

**MEASURING BUSINESS OPPORTUNITY:  
A DISPARITY STUDY OF NCDOT'S STATE AND FEDERAL PROGRAMS**

**EXECUTIVE SUMMARY AND RECOMMENDATIONS**

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**STUDY ORGANIZATION**

**EXECUTIVE SUMMARY & RECOMMENDATIONS**

**VOL 1: ECONOMIC AND STATISTICAL ANALYSIS**

**VOL 2: SUMMARY OF QUALITATIVE EVIDENCE**

**VOL 3: LEGAL ANALYSIS**

**VOL 4: DETAILED SUMMARY OF ANECDOTAL INTERVIEWS**

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**FINAL REPORT**

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## **PREFACE**

This Disparity Study was mandated by North Carolina State Statute N.C.G.S.A. § 136-28.4(b). The objective is to examine relevant evidence related to the effects of race-based or gender-based discrimination upon the utilization of disadvantaged Minority-owned Business Enterprises (MBEs) and disadvantaged Women-owned Business Enterprises (WBEs) by the North Carolina Department of Transportation (NCDOT). The Department is a recipient of federal transportation funds. As such, it is also required by Federal Regulation 49 C.F.R. § 26 to implement a Disadvantaged Business Enterprise (DBE) Program. Accordingly, this Disparity Study examines the NCDOT's State MBE and WBE Program and its Federal DBE Program. The examination covers state fiscal years 2004 - 2008. The study found that the NCDOT has implemented the State and Federal Programs in accordance with the governing statutes and regulations. Furthermore, NCDOT has sought to narrowly tailor its remedies for discrimination by implementing an impressive number of race- and gender-neutral programs. These have included the establishment of a Business Opportunity and Workforce Development (BOWD) Office, which administers 13 activities designed to improve the outreach, marketing, training, and financial assistance provided to MBEs, WBEs, DBEs and other firms. BOWD also operates a very effective Executive Management Program and it provides Engineering Technical Assistance and a Business Financing Program. The NCDOT partnered with 10 organizations to provide supportive services to DBEs, MBEs and WBE and other firms. The Department has also established race- and gender-neutral procurement programs; including the Small Professional Service Firm Program (SPSF) and the Small Business Enterprise Program (SBE).

Despite the significant number of race- and gender-neutral activities, the study found that most utilization of MBEs, WBEs and DBEs is achieved through aspirational goals that are set on State and Federal projects. Total MBE and WBE utilization on state projects was 9.4% while race- and gender-neutral utilization was 1.9% and 1.7% respectively for MBEs and WBEs. Total DBE utilization on federal projects was 8.0% and race- and gender-neutral utilization was 1.7%. One inference of the findings is that absent the State and Federal Programs, total utilization of MBEs, WBEs and DBEs might be significantly lower. The Disparity Study also determined that the capacity of work that MBEs, WBEs and DBEs were capable of performing was 15.1%.

The consulting team wishes to thank hundreds of business owners who provided input into the study through vendor surveys, anecdotal interviews, public hearings and focus groups. We also thank the Secretary of Transportation and the senior leadership of the Department for the notable steps they took to support the study. The members

of the Disparity Study Advisory Committee provided very insightful feedback to the research team and we greatly appreciated their support. Most importantly, we thank the State Contractual Services Engineer and her staff for responding promptly and efficiently to every request for data and information made by the consulting team. Without that support, this study would not have been possible.

# I

## **EXECUTIVE SUMMARY**

The North Carolina General Statutes and Administrative Provisions require that the North Carolina Department of Transportation (NCDOT) conduct a Disparity Study of the availability and utilization of disadvantaged Minority-owned Business Enterprises (MBEs) and disadvantaged Women-owned Business Enterprises (WBEs) every five years. State statute N.C.G.S.A. § 136-28.4(b) stipulates that the Disparity Study examine relevant evidence related to the effects of race-based or gender-based discrimination upon the utilization of such business enterprises in contracts for planning, design, preconstruction, construction, alteration, or maintenance of State highways, roads, streets, or bridges, and in the procurement of materials for these projects. Accordingly, this Disparity Study examines the NCDOT's contracting and procurement activity that occurred during State Fiscal Years 2004 - 2008. For simplicity, the report refers to MBEs and WBEs collectively as MWBEs, and it refers to the NCDOT program that implements the State statutes, as the "State Program".

Federal Regulation 49 C.F.R. § 26 requires state and local government recipients of federal transportation funds to implement a Disadvantaged Business Enterprise (DBE) Program. Recipients must set annual aspirational DBE goals for the program in accordance with guidelines set forth in the federal regulation and conditions in their relevant marketplace. Revisions to the Federal DBE Program outline certain steps a state or local government recipient can follow in establishing the goal. While the goal is reviewed and approved by the USDOT, but the implementation of the Federal DBE Program is substantially in the hands of the state or local government recipient. This report refers frequently to the Federal DBE Program as simply the DBE Program. The reader should be mindful that all references to DBEs relate to the Federal Program and references to MWBEs, MBEs or WBEs relate to the State Program.

This disparity study seeks to examine the NCDOT's State and Federal Programs in relationship to the statutes and regulations governing them and with respect to certain case law and legal decisions pertaining to the implementation of such programs.

