approach. Some of the relative strengths of a custom census approach as used in ODOT’s disparity study are summarized in Figure IV-8. It is worthwhile to summarize certain strengths in how BBC examined specific factors for determining whether a firm was available for a particular contract element.

Specialization of work. USDOT suggests considering the availability of firms based on their ability to perform specific types of work. The example USDOT gives in “Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program” is as follows: If 90 percent of an agency’s contracting dollars is spent on heavy construction and 10 percent on trucking, the agency would calculate the percentage of heavy construction firms that are MBEs or WBEs and the percentage of trucking firms that are MBEs or WBEs, and weight the first figure by 90 percent and the second figure by 10 percent when calculating overall MBE/WBE availability.¹⁷ BBC examines 15+ different areas of specialization (“subindustries”) in the ODOT disparity study.

**Figure IV-8.
Summary of the strengths of a
“custom census” approach**

Federal courts have reviewed and upheld “custom census” approaches to availability that begin with D&B data. The study team’s methodology for analyzing MBE/WBE availability took the previous court-reviewed custom census approach as a starting point and added several layers of additional screening when determining firms available for transportation contracting work.

For example, the BBC analysis includes discussions with individual firms about interest in state and local government work, contract role and geographic location of their work, items not included in the court-reviewed availability analyses. BBC also analyzes the sizes of contracts and subcontracts that firms have performed or bid on in the past.

¹⁷ Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program, <http://osdbu.dot.gov/?TabId=133>.

Qualifications and interest in prime contractor and subcontractor work. Although not a requirement in the Federal DBE Program (and not done by the Illinois Department of Transportation in the information reviewed by the Seventh Circuit in *Northern Contracting*), BBC collected information on whether firms reported qualifications and interest in working as a *prime contractor* and as a *subcontractor*. In BBC's availability analysis, only firms qualified and interested in prime contracts are counted as available for prime contracts. Firms reporting qualifications and interest in subcontracts are counted as available for these contract components. Some firms reported qualifications and interest in both contract roles, and are counted as available for either role.

Size of contract or subcontract element. In counting available firms, BBC also considered whether a firm had previously worked or bid on a project of equivalent size (in dollars) to the specified contract or subcontract element. BBC's approach is consistent with guidance from the U.S. Court of Appeals for the Federal Circuit regarding capacity of firms to perform different sizes of contracts (see *Rothe Development Corp. v. Department of Defense*).¹⁸

¹⁸ *Rothe Development Corp. v. U.S. Department of Defense*, 545 F.3d 1023 (Fed. Cir. 2008).