## I. HOW THE STUDY WAS CONDUCTED

The disparity study involved several discrete tasks:

1. A legal analysis and review. This analysis was conducted by the law firm of **Holland and Knight LLP** and was supervised by Attorney Keith Weiner. The legal review examined relevant US Supreme Court cases; the legal framework as it applies to state and local government MWBE and DBE programs; recent Fourth Circuit decisions involving state and local governments, including H.B. Rowe Company v. Tippet, North Carolina Department of Transportation; recent decisions in other circuit courts of appeals; recent district court decision; recent state court decisions; and recent decisions involving the Federal DBE Program.
2. EuQuant conducted the economic and statistical analysis of contracting activity that was commissioned by the NDCOT between state fiscal year 2004 and 2008. The quantitative analysis examined the following major activities of the State and Federal Programs: the NCDOT's relevant market; race- and gender-neutral contracting activity; the availability and capacity of contractors by work code, the geographic location of available firms, the DBE/MWBE status of firms, their owners' race and ethnicity; the utilization of contractors on State and Federal projects, and whether or not there were statistically significant disparities in the utilization of DBE and MWBE contractors. The quantitative analysis examined prime contracts and sub-contracts that were awarded out of the Raleigh office (Centrally Let Contracts); Purchase Order Contracts for awards of less than \$1,200,000 (POCs), which were awarded by the 14 Division Offices and specific central units; and Small Business Enterprise (SBE) awards made in accordance with program guidelines for amounts of \$500,000 and below. The empirical examination of contracts was supplemented by a survey, to which responses were received from 388 randomly selected contractors.
3. Public hearings were organized in seven locations throughout the State of North Carolina by **Ken Weeden & Associates**. The purpose was to gather the perceptions and anecdotes of contractors about their experiences in pursuing and performing work for the NCDOT. Along with public announcements placed in local media, post card invitations were mailed to 4,122 registered vendors.

4. Personal interviews were conducted by attorneys at the law firm of **Holland and Knight, LLP** and 50 business owners were randomly selected from the population of contractors who pursue work with the NCDOT. The contractors were randomly selected from among the 14 geographic Divisions of NCDOT. The purpose of the interviews was to explore, in greater detail, the perceptions and anecdotes of business owners who are qualified, willing and able to work for the NCDOT.
5. Seventeen (17) focus groups of NCDOT registered contractors were held in six locations across the State. Again, the purpose was to gather the perceptions and anecdotes of contractors regarding their experience in pursuing and/or performing work for the NCDOT. The focus groups were organized by **Drs James Johnson and Alan Parnell**.
6. Information technology assistance and assistance in database organization was provided by **Professional Technology Integration**.
7. Preliminary findings of the disparity study were carefully reviewed for accuracy and validity. This final report reflects the outcome of all of the steps described above.

## **II. SUMMARY OF FINDINGS**

### **A. District Court's Order finds NCDOT's Implementation of the State Program Constitutional and Narrowly Tailored**

After a bench trial in the case of H.B. Rowe Company v. Tippett, North Carolina Department of Transportation, the District Court Order of December 9, 2008 found as a fact and concluded as a matter of law that the Plaintiff (H.B. Rowe and Company) failed to satisfy its burden of proof that the NCDOT's MWBE Program, as enacted by the state legislature to affect the awarding of contracts and subcontracts in state highway construction, violated the United States Constitution. The District Court held that the NCDOT established a compelling governmental interest to have the MWBE Program. The Court found that the North Carolina Legislature relied on a strong basis of evidence in concluding that prior race discrimination against MBEs in North Carolina's road construction industry existed, so as to require remedial action. The 2004 Disparity Study demonstrated the existence of previous discrimination in specific industries and localities, and the court found that the disparity ratios derived in the study highlighted the underutilization of MBEs by prime contractors bidding on state funded highway projects. The Court applied a different standard of review to WBEs and looked

specifically at whether or not the program served an important governmental interest and was substantially related to the achievement of those objectives. The Court held that the NCDOT established, based upon a clear and strong inference raised by the Study, that women contractors suffer from past gender discrimination in the road construction industry.

Furthermore, the District Court held that the legislative statute implementing the State Program is narrowly tailored to remedy private discrimination against minorities and women in road construction contracts. The Court gave special attention to several narrowly tailoring provisions of the statute: the fact that the program has a planned duration (sunset provision) and is reviewed every five years; and the fact that the program is restricted to racial or ethnic classifications identified in the study as having been adversely affected and that the goals of the program are flexible and implemented on a project by project basis according to the availability and capability of MWBE's in specific geographic areas.

**B. Since 2004, the NCDOT has Continued to Implement Additional Steps to Narrowly Tailor its State and Federal Programs**

Federal court decisions regarding the implementation of DBE/MWBE programs require recipients of Federal financial assistance to seriously consider implementing race-, ethnicity-, and gender-neutral remedies prior to the implementation of race-, ethnicity-, and gender-conscious remedies. To this end, the NCDOT has sought to achieve its overall goal by implementing a range of race and gender-neutral programs and activities. These efforts are among the most extensive that this consultant has encountered at the state and local agency level. The most impressive in this regard is the Small Business Enterprise (SBE) Program.

The SBE Program provides contracting opportunities for firms that meet small business eligibility criteria, as defined by G.S. 136-28.10. The Board of Transportation may award Highway Fund or Highway Trust Fund projects of five hundred thousand dollars (\$500,000) or less to the lowest responsible bidder after at least three informal written bids have been received from certified SBEs. The Disparity Study found that certified SBEs that also hold MWBE certification status account for 24.2% of all SBEs (15.5% of which hold MBE certification and 11.5% hold WBE certification). Although the SBE Program is race- and gender-neutral, the study found that 20.3% of all SBE awards were made to firms having MWBE certification (7.5% to MBEs and 15.8% to WBE's). When SBE awards are broken down by race and ethnicity, the results are as follows:

11.2% went to Black Americans, .7% went to Hispanic Americans, and 4.7% went to Native Americans. Because of the success of this program, in May of 2009 the Secretariat of Transportation issued guidelines for the program to be used more broadly throughout the entire NCDOT.

**C. Some of the NCDOT's other race- and gender-neutral programs are as follows:**

1. Establishing a Business Opportunity and Workforce Development (BOWD) Office that administers 13 outreach, marketing, training and financial assistance programs, including a very effective Executive Management Program, an Engineering Technical Assistance Program, a Business Financing program in partnership with a Raleigh area nonprofit corporation to create loans for small businesses in partnership with the USDA Intermediary Relending Program, many networking conferences and several training courses for DBEs and non-DBEs to improve operational skills
2. Establishing NCDOT-BOWD partnerships with 10 organizations to provide supportive services to DBEs and non-DBEs in areas such as training, outreach and other race and gender neutral activities
3. Hiring 10 business consultants to assist in delivery of supportive services to DBEs and non-DBEs
4. Establishing a Small Professional Service Firm (SPSF) Program that is race- and gender-neutral
5. Designing six "Levels of Contracting" that are associated with the risk inherent in a contract award (i.e. Level I – Level VI). The varying levels of risk coincide with the development of certain race- and gender- neutral programs (e.g. the SBE program is Level IV) and subcontracting opportunities that do not require bonding (Level II and Level III).
6. Creating an efficient electronic database system for generating the on-line NCDOT Business Directory. The Directory contains the names and addresses of all firms (including DBEs, MWBEs and non-minority-owned firms) along with their certification status, prequalification status, work code, and Districts of the State in which their services are available. The database system also allows more efficient tracking and monitoring of contracting activity.
7. Continuous race-and gender-neutral programmatic innovations, such as the SPSF Program, extension of the SBE program throughout the Department and improvements in database tracking and monitoring to better capture

subcontracting attainment and more accurate data related to Purchase Order Contracts (POCs).

8. In 2004, the NCDOT received final approval from the FHWA to be the central point of certification. Since then, it has implemented the Unified Certification Program (UCP) statewide in accordance with the federal regulation. The purpose of the UCP is to provide “one-stop shopping” to applicants for certification, so that an applicant is required to apply only once (to NCDOT) for a DBE certification that will be honored by all federal recipients in the state.

**D. MWBE/DBE Goals are Narrowly Tailored, Flexible and Waived when Warranted**

The NCDOT obligates bidders, subcontractors, consultants, and sub consultants not to discriminate on the basis of race, religion, color, national origin, age, disability or sex in the performance of transportation contracts. Consistent with federal and state regulations, the NCDOT's Goal Setting Committee meets to discuss the subcontractor opportunities for DBEs and MWBEs and sets goals on centrally let projects. Where sufficient DBE or MBEWBE availability and capacity exists, the bidder is required to meet the contract goal by creating subcontracting opportunities. Where sufficient availability and capacity does not exist, the advertised goal may be set at zero. Nevertheless, even when DBE or MWBE goals are not set on projects, the NCDOT still encourages firms to utilize DBE and MWBE contractors and suppliers. If the advertised goal is zero, the contractor is expected to continue to recruit DBEs and report the use of DBEs doing the execution of the project. A good-faith effort is not required on contracts that have zero goals. Firms are also encouraged to give every opportunity to DBEs and MWBEs to participate in supplemental agreements

The NCDOT requires a Letter of Intent for each DBE listed in fulfillment of the goal. The bidder and DBE/MWBE must sign the Letter. The bidder is also required to submit Form RS-1-D attesting to the agreed-upon unit price and contract terms between the bidder and DBE/MBE. If the bidder fails to submit the Data for each committed DBE/MWBE, the participation will not count towards meeting the goal. The Goal Setting Committee also assists in setting goals on projects let by the Aviation, Ferry, and Rail Divisions. Projects that are let in the field Divisions have goals that are set by those Divisions. Recently, all field Divisions were assigned a Contract Officer who has the responsibility of setting goals in coordination with the Goal Setting Committee. That person is also responsible for leading the Division's good-faith committee.

If the apparent lowest bidder does not meet or exceed the DBE contract goal, the bidder must submit documentation of its good-faith efforts to reach the advertised goal. Documentary evidence of MWBE/ DBE quotations is expected to be part of the good-faith submittal, along with telephone logs and notes of verbal quotations or other appropriate documentation. After considering the documentation and discussing each case at length, Goal Compliance Committee makes a determination of the adequacy of a bidder's good-faith effort. If the effort is adequate, the goal requirement is waived or reduced appropriately.

**E. MWBE/DBE attainment has almost reached the annual aspirational goals in the State and Federal Programs, but is still significantly lower than capacity.**

In fiscal year 2008, the MWBE goal for the State Program was 11.0%; 3.5% of this amount was planned to be achieved in a race-and gender-neutral manner. The goal was divided between MBEs (5.8% with 1.9% race- and gender-neutral) and WBEs (5.2% with 1.7% race-and gender-neutral). Contracts awarded to MWBEs in the State Program over the study period averaged 9.4%, with 4.7% awarded to MBEs and 4.7% awarded to WBEs. Race-and gender-neutral attainment for MBEs in the State Program amounted to 2.4% of all state contracts. Similarly, WBE race neutral awards totaled 1.8% of all State aid contracts. This means that the NCDOT's race-and gender-neutral awards met and exceeded the goal. Overall, contracting fell short of the goal by 1.6 percentage points.

In fiscal year 2008, the DBE goal for the Federal Program averaged 10.1%; 3.5% of this amount was planned to be achieved in a race-and gender-neutral manner. Contracts awarded to DBEs in the Federal Program over the study period averaged 8.0% (1.7% was awarded to DBEs who also held MBE certification, while 6.2% was awarded to DBEs who also held WBEs certification). Race-and gender-neutral attainment for DBEs in the Federal Program amounted to 2.3% of all federal aid contracts. This means that the NCDOT's race-and gender-neutral awards fell short of the goal by 1.2 percentage points. Overall contracting fell short of the goal by 2.1 percentage points.

- F. The utilization of minority and women owned vendors in the SBE program exceeds that achieved in all other areas of procurement and is close to that achieved in centrally let subcontracting. This program represents a best in class race-neutral program that can serve as a model for other state and local programs.**

Awards in the SBE program are race-and gender-neutral. Between FY 2004 and FY 2008 this program awarded \$144,645,270 in contracts. Total MWBE utilization was 20.3%, divided as 7.5% MBE utilization and 15.8% of DBE utilization. Attainment in this program compared favorably to attainment in the Federal DBE subcontracting program where total awards represented 24.4% of all subcontracting awards, divided as 5.2% to DBEs that held MBE certification and 19.2% to DBEs that held WBE certification. Total awards to subcontractors in the State program amounted to 33.2% of all subcontract awards, divided as 13.6% to MBEs and 18.3% to WBE.

- G. Regression analysis determined that the capacity of MBEs and WBEs would be significantly greater if they were treated the same way as similarly situated Non-MWBEs are treated. It also determined that total revenue (private sector and public sector) of MBEs and WBEs was significantly lower than that of non-MWBEs after controlling for relevant firm and performance related attributes.**

We used regression models to determine whether or not any of the identified disparities in contracting could be attributed to factors other than MWBE status. The models controlled for the following attributes of firms: the work codes in which he or she operates, the geographic divisions of the state in which he or she is available to do work, the number of years the contractor has been operating, whether the contractor is a prime or subcontractor, the revenue of a firm (after adjusting for any effects of disparate treatment or discrimination), and whether the contractor is a WBE as opposed to a non-DBE or an MBE as opposed to a non-DBE. We also used regression analysis to determine the capacity of NCDOT contracting that MWBEs were capable of performing if they were treated the same as similarly situated non-MWBEs.

Capacity was defined as the dollar volume of work a contractor is capable of performing given the contractor's business related attributes. Specifically, the work codes in which he or she operates, the geographic divisions of the state in which he or she is available to do work, the number of years the contractor has been operating,

whether the contractor is a prime or subcontractor, the revenue of a firm (after adjusting for any effects of disparate treatment or discrimination), and whether the contractor is a WBE as opposed to a non-DBE or an MBE as opposed to a non-DBE.

The regression analysis determined that the overall capacity of MWBEs would have been 15.1% had the revenue they received for their productive characteristics been the same as that of non-MWBEs. Total capacity was further decomposed into WBE and MBE capacity as 8.0 percent and 7.1 percent, respectively. Several different regression models were estimated to derive this capacity value. The first model examined whether, after controlling for relevant performance related factors, WBEs and MBEs (who were prequalified contractors and who received awards from NCDOT) experienced lower total revenue in the private and public sectors. The results revealed that the revenue of MBEs was lower than that of non-MWBEs by 99% percent and the difference was statistically significant. The revenue of WBEs was lower than that of non-MWBEs by 50% and the difference was statistically. The results suggested they experienced disparate treatment in the general market place.

Using decomposition analysis, we found that non-DBEs experienced a 4.0 percent increase in revenue for every additional year of operations, while DBEs experience only a 3.0 percent increase in revenue. For every one additional geographic division that a non-DBE works in, that firms revenue increases by 4.3 percent, while the revenue of DBEs increases by only 1.8 percent. When non-DBEs work in hauling as opposed to engineering and other professional services, their revenue on average is 20.7 percent lower, while for DBEs the revenue is on average 50.8 percent lower. In bridges and structures, the revenue of non-DBEs increases by 111 percent over the revenue of firms working in engineering and other related professions. In comparison, the revenue of DBEs in bridges and structures decreases by 27.8 percent compared to the revenue they earn in engineering and other related professions. For non-DBEs the revenue in the paving work code is 24.3 percent higher than in engineering and other professional services, while for DBEs it is 9 percent lower. Finally, in non-highway construction work codes, the revenue for non-DBEs is 2.6 percent lower than it is when they work in engineering and professional services; it is 92 percent lower for DBEs. Clearly, DBEs experienced a much lower return on all business related attributes than did non-DBEs, other things equal.

- H. In the State Program firms are certified as MBEs and WBEs, but the Federal Program certifies firms as DBEs only. In the State Program, the percentages of all awards received by MBEs and WBEs were similar. To determine how the percentages of awards varied between minority-owned and women-owned firms in the Federal Program, we cross-referenced firms' Federal DBE status to their State MBE and/or WBE status. The results indicated that the percentage of all awards received by DBE/WBE certified firms greatly exceeded the percentage received by DBE/MBE certified firms.**

Considering all categories of State funded projects, MBEs received 4.7% and WBEs received 4.7% of the total dollar value. For Federal aid projects, DBE/MBE certified firms received 1.7% and DBE/WBE certified firms received 6.2%. Similarly, among State funded projects, MWBEs received 33.2% of all subcontracting dollars (13.6% went to MBEs and 18.3% went to WBEs. Among Federal projects, DBEs received 24.4% of the dollar value of all subcontracts (5.2% went to DBE/MBEs and 19.2% went to DBE/WBEs). In summary, the race and gender distribution of awards was more balanced in the State Program than it was in the Federal Program. Furthermore, the differences in the Federal Program could not be attributed exclusively to capacity differences between the groups because DBE/MBE capacity was 7.1% while DBE/WBEs capacity was 8.0%. It is more likely that the balance achieved in the State Program was because State statues allowed NCDOT to establish separate MBE and WBE project goals. This was not done in the Federal Program. Instead, only DBE project goals were set.

- I. DBEs and MWBE are substantially underutilized on State and Federal Prime contracts.**

DBEs and MWBE's are substantially underutilized on prime contracts, with the exception of SBE contracts. Centrally let prime contracts and POCs DBEs received only 0.2% of centrally let federal contracts and 2.4% of centrally let state contracts; they received only 0.7% of POCs. The utilization rates on prime contracts are substantially below capacity. POCs give rise to particular concerns because the capability required to successfully perform these contracts does not differ much from that required to perform centrally let subcontracts and SBE awards.

**J. Under utilization of MBEs and WBEs on Purchase Contracts (POCs) was investigated extensively (both empirically and by speaking with numerous individuals familiar with Division bidding and contracting award procedures). Overall, data indicates that MBEs received 0.7% of the \$490,217,483 in purchase order awards. It is also true that many of the complaints collected and anecdotes were related to Division POCs. The results, while inconclusive, point to some of the following factors listed below as contributing to the disparity.**

The low percentage utilization of MBEs and WBEs on POCs raises concern because MWBEs have high percentage utilization on SBE awards and centrally let subcontracts and the median contract size in both cases exceeds the median size of POCs. This means that MWBE have the capacity to perform the average size POCs. For example, centrally let subcontracts awarded to non-DBE/MWBE ranged in value from \$100 to \$38,772,714. For DBE/MWBEs, they ranged from \$48 to \$10,073,140. The median value of a centrally let subcontract was \$59,235 for non-DBE/MWBEs and \$24,720 for DBE/MWBEs. Also, Contracts awarded to SBEs who were non-MWBEs ranged in value from \$44 to \$495,000. SBE firms that were certified as MWBEs received awards which ranged from \$93 to \$452,677. The median value of an SBE award was \$68,325 for non-MWBEs and \$75,650 for MWBEs. In comparison, POCs awarded to non-MWBEs ranged in value from \$1 to \$1,229,877. For MWBEs, they ranged from \$1 to \$222,700. The median value of a POC was \$3,083 for non-MWBEs and it was \$633 for MWBEs. Likewise, 95% of POCs awarded to non-MWBEs were for amounts of less than \$16,000.

The results above indicate that while some categories of POCs may require special capabilities, the majority should fall within the capabilities of prequalified MWBEs to perform. Note that the disparity study team attempted to exclude from the analysis POCs in the data whose value or award center suggested that they were not competitively bid.

The major problem/s causing the underutilization of MWBEs on POCs is unclear. Below, we present explanations that have been provided by administrators at the NCDOT, and we follow that presentation with the perceptions of vendors and contractors that were collected through the anecdotal evidence process. We reiterate that, at present, it is impossible to determine why there is such a significant disparity in the utilization of MWBEs. One factor of great concern relates to data quality.

Some possible explanations of the underutilization are as follows:

1. During the period under investigation, NCDOT awarded \$114.6 million in SBE contracts. Each contract was less than \$500,000. State statutes authorize the SBE program and NCDOT officials indicated that projects that are set aside for SBE letting are taken from the population of POC projects. If this is the case, then the low utilization of MWBEs on SBE contracts is explainable in part by the high utilization of MWBEs on SBE awards because had the projects not been set aside, the MWBE utilization that is currently reflected on SBE awards would have been reflected on POCs.
2. POC data may include awards that are not related to State contracting but instead to procurement of commodities and supplies. If such awards are mixed with contracting awards, the effect might result in lower MWBE utilization percentages because the State MBE/WBE program statutes do not apply.
3. Division contracting offices are required to set goals on POCs and those goals are designed to be reached through subcontracting opportunities. The absence of subcontracting data therefore is potentially a major problem. For example, if subcontracting award data were missing for centrally let prime contracts, it would be impossible to conduct an accurate Disparity Study. Since POCs are a minor part of NCDOT contracting activity, we are able to complete the study but must make note of the fact that data on this program appears to be less than accurate.
4. The Department still lacks accurate tracking of POC data and has no award data on POC subcontract activity. This means that data collection of POCs may be incomplete and/or inaccurate.
5. The centrally let contracting process at the State Office has a long history of operation and is very structured. It typically involves the same individuals and has operated with a great deal of consistency and regularity. The Division POC process is a relatively new program that has experienced a great deal of personnel turnover. In response to this, the NCDOT recently assigned a Contracting Officer to each Division for the purpose of setting goals for POC's, implementing its good faith effort process, and coordinating with the Goal Setting Committee of the Central Office. They should create greater consistency of practices across Divisions.

6. In the past some NCDOT Division procurement officers may not have been as careful as is required in identifying qualified MWBEs from which to solicit bids. Others may have lacked sufficient training and understanding of the goal setting objectives in the State Program.
7. Although the Division Contracting Officer is required to solicit three bids and award the contract to the lowest of the three bids, in practice, over the last four years, TOC bid opportunities have been advertised on the Internet. This means that all firms should be aware of the opportunities to submit bids for POCs.

**Some of the perceptions of contractors that were expressed during the anecdotal evidence collection process were as follows:**

1. Some contractors believe that Division procurement officers operate a “buddy system” in which they solicit three bids from the same vendors repeatedly.
2. Some Division contractors are not perceived as being open and fair in awarding contracts.
3. Some contract awards do not appear to adhere to bid solicitation criteria.
4. Some interviewees suggested that procurement practices vary significantly from one division to the other and that the award process is not transparent.
5. Some contractors perceive there to be a wide variation across divisions in the distribution of information on new POC bids and that information is distributed within a small network—“good-old boys.”
6. Some contractors perceive that there is a wide variation in the interpretation and application of “good faith efforts” at the Division level.
7. Some contractors perceive that the goal setting process at the division level was not consistent with the way in which goals were set at the central office.
8. It was the perception of some contractors that some Division offices and worksites are hostile environments to minorities and women.
9. Certain DBE/MWBE contractors perceive there is difficulty in obtaining PO payments until jobs are complete.

10. Some contractors believe that prime contractors who received POC awards rely on an established network that excludes minorities and women.

11. Some contractors believe that some WBE certified firms are not legitimately owned or controlled by women and some DBEs are not controlled by minorities.

**K. The relevant market refers to the physical area where the delivery of products and services takes place. Within this area, producers supply goods and services that are interchangeable or homogeneous, and the producers themselves are substitutable. The market area is also bounded by the "affected market". This area is defined as the geographic boundary within which 80% or more of the producers, who supply the homogeneous goods and services, are located. The report found that the relevant market for prequalified prime contractors is North Carolina, Virginia, South Carolina, Tennessee, Florida and Georgia. Furthermore, this relevant market differs from the relevant market for prequalified subcontractors, which includes North Carolina, Virginia and South Carolina. Finally, the relevant market for prequalified SBEs is the State of North Carolina because 98.9% of all certified SDBs are headquartered within the State.**

The NCDOT's procurement of goods and services can be divided into several distinct product categories. These include centrally let prime contract awards, centrally let subcontract awards, POCs and SBE awards. In order to determine whether or not these categories define one product market or several markets, we applied several criteria. The results indicated that the market for centrally let prime contracts differs from the market for centrally let subcontracts, POCs and SBE awards. Prequalified prime contractors operate in one market while prequalified subcontractors and certified SBEs operate in a different market. Within each of the two markets, the goods and services that are provided are homogeneous, and the producers are interchangeable one for the other. However, these characteristics do not exist between or across the two markets. In particular, the goods and services provided by prequalified prime contractors on centrally let projects are not interchangeable with the goods and services provided by subcontractors on centrally let projects, nor are they interchangeable with goods or services procured through POCs or SBE awards. Similarly, the firms that perform centrally let subcontracts, POCs and SBE projects are usually not capable of performing centrally let prime contracts. This means that prime contractors and subcontractors are not necessarily interchangeable. However, firms that perform

centrally let subcontracts, POCs and SBE contracts are substitutable. Consider the following results:

1. Between fiscal years 2004 and 2008, centrally let prime contract awards made to non-DBE/MWBEs ranged in value from \$296,617 to \$192,040,143. For DBE/MWBEs, they ranged from \$332,060 to \$21,866,100. The median value of a centrally let prime contract was \$1,790,064 for non-DBE/MWBEs, and it was \$825,155 for DBE/MWBEs. The median value is the midpoint or the amount such that one-half of the projects are greater in value and one-half are less in value.
2. In contrast to centrally let prime contracts, we illustrated above how the size distribution of subcontracts, SBE awards and POCs are similar among themselves but different from that of prime contracts.
3. In most cases, firms that are capable of performing centrally let prime contracts are also capable of performing centrally let subcontracts, SBE contracts and POCs. In fact, 80% of NCDOT's prequalified prime contractors are also prequalified as subcontractors, but the reverse is not true. That is, most prequalified subcontractors and contractors who perform POCs and SBE contracts are not capable of performing centrally let prime contracts. For example, only 21% of subcontractors are also prequalified as prime contractors. While many of the services provided by prequalified subcontractors are interchangeable with POC's and SBE awards, those services are not interchangeable with the ones provided by prequalified prime contractors on centrally let projects.
4. The "affected market" for prequalified prime contractors is defined as the area within which approximately 80 percent or more of the firms pursuing NCDOT work have a principal place of business. As such, the market for prime contractors includes North Carolina, Virginia, South Carolina, Tennessee, Florida and Georgia. The percentages of all prequalified NCDOT prime contractors in the states are 47.0%, 9.4%, 6.3%, 5.1%, 4.8%, and 3.6%, respectively, resulting in a combined total of 76.2%. Similarly, the affected market for prequalified subcontractors includes North Carolina (75.7%), Virginia (7.1%) and South Carolina (5.3%). Combined, these areas contain 88.1% of all NCDOT prequalified subcontractors. Since 98.9% of SBEs are located within the State of North Carolina, their affected area is contiguous with the State boundaries.

The Disparity Study determined that within the market area as defined above, DBE/MWBE prequalified prime contractors comprise 7.6% of all prequalified prime contractors; DBE sites and the DBE prequalified subcontractors comprised 27.9% of all prequalified subcontractors; and DBE sites and WBE firms that are also certified as SBEs comprised 24.3% of all certified SBEs.

Disparity study consultants often restrict the relevant market area to state boundaries when they examine state transportation agencies. As a result, the disparity study also examined how the availability percentages above would change if we restricted the market area to be the State of North Carolina. That approach would lead to the following outcomes: DBE/MWBE prequalified prime contractors would comprise 10.3% of all prequalified prime contractors; DBE/MWBE prequalified subcontractors would comprise 29.3% of all prequalified subcontractors; and DBE/MWBE firms that are also certified as SBEs would comprise 24.0% of all certified SBEs. The results indicate that by restricting the relevant market area to the State of North Carolina, the percentages of available DBE prime contractors and subcontractors would increase while the percentage of SBEs would remain almost unchanged.

The restriction would also affect the capacity of available DBEs and MWBEs. The results are as follows: For the market area as used in the Disparity Study, DBE/MWBE total capacity was 15.10%; DBE/MWBE prime contracting capacity is 7.6%; and DBE/MWBE subcontracting capacity was 47.9%. When the relevant market area was restricted to the State of North Carolina, the results were as follows: DBE/MWBE total capacity was 18.3%; DBE/MWBE prime contracting capacity was 9.6%; and DBE/MWBE subcontracting capacity was 45.1%.

Although there are strong rationales for using either approach to defining the relevant market area, we used the market area as defined in the study because it takes into consideration the unique relevant market characteristics of prime contractors. Those characteristics are distinctly different from those of subcontractors and certified SBEs. Furthermore, if we restrict the market area to the State of North Carolina, we would increase the size of measured disparities because it would increase the capacity of MWBEs.

#### **L. General Availability of Firms to NCDOT**

The availability of firms was derived from prequalification forms completed by prime contractors and subcontractors as well as from certification forms completed by SBEs. Prime contractors, subcontractors and SBEs are assigned to every work code

classification that their prequalification and certification form indicated that they had an expertise in. As such, the availability tables are not simply based on the primary work code of vendors. Instead the tables reflect all work codes within which vendors have expertise as indicated by their prequalification records.

In the Federal program, DBEs comprise 20.3% of all prequalified prime contractors and subcontractors to the NCDOT. The largest concentration of DBEs is in the hauling work code, which includes gravel and asphalt; 35.0% of DBEs indicated an expertise in this area. There were 180 firm DBEs and 334 non-DBEs that indicated an expertise in the area of hauling. The second largest category of available vendors was in landscaping and erosion control. Within this work code, 20.6% of the prequalified contractors are DBEs and 79.4% are non-DBEs. While the largest availability percentage recorded by DBEs is in the vertical construction work code, overall, only 10 DBEs listed this as their area of expertise and only four non-DBEs did. The number of contractors in site preparation, which includes clearing, demolition, excavation and surveying, exceeded other categories. Among DBEs, 107 contractors, or 18.5%, have expertise in this work code. In addition, 479 DBEs, or 81.5%, indicated an expertise in this area.

In the State program, the availability of prequalified prime contractors and prequalified subcontractors that are certified MBEs was 10.9% in 2008. The work code classification of MBEs displays a similar pattern as that of DBEs, except there are fewer MBEs in every work code classification. Hauling continues to be the work code that has the largest number of MBEs (118); these firms represent 23.0% of the available contractors in this work code. The largest number of WBEs is also in the hauling work code classification, 14.6%. Overall, WBEs represent 10.4% of all prequalified prime contractors and subcontractors to NCDOT. The tables provided below summarize many relevant findings of the Disparity Study regarding the availability, capacity and utilization of MBEs, WBEs, and DBEs.

**Table 1: Percentages of firms by DBE, MBE, WBE status and race and ethnicity (FY2004 - 2008)**

	Availability and Capacity Estimates				
	Contract Type				
	Prime & Sub Contracts	Prime Contracts	Subcontractors	SBE Contracts	POCs
<b>DBE Availability</b>	<b>20.30%</b>	<b>6.90%</b>	<b>21.60%</b>	<b>24.20%</b>	<b>21.60%</b>
<b>DBE Capacity</b>	<b>15.10%</b>	<b>7.60%</b>	<b>47.90%</b>	<b>47.90%</b>	
<b>MBE Availability</b>	<b>10.90%</b>	<b>3.60%</b>	<b>11.60%</b>	<b>15.50%</b>	<b>11.60%</b>
<b>MBE Capacity</b>	<b>7.10%</b>	<b>3.20%</b>	<b>21.40%</b>	<b>21.40%</b>	
<b>WBE Availability</b>	<b>10.40%</b>	<b>3.10%</b>	<b>11.10%</b>	<b>11.50%</b>	<b>11.10%</b>
<b>WBE Capacity</b>	<b>8.00%</b>	<b>4.40%</b>	<b>23.90%</b>	<b>23.90%</b>	
	<b>Availability Figures</b>				
<b>Asian/Pacific Islander</b>	<b>0.04%</b>		<b>0.04%</b>	<b>0.50%</b>	<b>0.04%</b>
<b>Black</b>	<b>10.70%</b>		<b>11.40%</b>	<b>21.70%</b>	<b>11.40%</b>
<b>Caucasian</b>	<b>86.10%</b>		<b>85.20%</b>	<b>72.30%</b>	<b>85.20%</b>
<b>Hispanic</b>	<b>0.90%</b>		<b>0.90%</b>	<b>0.70%</b>	<b>0.90%</b>
<b>Native Americans</b>	<b>1.70%</b>		<b>1.80%</b>	<b>3.60%</b>	<b>1.80%</b>
<b>Subcontinent Asians</b>	<b>0.30%</b>		<b>0.30%</b>	<b>1.00%</b>	<b>0.30%</b>

**Table 2: Dollar value of awards by type of program and DBE, MBE and WBE status**

	DBE/MWBE Status of Recipient				
	Dollar Value of Awards				
	Total Value of Awards (in Category)	Non-MWBE Awards	DBE (or MWBE) Awards	MBE Awards	WBE Awards
<b>Purchase Order contracts</b>	\$ 490,217,483.00	\$ 486,577,456.00	\$ 3,640,027.00	\$ 1,735,027.00	\$ 1,905,000.00
<b>SBE Contracts</b>	\$ 144,645,270.00	\$ 115,287,968.00	\$ 29,357,302.00	\$ 10,903,407.00	\$ 22,834,881.00
<b>Federal Prime Contracts</b>	\$ 2,642,203,256.00	\$ 2,636,232,524.00	\$ 5,970,732.00	\$ 268,262.00	\$ 3,285,470.00
<b>Federal Subcontract</b>	\$ 913,178,719.00	\$ 690,695,754.00	\$ 222,482,965.00	\$ 47,198,690.00	\$ 175,284,274.00
<b>Total Federal Contracts</b>	\$ 2,864,686,221.00	\$ 2,636,232,524.00	\$ 228,453,697.00	\$ 47,466,952.00	\$ 178,569,744.00
<b>State Prime Contract</b>	\$ 1,630,125,071.00	\$ 1,590,841,386.00	\$ 39,283,685.00	\$ 33,312,952.00	\$ -
<b>State Subcontract</b>	\$ 471,898,092.00	\$ 315,353,030.00	\$ 156,545,062.00	\$ 66,823,711.00	\$ 89,721,351.00
<b>State Total</b>	\$ 2,421,532,886.36	\$ 2,192,706,810.00	\$ 228,826,076.36	\$ 112,775,097.16	\$ 114,461,232.19
<b>State and Federal Total</b>	\$ 5,286,219,107.37	\$ 4,828,939,334.00	\$ 457,279,773.37	\$ 160,242,049.16	\$ 293,030,976.19

<b>Table 3: Percentage of awards by type of program and DBE, MBE and WBE status</b>			
	<b>DBE/MWBE Status of Recipient</b>		
	<b>Percentage Value of Awards</b>		
	<b>DBE (or MWBE) Awards</b>	<b>MBE Awards</b>	<b>WBE Awards</b>
<b>Purchase Order contracts</b>	<b>0.7%</b>	<b>0.4%</b>	<b>0.4%</b>
<b>SBE Contracts</b>	<b>20.3%</b>	<b>7.5%</b>	<b>15.8%</b>
<b>Federal Prime Contracts</b>	<b>0.2%</b>	<b>0.0%</b>	<b>0.1%</b>
<b>Federal Subcontract</b>	<b>24.4%</b>	<b>5.2%</b>	<b>19.2%</b>
<b>Total Federal Contracts</b>	<b>8.0%</b>	<b>1.7%</b>	<b>6.2%</b>
<b>State Prime Contract</b>	<b>2.4%</b>	<b>2.0%</b>	<b>0.0%</b>
<b>State Subcontract</b>	<b>33.2%</b>	<b>13.6%</b>	<b>18.3%</b>
<b>State Total Contracts</b>	<b>9.4%</b>	<b>4.7%</b>	<b>4.7%</b>
<b>State and Federal Total</b>	<b>8.7%</b>	<b>3.0%</b>	<b>5.5%</b>

<b>Table 4: Percentage of awards by type of program and DBE, MBE and WBE status</b>					
	<b>Percentage Value of Awards</b>				
	<b>Race and ethnicity</b>				
	<b>Asian/Pacific</b>	<b>Black</b>	<b>Caucasian</b>	<b>Hispanic</b>	<b>Native American</b>
<b>Centrally Let Prime and Sub Contracts</b>	<b>0.1%</b>	<b>2.8%</b>	<b>95.7%</b>	<b>0.3%</b>	<b>1.2%</b>
<b>SBE Contracts</b>	<b>0.0%</b>	<b>11.2%</b>	<b>83.3%</b>	<b>0.7%</b>	<b>4.7%</b>
<b>POC Awards (approximate totals by race/ethnicity)</b>					
<b>Federal subcontracts</b>	<b>0.2%</b>	<b>2.7%</b>	<b>96.9%</b>	<b>0.2%</b>	<b>0.1%</b>
<b>State Subcontracts</b>	<b>0.1%</b>	<b>10.0%</b>	<b>83.4%</b>	<b>0.6%</b>	<b>5.9%</b>
<b>Federal and State subcontract</b>	<b>0.1%</b>	<b>5.1%</b>	<b>89.6%</b>	<b>1.3%</b>	<b>3.9%</b>
<b>Total Awards, all Categories</b>	<b>0.1%</b>	<b>3.5%</b>	<b>95.0%</b>	<b>0.3%</b>	<b>1.1%</b>